

NOT FOR PUBLICATION WITHOUT APPROVAL OF
THE TAX COURT COMMITTEE ON OPINIONS

TAX COURT OF NEW JERSEY



Mala Sundar
JUDGE

R.J. Hughes Justice Complex
P.O. Box 975
25 Market Street
Trenton, New Jersey 08625
Telephone (609) 943-4761
TeleFax: (609) 984-0805
taxcourttrenton2@judiciary.state.nj.us

January 9, 2017

Paul Tannenbaum, Esq.
Zipp Tannenbaum Caccavelli, L.L.C.
280 Raritan Center Parkway
Edison, New Jersey 08837

Martin Allen, Esq.
DiFrancesco Bateman et al.
15 Mountain Boulevard
Warren, New Jersey 07059

Re: Surfrider Beach Club, L.L.C. v. Borough of Sea Bright
Docket No. 001296-2016

Dear Counsel:

This matter addresses defendant's motion for reconsideration of this court's prior opinion and Order dated December 7, 2017 which had denied defendant's motion to dismiss the complaint. The court had noted that the issue was "whether the" United States Postal Service ("USPS") had "properly followed its procedures on delivering the assessor's Chapter 91 request." In this regard, the court had concluded as follows:

Because the reasons for returning the Chapter 91 request were contradictory, because only one of the alleged three attempted delivery dates was reflected in the USPS' web delivery record, and further because there was no testimonial or other evidence from the USPS clarifying these delivery issues, the court agrees with plaintiff that the City cannot prove proper delivery of the Chapter 91 request.

The court also found that plaintiff's witness' un-contradicted testimony on the issue of plaintiff's routine business procedures for mail receipt was credible.

The Borough timely moved for reconsideration. It included a certification from the Postmaster of Rumson in support thereof. The certification reproduced the seven questions posed by the Borough with “yes” or “no” responses to each and/or a reference to either the certified mailing envelope, the mailing receipt, the unsigned green card (return receipt), or the USPS electronic tracking information sheet (all the four of which were included in support thereof). The responses were that: (1) plaintiff’s address on the certified mailing envelope was correct; (2) there was an attempted delivery of the mail on June 3, 2015 as per the “USPS ‘Track and Confirm’” electronic record; (3) the mail was returned “because it was unclaimed” as per the “USPS ‘Track and Confirm’” electronic record; (4) the mail was “returned to the” assessor’s office as evidenced by the date stamp on the mailing envelope by the Borough, therefore, the mail was not “returned, or otherwise unclaimed” by the Borough; and (5) the USPS “follow[ed] all of the usual procedures for processing” the certified mail, as “it would follow for processing any other item of certified mail.”

In response to the question “[w]as the [plaintiff’s] address . . . insufficient? If not, why was the item marked as having ‘Insufficient Address?’” the Postmaster said “Unknown.” The same “Unknown” response accompanied the question “[d]oes the [plaintiff] . . . usually claim his¹ certified mail?” The Borough also asked “[w]hy was only one delivery attempt reflected on the web tracking printout?” To this, the Postmaster replied that “[a] second notice is given by PS form 3849 only to the intended recipient. There’s not a second attempted scan executed. Therefore, only one initial attempt with a scan on the web tracking printout.”²

¹ The mailing envelope showed the plaintiff as the addressee. The plaintiff is an entity.

² There appears to be a word or two missing in this last sentence and may likely have meant: “Therefore, only one initial attempt with a scan [is reflected] on the web tracking printout.” Or “Therefore, [there is] only one initial attempt with a scan on the web tracking printout.”

A motion for reconsideration must “state with specificity the basis upon which it is made, including a statement of the matter . . . which counsel believes the court has overlooked or as to which it has erred.” R. 4:49-2. Such motion will be granted “only for those cases which fall into that narrow corridor in which either the Court has expressed its decision based upon a palpably incorrect or irrational basis, or it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence” D’Atria v. D’Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). The movant must “initially” show that the trial court “acted in an arbitrary, capricious, or unreasonable manner, before the Court should engage in the actual reconsideration process.” Ibid. A court may, “in the interest of justice” consider any “evidence” that the litigant claims is “new or additional . . . which it could not have provided” during the initial hearing. Ibid.

The Borough asserts the Postmaster’s certification is evidence of “new information,” and thus, appropriate for reconsideration as new evidence. It argues that regardless of the “unknown” responses, the issue as framed by the court, viz., “whether the USPS properly followed its procedures on delivering the assessor’s Chapter 91 request,” is now resolved via the Postmaster’s response that the USPS followed its procedures for “processing” the mailed Chapter 91 request.

The court is not persuaded. First, the Borough does not show why all of the information from the Postmaster was never available, or could not be made available, at or during the earlier hearing. No newly discovered documents were provided. All of the documents referenced to, or relied upon by the Postmaster in his certification were already part of the record in the prior Chapter 91 motion hearings. Indeed, and as plaintiff points out, several responses (such as its address on the mail envelope; return of the mail to the assessor; contents of the electronic tracking sheet) were not even disputed during the plenary hearing.

Second, even if this court were to consider the certification as an answer to the issue of delivery, the reason why the Chapter 91 request was returned to the assessor's office still remains, according to the Postmaster, unknown. Although the response shows that the USPS does not scan a second attempted delivery on the electronic tracking sheet (or even a third attempt since here the envelope contained three dates in June below the words "UNC"), it is still unknown why the envelope was returned with notations of both having an insufficient address and being unclaimed. That the USPS followed all procedures it normally would for "processing" certified mails does not cast any further light in resolving this puzzle. Thus, the USPS' compliance does not raise an inference that plaintiff must have refused delivery especially since the Postmaster did not certify that he personally delivered or attempted to deliver the mail. Furthermore, neither the USPS' compliance, nor the Postmaster's lack of knowledge of plaintiff's practice of claiming certified mails, contradict the witness' testimony as to the routine procedure of accepting or receiving mail at plaintiff's business address.³

Third, even if this court were to consider the Postmaster's certification as an answer to the issue of delivery, the Borough's arguments are the same as raised before: namely burden-shifting, and that plaintiff only produced one individual instead of the "numerous individuals who come in contact with the postal delivery person." These arguments were not deemed persuasive then, and are not so now either.⁴ Dissatisfaction with the court's non-acceptance of the Borough's prior

³ Plaintiff claims the response contradicts the assessor's prior certification which was made in support of the Borough's Chapter 91 motion. This is an improper assertion because plaintiff strenuously objected to those statements as hearsay, which is why the assessor could not so testify at the plenary hearing.

⁴ On burden-shifting, the Borough re-argues that the burden shifts to the plaintiff to disprove delivery, and cites to the footnote 2 of the court's prior opinion in support. However, that footnote simply noted that in Green v. City of East Orange, 21 N.J. Tax 324, 331 (Tax 2004), the court "saw no need to decide whether 'there can be a presumption of receipt' in certified mailing cases, akin to regular mailing, *i.e.*, if the envelope has the correct address and postage, and is properly mailed, there is a presumption of receipt and the burden shifts to the addressee to rebut the presumption." This court did not rule that the presumption of receipt and burden shifting principles of regular mailing, applies to certified mailing generally or in this case. As to the re-argument that plaintiff produced only one witness,

arguments is an inappropriate ground for reconsideration. Palumbo v. Township of Old Bridge, 243 N.J. Super. 142, 147 n.3 (App. Div. 1990) (observing that “[w]e . . . disapprove of the excessive use of motions for reconsideration . . . [which are being] made with increasing frequency when essentially there is little more than disagreement with the Court’s decision. Motions for reconsideration were never meant to be a substitute for the filing of a timely appeal”).

The court can exercise its discretion to consider ““new or additional” evidence that was unavailable during the initial hearing “in the interest of justice.” D’Atria, supra, 242 N.J. Super. at 401. Here, the Postmaster’s responses, while “new or additional” in a technical sense, do not warrant reconsideration of the court’s opinion because that information was never claimed or shown to be unavailable during the plenary hearing. The Borough also has not proven that the court’s decision was “arbitrary, capricious, or unreasonable.” Therefore, the Borough’s motion for reconsideration is denied.

Very Truly Yours,

A handwritten signature in blue ink that reads "Mala Sundar". The signature is written in a cursive style with a horizontal line underneath the name.

Mala Sundar, J.T.C.

the Borough does not explain why it did not or could not have deposed, or issued subpoenas to plaintiff’s employees in this regard during the prior hearing.