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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2689-15T3
A-0535-16T4

POSITIVE HEALTH CARE, INC.,

Plaintiff-Appellant,

v.

CITY OF NEWARK,

Defendant-Respondent.

CITY OF NEWARK,

Plaintiff-Respondent,

v.

POSITIVE HEALTH CARE, INC.,

Defendant-Appellant.

Argued September 19, 2017 – Decided May 22, 2018

Before Judges Reisner, Hoffman, and Gilson.

On appeal from Tax Court of New Jersey, Docket
No. 17739-2011, whose opinion is reported at
29 N.J. Tax 213 (Tax 2016); and Superior Court
of New Jersey, Chancery Division, Essex
County, Docket No. F-031507-15.

Mary Ann McField argued the cause for
appellant.

Bradley M. Wilson argued the cause for respondent in A-2689-15 (Nowell, PA, attorneys; Bradley M. Wilson, on the brief).

Elliott J. Almanza argued the cause for respondent in A-0535-16 (Goldenberg, Mackler, Sayegh, Mintz, Pfeffer, Bonchi & Gill, attorneys; Keith A. Bonchi, of counsel and on the brief; Elliott J. Almanza, on the brief).

Honig & Greenberg, LLC, attorneys for intervenor Madison Trust Company as collateral assignee of Stonefield Investment Fund IV, LLC in A-2689-15 (Adam D. Greenberg, on the brief).

PER CURIAM

In A-2689-15, Positive Health Care, Inc., (PHCI) appeals from a January 27, 2016 order of the Tax Court, denying PHCI's motion to amend its complaint concerning the City of Newark's tax assessments on its properties, to include the years 2010, 2012, 2013, and 2014. In A-0535-16, PHCI appeals from an October 5, 2016 final judgment of foreclosure in favor of the City of Newark. We consolidated the appeals for purposes of this opinion. For the reasons set forth below, we affirm the January 27, 2016 Tax Court order. We affirm the October 5, 2016 foreclosure judgment, but we remand for the limited purpose of amending the judgment to preserve any interest held by the federal government.

I

The appeals concern residential properties owned by PHCI, a nonprofit entity whose mission is to provide housing for homeless

persons suffering from AIDS or HIV infection. Using private loans and matching grant money provided by the federal Department of Housing and Urban Development (HUD), PHCI purchased twelve properties in Newark to house its needy clients. As a condition of funding, HUD required "the inclusion of a restrictive covenant in the deeds mandating" that the properties be used to house persons with HIV/AIDS and their families for twenty years, pursuant to the McKinney-Vento Homeless Assistance Act of 1987, 42 U.S.C. § 11383.¹ See Positive Health Care, Inc. v. City of Newark, 29 N.J. Tax at 216. The language of the covenant reads as follows:

This conveyance is made subject to the following restrictions for the use of the property hereby conveyed: Grantee, grantee's heirs, successors or assigns, shall operate the property in accordance with sections 423(b)(1) and (b)(3) of the McKinney Act [§42 [U.S.C.A.] 11383(b)(1) and 11383 (b)(3)]. This restriction shall remain in full force and effect and shall run with the title to the property conveyed for a period of twenty (20) years from the date of this deed.

Between 2003 and 2013, the City of Newark, through its Department of Child and Family Well-Being and its Office of Partnerships and Grants Management, awarded PHCI multiple grants,

¹ As discussed later in this opinion, the record does not reflect that any party in either case has given HUD formal notice of the litigation. Nor was HUD named as a defendant in the foreclosure cases, although it has an interest in the properties that may affect the title.

using money from HUD's Housing for Persons with HIV/AIDS (HOPWA) program. Meanwhile, in 2010 PHCI applied for tax-exempt status for its twelve properties. However, the Newark Tax Department denied the application, even though – as the City now candidly admits – PHCI is a nonprofit entity, its properties would qualify for tax exempt status, and the organization was performing a valuable public service for the City's homeless poor.²

PHCI appealed to the Essex County Tax Board, which dismissed the appeals without prejudice, for reasons not explained on this record.³ PHCI filed an appeal with the Tax Court for the 2010 tax year. For reasons not explained on this record, the 2010 appeal was not adjudicated for several years. On October 20, 2014, PHCI amended its case information statements to delete the 2010 tax year and add the 2011 tax year. In the meantime, PHCI did not apply for tax exemptions, file tax appeals, or pay property taxes for tax years 2012, 2013, and 2014. At some point in 2014, Newark executed multiple tax sales on PHCI's properties, and stopped providing PHCI with funding.

² The Tax Court's opinion notes that Newark probably denied the tax exemption for 2010 based on a Tax Court opinion that was later reversed on appeal. See Advance Hous., Inc. v. Twp. of Teaneck, 215 N.J. 549, 553-54 (2013).

³ The history recited in this paragraph is drawn from the Tax Court's opinion.

In February 2015, PHCI filed a motion for summary judgment on the issue of its entitlement to a tax exemption for its properties. According to its May 8, 2015 order, the motion was unopposed, but the Tax Court denied the motion on the grounds that there were material facts in dispute.

On May 11, 2015, the Tax Court entered a case management order, noting the parties had advised that the dispute was settled pending approval by the Newark City Council. The settlement involved the City's agreement that the properties qualified for property tax exemptions.⁴ While the parties were working out the settlement, PHCI filed a motion seeking to re-amend its pleading, to once again appeal as to the 2010 tax year, as well as the tax years 2012, 2013, 2014, and 2015. Ultimately, the City only signed a settlement agreeing to a tax exemption for 2011. However, according to the Tax Court's opinion, the City "also represented to the court and to PHCI that the properties would be exempt for

⁴ As the Tax Court judge observed at oral argument, pursuant to N.J.S.A. 54:4-3.6c, Newark had authority to retroactively grant a tax exemption to a charitable organization despite the organization's failure to file a timely tax appeal. The Tax Court judge also noted that in foreclosing on property purchased and operated with federal grant money, Newark was obtaining a windfall at the expense of federal taxpayers.

tax year 2015."⁵ 29 N.J. Tax at 218.

According to the Tax Court opinion: "The parties also agreed to permit the motions to amend the complaints to proceed." Id. at 218. However, the Tax Court denied the motion to amend, by order dated January 27, 2016, reasoning that the amendment would be futile, because PHCI failed to file timely tax appeals for the years covered by the amendment. Id. at 224. The Tax Court also found that there was "no evidence of unfair dealing or misrepresentation by the City of Newark." Id. at 223.

Meanwhile, as the result of PHCI's failure to pay the 2010 property taxes that were the subject of its tax appeal, the City pursued a tax sale foreclosure on two of PHCI's properties, known as block 2649, lot 9 and block 2649, lot 10.⁶ In response to our question at oral argument, the City's counsel could offer no assurances that the City will arrange continued housing for PHCI's needy clients once the foreclosure litigation is concluded.

⁵ According to the Tax Court's opinion, Newark did not honor that representation, leading to foreclosure litigation in the Chancery Division.

⁶ In other pending foreclosure cases, private investors are seeking to foreclose on other PHCI properties as to which the City sold tax certificates.

II

In reviewing the orders on appeal in both cases, we defer to a trial court's factual findings so long as they are supported by substantial credible evidence. See Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 483-84 (1974). Our review takes into account the special expertise of the Tax Court. See Dover-Chester Assocs. v. Randolph Twp., 419 N.J. Super. 184, 195 (App. Div. 2011). However, as to both appeals, we review a trial court's legal interpretations de novo. Manalapan Realty v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995); Dover-Chester Assocs., 419 N.J. Super. at 195.

In both appeals, PHCI argues that, because it is a nonprofit charitable organization, its properties cannot be taxed. Unfortunately, that argument overlooks the requirement that an entity seeking a tax exemption has the obligation to make a timely application for the exemption, and to file a timely appeal of assessments on its property if it claims the assessments are improper. See F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 425 (1985). Although, as discussed below, PHCI claims a right to equitable relief, PHCI does not claim it made timely filings. PHCI's reliance on Advance Housing v. Township of Teaneck, 215 N.J. 549 (2013) is misplaced. In that case, the

plaintiff filed a timely tax appeal, and the issue was whether its properties were tax exempt. The case is not on point here.

In a brief discussion in both appeals, PHCI asserts that taxation of its property is barred by the square corners doctrine. Under the square corners doctrine, there is precedent for extending the deadline to file a tax appeal, where the taxing authority led the taxpayer to believe that the City was willing to work with the taxpayer "in a fair, informal and reasonable manner" to settle the exemption issue, and then abruptly changed course after lulling the taxpayer into withholding filing a tax appeal. See New Concepts for Living, Inc. v. City of Hackensack, 376 N.J. Super. 394, 403-04 (App. Div. 2005).

The square corners claim was not raised in the Tax Court, and PHCI did not submit any legally competent evidence pertinent to a claim under the square corners doctrine. Indeed, PHCI provided no certification from anyone with personal knowledge, explaining why PHCI did not file timely tax appeals. In its opinion, the Tax Court found no evidence that Newark engaged in any unfair dealing or misrepresentation. 29 N.J. Tax at 223. On this record, we

find no basis to disturb that factual finding.⁷

PHCI also contends that because it bought the properties using HUD funds, it operates its programs using HUD grants, and its programs serve important federal housing policies, the Supremacy Clause barred Newark from assessing taxes on PHCI's property. For the same reasons, PHCI argues that the Supremacy Clause barred Newark from conducting a tax sale foreclosure on the properties. PHCI's brief does not cite any cases specifically supporting those legal arguments, nor does it cite to any provisions of the McKinley-Vento Act that provide for preemption.

In essence, PHCI asserts that Newark's conduct in both these cases constitutes bad public policy. We might be inclined to agree, but PHCI's policy argument does not equate to a constitutional preemption claim.

The pertinent principles may be summarized as follows:

[W]hile the Supremacy Clause exempts property of the United States from state and local taxation, there is no exemption from taxation for real property in which the United States holds only a lien interest. State and local governments have historically been able to tax such property, subject only to the requirement that enforcement to collect the taxes could not destroy the federal lien.

⁷ In the foreclosure appeal, PHCI's brief relied on an affidavit which, upon our inquiry, PHCI withdrew from its appendix because it was never filed with any court and was not part of the appellate record.

[Casino Reinvestment Dev. Auth. v. Cohen, 321 N.J. Super. 297, 306 (Law Div. 1998).]

Property owned by the United States government is not subject to state or local taxation, absent federal consent. S.R.A., Inc. v. Minnesota, 327 U.S. 558, 561 (1946). However, "the interest of private parties in such property may be taxed." Todd Shipyards Corp. v. Twp. of Weehawken, 45 N.J. 336, 340 (1965). For taxation purposes, the Supreme Court of the United States has long recognized the distinction between federally-owned property and private property subject to a federal lien.

In New Brunswick v. United States, 276 U.S. 547, 555 (1928), the Court acknowledged that federal property was not subject to state taxation. However, the Court held that where the federal government had sold property to private individuals, taking back a mortgage to secure the unpaid balance of the purchase price, the property was not exempt and the City of New Brunswick could assess real estate taxes on it. Id. at 555-56. The Court further held that the City could foreclose on the private owner's interest, but could not wipe out the federal lien by means of a tax foreclosure:

[T]he City is without authority to enforce the collection of the taxes thus assessed against the purchasers by a sale of the interest in the lots which was retained and held by the [federal government] as security for the payment of the unpaid purchase money, whether as an incident to the retention of the legal

title or as a reserved lien or as a contract right to mortgages. That interest, being held by the [federal government] for the benefit of the United States, is paramount to the taxing power of the State and cannot be subjected by the City to sale for taxes.

[Id. at 556.]

Accordingly, the Court held that any foreclosure suit must exempt the federal lien interest:

We conclude that, although the City should not be enjoined from collecting the taxes assessed to the purchasers by sales of their interests in the lots, . . . it should be enjoined from selling the lots for the collection of such taxes unless all rights, liens and interests in the lots, retained and held by the [federal government] as security for the unpaid purchase moneys, are expressly excluded from such sales, and they are made, by express terms, subject to all such prior rights, liens and interests. This, we think, will meet the equities of the case as between the [federal government] and the City, and fully protect the paramount right of the United States.

[Ibid.]

The Court recognized the same principle in S.R.A., stating: "The possibility of repossession by the United States is not enough to block a tax sale in which the paramount rights of the United States are protected." 327 U.S. at 566.

Thus, the Supremacy Clause does not bar the City of Newark from taxing PHCI's property, or from foreclosing on PHCI's ownership interest in the properties. However, it does bar the

City (or any private holder of a tax sale certificate) from foreclosing on any lien or other legal interest that HUD holds under the McKinley-Vento Act. As a result, even after title passes through foreclosure, Newark may be precluded by federal law from evicting the existing tenants, or from precluding PHCI from providing those tenants with services as required by HUD.

Of course, the issue of preserving HUD's interest is not directly before us here. But, to ensure that Newark does not circumvent any obligations to HUD, we require that, within fourteen days of the date of this opinion, the City of Newark must serve HUD with a copy of this opinion and with written notice of all of the tax foreclosure actions pending against PHCI's properties located in Newark. We also remand the foreclosure case to the trial court for the limited purpose of amending the foreclosure judgment to specify that any legal interest that may be held by HUD in the property is excepted from the foreclosure. See New Brunswick, 276 U.S. at 556.

In PHCI's appeal from the October 5, 2016 final foreclosure judgment, we agree with the General Equity judge that the Tax Court decision collaterally estopped PHCI from re-litigating, in the foreclosure action, the issues that were litigated and decided in the Tax Court. See Allen v. V & A Bros., Inc., 208 N.J. 114, 138 (2011). Thus, PHCI was barred from re-litigating its

entitlement to a tax exemption, on the various legal theories considered and rejected by the Tax Court. PHCI's equitable estoppel argument, raised for the first time on appeal from the foreclosure judgment, is not supported by record evidence and is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

We affirm the January 27, 2016 order entered by the Tax Court. We also affirm the October 5, 2016 final foreclosure judgment entered by the Chancery Division, except that we remand for the limited purpose of issuing an amended judgment containing the language set forth above. The stay of further proceedings in the pending foreclosure cases involving PHCI, which we entered by order dated June 2, 2017, is hereby vacated.⁸

Affirmed.

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



CLERK OF THE APPELLATE DIVISION

⁸ By order dated September 5, 2017, we granted a motion filed by Madison Trust Co., as collateral assignee of Stonefield Investment Fund IV, LLC, to intervene in A-2689-15, for the limited purpose of moving for relief from the stay. We denied the stay, and the issue is now moot by virtue of this opinion.