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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0286-22

BRIGANTINE MARINE SUPERSTORE,

Plaintiff-Respondent,

v.

BRIGANTINE CITY,

Defendant-Appellant.

Submitted March 21, 2023 – Decided April 27, 2023

Before Judges Messano and Gilson.

On appeal from an interlocutory order of the Tax Court of New Jersey, Docket No. 011350-2021.

Parker McCay, PA, attorneys for appellant (John C. Gillespie, on the briefs).

Spiotti & Associates, PC, attorneys for respondent (Robert E. Spiotti and Joseph E. Bock, Jr., on the brief).

PER CURIAM

We granted the City of Brigantine (the City) leave to appeal from the Tax Court's August 16, 2022 order denying the City's motion to dismiss the real estate tax appeal filed by plaintiff, Brigantine Marine Superstore Inc. (Brigantine Marine).[1] The facts are essentially undisputed.

N.J.S.A. 54:4-34 (Chapter 91) "is part of a comprehensive statutory scheme implementing this State's constitutional mandate to assess and tax real property 'at the same standard of value' and 'the general tax rate of the taxing district[.]'" Davanne Realty v. Edison Twp., 408 N.J. Super. 16, 20 (App. Div. 2009), aff'd o.b., 201 N.J. 280 (2010) (quoting N.J. Const. art. VIII, § 1, ¶ 1(a)). Under New Jersey's real estate taxation framework, "a municipality has 'a significant interest in the timely receipt of economic data for income-producing property.'" Ibid. (quoting Ocean Pines, Ltd. v. Borough of Point Pleasant, 112 N.J. 1, 10 (1988)).

Chapter 91 permits a municipal tax assessor "on written request . . . made by certified mail" to obtain from owners of income-producing properties "a full and true account of [the owner's] name and real property and the income therefrom." N.J.S.A. 54:4-34. An owner's failure to respond within forty-five

[1] Oceans 10 LLC purchased the property from Brigantine Marine in March 2021. However, all pleadings in the litigation name Brigantine Marine as plaintiff.

days requires the assessor to "value [the] property at such amount as he [or she] may, from any information in his possession or available to him, [and] reasonably determine . . . the full and fair value thereof." Ibid. Moreover, and particularly important here, Chapter 91 provides that "[n]o appeal shall be heard from the assessor's valuation and assessment . . . where the owner has failed or refused to respond to such written request for information within [forty-five] days . . . ."

"This limitation on the right to appeal has been described as an 'appeal-dismissal sanction.'" Davanne Realty, 408 N.J. Super. at 21 (quoting Ocean Pines, 110 N.J. at 10).

> The effect of the appeal-dismissal sanction is limited to preclusion of "appeals asserting claims for revaluation based upon the economic data withheld by the taxpayer." The purpose of the sanction is "to assist the assessor in the first instance, to make the assessment and thereby . . . to avoid unnecessary expense, time and effort in litigation." Consistent with that limited purpose, the property owner retains the right to challenge "(1) the reasonableness of the underlying data used by the assessor, and (2) the reasonableness of the methodology used by the assessor in arriving at the valuation," and, upon a showing of good cause for failure to file a timely response to a proper request, the property owner may present the information. In sum, what the property owner loses by delay is the opportunity to rely on information that should have been provided within the statutory time-frame. No amount may be added to the property owner's tax bill

> based on failure to respond to the municipality's request for information.
>
> [Ibid. (quoting Ocean Pines, 110 N.J. at 7, 11).]

It is undisputed that the City's tax assessor fully complied with Chapter 91. In September 2020, she mailed a blank information request form to Brigantine Marine at the proper address by certified mail, return receipt requested. The certified mailing, however, was returned with an adhesive sticker attached to the envelope's front that read: "Return to Sender — Not Deliverable As Addressed — Unclaimed." The assessor then fixed the property's 2021 assessment.

Although it is unclear from the record when plaintiff filed an appeal to the Atlantic County Tax Board, at the time, Oceans 10 LLC was the contract purchaser of the property and subsequently closed title on March 15, 2021. The City sought to dismiss the complaint pursuant to Chapter 91. In June 2021, the Tax Board dismissed plaintiff's appeal and entered judgment for the City in the amount set by the assessor. Plaintiff appealed to the Tax Court.

The City again moved to dismiss pursuant to Chapter 91. The assessor's certification in support of the motion set forth most of the facts already stated above. Plaintiff's opposition contended that the assessor failed to include a copy of Chapter 91 with the request for information as required by the statute.

Plaintiff also asserted that the City's "moving papers do not show the front of the envelope with a delivery address," because that was obscured by the Postal Service's label. Plaintiff argued it was "very plausible that the [a]ssessor sent the request to an incomplete or incorrect address, and that the prior owner never received the request." For these two reasons, plaintiff contended the City failed to establish service that met due process standards.

The assessor filed a supplemental certification in response. She stated that at the hearing before the Tax Board, she opened the unsealed returned envelope from the September 2020 mailing, and it included a copy of Chapter 91. The assessor also attached a photocopy of the returned envelope, with the Postal Service label peeled back. That revealed the envelope was properly addressed to plaintiff.

The Tax Court judge held oral argument on the City's motion. Plaintiff's counsel reiterated the two points raised in the previously filed opposition, largely contending the original and supplemental certification filed by the assessor were contradictory; nevertheless, counsel eschewed any opportunity seemingly considered by the judge to hold a plenary hearing on the issue. The judge reserved his decision.

More than one month later, the judge sua sponte entered an order requiring the City to submit a certification as to whether the assessor also served the September 2020 Chapter 91 correspondence by regular mail. The judge never explained why he was requesting this information; nonetheless, the City complied, and the assessor certified that she had not sent the correspondence by regular mail.

A comprehensive written decision accompanied the judge's August 16, 2022 order denying the City's motion to dismiss. The judge concluded that although the assessor properly sent her Chapter 91 request to plaintiff's predecessor-in-title by certified mail, the assessor was under a further obligation to send the request by regular mail when the certified mail went unclaimed. Although plaintiff never raised that issue or suggested such requirement was necessary to satisfy due process, the judge concluded the failure to also serve the Chapter 91 request by regular mail violated plaintiff's due process rights. He denied the motion, and we granted the City leave to appeal.

Before us, the City argues the judge's decision is contrary to the plain language of Chapter 91, the Legislature's intended purposes and "binding precedent." The City also contends there can be no due process violation

because even if plaintiff's complaint is dismissed, it retains the opportunity to challenge the assessment at a so-called "reasonableness hearing."

Plaintiff argues that the judge's reasoning was consistent with the plain language of Chapter 91 and did not "overturn or challenge" any precedent. Plaintiff contends caselaw has only approved service under Chapter 91 when the assessor's inquiry form was served both by certified and regular mail, and the judge properly considered the facts presented here and required additional service by regular mail. Plaintiff also reiterates its argument that the assessor failed to include a copy of Chapter 91 with the September 2020 mailing.

Having considered these arguments, we reverse.

"Generally, appellate courts apply a highly deferential standard of review when considering the factual findings and decisions of Tax Court judges." Presbyterian Home at Pennington, Inc. v. Borough of Pennington, 409 N.J. Super. 166, 180 (App. Div. 2009) (citing Brown v. Borough of Glen Rock, 19 N.J. Tax 366, 375 (N.J. Tax 2001)). But we will "review the holding of the Tax Court on questions of law de novo." Waterside Villas Holdings, LLC v. Monroe Twp., 434 N.J. Super. 275, 287 (App. Div. 2014) (citing Gallenthin Realty v. Borough of Paulsboro, 191 N.J. 344, 358 (2007)).

The procedure employed by the Tax Court judge to reach his decision and enter the August 16, 2022 order denying the City's motion is reason enough to reverse. As already noted, plaintiff never asserted that service was deficient because the assessor only sent the Chapter 91 inquiry form by certified mail, nor did plaintiff suggest that under these circumstances, due process required that service also be made by regular mail. Most importantly, the judge never provided the City with any opportunity to address the alleged due process violation that was the basis for his denial of the City's motion.

In Curzi v. Raub, we criticized the trial judge's remittitur decision without the filing of a formal motion being filed and without notice to the parties, because "[d]ue process requires that the parties be placed on notice of the issue and given an opportunity to be heard." 415 N.J. Super. 1, 28 (App. Div. 2010). In Klier v. Sordoni Skanska Constr. Co., on the day of trial, the judge proposed to consider the plaintiff's counsel's presentation of "the best case that he hope[d] to produce" and then decide if it was sufficient to "go to the jury." 337 N.J. Super. 76, 81–82 (App. Div. 2001). After hearing argument, the judge dismissed the plaintiff's case. Id. at 83. On appeal, we explained: "The minimum requirements of due process of law are notice and an opportunity to be heard. The opportunity to be heard contemplated by the concept of due process means

an opportunity to be heard at a meaningful time and in a meaningful manner." Id. at 84 (citing Doe v. Poritz, 142 N.J. 1, 106 (1995)).

Considering the judge's professed concern for plaintiff's due process rights, his decision to deny the City's motion in this manner is baffling. Nevertheless, rather than reverse and remand for the judge to correct this obvious procedural error, we choose to address the merits of the judge's decision, which was incorrect as a matter of law.

We first note that "[t]he constitutionality of the provision that bars appeal from the assessor's valuation and assessment where the owner has failed to furnish this information has been upheld." Towne Oaks at S. Bound Brook v. Borough of S. Bound Brook, 326 N.J. Super. 99, 100 (App. Div. 1999) (citing Ocean Pines, 112 N.J. at 10). We agree with the City that the Court's decision in Ocean Pines adequately addressed the procedural due process protections extant in Chapter 91 as written, applying the three-part test adopted by the United States Supreme Court in Mathews v. Eldridge, 424 U.S. 319, 335 (1976). 112 N.J. at 9.

Finding the taxpayer's private property interest entitled to protection was "the actual tax bill" received, the Court concluded that given the taxpayer's right to a "reasonableness" hearing even if he or she failed to comply with Chapter

91, "the risk of an erroneous deprivation of the taxpayer's money is minimal, as is the probable value of any additional protections that might possibly be afforded." Id. at 9–10. The Court further determined that "the governmental interest involved is significant, . . . [and] clearly outweighs the private interest involved." Id. at 10.

Here, the Tax Court judge seized on our statement in Towne Oaks, that "[t]he touchstone of due process is fair notice and an opportunity to be heard. The door to tax appeals cannot be closed unless the municipality has given the property owner fair notice of the Chapter 91 obligations." 326 N.J. Super. at 102 (citing Cassini v. City of Orange, 16 N.J. Tax 438, 450 (N.J. Tax 1997)). In Towne Oaks, "[t]he issue . . . [wa]s whether the owner . . . received adequate notice." 326 N.J. Super. at 100–01.

In Towne Oaks, the assessor sent the Chapter 91 request by both certified and regular mail. Id. at 101. The certified mail was "returned . . . and marked unclaimed when no one accepted delivery," a second attempt had the same result, but the regular mail was not returned. Ibid. The plaintiff did not respond to the information request and later asserted that service by regular mail was deficient under Chapter 91's terms. Ibid. We accepted the municipality's argument that it had complied with Chapter 91 because the notice was sent by

both certified mail and regular mail. Ibid. We took note of the municipality's contention that "property owners could avoid the requirements of N.J.S.A. 54:4-34 and its consequences by simply refusing the certified mail," and we also accepted the presumption that the plaintiff received the notice sent by regular mail. Ibid. Plaintiff contends, therefore, that our courts have only found that due process was met when the municipality sent the Chapter 91 notice by both certified and regular mail, or, as in Ocean Pines, the property owner admitted it had received the Chapter 91 request. See Ocean Pines, 112 N.J. at 4.

But here plaintiff and the Tax Court judge fail to account for the unrebutted presumption that plaintiff's predecessor-in-title received notice of the assessor's certified September 2020 mailing, which was properly addressed and had adequate postage. See SSI Med. Servs., Inc., v. State, Dep't of Human Servs., 146 N.J. 614, 625 (1996) ("The presumption of receipt derived from proof of mailing is 'rebuttable and may be overcome by evidence that the notice was never in fact received.'" (quoting Szczesny v. Vasquez, 71 N.J. Super. 347, 354 (App. Div. 1962))). Plaintiff produced no evidence that its predecessor-in-title failed to receive notification of the certified mailing; the only evidence was plaintiff's predecessor-in-title failure to claim the mailing. Properly addressed and properly posted certified mail remains unreceived not because of some

shortcoming by the sender, but rather because of actions or inactions by the putative recipient. See Cardinale v. Mecca, 175 N.J. Super. 8, 11 (App. Div. 1980) (unclaimed mail is mail returned to the post office "if no one accepts delivery by signing the return receipt").[2]

The language of Chapter 91 is plain and unambiguous in requiring that the municipal tax assessor serve the property owner by certified mail. "We must presume 'that the [L]egislature acted with existing constitutional law in mind and intended the [statute] to function in a constitutional manner.'" Whirlpool Props., Inc. v. Dir., Div. of Tax'n, 208 N.J. 141, 172 (2011) (alterations in original) (quoting State v. Profaci, 56 N.J. 346, 349 (1970)). We acknowledge that "when 'a statute may be open to a construction which would render it unconstitutional or permit its unconstitutional application,'" a court should "construe the statute as to render it constitutional if it is reasonably susceptible to such interpretation." Ibid. (quoting Profaci, 56 N.J. at 350).

Such judicial interference is unnecessary here, because service by certified mail, return receipt requested, clearly meets constitutional muster—neither plaintiff nor the judge said otherwise—and the failure of a property

[2] The defendant's last name was actually "Santa Mecca," but the official reporter's citation has eliminated a portion of the name.

owner to claim the certified mailing cannot render Chapter 91 unconstitutional as applied.

Lastly, plaintiff's contention that the City failed to demonstrate that a copy of the statute was contained in the September 2020 certified mailing lacks sufficient merit to discuss in a written opinion. R. 2:11-3(e)(1)(E).

Reversed. The matter is remanded to the Tax Court to dismiss plaintiff's appeal from the County Tax Board judgment and to conduct a reasonableness hearing should plaintiff request one. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION