TAX COURT OF NEW JERSEY

CHRISTINE M. NUGENT
JUDGE

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Re: All Can Excel Academy, Inc. and Greater Paterson Properties, LLC v. East Orange
Docket No. 008543-2012
Greater Paterson Properties, LLC
Docket Nos. 010868-2013; 009928-2014; 008613-2015

Dear Counsel:

In this opinion the court resolves defendant's motion to dismiss plaintiff's complaints for failure to comply with the obligation to pay taxes required by statute. N.J.S.A. 54:3-27; N.J.S.A. 54:51A-1(b). Interpretation of the 1999 amendment permitting the court to relax the tax obligation and allow plaintiff to maintain the appeals "in the interests of justice" is at issue here. Ibid. Plaintiff does not dispute tax arrearages are due and owing on the property as of the relevant dates. Plaintiff argues that based on the timing of defendant's motion, filed after "significant" time and expense dedicated to reducing assessments it views as excessive, on property it describes as deplorable, the court should find the motion to dismiss was not filed within a reasonable time of plaintiff's complaints and thereby relax the tax obligation "in the

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interests of justice." Plaintiff argues as well that the city's actions constitute a failure to turn square corners. FMC Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 426-27 (1985). For the reasons set forth herein, the court concludes the facts do not warrant relief from the tax obligation. Defendant's motion to dismiss is granted.[1]

Analysis

The court's findings of fact are based on the certifications and exhibits submitted by the parties.

The property under appeal is improved with a two-story office building containing 13,600 square feet, on land measuring .4569 acres.[2] Plaintiff obtained title to the property in June 2012 through foreclosure of tax sale certificate number 07-336 issued for unpaid municipal charges in the amount of $939.17, previously purchased by plaintiff. Records of the municipal tax collector reveal plaintiff paid property taxes through the fourth quarter of 2009. No further taxes were paid. Tax arrearages due and owing on the property total $472,906.25 as of the date of the motion. Defendant acquired a subsequent tax sale certificate issued for nonpayment of taxes on the property in 2010.

For each tax year 2013 through 2015, plaintiff challenged the assessment with the county tax board, then contested the county board judgment via complaint filed with the tax court. A direct appeal to the tax court challenging the assessment was filed for tax year 2012. The court scheduled trial on all pending matters to be conducted in March 2016. Thereafter, in December

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[1] The 2012 complaint was captioned "All Can Excel Academy, Inc. and Greater Paterson Properties, LLC v. East Orange." Complaints filed in subsequent years identify plaintiff as Greater Paterson Properties, LLC. The court will use the singular "plaintiff" throughout the opinion for ease of reference.

[2] The property is identified as block 520, lot 17, also known as 186 South Clinton Street, in the City of East Orange.

2015, defendant filed the within motion to dismiss the appeals. The court considered the motion in April 2016 after several adjournment requests by the parties, and trial on the years here at issue was rescheduled.

At the time plaintiff acquired the property in 2012, the building was vacant, boarded and locked. It was only after obtaining title that plaintiff was able to enter the property and discover the interior condition of the building it described as "deplorable" and "uninhabitable." Plaintiff hoped to utilize the building once it obtained title and was "shocked" at the interior condition once it gained access. The building had been vandalized, there was no functioning electrical system, and no functioning heating and air conditioning system. The walls, floors, and ceiling were unfinished and in disrepair, the roof needed replacement, there was mold throughout the building and it lacked running water. It was difficult obtaining information regarding the prior history of the property. For example, when the architect requested copies of site plan, approvals, permits, and the like, to guide plaintiff in the best use of the property, he was advised the municipality was unable to locate any prior plans or permits. Plaintiff argues the costs associated with the rehabilitation combined with the large tax burden on the property have made it difficult to proceed, though it "still intends through the appeal to make the property viable again once the burdensome tax situation is corrected."

Since its acquisition of the property in 2012, plaintiff and its representatives have engaged in extensive discussions and meetings with the municipal assessor and representatives in an attempt to reach an amicable resolution of the appeals, and in plaintiff's view, to have the assessments "adjusted and reduced to [a] reasonable assessment[s] which reflect[s] the property's actual condition." For tax year 2012, the property carried a total assessment of $1,707,800 (allocated $625,500 to the land and $1,082,300 to the improvement.) A revaluation

effective for 2013 reduced the assessment to $633,000 (allocating $166,500 to land and $466,500 to improvement.)

During the ensuing litigation, plaintiff answered interrogatory requests and obtained the report of an appraiser who concluded the structure had no value and should be demolished. The appraiser opined the property's true value to be well below the assessments. In conjunction with ongoing settlement efforts and offers exchanged between the parties, plaintiff also engaged the services of another cost expert to confirm for defendant the costs associated with attempting to rehabilitate the building. Late in their discussions, defendant advised plaintiff that foreclosure proceedings on the property had been initiated by defendant, presumably on the 2010 tax certificate acquired by it, ending settlement discussions between them.

In support of its motion, defendant contends that absent payment of property taxes required under N.J.S.A. 54:3-27 and N.J.S.A. 54:51A-1(b) the tax court lacks subject matter jurisdiction over the appeals. By statute, to sustain a tax appeal filed direct to the county board or tax court, taxpayer "shall pay . . . no less than the total of all taxes and municipal charges due, up to and including the first quarter of the taxes and municipal charges assessed against him for the current tax year . . . ." N.J.S.A. 54:3-27. Taxes paid on or prior to the return date of the motion to dismiss satisfy the statutory requirement. Lecross Assocs. v. City Partners, 168 N.J. Super. 96, 99-100 (App. Div.), certif. denied, 81 N.J. 294 (1979). Under the terms of N.J.S.A. 54:51A-1(b), an appeal to the tax court from a county board judgment requires, "all taxes or any installments thereof then due and payable for the year for which review is sought must have been paid" at the time the complaint is filed seeking review of the county board judgments.

The statutes were amended in 1999 to permit the fact finder to relax the tax payment "in the interests of justice." Based on the amended language, the court's jurisdiction to review

assessments on real property may be invoked even where taxes on the property have not been paid, under certain circumstances. Yet the phrase "interests of justice" is otherwise undefined by the statutes. When a motion to dismiss is brought, the court is required to weigh the facts to determine whether "hearing the case would best serve the interests of justice." Christian Asset Management Corp. v. City of East Orange, 19 N.J. Tax 469, 475 (Tax 2001).

In opposition to the motion, plaintiff relies on the holding of the court in Farrell v. City of Atlantic City, 10 N.J. Tax 336 (Tax 1989), a pre-1999 case. In Farrell, the parties agreed to resolve the taxpayer's appeal nineteen days before trial, executed settlement documents, and judgment was entered. Subsequently, the municipality disavowed the settlement, and filed a motion to vacate judgment and dismiss the appeals for failure to pay the taxes due. (The municipality's motion was filed fifteen months after the date of the taxpayer's appeal.) The tax court held "a timely motion to dismiss a complaint filed in the Tax Court on an appeal from a county board of taxation will be granted and the complaint dismissed if the taxes have not, in fact been paid. However, the city's position in this case must be rejected." Id. at 345. For the municipality to argue it could participate in a case that proceeded to the board and through the court to the entry of judgment by a settlement on the record, then seek to vacate the judgment and dismiss the complaint because of taxes overdue at the time the complaint initially was filed, was untenable the court reasoned. Id. at 346. Plaintiff here contends the same standard should be applied by this court. In plaintiff's view of the facts, it expended time and money actively litigating the matter only to be faced with a motion to dismiss when the parties were unable to settle the matters.[3]

[3] Notably, plaintiff's assertion that defendant moved to dismiss four years from the filing of the complaint applies to the 2012 year only. The time frame shortens for each subsequent appeal. The 2015 appeal was filed on May 28, 2015, seven months before the motion. The 2014

The timing argument raised by plaintiff was rejected by the court in Dover-Chester Associates v. Randolph Township, 419 N.J. Super. 184 (App. Div. 2001), a post-1999 case. In Dover-Chester, the taxpayers sought to apply the interests of justice standard to the facts to ameliorate the effect of their failure to pay taxes. There, two separate taxpayer-owners of township property appealed to the tax court from county board judgments. Neither taxpayer was current in the payment of property taxes at the time the complaints were filed. After filing, partial tax payments were made through sale of a tax certificate. The court held that relaxation of the tax payment obligation in N.J.S.A. 54:51A-1(b) is not satisfied by the issuance of a tax certificate prior to the return date of a motion to dismiss, an issue central to the case. Id. at 201-02.[4] The Dover-Chester court also rejected the taxpayers' argument to allow the appeals to continue, despite the non-payment of taxes, based solely on the timing of the motion (filed over two years from the earliest filed complaint). The appellate court rejected the continued application of the Farrell standard and held, in relevant part,

> Based upon the language of the applicable statutes at that time, before the 1999 amendments added the "interests of justice" exception, the Tax Court stated that a taxpayer's failure to pay taxes in a timely manner results in "a *jurisdictional deficiency* of a procedural nature" which must be presented to the court within "a reasonable time." However, because the 1999 amendments . . . granted the Tax Court limited discretion to relax the tax payment requirement in the "interests of justice," . . . the tax payment requirement no longer strips the Tax Court of the authority to exercise jurisdiction in cases in which taxes have not been paid. The initial premise in *Farrell* is therefore inapplicable to our analysis.

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appeal was filed on May 19, 2014, eighteen months prior to the motion, and the 2013 appeal was filed July 2, 2013, over two years before the motion. For the 2012 tax year, the motion was filed over three years after the complaint, which was filed on March 30, 2012.

[4] By its ruling the Dover-Chester court effectively overruled U.S. Land Resources v. Borough of Roseland, 24 N.J. Tax 484 (Tax 2009).

[Id. at 198.]

The court then distinguished Dover-Chester and Farrell on their facts, stating "[m]ost significant, the municipality in Farrell did not merely seek to dismiss a complaint, it sought to vacate a judgment." Id. at 198. "Preservation of the tax payment requirement reflects an intent that 'the relaxation of the requirement be granted sparingly, and in limited circumstances.'" Id. at 202, citing Wellington Belleville, L.L.C. v. Township of Belleville, 20 N.J. Tax 331, 336 and n. 7 (Tax 2002) and Christian Asset Management Corp., supra, 19 N.J. Tax at 475-76. The Dover-Chester court held that "[a] review of the record here reveals no circumstances that contributed to the non-payment of taxes. The taxpayer's arguments for relaxation depend upon events that occurred after their complaints were filed, i.e., the timeliness of the Township's motions." Id. at 203. "Any prejudice to the taxpayer as a result of the township's delay was outweighed by the prejudice suffered to the township in permitting the appeals of delinquent taxpayers to be heard." Id. at 194.

Aside from the Farrell case, plaintiff cited to three other tax court cases where the municipalities moved to dismiss for failure to pay taxes. Because in each case the court granted relief to the municipality, the case law cited would appear contrary to plaintiff's position. However, plaintiff cites the cases as a means of comparison, in an effort to establish that the timing in this case was unreasonable. For example, in each case cited the motion was filed within fifteen months of the complaint, or less. Plaintiff cites the following: U.S. Land Resources, supra, 24 N.J. Tax at 484 (eighteen months from complaint to motion); Christian Asset Management Corp., supra, 19 N.J. Tax at 469 (twelve months from complaint to motion); and Huwang v. Hillside Township, 21 N.J. Tax 496 (Tax 2004) (twelve months from complaint

to motion). This court is unpersuaded by plaintiff's argument since the timing of the municipality's motion in each case cited was not an issue raised or considered by the court.

In further consideration of plaintiff's position that the property's condition requires relaxation of the tax payment, Wellington Belleville, provides this court guidance. There, the tax court set forth a three-part, minimum test to relax the tax payment in the interests of justice. "At a minimum, it would seem that such circumstances must be: (1) beyond the control of the property owner, not self-imposed, (2) unattributed to poor judgment, a bad investment or a failed business venture, and (3) reasonably unforeseeable." Wellington Belleville, L.L.C., supra, 20 N.J. Tax at 336. Finding the financial hardship claimed by the plaintiff in that case was self-imposed amid plans to redevelop blighted property, the court held that "financial difficulties of plaintiff alone did not provide an adequate basis to apply the interests of justice exception," where plaintiff "did not offer evidence regarding assets and liabilities, if any, or otherwise demonstrate that it is unable to obtain money to pay its taxes pending its tax appeal". Wellington Belleville, L.L.C., supra, 20 N.J. Tax at 337.

Here, there is no proof plaintiff was financially unable to pay the taxes, and it made only a vague claim to that effect. The failure to pay taxes was not based on circumstances beyond its control. Rather, plaintiff's only explanation for nonpayment is the sheer expense involved both in developing the property, and in meeting the tax obligation, which plaintiff feels does not adequately represent the value of the property. As plaintiff property owner certified, "[e]xtreme costs associated with rehabilitation combined with the large tax burden on the property make it extremely difficult for [plaintiff] to proceed."

Plaintiff argues it stopped paying taxes after conducting an inspection in 2012 that revealed its deplorable condition, and an appraisal report confirmed for taxpayer its allegation

that the property was over-assessed. The court does not find the contention to be credible. Plaintiff stopped paying taxes long before the 2012 inspection, given the last tax payment made was for the fourth quarter of 2009. Rather, in allocating resources, plaintiff simply elected not to pay the taxes. The facts present no circumstances that would make it unfair to dismiss the complaint where nothing unforeseen or outside plaintiff's control has occurred to excuse the obligation. Nor has plaintiff made any effort to comply with the statutes' requirements. See Huwang, supra, 21 N.J. Tax at 496 (denying motion to dismiss where the municipality failed to object to the taxpayer's bankruptcy restructuring plan in which all back property taxes would be paid and the taxpayer complied with the schedule for monthly payments required by the plan).

The purchaser of a tax certificate does not hold legal title to the property. Township of Jefferson v. Block 447A, Lot 10, 228 N.J. Super. 1 (App. Div. 1988). The purchaser "acquires only a tax lien, not title to the property. It gives the purchaser an inchoate right or interest in the property sold subject to a statutory right of redemption." Bron v. Weintraub, 79 N.J. Super. 106, 111 (App. Div. 1963). "A private owner of a tax-sale certificate does not have the right to inspect the property for the purpose of determining its physical condition." Kahn Pension Plan v. Township of Moorestown, 243 N.J. Super. 328, 335 (Law Div. 1990). "The fact is that buyers of tax liens, frequently bargain hunters, are expected to buy a pig in a poke. The law does not provide them with warranties or guarantees or special protection of any kind. Caveat emptor is the rule." Id. at 339. The purchaser of a tax certificate buys at its own risk, "speculating that he will receive a return on his investment at a high rate of interest, or, eventually, he may secure legal title." Northfield City v. Zell, 12 N.J. Tax 180, 187 (Tax 1991). Plaintiff had full access to the tax assessment on the property and elected to purchase and foreclose on the tax sale certificate, obtaining title to the property sight unseen. It thereby acted at its own risk.

Moreover, it is unclear whether the appraiser's conclusion of the property value may be attributable in part to the conduct of plaintiff itself. According to defendant, plaintiff "has failed to take any reasonable steps to maintain and/or secure the property and in fact has deliberately allowed the property to fall into a state of disrepair." To permit plaintiff now to cry foul would work an injustice to the municipality and the other taxpayers.

> The purpose of the tax payment requirement is to protect the municipality's interest in receiving timely payments of taxes to provide the revenue necessary for governmental operations. When the flow of revenue is interrupted, the burden of an appealing taxpayer's unpaid taxes is shifted to the other taxpayers in the district and reflected in the reserve for uncollected taxes.
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> Dover-Chester Assocs., supra, 419 N.J. Super. at 201 (citing J.L. Muscarelle, Inc. v. Township of Saddle Brook, 14 N.J. Tax 453, 457 (Tax 1995)).

The court finds that plaintiff should be denied relief having failed to meet the three-factor test set forth in Wellington-Belleville. See also, Christian Asset Management Corp., supra, 19 N.J. Tax at 475-76, where the tax court found relaxation of the payment requirement based on an allegation of gross overassessment does not serve the interests of justice.[5]

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[5] The facts present an issue not raised by the parties. It appears that plaintiff may not have qualified as an aggrieved taxpayer pursuant to N.J.S.A. 54:3-21, at least at the time the 2012 appeal was filed, and thereby lacked standing to bring the appeal. On the date the complaint was filed for tax year 2012 (March 31, 2012) plaintiff had not yet obtained a deed for the property. While the court has held that a certificate holder qualifies as a "taxpayer" under the statute, that applies only where the certificate holder pays the taxes due on the property from the time it acquires the certificate. Lato v. Township of Rockaway, 16 N.J. Tax 335, 358 (Tax 1997). Under these facts, plaintiff would lack standing to maintain the appeals having failed to remain current on the property taxes. Standing "involves a threshold determination of the court's power to hear the case" . . . . "akin to that of jurisdiction." Watkins v. Resorts Int'l Hotel & Casino, 124 N.J. 398, 418 (1991) (citation omitted).

It is likewise unclear whether plaintiff properly obtained a Sheriff's Deed for the property in 2012 since taxes accruing after the purchase of certificate 07-336 remained unpaid. The governing statutes provide, "[e]very municipal lien shall be a first lien on such land and paramount to all prior or subsequent alienations, . . . or encumbrances thereon, except subsequent

Plaintiff also contends, in reliance on FMC Stores, that defendant failed in its obligation to turn square corners where it moved "on the eve of trial to dismiss" for failure to pay taxes after almost four years of litigation on the appeals. FMC Stores Co., supra, 100 N.J. at 426-27 ("We have in a variety of contexts insisted that governmental officials act solely in the public interest. In dealing with the public, government must "turn square corners.").

The circumstances here run counter to a finding that defendant acted with the intention of obtaining a litigation advantage over plaintiff. Instead, plaintiff describes significant time spent by defendant meeting with plaintiff to pursue resolution of tax appeals. Plaintiff presented no evidence to bar the inference that the city expended good faith efforts to resolve the appeals without the need for trial. When discussions failed to result in a negotiated settlement, defendant was within its rights to investigate the current status of tax payments and move to dismiss if appropriate. Plaintiff availed itself of the opportunity to continue negotiations with defendant, all the while permitting the unpaid tax obligation to accrue. Plaintiff expressed the intent to "make the property viable again," a laudable goal that if pursued would certain benefit the parties. Instead, it permitted the property to fall further into disrepair as it negotiated to resolve the tax appeals, and ignored payment of the tax obligation.

"The principle that taxes must be paid when due as a condition to litigating liability for the amount alleged due is firmly embedded in our law." Woodlake Heights Homeowner Ass'n Inc. v. Township of Middletown, 7 N.J. Tax 364, 366 (App. Div. 1984) (citing New N.Y. Susquehanna and W.R.R. v. Vermeulen, 44 N.J. 491 (1965)). The purpose of paying tax before

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municipal liens." N.J.S.A. 54:5-9. "No foreclosure judgment shall be entered, . . . unless evidence is produced in the foreclosure action that all subsequent municipal liens have been paid to the time of the commencement of the action." N.J.S.A. 54:5-99. "A tax sale certificate holder does not have the option to foreclose subject to municipal liens." Lato, supra, 16 N.J. Tax at 365

an appeal is heard is to shift the burden of unpaid taxes away from other taxpayers in the district. J.L. Muscarelle, Inc., supra, 14 N.J. Tax at 457. See also, Huwang, supra, 21 N.J. Tax at 504 ("To avoid exposing a municipality to financial hardship through the non-payment of taxes, the intent of the Legislature when originally enacting N.J.S.A. 54:3-27 and N.J.S.A. 54:51A-1 was to 'assure the flow of revenue to a municipality while an appeal is pending.'") (citation omitted).

Defendant's motion is granted for the reasons set forth herein. An Order and Final Judgment dismissing the complaints will be entered accordingly.

Very truly yours,

/s/Christine M. Nugent, J.T.C