NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE TAX COURT COMMITTEE ON OPINIONS

B & D ASSOC., LTD.,	:	TAX COURT OF NEW JERSEY
	:	DOCKET NO.: 006112-17; 006387-2018
Plaintiff,	:	
	:	
v.	:	Approved for Publication In the New Jersey Tax Court Reports
	:	
TOWNSHIP OF FRANKLIN,	:	
	:	
Defendant.	:	

Decided: October 26, 2020

Lawrence S. Berger for plaintiff
(Berger & Bornstein LLC, attorneys).

Gregory B. Pasquale for defendant
(Shain Schaffer PC, attorneys).

BRENNAN, J.T.C.

This constitutes the court's opinion on defendant Township of Franklin's summary judgment motion. Defendant challenges a property owner's standing to pursue a local property tax appeal while the property was in foreclosure and tax payments were made by the mortgagee. For the reasons explained more fully below, the court will deny defendant's summary judgment motion.

I. Procedural History and Factual Findings

Pursuant to R. 1:7-4, the court makes the following findings of fact and conclusions of law.

On August 15, 1984, plaintiff, B & D Assoc., LTD., (Plaintiff), purchased an office building located at 27 School House Road in Franklin Township, which is identified on the

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municipality's tax map as Block 517.02, Lot 20.02 (subject property). On or about May 8, 2008, Plaintiff secured a loan from Oritani Savings Bank (Oritani) for $1,875,000, which was secured by a mortgage encumbering the subject property.

On or about October 1, 2012, Plaintiff defaulted on the Oritani loan. On December 12, 2012, Oritani filed a Complaint against Plaintiff in the Superior Court of New Jersey, Chancery Division, Somerset County. Thereafter, on April 17, 2014 Plaintiff entered a Consent Order which stated that the foreclosure action "shall proceed as an uncontested matter before the Office of Foreclosure." On July 14, 2014, the Chancery Court entered a judgment of foreclosure in favor of Oritani.

On November 18, 2014, Plaintiff filed a voluntary Chapter 11 petition under the United States Bankruptcy Code, which stayed the enforcement or execution of the foreclosure judgment and stayed any sheriff's sale of the property.

The following year, the parties reached an agreement on reinstatement of the loan. On September 2, 2015, a loan reinstatement agreement was filed with the Bankruptcy Court, pursuant to which Oritani agreed to reinstate the mortgage loan, extend the term of the loan, and forebear from exercising its rights under the foreclosure judgment. On October 16, 2015, Plaintiff filed with the Bankruptcy Court a first modified Plan of Reorganization, which was approved on December 18, 2015.

During this time, Plaintiff leased the subject property to a tenant who was responsible for payment of real estate taxes. The lease provided that the tenant would make rent and tax payments into a lock box account, from which Oritani could withdraw mortgage payments and escrowed tax payments. The tenant ceased making payments in 2015, and Plaintiff did not recommence its payment obligations to Oritani.

As a result of Plaintiff's breach of the loan reinstatement agreement, the sheriff's sale originally scheduled for October 21, 2014 was rescheduled for June 26, 2018, at which time the subject property was sold. Oritani was the successful bidder at the foreclosure sale but did not take title to the property. Rather, Oritani assigned its property rights to Zorm 2009 LLC, an entity which Oritani owned and controlled. The deed to Zorm LLC was executed on August 8, 2018. Electronic recording of the sale was entered on August 21, 2018.

The last mortgage and tax escrow payments made by or on behalf of Plaintiff to Oritani occurred in 2015. The Franklin Township records indicate that beginning in 2014, all property tax payments were made by Oritani presumably to protect its interests. It is undisputed that Oritani paid all real estate taxes for tax years 2017 and 2018 despite the lack of receipt of funds from Plaintiff or its tenant.

On March 30, 2017, Plaintiff filed a timely direct appeal with the tax court challenging its 2017 tax assessment. On March 29, 2018, Plaintiff filed a timely direct appeal challenging its 2018 assessment. On July 2, 2020, defendant Franklin Township filed a motion for summary judgment requesting dismissal of the two appeals on the basis that Plaintiff was not an aggrieved taxpayer. The motion was opposed, and the court heard arguments virtually on August 11, 2020 and September 11, 2020.

II. Conclusions of Law

A motion for summary judgment should be granted where "the pleadings, depositions, answers to interrogatories and admissions on file together with 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). The standard for summary judgment as established by the Supreme Court provides:

> [W]hen deciding a motion for summary judgment under Rule 4:46-2, the determination whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.
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> [Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995).]

Furthermore, the "express import of the Brill decision was to 'encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves.'" Howell Twp. v. Monmouth County Bd. of Taxation, 18 N.J. Tax 149, 153 (Tax 1999) (quoting Brill, 142 N.J. at 541).

As the relevant facts are undisputed and the issue is entirely a matter of statutory interpretation, the court finds that this matter is ripe for summary judgment.

N.J.S.A. 54:4-23 provides, "[a]ll real property shall be assessed to the person owning the same on October 1 in each year." This court's jurisdiction to review property assessments is established by N.J.S.A. 54:3-21. That statute provides in relevant part that:

> [A] taxpayer feeling aggrieved by the assessed valuation of the taxpayer's property . . . may on or before April 1, or 45 days from the date the bulk mailing of notification of assessment is completed in the taxing district, whichever is later, . . . file a complaint directly with the Tax Court, if the assessed valuation of the property subject to the appeal exceeds $1,000,000. In a taxing district where a municipal-wide revaluation or municipal-wide reassessment has been implemented, a taxpayer or a taxing district may appeal before or on May 1 to the county board of taxation by filing with it a petition of appeal or, if the assessed valuation of the property subject to the appeal exceeds $1,000,000, by filing a complaint directly with the State Tax Court.
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> [N.J.S.A. 54:3-21.]

N.J.S.A. 54:3-21 refers to an aggrieved taxpayer. The Division of Taxation, Handbook for New Jersey Assessors, §1105.03 (Dec. 2019) in interpreting this statute, states that a taxpayer may file an appeal "if he/she is aggrieved by the assessed value on his/her own property. . . ."

Franklin Township's position is that a property owner who does not pay the taxes directly or indirectly is not by definition an aggrieved taxpayer.

It is well established that one need not be the owner of real property to be an aggrieved taxpayer. Statutory authority to challenge a tax assessment simply requires that the plaintiff have a sufficient financial interest affected by the challenged assessment in order to have standing to file a Complaint.

For example, in Ewing Twp. v. Mercer Paper Tube Corp., 8 N.J. Tax 84, 91 (Tax 1985), this court held that "the Legislature intended to include within the class of 'aggrieved taxpayers,' given the right to appeal tax assessments, any lessee whose lease covers the full tax year and requires him to pay the full assessment of the taxes levied." (footnote omitted). This court concluded, however, that

> [b]ecause real estate taxes are a lien against the real estate, N.J.S.A. 54:5-6, and since in addition to a possible reduction there also exists the risk of an increased assessment, F.M.C. Stores Co.. v. Borough of Morris Plains, 100 N.J. 418, 495 A.2d 1313 (1985); even though the tenant is solely responsible for the taxes, the owner of the real property is a necessary party, therefore any appeal by the sole tenant . . . must be instituted in the name of the owner by the tenant as express agent for the owner, or, as co-plaintiff, or, in lieu thereof, the owner must be included as a co-defendant.
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> [Id. at 91-92.]

In Chemical Bank N.J., N.A. v. City of Absecon, 13 N.J. Tax 1 (Tax 1992), a mortgagee had standing to file an appeal of an assessment after a default by the mortgagor. Noting that "the mortgagee has a substantial interest in the property, and . . . many of the attributes of an owner

upon the happening of any event of default," the court held that "there is no justifiable reason for prohibiting a mortgagee, whose mortgage is in default, who has paid the real estate taxes, and who seeks to protect its security, from pursuing an appeal of the local property tax assessment on the mortgaged premises." Id. at 11. Key to the court's analysis was the common law's creation by the mortgage of an immediate estate in fee simple in the mortgagee subject to defeasance by the payment of the mortgage debt, which vested in the mortgagee significant interests in the property. Ibid. As is the case in other, similar contexts, the court required that the entity filing the appeal of the assessment provide notice to the property owner. Id. at 13-14.

Also, in Aperion Enters., Inc. v. Borough of Fair Lawn, 25 N.J. Tax 70 (Tax 2009), this court held that a tenant in a single-tenant property who was responsible for paying all local property taxes under the lease has standing to control a tax appeal despite the property owner's previously filed appeal.

These cases resulted in the implementation of R. 8:5-3(a)(8), which requires that a tenant filing a tax appeal serve a copy of the complaint on the record owner of the property.

Franklin Township's primary argument is that Plaintiff is not an aggrieved taxpayer and consequently has no standing to appeal the 2017 and 2018 tax assessments. It contends that because during those years the subject property was in foreclosure and all tax payments were made by the mortgagee the only entity with standing is the mortgagee Oritani.

There is no dispute that Oritani obtained a foreclosure judgment on the subject property two and a half years before the 2017 appeal was commenced, and that Oritani paid the taxes on the subject property from 2015 when the tenant ceased making payments until August 2018, when the subject property was sold at sheriff's sale. Franklin Township argues therefore that since

Plaintiff did not pay the subject property's taxes since 2014, it lost its aggrieved status and the mortgagee Oritani is the true aggrieved taxpayer.

In New Jersey, real estate property taxes are a continuous lien on the real estate. N.J.S.A. 54:5-6. Municipal liens are first liens and paramount to all prior or subsequent liens, with the exception of subsequent municipal liens. N.J.S.A. 54:5-9. Municipalities are able to sell or assign municipal liens without first having to foreclose in order to return delinquent properties to the paying tax rolls. Simon v. Deptford Twp. 272 N.J. Super 21, 26 (App. Div.), certif. denied, 137 N.J. 310 (1994)("[t]he legislative objective of allowing the sale or assignment of tax liens is to enable local governments to realize taxes by returning property to the paying tax rolls without first expending money to foreclose or bar the equity of redemption.")

> The purchaser of a municipal lien has an inchoate interest consisting of three significant rights: (1) the right to receive from any redemption the sum paid for the certificate evidencing the lien, together with interest thereon; (2) the right to redeem any subsequently issued tax sale certificate; and (3) the right to foreclose on the subject property after the expiration of two years from the date of sale.
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> [Scott T. Tross, N.J. Foreclosure Law & Practice, §18-1, at 416 (2020 ed.)

Due to the above, many mortgage holders will undertake payment of the property taxes to the municipality to maintain their priority by avoiding the sale of the municipal lien. The mortgagee's financial interests in the property, which represents the collateral on the loan, is fully protected only when it holds a first priority lien. For this reason, the mortgagee paying taxes not from escrow is considered to be an aggrieved taxpayer and has standing to appeal the assessment.

The issue before the court is whether Plaintiff, by virtue of holding title to the property, maintains independent standing as an aggrieved taxpayer even if it is not making any direct or indirect tax payments. The court finds it does.

An aggrieved taxpayer as contemplated by the legislature is a status designated for the purpose of expanding or extending affected litigants' rights beyond just the property owner. The legislature did not employ this designation to exclude a property owner, even if the property owner was not directly or indirectly paying the taxes and the property is in foreclosure. Accordingly, the court concludes that while Plaintiff did not actually pay the taxes, it retained a sufficient interest in the validity of the assessment on the subject property to qualify as an aggrieved taxpayer within the meaning of N.J.S.A. 54:3-21 entitling it to appeal both the 2017 and 2018 assessments.

The court is aware that our legislature can and has enacted laws that prohibit a property owner's right to litigate a tax appeal. N.J.S.A. 54:4-34 prohibits an owner of income producing property from appealing a tax assessment if the income and expense information required by that statute is not timely sent to the assessor. In this instance even a tenant who is making the tax payments cannot independently file a tax appeal. In addition, N.J.S.A. 54:3-27 prohibits a property owner from filing a tax appeal when the taxes are not paid to the municipality. Should the legislature determine to further limit a property owner's rights to challenge an assessment it is within its discretion to do so.

Notwithstanding the court's holding, Oritani is also an aggrieved taxpayer and is arguably the entity entitled to any potential refund. For that reason, and in the spirit of Mercer Paper Tube Corp. and R. 8:5-3(a)(8), the court requires that Plaintiff serve a copy of the Complaints on Oritani.[1] The court notes that there is nothing in the motion record suggesting that Plaintiff would

[1] On September 15, 2020, Plaintiff filed proof of service on Oritani.

be unable effectively to prosecute its appeals or that Oritani objects to Plaintiff having filed the appeals.

The court is cognizant of Franklin Township's contention that Plaintiff is not authorized by the bankruptcy court to receive a refund of taxes should this court reduce the assessment(s) and order a refund. Should the need arise, the interested parties can return to the bankruptcy court to clarify its authority in this regard. In addition, as noted by Judge Rimm in Chemical Bank, "in the event of any dispute among the interested parties as to the disposition of tax dollars in the event of a change in the assessment one way or another as a result of this litigation [the court] can enter an appropriate order which would protect the rights of all such parties." 13 N.J. Tax at 13 (citing Freehold Office Park, Ltd. v. Freehold Twp., 12 N.J. Tax 433 (Tax 1992)).

III. Conclusion

The court finds that an owner of real property has a sufficient stake in the property's tax assessment while it holds title to the property. Plaintiff has standing to appeal the 2017 and 2018 tax assessments as it held title to the property until at least August 8, 2018, which was beyond the October 1 valuation date and the April 1 filing date for those years. Franklin Township's motion, therefore, is denied.