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THE TAX COURT COMMITTEE ON OPINION

GAMMA-UPSILON ALUMNI ASS'N OF KAPPA SIGMA, INC. Plaintiff, v. CITY OF NEW BRUNSWICK, Defendant.	TAX COURT OF NEW JERSEY DOCKET NO. 007576-2017 Approved for Publication In the New Jersey Tax Court Reports

Decided: April 26, 2018

Joseph G. Buro for plaintiff
(Zipp Tannenbaum Caccavelli, L.L.C., attorneys).

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(Hoagland, Longo, Moran, Dunst & Doukas, L.L.P., attorneys).

SUNDAR, J.T.C.

This opinion decides defendant's motion to dismiss plaintiff's complaint. Defendant ("City") urges a dismissal on grounds plaintiff failed to respond to the City's assessor's request for income and expense ("I&E") information of plaintiff's property ("Subject") under N.J.S.A. 54:4-34 (commonly known as Chapter 91).

Plaintiff does not dispute its non-response. However, it contends that the City's motion should be denied for several reasons. One is that the Subject cannot be income-producing because, among others, plaintiff is organized, and recognized as a federally tax exempt fraternal organization under I.R.C. § 501(c)(7). Another reason is that the City failed to file an answer to plaintiff's complaint, and thus, failed to plead the non-response as an affirmative defense, therefore, has waived its right to litigate this issue. Plaintiff further argues that the City's motion should be denied because (1) it is barred by the square corners doctrine; (2) it is substantively a

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summary judgment motion, which must nonetheless be denied because it did not contain a statement of undisputed material facts; (3) it fails to make a prima facie case for dismissal because it failed to allege, with support, that the Subject was income-producing; and (4) it is premature since plaintiff must be allowed discovery to determine whether the third party revaluation complied with the statutory requirements of Chapter 91.[1]

For the reasons following, the court finds the Subject to be income-producing for purposes of Chapter 91, and finds no procedural deficiencies as barring the grant of the City's motion. Plaintiff is however entitled to a reasonableness hearing under Ocean Pines, Ltd. v. Borough of Point Pleasant, 112 N.J. 1 (1988).

FACTS

The Subject is a fraternity house located at Rutgers University. It is owned by plaintiff, a non-profit fraternal organization which is exempt from federal income tax under I.R.C. § 507(c)(7). It is used for fraternity purposes by members, who are students of Rutgers University. In addition, it serves as housing for several members of the fraternity.

Plaintiff's counsel described the Subject as akin to a college dormitory with common areas, such as a lobby, and bedrooms which could be occupied on a shared or single occupancy basis. Plaintiff's counsel also conceded that the fraternity members who reside at the Subject pay rent pursuant to lease agreements with plaintiff, thus, the Subject earned rental income attributable to real property.

On or about June 1, 2016, the City's assessor mailed to plaintiff, by certified mail, return receipt requested, a Chapter 91 request for I&E information for the "last year," or the prior calendar year, or if plaintiff was the owner for only a part of the year, then to so indicate, and to provide

[1] The City underwent a district-wide revaluation in 2016, effective for 2017.

such information for the period of the ownership. The return receipt for the certified mailing was acknowledged with a signature (and a printed name). It is undisputed that plaintiff received the Chapter 91 request and failed to respond.

Plaintiff filed a complaint challenging the Subject's 2017 assessment of $1,488,700 on or about April 28, 2017. The City's motion to dismiss the complaint followed.

ANALYSIS

N.J.S.A. 54:4-34 requires a property owner to "render a full and true account of" the property owner's "name and real property and the income therefrom," if the property is "income-producing." Failure or refusal to respond within 45 days of the Chapter 91 request allows the assessor to reasonably determine the property's "full and fair value" based upon any information he or she has. A non-response also bars the property owner from appealing that assessment. Ibid.

The justification for such a consequence is that the I&E information of an income-producing property enables the assessor to set the initial assessment of such property, which would be significantly hampered if it is received only after the assessment is on appeal. See Ocean Pines, Ltd., 112 N.J. at 7-8 ("If the economic data are to be of any use in the valuation process, they must be submitted in timely fashion to the assessor, and not to a tribunal on a subsequent appeal."). Further, the assessor would be completely "unprepared to challenge or even evaluate the information provided by plaintiff" if the assessor were to be confronted with the economic evidence of the value of the property for the first time on the appeal of the property. Id. at 8.

Thus, the statutorily provided appeal limitation for income-producing property ensures compliance by its owner. Nonetheless, the owner is entitled to a hearing as to the reasonableness of the assessment in light of the available data and methodology used by the assessor. Id. at 11-12.

Chapter 91 does not provide any exceptions to, or exemptions from, the requirement to respond to a valid request. Rather, it only allows for an extension of time to provide the response. See N.J.S.A. 54:4-34 ("The county board of taxation may impose such terms and conditions for furnishing the requested information where it appears that the owner, for good cause shown, could not furnish the information within the required period of time.").

However, under few circumstances, precedent has permitted an owner to escape the consequences of a non-response, i.e., an appeal being limited to a reasonableness hearing. One exception is if the property is not income-producing, which is generally the case where the property that is used for commercial purposes (including retail), is owner occupied. H.J. Bailey Co. v. Township of Neptune, 399 N.J. Super. 381, 382-83 (App. Div. 2008) ("Chapter 91's appeal-preclusion provision and the limited appeal process fashioned . . . in Ocean Pines apply solely to income-producing properties,"); see also Monsanto Co. v. Township of Kearny, 8 N.J. T Tax 109, 111 (Tax 1986) (an "owner-occupied" property is not "income producing" therefore, the consequences of a non-response do not apply).[2]

As noted earlier, plaintiff opposed the City's motion on several grounds, some for substantive reasons, and most for procedural deficiencies. The City refuted each argument as having no support in the law. Each argument, and its disposition, is addressed below.

(A) Is the Subject Non-Income-Producing because Plaintiff is Organized as an I.R.C. § 501(c)(7) Organization?

The answer is no. As noted above, the owner of a non-income-producing property suffers no consequences for failing to respond to a Chapter 91 request, thus, may "ignore" the request

[2] A non-responsive property owner of an alleged non-income producing property risks the loss of an appeal if the property used to be income-producing, or the owner was under a "mistaken belief that his property was non-income-producing," or, the "property was, in fact, income-producing." H.J. Bailey Co., 399 N.J. Super. at 389-90 (citations omitted).

"with impunity." H.J. Bailey Co., 399 N.J. Super. at 389. "Income" for purposes of the "income producing" qualification of Chapter 91 is rental income, i.e., income attributable to the use of real property, as opposed to business income, or income from business operations. Great Adventure, Inc. v. Township of Jackson, 10 N.J. Tax 230, 232-34 (App. Div. 1988) (the "term income-producing property is generally limited to property producing rental income," and for charges which are "for the use of the property in any tenancy sense").

Plaintiff concedes that for the period encompassed by the Chapter 91 request, it had lease agreements with the fraternity members who resided in the Subject, and received rental income from its members (students) pursuant to those agreements. Thus, there can be no question that the Subject generates income from rent, which is attributable to the use of real property, and the fraternity members, as tenants, are entitled to continuous and exclusive possession and use of the Subject. This undoubtedly renders the Subject income-producing. See Southland Corp. v. Township of Dover, 21 N.J. Tax 573, 589 (2004) ("The distinction drawn by the courts in defining income-producing . . . is whether the fee paid . . . is for the continuous and exclusive use of a specific portion of the land and buildings . . . or for the brief right to enter the land and buildings with others on a non-exclusive basis, more akin to a license. If the owner is paid for access to a property to which others have access . . . the property [is] not income-producing . . . . [H]owever, payment . . . for continuous and exclusive use of a portion or all of the property . . . [renders] . . . the property . . . income-producing for purposes of Chapter 91."). Thus, although in addition to rental income, plaintiff may receive other income (e.g., dues for the privilege of being a member of, and having access to, the Subject for social gatherings and other functions, on a non-exclusive basis), its concession that it receives rental income suffices for purposes of deciding that the Subject is income-producing.

Plaintiff argues that its receipt of rental income is irrelevant because the focus of the inquiry should be the "character" of a property as income-producing, which would result when a property is "created primarily to produce monetary income." (quoting the definition of "income producing property" in Appraisal Institute, The Dictionary of Real Estate Appraisal, 99 (5th ed. 2010)). Here, plaintiff is organized under I.R.C. § 501(c)(7), which applies to clubs "organized for pleasure, recreation, and other nonprofitable purposes." Thus, plaintiff argues, in keeping with this federal statute, the Subject is foreclosed from being primarily created to produce monetary income, as evidenced by the fact that its tenants are restricted to fraternity members who occupy the Subject at allegedly "nonmarket rents."

The argument is unpersuasive. The federal income tax code does not control the application of Chapter 91. Thus, being granted status as a federal income tax exempt entity does not convert the Subject to a non-income-producing property for purposes of Chapter 91. Indeed, even where a property may be exempt from local property tax, the owner is not immune from the requirements of Chapter 91 because such exempt property must nonetheless be valued, and must have an assessment (but not have the consequent tax imposed and collected). See Cascade Corp. v. Township of Middle, 323 N.J. Super. 184, 188, 190 (App. Div. 1999) ("Chapter 91 requires [economic] data with regard to all income-producing property, irrespective of whether it is entitled to exemption from taxation," and the statute does not accord "any special status" to owners of property that may be ultimately exempt from local property taxation) (citation and internal quotation marks omitted). The court observed that the statute's "language . . . requiring disclosures in respect of all 'income-producing property' must logically be interpreted literally to include even tax-exempt property that produces income (as distinguished from profit)." Id. at 191.

Thus, regardless of plaintiff's tax-exempt status under I.R.C. § 501(c)(7), the Subject is properly deemed income-producing for purposes of Chapter 91.[3] See also Southland, 21 N.J. Tax at 589 (when "the property owner . . . receives money from its franchisees for the continuous and exclusive use of its real estate . . . [then a] tenancy was created and the money received is, at least in part, rental income and therefore, the subject property is income producing for purposes of Chapter 91.").

Plaintiff next argues that the Subject is not an income-producing property because this type of property is typically valued under the income approach and in which an investor seeks a return of investment.[4] Rather, it is akin to special purpose property, for which the cost approach method of valuation is more appropriate. See TD Bank v. City of Hackensack, 28 N.J. Tax 363, 379 (Tax 2015) (special purpose properties are "(1) unique and specially built for the purpose for which they are used, (2) without a market or comparable sales, (3) unlikely to be converted without substantial economic expenditure, and (4) reasonably expected to be replaced or reproduced if destroyed.") (citations omitted). Examples of special purpose properties include "manufacturing plants, railroad sidings, research and development properties, museums, schools, houses of worship, theaters, and sports arenas." Ibid. (citation omitted). However, a property will not be considered special purpose property "where it possesses certain features which, while rendering the property suitable to the owner's use, are not truly unique." Id. at 380 (citation omitted).

[3] Plaintiff provided no proof for its contention that the fraternity members pay "nonmarket rents." Regardless, this allegation is of no moment for purposes of Chapter 91. See SKG Realty Corp. v. Township of Wall, 8 N.J. Tax 209, 211 (App. Div. 1985) (rental income from a related entity, even if not at market, is no excuse for a non-response, since "[t]ransactions among related corporations are not privileged" or exempted from Chapter 91).

[4] The City refuted this allegation noting that plaintiff had properly responded to a Chapter 91 request for tax year 2014.

Plaintiff provided no evidence to support its theory that the Subject is unique, or has limited marketability. The only information conveyed to the court was that the Subject is akin to dormitory-style housing, with common areas accessible by non-resident fraternity members. No evidence was submitted to show that the Subject could not easily be converted into any type of residential use, without its demolition or large capital investment by an investor, or that it would have no buyers. Therefore, the court rejects plaintiff's theory that the Subject should be considered a special purpose property as to which the income approach would not be the appropriate valuation method.

Similarly, that the Subject may be valued by using a methodology other than the income approach does not require a conclusion that a necessary corollary is that the Subject is not income-producing. This argument was rejected in Rolling Hills of Hunterdon L.P. v. Township of Clinton, 15 N.J. Tax 364, 368 (Tax 1995) ("The income approach may ultimately not be chosen to value a particular nursing home, . . . does not mean that nursing homes are not income-producing properties."). That sound reasoning applies here as well.

In sum, the court finds that the Subject was income-producing for purposes of Chapter 91.

(B) Should a Non-Response to a Chapter 91 Request be pled in an Answer as an Affirmative Defense?

The answer is no. The parties agree that a claim of failure to respond to a request for income information under Chapter 91 is an affirmative defense. They part ways as to the procedure in which the "defense" should be raised. Plaintiff argues that Chapter 91 is no different than any other civil affirmative defense, therefore, must be pled in an answer to its complaint, or deemed waived, as required, and provided, by the Rules Governing Civil Practice (hereinafter "Part IV"). See R. 4:5-4; 4:6-2; 4:6-7; Brown v. Brown, 208 N.J. Super. 372, 384 (App. Div. 1986) ("It is well settled that an affirmative defense is waived if not pleaded or otherwise timely raised.") (citing R.

4:6-7). Plaintiff maintains that as is the purpose of any affirmative defense, it must be put on notice that its complaint may be dismissed because of an alleged non-response to a Chapter 91 request. Per plaintiff, therefore, the City must file an answer within 35 days of the service of the complaint under R. 4:6-1 and specifically plead a Chapter 91 violation s an affirmative defense. Only if such an answer is filed with the affirmative defense of the Chapter 91 non-compliance, plaintiff argues, can the City then move to dismiss the complaint, see e.g. R. 4:6-3, but within the time limits set forth in the Rules Governing Practice in the Tax Court (hereinafter "Part VIII"), specifically, R. 8:7(e).

The City contends that such a reading not only contradicts R. 8:3-2(b) (which allows taxing districts the option of filing an answer) and R. 8:7(e), but also severely prejudices all taxing districts, which have thus far relied upon R. 8:7(e) as controlling the practice and procedure for filing Chapter 91 motions since the rule's inception in 1998. It also maintains that regardless of being viewed as an affirmative defense, it cannot be deemed waived because a Chapter 91 violation is jurisdictional.

The scheme of Part VIII does not permit the conclusion plaintiff desires. First, while it is true that Part VIII seeks to emulate, to the extent possible and applicable, Part IV, it is not a wholesale adoption. As pointed out,

> [t]he basic scheme of Part VIII is to conform the practice and procedure of the Tax Court as nearly as practical to that applicable to all other trial courts in the State and yet to retain, insofar as possible, a high degree of expedition in the initiation, progress and determination of the matters constituting the business of the Tax Court. These rules are also designed to prescribe with particularity the practice of the Tax Court in respect of those procedural considerations unique to it. Thus, to a large extent the rules of Part IV have been incorporated by reference where appropriate, and the implicated rules of general application were also amended to include and provide for the Tax Court.

> [Pressler & Verniero, Current N.J. Court Rules, cmt. on R. 8:1 (2018) (emphasis added).]

Those "implicated rules" include certain Rules of General Application, specifically, R. 1:1-1, 1:1-2, 1:2-2, 1:2-4, 1:12-3, 1:30-5, 1:32-1, 1:33-1, 1:34-2, 1:35-1, 1:37-1, 1:37-3; the Rules Governing Appellate Practice, specifically, R. 2:2-3, 2:4-1, and, Part IV, specifically, R. 4:1, 4:3-4 and 4:69-1. Pressler & Verniero, cmt. on R. 8:1.

Rule 4:1, titled "Scope of Rules" similarly states that "[t]he rules in Part IV, insofar as applicable, govern the practice and procedure of civil actions in . . . the Tax Court except as otherwise provided in . . . Part VIII." See also Pressler & Verniero, cmt. on R. 4:1 (the general applicability of Part IV is subject to "contrary procedures . . . prescribed by . . . Part VIII").

Pleadings under Part VIII for local property tax assessment complaints are distinctly different from civil pleadings under Part IV. Specifically, while Part IV requires an answer be filed to a complaint, see R. 4:5-1, Part VIII does not so mandate. See R. 8:3-2(b). In contrast, and similar to Part IV, an answer is required for "State Tax Cases." See R. 8:3-2(c). Thus, the requirement under Part IV that a "responsive pleading" such as an answer must "set forth specifically and separately a statement of facts constituting an . . . affirmative defense," see R. 4:5-4, does not abrogate or alter the permissiveness of filing an answer under Part VIII in local property tax cases. If an answer is not required, then a deemed waiver of something required to be pled in an answer is simply not implicated.

It is true that Part VIII also provides that "[i]f an answer is filed, it shall conform to the requirements of R. 4:5-3." See R. 8:3-6 (captioned "Answers"). Rule 4:5-3 however, only provides instructions as to the form of an answer, i.e., state a defense to each claim in "short and plain terms," "admit or deny the allegations," assert lack of knowledge or belief in the veracity of the allegation, admit part of an allegation, and specifically deny the "designated allegations or

paragraphs." It does not require that the answer include any affirmative defense. This is provided for separately in R. 4:5-4.

Does the absence of an incorporation of R. 4:5-4 in R. 8:3-6 mean that the former is applicable under the umbrella of the general applicability of Part IV, and by such extension, require a conclusion that something not affirmatively pled should be deemed waived? In this particular scenario, i.e., involving a Chapter 91 assertion, the answer is no. This is because, regardless of the general applicability of Part IV, the scheme of Part VIII is "yet to retain, insofar as possible, a high degree of expedition in the initiation, progress and determination of the matters constituting the business of the Tax Court." Pressler & Verniero, cmt. on R. 8:1 (emphasis added). Similarly, Part VIII rules "are also designed to prescribe with particularity the practice of the Tax Court in respect of those procedural considerations unique to it." Ibid. (emphasis added).

Rule 8:7(e) is precisely one which falls outside the scope of the general applicability of Part IV as to Chapter 91 assertions by a taxing district. First, the preface to the rule states that while motion practice "shall be governed by the applicable rules in Part I and Part IV," those rules will not apply if "otherwise provided in Part VIII." See R. 8:7(a).

Second, R. 8:7(e) describes "with particularity the practice of the Tax Court" as to the procedure by which a Chapter 91 assertion is made (by motion). It crystalized the practice which had existed as to Chapter 91 motions since 1979. The consequences for a failure to respond to a Chapter 91 request for income-producing properties has been effective since 1979 (L. 1979, c. 91, § 1). Since then, the procedural mechanism for asserting a failure to comply with Chapter 91 was by motion as evidenced by precedent. See e.g. Terrace View Gardens v. Township of Dover, 5 N.J. Tax 469, 470 (Tax 1982); SAIJ Realty Inc. v. Township of Kearny, 8 N.J. Tax 191, 193 (Tax 1986); Delran Holding Corp. v. Township of Delran, 8 N.J. Tax 80, 81 (Tax 1985); Southgate

Realty Assocs. v. Township of Bordentown, 246 N.J. Super. 149, 150 (App. Div. 1991). These cases did not indicate any time limit as to the motion filing, nor a requirement that the same be pled as an affirmative defense in an answer to a complaint. In 1998, R. 8:7(e) was adopted to reduce this practice into a formal procedure to be governed by the court rules because a time limit to file such motions was needed. See Township of Phillipsburg v. ME Realty, L.L.C., 26 N.J. Tax 57, 71 (Tax 2011) ("[T]he commentary of the Supreme Court Committee" indicates that the rule "[s]ets time limitations on municipality's obligation to file [a] motion to dismiss for failure to comply with N.J.S.A. 54:4-34.") (citations and internal quotation marks omitted).

Third, R. 8:7(e) assists the expeditious resolution of cases subject to such motion, i.e., the "business of the Tax Court," by imposing short, specific time limits for filing a motion (the earlier of "180 days after the filing of the complaint," or "30 days before the trial date," unless the motion claims that the response was "a false or fraudulent account" as to which the motion can be filed at any time). In Paulison Ave. Assoc. v. City of Passaic, 18 N.J. Tax 101 (Tax 1999), the court explained the salutary purposes of R. 8:7(e). There, the taxing district, which had filed a counterclaim, filed an untimely motion to dismiss the complaint for failure to respond to a Chapter 91 request. The court held that the rule "simply imposes on the municipality time limitations for enforcing the statute," without which a property owner that had failed to respond to a Chapter 91 request "has no way of knowing whether the municipality will file its motion." Id. at 109. Further, it also "permits early disposition of the appeal" which would save "both parties . . . unnecessary . . . time and expense, including the expense of appraisal reports, and enabling the court to avoid unnecessary expenditure of its time and resources," which in turn, allowed for an "orderly and expeditious processing and disposition of litigation." Id. at 110. See also ME Realty L.L.C., 26 N.J. Tax at 70-72 (court rules also ascribe to a "plain language" interpretation, thus, the 180-day

time limit is triggered from the filing of a complaint by a taxing district, not from the time the taxpayer filed its counterclaim).

In sum, the court rejects plaintiff's argument that compliance with R. 4:5-4 is a mandatory condition precedent to a taxing district's motion under R. 8:7(e).[5] In light of this conclusion, the court finds it unnecessary to address the City's argument that a Chapter 91 violation is jurisdictional, and therefore cannot be waived. But see Paulison, 18 N.J. Tax at 111-12 (Chapter 91 motions do not deprive the court of subject matter jurisdiction, therefore, the time limits in R. 8:7(e) do not "conflict with the general principle that objections to subject matter jurisdiction may be raised at any time").

Plaintiff also claims that without notice of a possible Chapter 91 assertion by a taxing district, it is deprived of its opportunity to conduct discovery in connection with the factual allegations in a Chapter 91 motion (i.e., as to the alleged non-response, or a false or fraudulent

[5] Although not necessary, in light of the above conclusion, the court is not persuaded that the assertion of a non-response to a Chapter 91 request in a motion is an affirmative defense, in the sense that an affirmative defense acts as a complete bar to a property owner's claim for relief or cause of action. A Chapter 91 motion does not "dismiss the appeal in its entirety," since a taxpayer is nonetheless entitled to a reasonableness hearing. Pressler & Verniero, cmt. on R. 8:7(e). See also Paulison, 18 N.J. Tax at 111-12 ("A failure to respond to" a Chapter 91 request "does not require a dismissal of an appeal but only a limitation on the scope of the hearing to be held before the Tax Court," thus, the court can "hear the matter, but only on a limited basis."); ME Realty L.L.C., 26 N.J. Tax at 72 ("The plain language of R. 8:7(e) affords no distinction, exception, or tolling of the 180-day time period in which to move for dismissal, based upon the type of relief sought in the complaint."). Importantly, if in a reasonableness hearing a taxpayer can prove that the assessor's data and methodology was so arbitrary and capricious that the ensuing assessment was unreasonable or aberrant, then, the taxpayer can proceed to prove what the property's value should be. See Ocean Pines, 112 N.J. at 12 (citing to Transcontinental Gas Pipe Line Corp. v. Township of Bernards, 111 N.J. 507 (1988) as an "example of an aberrant methodology that dispelled the presumption of correctness of the" assessment). In Transcontinental, the Court held that "when confronted by . . . a totally deficient valuation methodology, which provides no reliable indication that the *quantum* of the assessment is itself reasonable, the Tax Court is obligated to exercise its power to make an independent assessment based on the evidence before it and data properly at its disposal." 111 N.J. at 538.

response). This is because it must complete valuation discovery within 150 days of the filing of the complaint in standard track cases (such as the instant one), see R. 8:6-1, which leaves it only 30 days to conduct discovery as to the Chapter 91 motion. Plaintiff claims that the 180-day period "assumes" that standard track discovery is complete, which will put the parties on notice of what the "legal issues are." It notes that not knowing the existence of a Chapter 91 "defense" would leave it vulnerable to a waste of, or misdirected expense of time, resources, and costs.

The arguments are unpersuasive. As noted in Paulison, the time limits are meant precisely for an expeditious resolution of an appeal so that costs can be saved. Additionally, although Part VIII provides 150 days for completion of discovery in standard track cases, see R. 8:6-1, there is nothing to prevent the parties from requesting an extension of the discovery end-date while a Chapter 91 motion is pending, so that resources may be devoted to discovery on the factual aspects of the motion (which is essentially whether or why a response was allegedly not provided by the plaintiff taxpayer). Nor is there any rule in Part VIII which prevents this exercise.[6]

The City's motion fully complied with R. 8:7(e), the court rule in Part VIII that is specifically applicable to assertions of a Chapter 91 non-compliance by a taxing district, the resolution of such motion being undisputedly the "business of the Tax Court." Therefore, the court rejects plaintiff's argument that the City's motion should denied pursuant to Part IV.

(C) Should the Chapter 91 Motion be Compliant with R. 4:46-2?

Plaintiff argues that the City's motion equates to a summary judgment motion because the motion relies upon statements outside the pleading. See R. 4:6-2 (e) (if a motion is made for a "failure to state a claim upon which relief can be granted," and movant presents "matters outside

[6] Indeed here, plaintiff sought a two-cycle adjournment for its initial response to the motion on grounds it needed time to "respond." Nonetheless, in its response, plaintiff did not refute either the receipt of, or its failure to respond to, the Chapter 91 request.

the pleading" which are "not excluded by the court," such a motion is treated "as one for summary judgment"). Plaintiff maintains that the City failed to comply with the requirements of a summary judgment motion under R. 4:46-2 because it did not file a Statement of Undisputed Material Facts with or without supporting affidavits, and a brief in support of the motion.

The City contends that its Chapter 91 motion is not one seeking to dismiss plaintiff's complaint "for failure to state a claim" under R. 4:6-2(e), but is a "jurisdictional objection." See Cascade Corp., 323 N.J. Super. at 191 ("[T]he barring language of Chapter 91 must be seen as jurisdictional (except for the right to a reasonableness hearing) where the scope of the assessor's request is plain") (citation omitted).

The City's Chapter 91 motion is not a motion for failure to state a claim upon which relief can be granted. It does not allege that plaintiff's complaint challenging the Subject's assessment as not reflective of true value, is a claim for which no relief can be granted. Rather, the motion seeks to limit the scope of plaintiff's complaint. Even if the City's motion were granted, plaintiff is entitled to a hearing on the reasonableness of the very same assessment.

Additionally, plaintiff's argument is problematic. If the City's motion is to be treated as a summary judgment motion, then plaintiff has violated the court rules governing such motions. Rule 4:46-2(b) requires an opposition to specifically dispute the movant's duly supported factual allegations, and to be submitted in compliance with R. 4:46-2(a). The latter rule requires "a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted . . . . identify the document and . . . specify the pages and paragraphs or lines thereof or the specific portions of exhibits relied on." R. 4:46-2(a). More importantly, R. 4:46-5(a) clearly states that the non-movant "may not rest upon the mere allegations . . . but must respond" with affidavits or in compliance with R. 4:46-2(b), "setting forth specific facts showing

that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered."

Yet plaintiff is doing exactly what R. 4:46-5(a) forbids, namely, seeking denial of a motion on mere suppositions. It did not provide any properly supported certification or affidavit to show that there are material facts in dispute as to which it needs discovery. The City filed its motion October 19, 2017. It provided certifications and adequate documents to support its allegations in the motion, including the certified mail return receipt, demonstrating that plaintiff received the Chapter 91 request. In response, after adjournments, plaintiff filed its opposition with one certification, that of plaintiff's counsel's. That certification averred certain facts, viz., plaintiff is organized as a federally tax exempt entity under I.R.C. § 501(c)(7), owns the Subject, which is used as a fraternity house consistent with the purposes of I.R.C. §501(c)(7), and for "housing members of the fraternity currently attending Rutgers," and averred that there were two unpublished opinions in support of plaintiff's arguments that it is entitled to discovery whether the Chapter 91 request was a pretext. There was no independent certification denying receipt of the Chapter 91 request, or the validity of the certified mail return receipt. In sum, plaintiff did not dispute the City's asserted facts of the mailing and receipt of the Chapter 91 request. Therefore, even if the court were to find that the Chapter 91 motion should be treated as a summary judgment motion, plaintiff has not pointed to any materially disputed facts as to which discovery is allegedly required.

(D) Prima Facie Case for Dismissal

Plaintiff's argument that the City's motion should be denied for failing to make a "prima facie" case because the City failed to "plead, support, and . . . demonstrate (or establish a rebuttable presumption)" that the Subject was income-producing lacks merit. As certified by the assessor,

an identical Chapter 91 request is sent to all income-producing property owners in the City. Additionally, the request did not seek I&E information from non-income-producing properties because it stated, clearly, in bold and italicized font:

> ***Please Note: If this property is 100% owner occupied, and there are no leases or rents, or other income derived from this property, complete PART I – PROPERTY IDENTIFICATION, then write the words "Owner Occupied across PART 2 – PROPERTY INFORMATION, and then certify your response . . . with your signature and the date, and return the completed form to the Tax Assessor within 45 days of receipt.***

Plaintiff never denied receipt of the Chapter 91 request. It never advised the City that the Subject was owner occupied, that it does not receive income from the Subject, or that there are no leases or rent from the Subject. It was plaintiff's obligation to respond, and not having so done, bears the burden of proving that the Subject was not income-producing. "The whole premise of [C]hapter 91 is that the taxpayer is in control of the income information; using the income information is a good, if not the best, measure of value; and if the taxpayer withholds that information, the municipality has no other choice but to set the assessment without the benefit of income information of the subject property." Carriage Four Assoc. v. Township of Teaneck, 13 N.J. Tax 172, 177 (Tax 1993).

The City's motion was properly supported by the assessor's certification as to the mailing of the Chapter 91 request, the mailing method, mailing date, and of its receipt, and included a copy of the request as well as the signed return receipt. In reply to plaintiff's opposition, the assessor further certified that he believed the Subject was income-producing when he sent the Chapter 91 request, and plaintiff responded to such request for tax year 2014. He also certified that his office mailed Chapter 91 requests to all commercial property owners, and for properties classified as commercial, so that he can use such critical information in setting assessments.

Thus, the court rejects plaintiff's contention that since the City failed to make a showing that the Subject is income producing, its motion should be denied.

(E) Discovery on the Involvement of the Revaluation Firm

Plaintiff's claim for discovery on the revaluation firm's involvement in sending the Chapter 91 requests is rejected. Not only is such claim belied by the credible refutation of the assessor, but the Chapter 91 request does not indicate anywhere that the request was sent from, and was to be returned to, the revaluation firm. Cf. Tri-Martin Assocs. II, L.L.C. v. City of Newark, 21 N.J. Tax 253, 257-58 (Tax 2004) (where the Chapter 91 request "was on" the revaluation company's "letterhead, with requested information to be forwarded to the same company," it violated the Chapter 91 statue which "clearly indicates that no one other than the assessor may send a request for income and expense information"). See also TMC Props. v. Borough of Wharton, 15 N.J. Tax 455, 465 (Tax 1996) ("acceptance and use" of financial information by a revaluation company "for purposes of setting" an assessment, "does not excuse or vitiate [the taxpayer's] failure to respond" timely to a Chapter 91 request).

(F) Square Corners Doctrine

Plaintiff's argues that the City's motion should be barred by the square corners doctrine. See F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 426 (1985) (government officials must act "solely in the public interest," and '"[i]n dealing with the public, [the] government must turn square corners") (citation and internal quotation marks omitted). Plaintiff maintains that it must engage in discovery to explore whether the Chapter 91 request was simply a pretext to have its complaint dismissed, or was genuinely needed to ascertain the Subject's assessment. The court is unpersuaded.

It is true that the implied purpose of a Chapter 91 request is to make I&E information available to an assessor to assist in determining the assessment of the property. See N.J.S.A. 54:4-34 (in the absence of a response, or if a false one is provided, then the assessor must "value [the] property at such amount as he may, from any information in his possession or available to him, reasonably determine to be the full and fair value thereof"). See also John Hancock Mut. Life Ins. Co. v. Township of Wayne, 13 N.J. Tax 417, 422 (Tax 1993) (the "purpose of N.J.S.A. 54:4-34 is to assist the assessor in making the assessment and to diminish the likelihood of litigation," therefore, "the assessor's request must be timely, so that [when received], the assessor can utilize the information by January 10," consequently, a "taxpayer must show that the information could not have been used by the assessor in completing the assessment by January 10 to defeat a [Chapter 91] motion.").

However, this court does not extend the holding in John Hancock, such that property owners are excused from their statutory obligation to respond to a Chapter 91 request on grounds that they are entitled to know whether or not the information that could (or would) have been provided, was (or would have been) used by the assessor in setting the assessment. Such a reading turns the statute on its head. N.J.S.A. 54:4-34 places two express burdens: one upon the property owner to respond in a timely manner; and another upon the assessor to send a written request by certified mail with a copy of the statute. There is nothing limiting, prescribing, or determining the method or means by which the assessor can or must use such information. See SKG Realty, 8 N.J. Tax at 211 ("[I]t is up to the assessor and not the taxpayer to decide whether to consider the information furnished."). Indeed, requesting the I&E data itself is discretionary.

The court thus, rejects plaintiff's argument that it must be afforded the opportunity to conduct discovery to explore whether the assessor would have used the Chapter 91 information in

the assessing process, had the same been provided by plaintiff. Plaintiff is not prejudiced because it would be entitled to a reasonableness hearing should its complaint be dismissed, and in that context, is permitted discovery on the methods employed by the assessor in setting the Subject's assessment.

CONCLUSION

For all of the aforementioned reasons, the court grants the City's motion in part subject to plaintiff's right to seek a reasonableness hearing under Ocean Pines Ltd.