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THE TAX COURT COMMITTEE ON OPINIONS

TAX COURT OF NEW JERSEY

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JUDGE

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Re: MCE Upper Freehold, L.L.C. v. Township of Upper Freehold
Docket No. 008487-2016

Dear Counsel:

This matter is before the court on the parties' respective motions for summary judgment in the above captioned matter. The sole issue is whether defendant ("Township") properly imposed penalties and interest for an alleged late payment of roll-back tax and regular tax for one quarter.

Plaintiff claims that it sent a timely check on October 29, 2015, after requesting tax bills in this regard from the Township. When the same was not cashed, it asserts that it diligently followed through with the Township's tax collector, who apparently assured plaintiff that there were no issues with non-payment of any tax. Yet, upon one such inquiry by plaintiff in January of 2016, the Township, for the first time, informed plaintiff that it was delinquent. Plaintiff argues that the Township's conceded failure to send plaintiff tax bills or tax delinquency notices cannot inure to the benefit of the Township such that it can impose and retain $30,701.02 in interest and penalties,

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since had the Township done its job, and had not misled plaintiff, plaintiff would not have minimized or even avoided the interest and penalty.

The Township claims that plaintiff had more than ample notice of the roll-back tax amount which was contained in the parties stipulation of settlement and in the judgment of the Monmouth County Board of Taxation ("County Board"), therefore, the Township's failure to send a tax bill or delinquency notices is an immaterial fact. Rather, plaintiff's knowledge in this regard, with its awareness that the alleged check it sent was never cashed, are undisputed material facts, which when combined with the specific language in N.J.S.A. 54:4-63.19 that failure to receive a tax bill is no excuse for untimely tax payment, merits summary judgment in favor of the Township.

For the reasons below, the court finds that the cancellation of the interest and penalties, whether pursuant to this court's equitable jurisdiction or otherwise, cannot be decided on summary judgment. Therefore, the matter will be set for trial.

FACTS

The facts are taken from the parties' factual contentions, which are based upon their discovery responses, including deposition testimony of the Township's assessor, tax collector, and Mr. Glackin, the financial controller of plaintiff's management company, CJS Investments, Inc., and certification of Mr. Glackin in connection with plaintiff's instant summary judgment motion.

On June 10, 2015, plaintiff notified the Township's assessor that it was purchasing a farmland assessed property (Block 12, Lot 7 (Q-Farm)) ("Subject"), but would not be using the same for farmland purposes. It confirmed that all tax bills in connection with the consequent roll-back assessment would be sent to plaintiff. The assessor responded immediately by providing plaintiff an estimate of the roll-back tax amount.

Plaintiff purchased the Subject on June 23, 2015. The sale deed was recorded July 7, 2015. The deed reflected plaintiff's mailing address, plaintiff as the buyer/owner, and the Subject's identification (street address, block and lot). Plaintiff then followed up with the Township by an e-mail of August 4, 2015, that it was the owner of record of the Subject. It requested a computation of the roll-back taxes, and that the tax bills in this regard be sent to plaintiff.

The assessor responded by an e-mail on the same day that she would send the information in a week and "will be sure to address them to you." She also indicated that she had "spoken" to the tax collector in this regard, and that she would include a proposed stipulation of settlement for plaintiff's review and signature. The tax collector acknowledged that she and the assessor had discussed plaintiff's ownership of the Subject, and its request for a corresponding name and address change.

Two weeks thereafter, the assessor sent plaintiff a roll-back assessment complaint with the proposed stipulation of settlement by certified mail addressed, and sent to plaintiff at its correct mailing address. The tax collector was also made aware that plaintiff would be obligated to pay the roll-back taxes.

After negotiation, plaintiff, through its counsel, finalized the roll-back tax assessment. The resulting roll-back tax amount was "projected" to be a total of $323,520.71. On September 4, 2015, the assessor sent a revised stipulation of settlement to plaintiff, which signed and e-mailed it back to the assessor on the same day. Plaintiff noted on its e-mail that it would "immediately submit payment" upon its receipt of "the bill" from the Township, and requested the Township to "direct all future correspondences and notices to [plaintiff] only at this e-mail address or physical address" which was provided below the e-mail. Plaintiff also requested the Township to "remove"

the prior owner's information "from the email and physical mailing address list." The assessor responded by e-mail that she would comply with plaintiff's requests.

Thereafter, the Township filed a complaint with the County Board seeking roll-back assessments. It included a copy of the sale deed for the Subject and the executed stipulation of settlement between the parties. The County Board issued a judgement dated September 9, 2015. The judgment, which was mailed September 10, 2015, showed the total of the roll-back taxes as $323,520.71. It also noted as follows:

> It is further ORDERED that a copy of this Judgment be sent to the Assessor and Collector of the Taxing Municipality and the Owner of the Property.[1]
>
> ROLL-BACK TAXES ARE PAYABLE TO THE TAXING MUNICIPALITY UPON RECEIPT OF A BILL FROM THE COLLECTOR OF THAT MUNICIPLAITY.

On October 29, 2015, plaintiff, via e-mail, advised the assessor that it never received "a final tax bill for the Roll-Backs or the Quarterly payments." Plaintiff asked if the assessor "[w]ould . . . be able to forward [plaintiff] a copy." The assessor and the tax collector responded (on the same day) that the tax bill was likely sent to the prior owner of the Subject, and that a "duplicate bill" would be mailed and e-mailed to plaintiff.[2] The tax collector then e-mailed and sent by regular mail, a copy of the roll-back tax bill to plaintiff at its correct mailing address. However, neither the assessor, nor the tax collector effectuated a name and address change on the tax records.

Mr. Glackin stated that he mailed a check on the same day, by check #1059 dated October 29, 2015, for the roll-back tax amount plus the tax for the last quarter of 2015. On the check, the Township's address was noted as "P.O. Box 89, Cream Ridge, NJ." However, he asserted that he

[1] Plaintiff claimed not to have received a copy of the County Board's judgment until the instant litigation, although it acknowledged that the judgment contained plaintiff's correct mailing address.
[2] The tax collector's email to plaintiff queried whether it "also" needed the "regular bill."

mailed the check to the Township's street address. He also asserted that he had alerted the tax collector the same day that he was mailing the check, to which she responded that she would be expecting the same. He further claims that after he had received a hard copy of the tax bills, by regular mail during the first week of November, he called the tax collector to inform her that he had already mailed the check and requested her to contact him if there were any issues in this regard, to which she agreed. Per the deposition transcripts, Mr. Glackin stated that it is not unusual for him to send a check for a large amount by mail because he has routinely mailed several other large amount checks by regular mail.

During his review of plaintiff's November 2015 bank statement (received in the first week of December), Mr. Glackin noticed that check #1059 was not cashed. He contacted the tax collector asking if there were any issues as to the tax payment, since he also noticed that another check for $15,000 (on which the same P.O. Box address for the Township was included), had been cashed. The tax collector allegedly assured him that there were no issues regarding the tax payment. When the January 2016 bank statement (received during the first week of January) also did not evidence that the check was cashed, he again called the tax collector, who reassured him that there were no issues because she had received the check. He also sent an e-mail on January 6, 2016, asking why the check was not yet cashed.

On January 7, 2016, the tax collector advised plaintiff that the Township had never received any tax payment. She also notified plaintiff that because of this she would have to charge interest of $10,718.62 (for November 1, 2015 to January 7, 2016) as well as an "end of the year" penalty of $19,982.40, since taxes were unpaid as of December 31, 2015.

Plaintiff immediately sent what it claims a "duplicate" check for the roll-back taxes, as well as the last quarter 2015 taxes. Another check was sent for the penalty and interest amount, "over

its objection." An internal memorandum documenting a telephonic conversation of January 7, 2016 between Mr. Glackin, the assessor and tax collector, reflects that Mr. Glackin called asking for a waiver of interest and penalties since he was "never properly billed," to which the Township responded that it had "provided him all information necessary for [him] to make the necessary payment of taxes."[3] The memorandum notes that Mr. Glackin advised the Township that he knew the amount of tax payable, and its due date, and had "paid" the Township on October 29, 2015. The Township told him no payment was received, hence interest and penalties are due. The memorandum also notes that Mr. Glackin knew that "the check was still outstanding as of December 31, 2015."

By letter dated January 26, 2016, addressed to the Township's Mayor, Deputy Mayor, Administrator, and committee members, plaintiff, through Mr. Glackin, requested the Township to abate the interest and penalties. The letter recited the above history, plaintiff's proactivity in the process of obtaining a tax bill for the roll-back tax amount, its immediate mailing of check #1059 to the Township upon receipt of the tax bills, which mail was not returned as undeliverable, and the absence of any delinquent tax notices from the Township, written or verbal. It further stated that plaintiff's title company had performed a rundown on the property on November 25, 2015 and did not report taxes as outstanding. It also noted that since the Subject was undergoing construction, plaintiff was contractually obligated by the lending bank to stay current on taxes, thus, it would never have risked its financing by not paying the taxes on time. The letter stated that an abatement of the interest and penalty was justified because plaintiff was a diligent taxpayer,

[3] The memorandum notes that as of November 1, 2015 roll-back tax amount of $323,520.71 was due, as was the tax of $561.73 "for normal QFarm taxes."

and the amount imposed was unfair since due to clerical errors, the delinquent period was only two months as of January 1, 2016.

There was no response to this letter from the Township. This complaint followed.

The Township admits that it is the assessor's policy that as soon as she receives a copy of a recorded sale deed from the county clerk, she notifies the tax collector of the ownership change, and such corrections are input manually. It is also the policy to send tax delinquency notices if quarterly tax payments are not received within 14 days from the due date. Such notices are sent to the address of the property owner shown on the tax records. The Township admits that it never changed its tax records to reflect plaintiff as the new owner of the Subject. Deposition testimony of the assessor and tax collector was that neither could explain the reason for not making an ownership change. The Township also admits that although a review of its tax delinquency reports showed that taxes were delinquent in November and December, it never sent plaintiff a delinquency notice in either month. Per the testimony, the tax collector's office is a cubicle area with no doors, thus, "anybody can walk around in the area at any time," and this situation violated an Internal Control Handbook which requires the "Tax Collection Area should be restricted from municipal employees and outside public."[4]

The Township however, refutes receipt of any tax payment from plaintiff until sometime after January 7, 2016. It refutes the allegation that it must have received check #1059 because plaintiff's bank records show that his check was in sequential order, and all the preceding and succeeding checks were presented for payment. It notes that the address on check #1059 is an old

[4] Although the Internal Control Handbook provides procedures to handle tax payments received by the office, in response to plaintiff's admission request that "[i]t is possible that others outside the [tax collector's] office will handle received" tax payments, the Township responded "admitted to the extent anything is possible." Plaintiff requested (in the course of discovery) that the tax collector search her office for check #1059. She responded that since the check was "never received' there was no need to "search for it."

one which is never used, and only the street address is used as evidenced by the e-mail exchange with plaintiff, the address on the County Board judgment, and the Township's website. It further notes that plaintiff knew of the roll-back tax amount without the aid of a tax bill or tax delinquency notice reminder since the amount was "entered into [Mr. Glackin's] system on October 21, 2015 before his call to [the Township] on October 29, 2015."

FINDINGS

Summary judgment should be granted where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2 (c). Whether there exists a genuine issue as to a material fact in dispute requires the "motion judge" to "consider whether the competent evidential materials presented" would allow a "rational factfinder" to decide in favor of the non-movant. Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995). In so doing, all facts must be "viewed in the light most favorable to the" non-movant. Ibid. If the evidence presented is "so one-sided that one party must prevail as a matter of law," then summary judgment is appropriate. Id. at 540 (citation and internal quotation marks omitted).

The controlling law on the issue presented to the court is not in dispute. When a roll-back tax assessment is imposed, the procedures for the "collection . . . and payment over of the roll-back taxes" are the same as for the "assessment and taxation of omitted property." N.J.S.A. 54:4-23.9. Thus, once a county board of taxation has entered a judgment as to the assessment of omitted property, a copy of the same must be sent to the assessor and the property owner, N.J.S.A. 54:4-63.14, after which a tax list and a duplicate is prepared and filed with the county board of taxation

reflecting inclusion of the omitted property. N.J.S.A. 54:4-63.17. The county board of taxation should then deliver a duplicate of that list (duly certified) to the tax collector. Ibid.

Once the tax collector receives the duplicate tax list, he or she must "at once begin the work of preparing, completing, mailing or otherwise delivering the tax bills" to the property owners. N.J.S.A. 54:4-63.19. These tasks must be completed "at least one week before November first." Ibid. Taxes due "upon omitted property" are "payable on" November 1, provided the county board of taxation's judgment is issued before October 1 of that year. N.J.S.A. 54:4-63.20.[5] However:

> The validity of any such tax or assessment or the time at which it shall be payable shall not be affected by the failure of a taxpayer to receive a tax bill, but every taxpayer, to whom a copy of any such judgment of a county board of taxation is sent, is put upon notice to ascertain from the proper official of the taxing district the amount which may be due for taxes upon the assessment of the omitted property according to such judgment.
>
> [N.J.S.A. 54:4-63.19 (emphasis added).][6]

Since the roll-back tax collection procedure is the same, it means that the roll-back taxes are due November 1 provided the county board's judgment is rendered before October 1. See also N.J.A.C. 18:15-7.7 (a)-(c) (roll-back tax due November 1, or if the judgment was rendered after October 1, then the tax is due November 1 of the following year). And pursuant to the application of the omitted assessment procedure for tax assessment, payment and collection, a failure to receive a tax bill will not act to extend the November 1 deadline, or excuse a late payment of the tax.

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[5] If the county board of taxation's judgment was "rendered" after October 1 and before December 31, then the tax is due on November 1 of the following year. N.J.S.A. 54:4-63.20.

[6] An identical provision is contained as to taxes due on regular assessments (and paid on a quarterly basis), except that the taxpayer has to ascertain the "amount which may be due for taxes or assessments against him or his property." See N.J.S.A. 54:4-64(a)(3). That statute also provides (in connection with the interest on the third installment of the current year taxes), that the "tax bill shall contain a notice specifying the date on which interest may begin to accrue." N.J.S.A. 54:4-64(a)(4) (emphasis added).

If the tax remains unpaid after November 1 (the date it is payable), then is "shall become delinquent." N.J.S.A. 54:4-63.20. Interest and penalties can then apply. Although a property tax bill must include "on or with the tax bill the delinquent interest rate or rates to be charged and any end of year penalty that is authorized," N.J.S.A. 54:4-65, there is no requirement for a municipality to issue periodic notices of tax delinquencies.

The statutes do not mandate the imposition of interest and penalties. Rather, the Legislature has left it to the governing body of a municipality to impose the same, circumscribing only the amounts which can be imposed. Thus, N.J.S.A. 54:4-67 provides that a "governing body may also fix the rate of interest to be charged for the nonpayment of taxes . . . on or before the date when they would become delinquent," and/or decide that no interest will be imposed "if payment . . . is made within" 10 days of the date the tax is "payable." The interest rate "so fixed shall not exceed 8% per annum on the first $1,500.00 of the delinquency and 18% per annum on any amount in excess of $1,500.00." Ibid. The interest is computed from the date the tax was payable until the date it is paid. Ibid.

A "governing body may also fix a penalty" provided the delinquency exceeds $10,000, and provided further that the taxpayer "fails to pay that delinquency as billed, prior to the end of the fiscal year." Ibid. The amount of penalty cannot be more than 6% of the delinquent amount. Ibid.

Also left to the discretion of a governing body is its decision to abate, revise, alter, adjust or settle delinquent tax, "and of any and all interest and penalties" as it deems "equitable and just and be for the best interests of the municipality." N.J.S.A. 54:4-99.[7]

[7] A decision to abate the actual tax requires satisfaction of certain other conditions. See N.J.S.A. 54:4-100. Additionally, if the agreed to amount is not paid within 60 days of the agreement, then the governing body's decision to the abatement or revision becomes "null and void." N.J.S.A. 54:4-101.

As applied to the issue here, the above statutory scheme clearly shows that (1) the date the roll-back, or other local property tax, becomes payable is not contingent upon the receipt of a tax bill, thus, failure to receive a tax bill does not extend the time to pay the tax, or without more, excuse or justify a late payment; (2) the taxpayer, who receives a county board judgment fixing the roll-back assessment is "on notice" to contact the tax collector to ascertain the amount of taxes due; (3) there is no statutory obligation to send reminders or delinquency notices to taxpayer; (4) failure to timely pay the tax can invite interest and penalties; and (5) a municipality has the discretion to abate or adjust interest and penalties.

Plaintiff argues that the undisputed facts of the Township's failure to change its records to reflect ownership change of the Subject; to send the tax bills; to send delinquency notices that the roll-back tax payment was never received as of November 1, or even as of December 1, despite specifically agreeing to plaintiff's requests to do all these actions, demonstrate the Township's blatant failure to comply with the law, its own polices and responsibilities, and specific representations to plaintiff. These facts suffice to merit summary judgment in its favor, regardless of the fact that the Township refutes plaintiff's allegation of having sent check #1059 on October 29, 2015. Plaintiff also notes that the totality of the presented evidence, namely, its bank records; the Township's consistent representations of there being no "issue" of lack of payment from plaintiff; its acknowledgement of payment; and its conceded failure to comply with its internal controls on protecting receiving/handling tax payment checks, more than sufficiently demonstrate plaintiff's timely payment of taxes.

The Township maintains that summary judgment in its favor is appropriate regardless of a dispute as to the fact whether plaintiff paid the roll-back tax on October 29, 2015. This is because plaintiff was fully aware of the amount due and the date payable (November 1, 2015), and was

also aware in early December 2015 that its check was not cashed by the Township. These facts, when applied to N.J.S.A. 54:4-63.19, which specifically states that timely tax payment is not dependent on "the failure . . . to receive a tax bill," allows grant of summary judgment to the Township. It notes that when the statute casts the responsibility upon the taxpayer to ensure timely tax payment, allegations of waiting for a tax bill or risking sending a six-figure amount check by regular mail should necessarily fail and inure against the taxpayer, regardless of the tax collector's failure to send a tax bill and tax delinquency notices.

For the reasons stated below, the court finds that summary judgment at this stage is inappropriate. First, the tax collector's imposition of interest and penalties is not per se invalid. Such an imposition is authorized by the statute's delegation in this regard to the Township. It is true that there appears to be some superficial conflict in the statutory scheme because N.J.S.A. 54:4-63.19 states that the time for payment of tax is not contingent upon, or excused by a failure to receive a tax bill, yet N.J.S.A. 54:4-65 requires a tax bill to notify the taxpayer of delinquent interest and "end of the year" penalty rates, and N.J.S.A. 54:4-67 allows such penalty to be imposed when a taxpayer fails to pay delinquent taxes "as billed." However, the court need not decide which statute prevails because plaintiff received the bills on October 29, 2015, rendering moot any issue of in this regard.

As to the admitted failure of the Township to send delinquency notices, there is no statutory remedy for the same since there is no statutory mandate to send such notices. However, in this context, plaintiff is seeking equitable relief, claiming the unfairness of the imposition based on the comparative diligence of plaintiff and the Township's course of conduct to the opposite. The court finds that the admitted failure of the Township to comply with its policies by not changing its records as to new ownership by plaintiff; by not sending a tax bill without urging of plaintiff; not

sending any tax delinquency notices; not raising the issue of delinquencies with plaintiff although its monthly reports reflected the same, when juxtaposed with the undisputed allegations of plaintiff's pro-activeness in this regard, raise reasonable and justifiable grounds to consider, on equitable grounds, whether the interest and penalties could have been avoided.

However, as plaintiff's statement of undisputed material facts notes, the Township disputes plaintiff's allegations that the tax collector assured plaintiff that she had received the October 29, 2015 check. Therefore, these alleged assurances, as being the basis for plaintiff's reliance and belief that the check was received, but simply not cashed, and as further evidence of the Township's pattern of disregard of its policies and procedures with respect to fair treatment of all taxpayers, cannot be decided on a summary judgment motion. Furthermore, while the Township admitted to not having sent delinquency notices per the Township's policy, those notices were as to the quarterly tax payments. It is unclear whether the same policy applies to a one-time roll-back tax payment. Thus, the alleged violation of this policy as evidence of a pattern of carelessness by the Township, cannot be decided on a summary judgment motion.

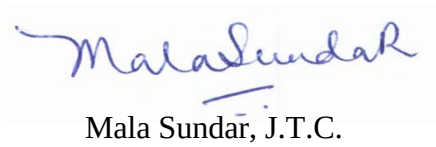
Finally, if plaintiff is correct that it did mail check #1059 on October 29, 2015, then the court can cancel the interest and penalties without resort to exercise of its equitable jurisdiction (timely paid taxes are not delinquent, thus, cannot have interest and penalties imposed). This fact of payment by plaintiff is disputed by the Township, which appears to be claiming that it never received a check, which is why it was never cashed, and that plaintiff took the risk of non-receipt by sending such a large amount by regular mail. Therefore, a hearing is required for the court to decide this issue. See SSI Medical Services, Inc. v. State, 146 N.J. 614 (1996) (explaining the principles of the presumption of receipt in regular mailing cases, which presumption is rebuttable). See also J & J Realty Co. v. Township of Wayne, 22 N.J. Tax 157, 161 (Tax 2005) (where taxpayer

alleges mailing a response to a Chapter 91 request, and the municipality denies receipt of the same, the court can "determine credibility and truthfulness" as it would in "other contexts").

CONCLUSION

For all of the above reasons, the court finds that whether it can, pursuant to its equitable powers, void the imposed interest and penalties, cannot be decided on summary judgment motions. Even if the court need not exercise equity to decide whether plaintiff sent the check on October 29, 2015, and whether the Township received it, the facts as to the mailing, and receipt, of the check are still disputed. Summary judgment is then inappropriate. The court therefore denies both parties' summary judgment motions.

Very Truly Yours,



Mala Sundar, J.T.C.