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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5388-13T3

THE TOP CONDOMINIUM,

Plaintiff-Respondent,

v.

TOWNSHIP OF SOUTH ORANGE,

Defendant-Appellant.

Argued March 14, 2016 – Decided August 5, 2016

Before Judges Messano, Simonelli and Carroll.

On appeal from the Tax Court of New Jersey, Docket Nos. 014840-2011; 016249-2012 and 009306-2013.

John F. Casey argued the cause for appellant (Chiesa, Shahinian & Giantomasi, P.C., attorneys; Mr. Casey, on the brief).

Michael I. Schneck argued the cause for respondent (Schneck Law Group, L.L.C., attorneys; Yana Chechelnitsky, of counsel; Mr. Schneck and Ms. Chechelnitsky, on the brief).

PER CURIAM

Plaintiff The Top Condominium is organized pursuant to the New Jersey Condominium Act (the Act), N.J.S.A. 46:8B-1 to -38. In the master deed establishing the condominium, all ninety-three condominium units, which are contained in a ten-story

building, parking for the units and various amenities are located on Block 5.01, Lot 5, in the Township of Maplewood (Maplewood). A largely vacant parcel of approximately 1.46 acres, Block 2605, Lot 1 (the subject property), in the Village of South Orange (South Orange), provides access to the units and is included in the master deed as part of plaintiff's common elements.

Maplewood imposed real property taxes upon the individual unit owners. See, e.g., Highpoint at Lakewood Condo. Ass'n v. Twp. of Lakewood, 442 N.J. Super. 123, 134 (App. Div. 2015) (citing N.J.S.A. 46:8B-19) ("For purposes of taxation, each unit is taxed separately."). In addition, South Orange assessed the subject property and forwarded its tax bills to plaintiff's condominium association for payment.

Plaintiff petitioned the Essex County Board of Taxation for review of the tax year 2011 assessment on the subject property of $318,000. When the assessment was confirmed, plaintiff filed a complaint in the Tax Court, contending that 1) the subject property was "entitle[d] to local property tax exemption because it is not separately assessable and falls within the exclusion of the common elements," and 2) the assessment was excessive. Plaintiff moved for summary judgment, and the Tax Court judge denied the motion, concluding that the "matter [was] not ripe

for summary judgment" because "there [was] simply not enough evidence . . . to conclude, that as a matter of law, the common elements were 'separately assessed' by South Orange, and that the assessment should be overturned as being violative of N.J.S.A. 46:8B-19."

Plaintiff again challenged the assessment of the subject property for tax years 2012 and 2013 of $239,700, and the Tax Board again affirmed the assessment, after which plaintiff again filed complaints in the Tax Court. In February 2014, plaintiff moved for summary judgment. This time, the motion was supported by the certification of Jon P. Brody, an expert retained by Maplewood in the past for various real estate matters.

Brody opined that

> the [contributory] value of the entire assessment of the subject property in South Orange is [already] included in the [individual sale prices and the] assessment of the individual condominium units . . . in Maplewood . . . and therefore the assessment of the subject property is incorrect and this parcel of land should not have been independently assessed in South Orange.

He further stated that the condominium unit owners were subject to "double taxation," because Maplewood's assessments "were at 100% market value and all property interests[,] both the [subject property] and the Maplewood property should and is actually assessed in Maplewood."

After considering oral argument, a different Tax Court judge, Judge Kathi F. Fiamingo, issued a comprehensive written decision. She initially noted that the only "facts" supporting plaintiff's assertion that the subject property had actually been assessed by Maplewood was Brody's certification and report, which relied in part upon hearsay conversations Brody claimed to have had with Maplewood's tax assessor. The judge concluded that Brody's opinion was "not evidentiary of the inclusion of the value of the subject property in the assessment of the . . . units . . . in Maplewood." Nonetheless, Judge Fiamingo determined that that unresolved question was not "a genuine issue of material fact which would bar disposition of th[e] matter on [s]ummary [j]udgment."

The judge took note of N.J.S.A. 54:4-25, which provides:

> When the line between taxing districts divides a tract of land, each part shall be assessed in the taxing district where located, unless the governing body of one of the taxing districts shall by resolution request that the entire tract be assessed by the adjoining taxing district in which a portion of the tract is located.
>
> [Ibid.]

However, neither Maplewood nor South Orange had passed such a resolution. The judge reasoned that it therefore did not matter whether Maplewood included the value of the subject property in its assessments because "absent compliance with N.J.S.A. 54:4-

25," "[o]ne municipality has no legal authority to assess taxes against property located in another municipality."

Judge Fiamingo concluded that under the Act, ownership of each condominium unit included an undivided interest in the common elements of the condominium. See, e.g., Highpoint, supra, 442 N.J. Super. at 133. Judge Fiamingo reasoned that pursuant to N.J.S.A. 46:8B-19, "'all property taxes are separately assessed against each condominium unit and not on the common elements of the condominium property.'" (Quoting City of Atl. City v. Warwick Condo. Ass'n, Inc., 334 N.J. Super. 258, 259 n.1 (App. Div. 2000)). The judge framed the issue as "how to reconcile South Orange's constitutional and statutory right and obligation to assess and tax property located within its taxing jurisdiction with the prohibition of N.J.S.A. 46:8B-19 against the separate assessment of common elements."

Judge Fiamingo reasoned that "although the common elements may not be the subject of a separate assessment to the 'condominium as a whole,'" N.J.S.A. 46:8B-19, "the property constituting the common elements does not escape assessment and taxation altogether. Instead it is to be included within the assessment of each individual condominium unit." The judge ultimately concluded:

> [W]hile I find that N.J.S.A. 46:8B-19 does not bar South Orange's right to assess taxes

> on property located within its taxing district which constitute common elements of a condominium, I also find that it does prohibit the assessment of the common elements against the "condominium property as a whole." Instead such taxes are to be allocated among the . . . unit owners on the percentages set forth in the condominium's master deed.
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> As a result, I find the assessment for the years in question is improper. The facts and legal issues before the court support only this conclusion, however impractical it may be to the parties. Nothing in this opinion prohibits the parties from seeking other remedies or corrections that may be available to them.

Judge Fiamingo entered the order under review, voiding the assessments on the subject property for tax years 2011 through 2013 inclusive. South Orange filed this appeal.

Before us, South Orange contends that it had the constitutional and statutory right to tax the subject property, and Judge Fiamingo's reliance upon the Act, specifically N.J.S.A. 46:8B-19, essentially contravenes those rights. South Orange also argues that permitting the issuance of tax bills to individual unit owners creates not only "significant and unwarranted" administrative problems, but also practically denies South Orange its only remedy — in rem foreclosure — in the event a unit owner refuses to pay his or her South Orange tax bill. Finally, South Orange argues that because the issue presented was novel, and affirming the Tax Court's order would

"drastically change[] the landscape and methodology of real property taxation in New Jersey," we should limit the holding to prospective application.

Plaintiff urges us to affirm Judge Fiamingo's order. Without filing a cross-appeal, however, it also argues that the subject property is "exempt" from taxation by South Orange because it is included in Maplewood's assessments as part of the condominium's common elements. Therefore, the Tax Court expanded the lawful taxing power of South Orange by permitting it to issue individualized tax bills to unit owners.

Having considered these arguments in light of the record and applicable legal standards, we affirm substantially for the reasons expressed by Judge Fiamingo. We add the following.

Initially, we refuse to consider plaintiff's argument that the subject property is "exempt" from South Orange's taxing power because plaintiff failed to file a cross-appeal. "A party may not attack the judgment under review without having appealed." Burbridge v. Paschal, 239 N.J. Super. 139, 151 (App. Div.), certif. denied, 122 N.J. 360 (1990). Rule 2:3-4(a) permits a respondent to file a cross-appeal as of right. "'[A] party, in order to attack the actions below which were adverse to him, must pursue a cross-appeal.'" Burbridge, supra, 239

N.J. Super. at 152 (quoting Franklin Discount Co. v. Ford, 27 N.J. 473, 491 (1958)).

We understand plaintiff's argument to be that the undisputed facts demonstrated, as a matter of law, the individual assessments issued to unit owners by Maplewood included valuation of all common elements, including the subject property. As a result, the subject property was already taxed and therefore was "exempt" from taxation by South Orange. Plaintiff clearly made that argument before Judge Fiamingo. However, the judge rejected plaintiff's argument, specifically finding that Brody's certification and report did not establish the asserted facts.

We have said that "without filing a cross appeal, a respondent may seek an affirmance of the judgment on any ground raised in the trial court." Smith-Bozarth v. Coal. Against Rape & Abuse, Inc., 329 N.J. Super. 238, 244 n.1 (App. Div. 2000) (citing Chimes v. Oritani Motor Hotel, Inc., 195 N.J. Super. 435, 443 (App. Div. 1984)). However, plaintiff does not merely seek affirmance of Judge Fiamingo's order on grounds that were different from those expressed by the judge. Rather, plaintiff seeks relief beyond that provided by the order under review. In short, we refuse to consider the argument in the absence of a cross-appeal.

"[W]e review the trial court's grant of summary judgment de novo under the same standard as the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016) (citing Mem'l Props., LLC v. Zurich Am. Ins. Co., 210 N.J. 512, 524 (2012)). "That standard mandates that summary judgment be granted 'if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.'" Ibid. (quoting R. 4:46-2(c)). "When no issue of fact exists, and only a question of law remains, [we] afford[] no special deference to the legal determinations of the trial court." Ibid. (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

We agree with the legal conclusions reached by Judge Fiamingo regarding the interplay between the Act and N.J.S.A. 54:4-25. South Orange has the constitutional and statutory right to impose ad valorem real estate taxes on property within its borders. N.J. Const. art. VIII, § I, ¶ 1(a); Twp. of Holmdel v. N.J. Highway Auth., 190 N.J. 74, 87 (2007) (citation omitted) ("All real property within New Jersey is subject to

taxation . . . unless expressly exempted by the Legislature[.]").

Judge Fiamingo did not hold that the Act exempted real property subject to a master deed from taxation, or that South Orange could not exercise its rights to tax the property inside its borders. Rather N.J.S.A. 46:8B-19 requires that "[a]ll property taxes . . . imposed by any taxing authority shall be separately assessed against and collected on each unit as a single parcel, and not on the condominium property as a whole. Such taxes . . . shall constitute a lien only upon the unit and upon no other portion of the condominium property." (Emphasis added).

South Orange contends that if it were to issue individual tax bills to the unit owners, any lien for unpaid taxes would be unenforceable. The issue is not before us, and we refuse to address something that South Orange essentially concedes in its brief would require us to render an advisory opinion.[1]

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[1] We quote from appellant's brief:

> Unless this Court is going to tell South Orange that it has the ability to issue a tax sale certificate on the condominium unit itself, and eventually conduct an in rem foreclosure of the unit itself, even though the unit is located in another taxing district and the taxes in Maplewood may be fully paid, South Orange is left without a

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Lastly, there is no support for South Orange's argument that the novelty of the issue requires only prospective application of the order. South Orange was on notice of plaintiff's position for years. Judge Fiamingo did not grant plaintiff prospective relief; she simply voided the assessments issued in three tax years. We further reject South Orange's argument that individual unit owners will receive a windfall by avoiding a portion of their real estate taxes for three years. That argument requires resolution of plaintiff's claim that Maplewood assessed all common elements, including the subject property; as noted, the judge never decided that issue. We also think it is inappropriate to address the issue for the first time on appeal, and particularly so because neither party ever sought to bring Maplewood into the litigation.

Affirmed.

(continued)

remedy and all of the unit owners can, with impunity, not pay the assessment levied by South Orange.