

NOT FOR PUBLICATION WITHOUT APPROVAL OF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

TAX COURT OF NEW JERSEY

Mala Narayanan
JUDGE



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November 9, 2011

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Re: Cam Gar v. Verona Township
Block 128, Lots 25, 26, 27
Docket No. 004838-2011

Dear Counsel:

This letter constitutes the court's opinion with respect to defendant's motion to dismiss the complaint because of plaintiff's failure to respond to a request for income and expense information pursuant to N.J.S.A. 54:4-34, commonly known as Chapter 91 (L. 1979, c. 91). For the reasons explained more fully below, defendant's motion is denied.

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PROCEDURAL HISTORY

On March 18, 2011, plaintiff filed a complaint with this court challenging the assessment on real property located in defendant Township of Verona (“Verona”) for the tax year 2011. The property is designated by the municipality as Block 128, Lots 25, 26, and 27 (“Subject Property”).

On or about July 29, 2011, Verona filed a motion to dismiss plaintiff’s complaint pursuant to Chapter 91 on grounds that plaintiff had failed to respond to a properly served request from the tax assessor for information regarding income and expenses associated with the Subject Property. Plaintiff opposed the Chapter 91 motion contending that it had mailed the assessor a timely response. Verona refuted these contentions.¹

Since plaintiff had raised a material issue as to whether or not it had mailed a timely and complete response, the court scheduled a plenary hearing in this regard. Plaintiff provided testimony of Barbara Schmidt. The court also heard oral argument from counsel for both parties.

FACTS

It is undisputed that the assessor sent a Chapter 91 request to plaintiff on or about August 10, 2010 by certified mail, and that plaintiff received the same on or about August 16, 2010. The parties stipulated that the tax assessor’s office did not receive any response from the plaintiff.

Barbara Schmidt is the bookkeeper for LPC Management (“LPC”), the plaintiff’s parent company. She has worked in this capacity for the last sixteen years. In this capacity she performs various duties such as collecting rent, paying bills, filing, dealing with leases, payroll,

¹ Verona agreed that it had not properly served its Chapter 91 request in connection with property owned by plaintiff and located at Block 125, Lot 1, and therefore withdrew its motion with respect to this property.

and business correspondence. She performs her required services for plaintiff's properties in four townships, including Verona, namely, Somerville, Parsippany, and Budd Lake.

Ms. Schmidt testified that in addition to her above-listed duties, she is also responsible for receiving and responding to the Chapter 91 requests. She testified that she routinely receives Chapter 91 requests for the two apartment complexes in Parsippany from that municipality, possibly one request from Somerville, none from Budd Lake, and usually four from Verona for the four properties owned by plaintiff in this township.

When Ms. Schmidt receives a Chapter 91 request, she follows a typical procedure, which she learned and received training for when she was initially hired sixteen years ago. She testified she would stamp the Chapter 91 requests when received since she is fully aware that the requests have a 45-day deadline for a response. She then would make a photocopy of the blank form, and place the photocopied form in a drawer for LPC's accountant who would provide the income and expense information. She kept the original form with the date stamp of its receipt facing upwards so she would be reminded of the running of the 45-day time limit.

LPC's accountant usually came in once a month and Ms. Schmidt would follow-up with the accountant to ensure his arrival, so that she could timely mail the Chapter 91 request. The accountant would fill in the photocopied Chapter 91 form with the required information in pencil and provide the same to Ms. Schmidt. Ms. Schmidt would then transcribe those figures by pen on the original Chapter 91 forms she received. She would then print out an envelope from her computer by feeding a pre-printed business (white) envelope into the computer's printer. Pre-printed meant that the envelope contained the plaintiff's name and address, which was P.O. Box 746, Union, NJ 07083-0746. She would address the envelope to the township's assessor, and use the name and address in this regard from the Chapter 91 forms she received. If she ran out of

supply of these white envelopes or the enclosures would not fit into them, she used a brown envelope to mail the response. Since these were not pre-printed, she would stamp in plaintiff's mailing address and hand-write plaintiff's name above it. She would then place the envelope on the postage metering machine, press the date button, and "standard" for the "weight" aspect, print out the postage, and affix the same on the envelope.

Once she affixed the postage, Ms. Schmidt testified that she would place the stamped and addressed envelope in a pile with other outgoing mail in an outbox receptacle. Another one of LPC's bookkeepers is responsible for collecting the items placed in this outbox (which would be done for instance, by placing a rubber band around the mailing envelopes) and taking them to the mail basket which is kept behind LPC's receptionist's desk on the first floor of the office building.² The contents of this mail receptacle are collected each day by a mail carrier. Ms. Schmidt testified that she does not supervise the other bookkeeper as to delivering the outgoing mail to the first floor, however, if she saw a pile of mail in the outbox she would call out to the other bookkeeper to remind her about delivering the same to the receptionist's floor. She stated that if the other bookkeeper called in sick or was unavailable, she would deliver the mail to the first floor herself.

Ms. Schmidt retains copies of the responses she prepares and sends out to be mailed. She produced a copy of the response at issue in this matter. She testified that the date stamp therein of August 18, 2010 was the date of receipt which she would have stamped in. She also testified that the handwriting on the form was her own, that the signature and title ("bookkeeper") therein were also hers. She stated that she had dated the completed form as 09/23/10, but had written on

² Another mail basket is also kept on the first floor by the receptionist and is used for the incoming mail. Ms. Schmidt and the other bookkeeper who brings the mail to the receptionist's desk work on the third floor of the building.

the bottom portion “mailed w/rent roll 9/24/10” on the bottom portion of the Chapter 91 request to indicate that the form was actually mailed out on 09/24/10 with copies of the rent rolls. She also confirmed that she had hand-written the additional two lots for Block 128 (Lots 26 and 27) since although she received three or four Chapter 91 requests from Verona, she always responded only with one form but listing the other properties.

Although Ms. Schmidt admitted that she did not have specific recollection of receiving and writing in the information on the Chapter 91 request at issue in this matter, or a specific recollection of placing that response in the outgoing mail pile for delivery by the other bookkeeper, she testified that she would have followed all of the above procedures as to her handling of Chapter 91 requests. Given the lapse in time of a year, she could not recollect with exactitude of how and when she prepared and completed the Chapter 91 response at issue here, nonetheless, she would have performed each and every step involved in her 16-year practice of responding to Chapter 91 requests. The procedure never varied, even as to Chapter 91 requests from the other townships she was responsible for (although all Chapter 91 requests did not come in at the same time). She testified that she would have followed all the procedures because responding to Chapter 91 requests is one of her responsibilities, she was diligent and good at her job, and there were no factors such as illness or being on vacation in September of 2010 which would or did prevent her from responding to the request.

DISCUSSION

Whether a response was properly mailed is defined by the presumption of receipt. SSI Medical Services, Inc. v. State, 146 N.J. 614 (1996). Mail is presumed to be received if: “(1) . . . [it] was correctly addressed; (2) . . . proper postage was affixed; (3) . . . the return address was correct; and (4) . . . [it] was deposited in a proper mail receptacle or at the post office.” Id. at 621.

These four elements can be established by proof of “habit or routine practice” with corroboration that the practice ‘was followed in a particular instance.’” J & J Realty Co. v. Township of Wayne, 22 N.J. Tax 157, 162 (Tax 2005) (quoting SSI Medical, supra, 146 N.J. at 622).

Thus, this court must “evaluate the nature and worth of the corroborative evidence offered to determine whether it meets the preponderance of the evidence standard and raises a presumption of mailing and receipt. As the forms of communication change, different proofs will have to be established in order to demonstrate mailing.” SSI Medical, supra, 146 N.J. 624 n.1. Therefore, a taxpayer who has not failed or refused to respond, and proves this fact by a preponderance of evidence, is not subject to the limitation of appeal rights, merely because the tax assessor has not received the response.

Plaintiff argues that it has established the presumption of receipt – that the response was properly mailed - by virtue of Ms. Schmidt’s testimony and the copy of the Chapter 91 response. Verona counters that plaintiff has not met its burden of proof because Ms. Schmidt could not specifically recollect preparing the Chapter 91 response at issue in this motion, nor of having placed the response in the outbox for its further pickup by some other employee, nor does she have specific knowledge that the other employee took the Chapter 91 response from the outbox for placing the same in the mailing basket on another floor. Verona argues that accepting as true Ms. Schmidt’s testimony is an improper extension of J&J Realty because, unlike here, in that case the testifying witnesses stated that they had taken certain actions with respect to the specific Chapter 91 request at issue. Thus, although it does not doubt Ms. Schmidt’s credibility as to business practice and procedure for responding to Chapter 91 requests, Verona submits that mere

recitation of the same, without testimony that the procedure was actually followed as opposed to “would have been” followed, simply does not suffice.

The court finds credible Ms. Schmidt’s testimony with respect to the manner in which she handles, and has handled for the last several years, responses to a Chapter 91 request. Equally credible is her testimony that this procedure would have been followed in 2010 with respect to the instant Chapter 91 request. The court is satisfied that Ms. Schmidt is a diligent and conscientious employee, as is further evidenced by her longevity in the employment and her job responsibilities. The copy retained in her files indicates that she filled out the requisite information, dated, and signed the same. She credibly testified that she was at work (i.e., not out on vacation or sick leave) on September 23 and 24, 2010 when the Chapter 91 response was prepared by her and sent out for mailing. She also credibly testified that she has never encountered an issue with respect to timely mailings and receipt of her Chapter 91 responses from any township.

That Ms. Schmidt honestly admitted that given the passage of time it was not possible for her to recollect with specificity that she actually performed these actions does not alter the court’s finding. Given her multitudinous responsibilities and the paper work she is involved in, including responding to Chapter 91 notices from the other two towns, it is reasonable for her not to remember the specific details of filling out Verona’s Chapter 91 request one year later. See e.g. SSI Medical, supra, 146 N.J. at 624 (if a business has “items mailed on a daily basis [which] are voluminous, it may not be possible for individuals engaged in mailing activities to recall actual mailing of a document or whether the custom or practice of mailing was followed on a given day In such cases, other corroborating proof creating the reasonable inference that the custom was followed on the given occasion may suffice to establish proof of mailing”).

Ms. Schmidt's testimony was credible, and was sufficient to establish her routine practice with respect to the mailing of Chapter 91 responses. Further, her practice with respect to the particular response in question was corroborated by the production of the photocopy of the response she maintained in her records. The photocopy was stamped with the received date which she testified was a part of her routine practice.³ The photocopied response form was filled out in her handwriting, which she testified was part of her routine after receiving the information from LPC's accountant.

Under the totality of the circumstances, the court is satisfied that in 2010, as done in prior years, Ms. Schmidt followed the established and routine practice/procedure for responding to Chapter 91 requests, in that she forwarded Verona's Chapter 91 request to the accountant, transcribed his information upon its receipt onto the original response form which she kept with herself, retained a completed copy of the response for her own records, deposited the completed response form into her outgoing mail pile, properly addressed to Verona, with adequate postage, and with the correct return address, which would then have been brought to the mail receptacle by the receptionist's desk.

Verona argues that ruling in favor of the plaintiff would be tantamount to allowing "the check is in the mail" to be a satisfactory reply whenever the tax assessor does not receive a Chapter 91 response. This very concern was addressed in J & J Realty. A plaintiff can falsely claim to have sent the response or a tax assessor can falsely claim that he never received the response; however, "the court is well situated to determine credibility and truthfulness and can

³ The receipt date stamped in as August 18, 2010 is the same date that the United States Post Office confirmed was the date of delivery of the Chapter 91 request to plaintiff.

do so in the context of Chapter 91 motions as effectively as they do in other contexts.” J&J Realty, supra, 22 N.J. Tax, at 161.

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.” SSI Medical, supra, 146 N.J. at 625 (citations and internal quotations omitted). Although here it was stipulated that the assessor’s office never received plaintiff’s Chapter 91 response, this does not automatically require a dismissal of plaintiff’s appeal. This is because, in the context of a Chapter 91 motion, the courts balance the severity of the consequences of such dismissal to the taxpayer and the township. Thus, this court has held that:

when a taxpayer, in good faith, responds by regular mail to a Chapter 91 request, and, through no fault or negligence of the taxpayer, the assessor does not receive the response, the severe limitation on appeal rights contained in Chapter 91 should not be imposed. That limitation is appropriate only when a taxpayer has, in the words of the statute, “failed or refused to respond” to the assessor’s request.

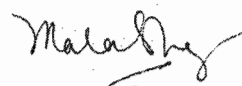
[J & J Realty, supra, 22 N.J. Tax at 165].

The court further held that the lack of response has an impact of a “far lesser magnitude” upon a township because “the unavailability of that information does not affect an assessor’s ability to assess a property as permitted by Chapter 91 . . . and [t]he taxpayer, not the assessor, bears the risk that, without accurate current income and expense information, the assessor will set a high assessment, and the taxpayer will have only limited appeal rights.” Ibid. For these reasons, the balance would tip in favor of a taxpayer who has in good faith, timely sent a response to the assessor by regular mail, and has corroborated the fact of such mailing to the court’s satisfaction.

Under the totality of the evidence submitted to this court, it finds that the plaintiff neither failed nor refused to respond to the request for information sent by Verona’s assessor.

Therefore, Verona's motion to dismiss plaintiff's complaint is denied. An Order reflecting this memorandum opinion will be entered by the court.

Very truly yours

A handwritten signature in black ink, appearing to read "Mala Narayanan". The signature is fluid and cursive, with a prominent initial "M" and a long, sweeping underline.

Mala Narayanan, J.T.C.