

SYLLABUS

(This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interests of brevity, portions of any opinion may not have been summarized).

1717 Realty Associates, LLC v. Borough of Fair Lawn (A-26-09)

[NOTE: This is a companion case to Lucent Technologies, Inc. v. Township of Berkeley Heights and Davanne Realty v. Edison Township, also decided today.]

Argued February 1, 2010 -- Decided March 17, 2010

PER CURIAM.

The Court addresses a constitutional challenge to the statutorily mandated dismissal sanction of a tax appeal when a taxpayer has failed to respond to a municipal assessor's request for income information from the taxpayer pursuant to N.J.S.A. 54:4-34, or what is commonly referred to as a "Chapter 91 request."

Plaintiff, 1717 Realty Associates, LLC (1717 Realty), owns a large, multi-tenant office building in Fair Lawn, New Jersey. On October 6, 2006, the tax assessor of the Borough of Fair Lawn (Borough) sent a Chapter 91 request to 1717 Realty that fully complied with the provisions of N.J.S.A. 54:4-34; it was mailed to 1717 Realty, via certified mail, at the address the taxpayer had specified; it requested that 1717 Realty render a true and full account of his name and real property and the income therefrom [;]" it provided 1717 Realty the statutorily described forty-five day within which to respond to the information request; it warned 1717 Realty that the failure to respond to the information request in a timely manner would result in the loss of the right to prosecute a tax appeal; and it enclosed a copy of the governing statute with the underscored and commonsense suggestion that 1717 Realty should read it.

1717 Realty failed to respond to the tax assessor's request for information, failed to make any inquiry of the tax assessor, and failed to seek any relief from the time limits for responding. As a result, on March 9, 2007, five months after the request for information was sent to 1717 Realty, the tax assessor valued the fair Lawn property for the year 2007 as follows: \$13,608,000 for the land and \$16,057,700 for the improvements, for a total valuation of \$29,665,700.

On March 19, 2007, 1717 Realty filed a complaint in the Tax Court, challenging that assessment. As provided in N.J.S.A. 54:4-34, on September 11, 2007, the Borough timely moved to dismiss 1717 Realty's complaint due to the taxpayer's failure to comply with the Borough's earlier Chapter 91 request. On October 27, 2007, once the issues were joined, the Tax Court granted the Borough's motion in part, ordering, in compliance with Ocean Pines, Ltd. V. Borough of Point Pleasant, that the hearing on 1717 Realty's complaint be limited to the reasonableness of the assessor's valuation based on the data available to the assessor and the methodology used by the assessor in arriving at his assessment. The Tax Court further ordered that, as required by Ocean Pines, 1717 Realty was entitled to conduct an inquiry as to the reasonableness of the underlying data available to the assessor and the reasonableness of the methodology used by the assessor in arriving at the assessment. After providing a reasonable period for discovery, the Tax Court also ordered that if the attorney for 1717 Realty failed to advise the court that 1717 Realty intends to proceed with a reasonableness hearing by January 11, 2008, then, 1717 Realty's complaint would be dismissed for lack of prosecution and that if the taxpayer's attorney advises the court that 1717 Realty intended to proceed with a reasonableness hearing, the hearing would be held on February 1, 2008 at 2:00 p.m.

On February 11, 2008, the Tax Court held a reasonableness hearing. After receiving the parties' proofs and the arguments of counsel, the court concluded that 1717 Realty failed to carry the burden of persuasion imposed on it under Ocean Pines. The court held that 1717 Realty failed to establish that the assessment on the subject property for the tax year 2007 could not have reasonably been arrived at in light of the data available to the assessor at the time of the valuation. The Tax Court found that the tax bill was neither a fine nor a punishment. By order dated April 14, 2008, and based on the reasons placed on the record on February 11, 2008, the Tax Court 1) dismissed

1717 Realty's complaint with prejudice, and 2) affirmed the tax assessor's valuation and assessment of the Fair Lawn property.

1717 Realty appealed and the Appellate Division, in an unpublished opinion, rejected 1717 Realty's constitutional arguments and affirmed the Tax Court's judgment. The Appellate Division concluded that the process and the data relied on were both found to be reasonable by the Tax Court and that 1717 Realty was not assessed any penalty or additional tax for its failure to comply with the Chapter 91 request. Reasoning that the application of the statute did not impose any additional tax on 1717 Realty for its failure to comply, the Appellate Division concluded that the statute as applied does not result in the imposition of an excessive fine prohibited by the United States and the New Jersey Constitutions.

The Supreme Court granted certification.

HELD: Judgment of the Appellate Division is affirmed based on the Court's judgment in Davanne Realty v. Edison Township, also decided today.

1. Before this Court, 1717 Realty advanced two principal arguments: 1) that the application of the appeal-preclusion sanction of N.J.S.A. 54:4-34 in this case violates the Eighth Amendment of the United States Constitution and Article I, Section 1, paragraph 12 of the New Jersey Constitution and 2) that the Tax Court's and the Appellate Division's determination that N.J.S.A. 54:4-34 does not impose an excessive fine is in contravention of the United States Supreme Court decision in Austin v. United States and United States v. Bajakajian. (pp. 7-8)

2. Questions identical to those posed here by 1717 Realty were presented in Davanne Realty v. Edison Township, an appeal also decided today. In that case, the Court considered a published Appellate Division decision that rejected 1717 Realty's mirror-image excessive fines and forfeitures constitutional challenges. In that opinion also filed today, the Court affirmed the judgment of the Appellate Division based substantially on the reasons set forth in Judge Grall's thorough and thoughtful opinion. In this case, the Court likewise affirms the judgment of the Appellate Division based on this Court's judgment in Davanne Realty. (p. 8)

Judgment of the Appellate Division is **AFFIRMED**.

CHIEF JUSTICE RABNER and JUSTICES LONG, LaVECCHIA, ALBIN, WALLACE, RIVERA-SOTO and HOENS join in this opinion.

SUPREME COURT OF NEW JERSEY
A-26 September Term 2009

1717 REALTY ASSOCIATES, LLC

Plaintiff-Petitioner,

v.

BOROUGH OF FAIR LAWN,

Defendant-Respondent.

Argued February 1, 2010 - Decided March 17, 2010

On certification to the Superior Court,
Appellate Division.

Steven R. Irwin argued the cause for
appellants (The Irwin Law Firm, attorneys).

Richard A. Lustgarten argued the cause for
respondent (Goodman & Lustgarten,
attorneys).

Julian F. Gorelli, Senior Deputy Attorney
General, argued the cause for Attorney
General of New Jersey (Paula T. Dow,
Attorney General, attorney; Melissa H.
Raksa, Assistant Attorney General, of
counsel).

PER CURIAM.

In this appeal, we address a constitutional challenge to
the statutorily mandated dismissal sanction of a tax appeal when
a taxpayer has failed to respond to a municipal assessor's
request for income information from the taxpayer pursuant to
N.J.S.A. 54:4-34, or what is commonly referred to as a "Chapter

91 request.”¹ According to plaintiff 1717 Realty Associates, LLC, the imposition of the tax appeal dismissal sanction “violate[s] the [Eighth] Amendment to the United States Constitution and Article [I], Section 1 (sic), [p]aragraph 12 of the New Jersey Constitution” because the difference purportedly resulting from the real estate tax bill actually issued and one informed and putatively reduced by plaintiff’s admittedly tardy income information constitutes an “excessive fine.”

Plaintiff owns a large, multi-tenant office building in Fair Lawn. On October 6, 2006, the tax assessor of defendant the Borough of Fair Lawn sent a Chapter 91 request to plaintiff that fully complied with the provisions of N.J.S.A. 54:4-34: it was mailed to plaintiff, via certified mail, at the address plaintiff had specified; it requested that plaintiff “render a full and true account of his name and real property and the income therefrom[;]” it provided plaintiff the statutorily prescribed forty-five days within which to respond to the

¹ That common name draws its genesis from the 1979 legislative amendment that first created the dismissal sanction “where the owner has failed or refused to respond to [the assessor’s] written request for [income] information . . . or shall have rendered a false or fraudulent account.” N.J.S.A. 54:4-34. See L. 1979, c. 91, § 1 (amending N.J.S.A. 54:4-34). As noted in a case also decided today, its use has become commonplace. Lucent Techs., Inc. v. Twp. of Berkely Heights, ___ N.J. ___, ___ (slip op. at 3) (2010); see also H.J. Bailey Co. v. Neptune Twp., 399 N.J. Super. 381 passim (App. Div. 2008); Thirty Mazel, LLC v. City of East Orange, 24 N.J. Tax 357 passim (Tax 2009); New Plan Realty Trust v. Brick Twp., 23 N.J. Tax 225 passim (Tax 2006).

information request; it warned plaintiff that the failure to respond to the information request in a timely manner would result in plaintiff's loss of the right to prosecute a tax appeal; and it enclosed a copy of the governing statute with the underscored and commonsense suggestion that plaintiff should read it.

Plaintiff failed to respond to the tax assessor's request for information, failed to make any inquiry of the tax assessor, and failed to seek any relief from the time limits for responding.² As a result, on March 9, 2007, five months after the request for information was sent to plaintiff, the tax assessor valued plaintiff's property for the year 2007 as follows: \$13,608,000 for the land and \$16,057,700 for the improvements, for a total valuation of \$29,665,700.

On March 19, 2007, plaintiff filed a complaint in the Tax Court, challenging that assessment. As provided in N.J.S.A. 54:4-34, on September 11, 2007, defendant Borough of Fair Lawn timely moved to dismiss plaintiff's complaint due to plaintiff's

² N.J.S.A. 54:4-34 provides a safety valve for those taxpayers who, in good faith, are unable to respond to a Chapter 91 request in a timely manner. It provides that "[t]he 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 [forty-five day] period of time." See Ocean Pines, Ltd. v. Borough of Point Pleasant, 112 N.J. 1, 9 (1988) (stating that "[a] plaintiff's failure to respond in any fashion to the assessor's request precluded plaintiff from asserting a 'good cause' claim before the [county board of taxation]").

failure to comply with defendant's earlier Chapter 91 request.³ On October 22, 2007, once the issues were joined, the Tax Court granted defendant's motion in part, ordering, in compliance with Ocean Pines, Ltd. v. Borough of Point Pleasant, 112 N.J. 1, 11 (1988), that "the hearing on plaintiff's [c]omplaint will be limited to the reasonableness of the assessor's valuation based upon the data available to the assessor and the methodology used by the assessor in arriving at his assessment." The Tax Court further ordered that "[p]laintiff is entitled to conduct an inquiry as to the reasonableness of the underlying data available to the assessor and the reasonableness of the methodology used by the assessor in arriving at the assessment[,]" also as required by Ocean Pines, supra. After providing a reasonable period for discovery, it also ordered that "[i]f the attorney for plaintiff fails to advise the Court that plaintiff intends to proceed with a reasonableness hearing by Jan[uary] 11, 2008, then, and in that event, plaintiff's [c]omplaint will be dismissed for lack of prosecution" and that "[i]f the attorney for plaintiff advises the Court that

³ Under Rule 8:7(e), "motions to dismiss for refusal or failure to comply with N.J.S.A. 54:4-34 shall be filed no later than the earlier of (1) 180 days after the filing of the complaint, or (2) 30 days before the trial date." Defendant's motion to dismiss was filed four days before the expiration of the 180-day period following the filing of the complaint and before a trial date had been set. The motion to dismiss was timely.

plaintiff intends to proceed with a reasonableness hearing, such hearing shall be held on Feb[ruary] 1, 2008 at 2[:00] p.m.”⁴

On February 11, 2008, the Tax Court held a reasonableness hearing. After receiving the parties’ proofs and the arguments of counsel, it ruled that

[p]laintiff has failed to establish that the assessment on the subject property could not reasonably have been arrived at in light of the data available to the assessor at the time of valuation, that is October 1, 2006 or even as of March 1, 2007, when the . . . tax assessor submitted his tax list to the County Board of Taxation.

The [p]laintiff has presented no evidence as [to] the reasonableness of the cost approach data used by the assessor or the revaluation company in determining the assessment on the subject property for tax year 2007 and although, as I’ve indicated, the cost approach is not the preferred methodology for valuing the subject property, [p]laintiff has failed to establish that the use of that approach was unreasonable for tax year 2007, in light of the information available to the assessor.

The Tax Court therefore concluded that “[p]laintiff has failed to carry the burden of persuasion imposed on it under Ocean Pines[.]” It held that plaintiff “has failed to establish that

⁴ On January 17, 2008, and due to plaintiff’s apparent failure to request a reasonableness hearing by the January 11, 2008 deadline, the Tax Court issued an order dismissing plaintiff’s tax appeal. Although the record is unclear as to whether plaintiff in fact made a timely request for a reasonableness hearing, defendant did not contest that assertion and the Tax Court relented and did conduct a full-fledged reasonableness hearing.

the assessment on the subject property for tax year 2007 could not have reasonably been arrived at in light of the data available to the assessor at the time of the valuation." By an order dated April 14, 2008, and based on the reasons placed on the record on February 11, 2008, the Tax Court (1) dismissed plaintiff's complaint with prejudice, and (2) affirmed the tax assessor's valuation and assessment of plaintiff's property.

Plaintiff appealed and the Appellate Division, in an unpublished opinion, rejected plaintiff's constitutional arguments and affirmed the Tax Court's judgment. The panel noted that, before it, "plaintiff argue[d] that the difference between the taxes that would have been due on a valuation of \$20,180,000 and the Borough's valuation of \$29,665,700 constitutes a 'fine' for failing to provide the information requested pursuant to N.J.S.A. 54:4-34." Expanding on plaintiff's arguments, it observed that, "[a]pplying the tax rate for 2007, this difference amounts to \$192,559.71, which plaintiff contends is an 'excessive fine' prohibited by the Eighth Amendment of the United States Constitution and Article I, § 1, ¶ 12 of the New Jersey Constitution."

Expressly rejecting that argument, the panel held that "the actual tax bill to plaintiff is not a punishment." It explained that "[t]he tax bill is not a forfeiture or even a civil sanction. It is the amount reached by applying the municipal

tax rate to the valuation made, in compliance with statute, based upon the information available to the tax assessor." It concluded that "[t]he process and the data relied upon were both found to be reasonable by the Tax Court[,]" and that "[p]laintiff was not assessed any penalty or additional tax for its failure to comply with the Chapter 91 request." Reasoning that "[t]he application of N.J.S.A. 54:4-34 did not impose any additional tax upon plaintiff for its failure to comply[,]" the Appellate Division "conclude[d] that the statute as applied does not result in the imposition of an 'excessive fine' prohibited by the United States and New Jersey Constitutions."

Before this Court, plaintiff advances two principal arguments.⁵ First, plaintiff argues that "the application of the appeal-preclusion sanction of N.J.S.A. 54:4-34 in the instant case violate[s] the [Eighth] Amendment to the United States Constitution and Article [I], Section 1 (sic), [p]aragraph 12 of the New Jersey Constitution." Second, plaintiff asserts that

⁵ Plaintiff also raises two secondary arguments. It asserts that its appeal should be considered "as of right" as it raises "a substantial constitutional question under R. 2:2-1(a)(1)[.]" That assertion is moot; the Court granted certification on plaintiff's alleged constitutional questions specifically in the form posed by plaintiff. 1717 Realty Assocs., LLC v. Borough of Fair Lawn, 200 N.J. 371 (2009). It also asserts that "the discrepancy between the Appellate Division's opinions in the instant case and Davanne Realty v. Edison Township, [408 N.J. Super. 16 (App. Div. 2009)], warrant[s] reconciliation by this Court[.]" To the extent necessary, that assertion is comfortably laid to rest by the conclusions reached in this case.

"the Tax Court['s] and Appellate Division's determination that N.J.S.A. 54:4-34 does not impose an excessive fine [is] in contravention of the Supreme Court's decisions in Austin v. United States[, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993)] and United States v. Bajakajian[, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998)]."

Questions identical to those posed here by plaintiff were presented in Davanne Realty v. Edison Township, 200 N.J. 371 (2009), an appeal we also decide today.⁶ In that case, we considered a published Appellate Division decision that rejected plaintiff's mirror-image excessive fines and forfeitures constitutional challenges. Davanne Realty v. Edison Twp., 408 N.J. Super. 16 (App. Div. 2009), certif. granted, 200 N.J. 371 (2009). In an opinion also filed today, we affirmed the judgment of the Appellate Division based substantially on the reasons set forth in Judge Grall's thorough and thoughtful Appellate Division opinion. Davanne Realty v. Edison Twp., ___ N.J. ___ (2010). We likewise affirm the judgment of the Appellate Division in this case based on our judgment in Davanne Realty. Ibid.

The judgment of the Appellate Division is affirmed.

⁶ We note, for sake of completeness, that both plaintiff here and the plaintiff in Davanne Realty were represented by the same counsel, and the two cases were consolidated for oral argument purposes.

CHIEF JUSTICE RABNER and JUSTICES LONG, LaVECCHIA, ALBIN,
WALLACE, RIVERA-SOTO, and HOENS join in this opinion.

SUPREME COURT OF NEW JERSEY

NO. A-26

SEPTEMBER TERM 2009

ON CERTIFICATION TO Appellate Division, Superior Court

1717 REALTY ASSOCIATES, LLC

Plaintiff-Petitioner,

v.

BOROUGH OF FAIR LAWN,

Defendant-Respondent.

DECIDED March 17, 2010
Chief Justice Rabner PRESIDING

OPINION BY Per Curiam

CONCURRING/DISSENTING OPINIONS BY _____

DISSENTING OPINION BY _____

CHECKLIST	AFFIRM	
CHIEF JUSTICE RABNER	X	
JUSTICE LONG	X	
JUSTICE LaVECCHIA	X	
JUSTICE ALBIN	X	
JUSTICE WALLACE	X	
JUSTICE RIVERA-SOTO	X	
JUSTICE HOENS	X	
TOTALS	7	