
HARRY GREENWALD, : SUPERIOR COURT OF NEW JERSEY
: APPELLATE DIVISION
: DOCKET NO.: A 3044-98 T5

Plaintiff, :
v. :
THE CITY OF PASSAIC, :
Defendant. :

**BRIEF IN SUPPORT OF APPELLEE / CROSS-APPELLANT'S MOTION TO STAY
THE JUDGMENT OF THE SUPERIOR COURT, LAW DIVISION**

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PRELIMINARY STATEMENT

Plaintiff Harry Greenwald moves this Court for a stay of an Order regarding which the Law Division, denying a stay application below, has admitted that plaintiff is legally correct. The Law Division nonetheless has stated, in denying plaintiff's stay application, that the court below's extra-legal, unconstitutional, self-described "splitting-the-baby" remedy was ordered solely for purposes of "an offer [sic] to compromise and to have both parties show their good faith in going forward in this action." There is no such basis, however, for a judgment at law or equity.

Indeed, a judicial requirement of "good faith" where litigation is under way and the party being burdened is asserting a meritorious position represents a failure of judging, not Solomonian wisdom. This is all the more true here. The judgment at issue - essentially a preliminary injunction where the findings of irreparable harm and likelihood of success are either absent or turned on their heads - would require a **mortgagee** to pay real estate taxes pending the appeal of a partial summary judgment **granted to him** in action in lieu of prerogative writs, which resulted in the vacatur of tax liens on the subject property.

How the court below concluded that Mr. Greenwald, a prevailing litigant, should have to pay money pending an appeal

brought against the judgment granting him summary judgment, has never been enunciated below. The Law Division cited no legal authority for its result. There is none. The requirement that Mr. Greenwald, as a mortgagee, pay real estate taxes pending appeal "in an offer to compromise and to have both parties show their good faith in going forward" is an unjustifiable and injudicious abuse of the power of equity. This Court should stay the judgment of the Law Division and permit this appeal to go forward without further prejudice to Mr. Greenwald.

STATEMENT OF FACTS

The property that is the subject of this litigation is known as 108 Washington Place, Passaic, New Jersey and is designated as Block 1085, Lot 23 on the Official Tax Map of the City of Passaic (the "Property"). Certification of Ronald D. Coleman / Appendix ("Coleman Cert."), Ex. E, ¶ 2. Mr. Greenwald was a trustee of the owner of the Property, Meor Hatorah,¹ during the tax years relevant hereto; he presently is the mortgagee on the Property. Before tax year 1993, the Property was exempt from taxation. See Coleman Cert., Ex. E, ¶ 12. The City assessed the Property at \$150,000 for tax years 1993 and 1994.²

¹ It is undisputed that Meor Hatorah is a tax-exempt religious corporation that was formed for the purpose of, among other things, establishing places and centers of Jewish prayer and learning.

² The City informed Meor Hatorah in October, 1992 that it was evaluating the exempt status of the Property for tax year 1993, and invited Meor Hatorah to provide the City with relevant information. *Id.*, Ex. A. Meor Hatorah did so, but was informed in November of 1993 that the exemption was denied (and that

In bringing this action, Mr. Greenwald sought a declaratory judgment declaring the Property exempt from taxation for 1993 and 1994, and that any tax liens or certificates relating to those tax years be declared null and void. In support of his position, Mr. Greenwald submitted that the City failed to follow the appropriate procedures with respect to the revocation of the Property's exempt status and that the City failed to send Meor Hatorah a tax bill for either 1993 or 1994 (regarding which the City presented no contrary evidence in the Law Division action). As a result of these irregularities, no taxes were paid on the Property for tax years 1993 and 1994 and tax appeals were not filed pursuant to the usual timetable.³ As to the liens, it is undisputed in the Law Division Action that the City served no notice of the imposition of the tax liens related to the 1993 and 1994 deficiencies on either Meor Hatorah, Mr. Greenwald or the Property's subsequent owner. Meor Hatorah and Mr. Greenwald only became aware that tax liens had been placed on the Property in late 1997, *id.*, ¶¶ 26, 27, following which the Law Division Action was filed.

it had until April 1995 to appeal that decision). No reason was given. Ex. B.

³ The City's November 1993 letter advised the clergyman who heads Meor Hatorah that the religious group could appeal the City's exemption denial to the Passaic County Board of Taxation any time prior to April 1, 1995. *Id.*, Ex. B. This Meor Hatorah (not yet represented by counsel) attempted to do in its Petition of Appeal. *Id.*, Ex. C. (reading, under "Tax Year," "92-93-94.") Because the City's advice regarding the 1995 deadline was erroneous, however, the appeal that was filed by Meor Hatorah on March 31, 1995 was docketed as an appeal of the exemption for tax year 1995 only, and so litigated in the Tax Court.

This case involves, in part, the Tax Court's decision in *Meor Hatorah, Inc. v. City of Passaic*, Docket No. 007865-95, an appeal (from an affirmance of the County Board of Taxation) of the City's denial of a tax exemption for the Property for the 1995 tax year. On August 18, 1997 the Honorable Maureen Dougherty, J.T.C., issued a bench opinion in that case exempting the Property from real property taxation for tax year 1995. *Coleman Cert., Ex D.* Judge Dougherty found that the Property had been used exclusively for an exempt purpose for the period 1989 through 1995. *Id., Ex. D*, pp. 25-26. Judge Dougherty also found that the City had not complied with the procedure for levying taxes on exempt properties which cease to be exempt as set forth in *N.J.S.A. 54:4-63.26*. *Id.*, pp. 33-35. In addition, Judge Dougherty stated that the record was essentially devoid of any evidence indicating why the City could have denied a tax exemption for the Property relative to the 1989-1994 tax years. *Id.*, pp. 25-26. On September 23, 1997, a judgment was entered by the Tax Court that exempted the Property from real property taxation for 1995. *Id.*, Ex. E, ¶ 24.

On June 25, 1998, Mr. Greenwald filed this action. Subsequently, the City moved to dismiss the Verified Complaint. Mr. Greenwald cross-moved for a summary judgment declaring any tax liens on the Property for those years to be null and void and exempting the Property from taxation for 1993 and 1994.

On November 6, 1998, the Honorable Margaret M. McVeigh, J.S.C., rendered her decision on the motion and cross-motion. Finding that the City had acted in an "unconscionable fashion," (*Id.*, Ex. F, 4:24 - 5:1), Judge McVeigh granted Mr. Greenwald a partial summary judgment by vacating the tax liens on the Property. Judge McVeigh also transferred the case to the Tax Court for consideration of the 1993 and 1994 assessments on the Property. *Id.*, 4; 21:7 - 20. The City's cross-motion for summary judgment was denied. An Order dated November 30, 1998 memorialized Judge McVeigh's rulings. *Id.*, Ex. G.

On December 1, 1998, the City filed a motion for reconsideration, which Mr. Greenwald opposed. By Order dated January 13, 1999, Judge McVeigh modified her previous decision, requiring Mr. Greenwald to pay the principal amount of the taxes on the Property for 1993 and 1994 as a condition of pursuing the appeal (the "January 13th Order"). The January 13th Order also provided that if the tax assessments on the Property were upheld, Mr. Greenwald personally would be required to satisfy any outstanding tax liens on the Property. *Id.*, Ex. H.

By Notice of Motion dated February 2, 1999, Mr. Greenwald sought an Order staying, pending appeal, Judge McVeigh's Order of January 13, 1999 or, in the alternative, an Order staying, pending appeal, that part of the January 13, 1999 Order that required Mr. Greenwald to pay the principal amount of

taxes due on the Property as a condition of pursuing an appeal.

At the hearing on this motion, Judge McVeigh stated as follows:

[F]ollowing [the Tax Court's] logic and my logic, there is some assumption that plaintiff [Mr. Greenwald] is going to prevail in the tax court.

Id., Ex. I, 17:9-11. Judge McVeigh nonetheless continued as follows:

I think that that perhaps what I did in my prior decision in ordering that the \$6,000 be paid in escrow was an attempt to split the baby in half. I think that's what I did. . . . And I admit that if I have a failing as a judge, it's that I really do attempt to split the baby. I attempt to come up with the most fair resolution, and even sometimes a fair resolution is not exactly a technically legal decision under all of the circumstances. . . . [S]ometimes the Appellate Division understands that and sometimes it doesn't.

Id., 19:7-18.

At the hearing for the stay motion, Mr. Greenwald also demonstrated conclusively that the Assignment of Mortgage from Meor Hatorah, Inc. to him was timely recorded, contrary to the City's repeated assertions. *Id.*, 3:6 - 3:23; Ex. J.⁴

⁴ Mr. Greenwald's position was that the recordation of his interest was not a material fact in the case, because the City had never asserted the supposed lack of recordation in its Statement of Material Facts nor in its summary judgment brief. Nonetheless, Mr. Greenwald felt compelled to correct the record as a result of the City's constant refrain that Mr. Greenwald's interest was unrecorded. The City's assertion was made apparently without so much as an examination of the Passaic County records themselves (the City having demanded no discovery in this action). Despite its lack of actual knowledge of whether the instrument was recorded, the City asserted the "unrecorded" canard repeatedly in the Law Division, as well as in the City's Statement of the Case to this Court (never modified).

Concurrent to Mr. Greenwald's motion for a stay, the City filed a Notice of Appeal with the Appellate Division with regard to Judge McVeigh's Order of November 30, 1998 as modified by the Order of January 13, 1999. All of the City's eleven purported issues for appeal relate to the tax assessments on the Property for 1993 and 1994, the tax liens imposed for those years, including the claim that "[a]s the tax assessments and related taxes are valid, the related tax lien must remain in effect." The City also alleges that Mr. Greenwald lacked standing to pursue an appeal. Mr. Greenwald filed a Notice of Cross Appeal which, among other things, contended that Judge McVeigh erred when she failed to grant Mr. Greenwald summary judgment on the totality of his claims.

On January 13, 1999, the City filed its Complaint in the Tax Court. In that Complaint, the City sought a declaratory judgment on a number of issues relating to the Property's exempt status, the tax liens on the Property, and the ability of Mr. Greenwald and Meor Hatorah to contest the assessments and the tax liens. Most of the claims in the City's Complaint were also raised by the City in its Notice of Appeal relating to the Law Division Action.

On March 9, 1999, Judge McVeigh rendered her opinion on Mr. Greenwald's motion to stay the Law Division's requirement that he, a mortgagee with no possible tax liability, post the

amount of the tax pending the City's appeal in this exemption case. In her oral opinion, Judge McVeigh stated as follows:

[U]nder the federal case law and New Jersey case law [Mr. Greenwald] would not be required[,] if there is the possibility of success[,] to pay or post any of the taxes that would be due and owing. This Court has no problem with [Mr. Greenwald's] position.

But the Law Division also has to consider the position of the municipality . . .

In an offer to compromise and to have both parties show their good faith in going forward in this action, this Court finds that it's within its equitable remedies [sic] to require that the plaintiff Mr. Greenwald or the temple [sic] or someone on their behalf post the \$6,000, approximately, that is the actual amount of the assessed taxes at issue in this case. It is not a penalty; it is, rather, a good-faith compliance with what the statutes would require in the event that the municipality, the public entity, were successful.

And for those reasons, this Court is going to require the plaintiffs to file the - to post, either with their own counsel or with an independent party, the \$6,000, which is the amount of the taxes.

Id., Ex. K, 2:6 - 3:10. The Law Division ordered no supersedeas bond.

This motion followed.

LEGAL ARGUMENT

I. THIS COURT SHOULD STAY THE ORDER OF THE LAW DIVISION REQUIRING A MORTGAGEE INVOLVED IN A TAX APPEAL TO POST THE AMOUNT OF THE TAX PENDING THE APPEAL OF PARTIAL SUMMARY JUDGMENT GRANTED TO HIM ON THE ISSUE OF TAX LIENS PLACED ON THE PROPERTY WITHOUT PROPER NOTICE.

Rule 2:9-5 governs the stays of civil judgments pending appeal. The decision whether to grant or deny a stay pending appeal of a judgment is entrusted to the sound discretion of the Court. *Grober v. Kahn*, 88 N.J. Super. 343, 349 (App. Div. 1965), *rev'd on other grounds*, 47 N.J. 135 (1966); *Grausman v. Porto Rican-Am. Tobacco Co.*, 95 N.J. Eq. 155, 167 (Ch.), *aff'd*, 95 N.J. Eq. 223 (Sup. Ct. 1923). The factors that guide judicial discretion in determining whether or not to grant a stay are similar to those considered upon applications for injunctive relief. See, e.g., *Grausman, supra*, 95 N.J. Eq. at 168. Among those factors are (1) the probability of success on appeal, *Glassboro v. Gloucester City Bd. of Chosen Freeholders*, 98 N.J. 186, 191 (1984); (2) the danger of irreparable injury in the absence of a stay, *Grausman, supra*, 95 N.J. Eq. at 167-68; and, (3) the relative hardship to the parties upon the granting or denial of a stay, *Tracy v. Tracy*, 140 N.J. Eq. 496, 502 (E & A. 1947). Based on all these factors, this Court should grant Mr. Greenwald a stay, pending appeal, of Judge McVeigh's January 13th Order.

a. Mr. Greenwald Is Likely to Succeed On Appeal.

In its original grant of partial summary judgment to Mr. Greenwald, the Court below vacated the liens that are the subject matter of this action in part because, the Court below held, the City acted in an "unconscionable fashion" with regard to the imposition of those liens without notice. The City then demanded that Mr. Greenwald pay off these vacated liens before it would comply with the Order. The Law Division, on a motion styled as one for reconsideration (see *infra*), essentially reversed the allocation of burdens in a matter where it had found for the Mr. Greenwald, and adopted the City's position as to posting the tax, though ultimately requiring "only" the payment by Mr. Greenwald of the taxes levied and not the accrued interest. This was reiterated upon Mr. Greenwald's motion to stay, though at that juncture the Law Division acknowledged that Mr. Greenwald's position was legally correct.

The Court below issued no written opinion, nor did it cite from the bench either a finding of fact nor a Rule, statute or precedent as a rationale for its decision to impose the burden of the City's "unconscionable" behavior on its victim, Harry Greenwald. In fact, there is no such authority. To the contrary, it is settled law that there is no obligation to pay taxes while pursuing an exemption appeal to the Tax Court. See *Morris-Sussex Area Co. Boy Scouts v. Hopatcong Borough*, 15 N.J.

Tax 438, 455 (Tax Ct. 1996) (organization seeking tax exemption is not required to satisfy the tax payment provisions of N.J.S.A. 54:3-27 in order to pursue appeal to county board of taxation).⁵ The party pursuing the appeal in *Boy Scouts* was the property owner. A *fortiori*, there is no legal basis for a **non-taxpayer** such as Mr. Greenwald to be so ordered – especially when, as Mr. Greenwald urged below, it is established that:

local property taxes are not assessed against a property owner, and a property owner has no personal property liability for taxes. Local property taxes are assessed against a property, and, if unpaid, they become a lien against the property.

Freehold Office Park v. Freehold Township, 12 N.J. Tax 433, 440 (Tax Ct. 1992); accord *State v. Washington Township*, 73 N.J. 182, 184 (1977). Hence, there is no legal basis upon which any individual can be compelled to satisfy the taxes on any property.

It will also be demonstrated on appeal that the Law Division erred by not requiring the City to present competent evidence that actual notice of the imposition of the subject tax liens was given to **anyone**, whether Meor Hatorah, the new owner of the Property or the mortgagee of record, Mr. Greenwald. Both the United States Supreme Court and this Court have ruled that constitutional due process mandates that an individual with an interest in real property must be given **actual** notice (not

⁵ This point is yet stronger when it is recalled that the City has already been paid this money by the purchaser of the tax lien – thus **no taxes are due to the City whatsoever**, as discussed *infra*.

published notice) of a pending tax sale. *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S. Ct. 2706, 77 L.Ed.2d 180 (1983) (notice by publication does not provide a mortgagee of real property with adequate notice of a pending action to sell the mortgaged property for non-payment of taxes); *Jefferson Tp. v. Block 447A, Lot 10*, 228 N.J. Super. 1, 7 (App. Div. 1988).

In addition, the decision below is marred by serious procedural errors which unfairly denied Mr. Greenwald his due process rights. For one, the City never submitted a R. 4:46-2(b) statement admitting or disputing Mr. Greenwald's statement of material facts as to whether notice was given of the imposition of the liens. Pursuant to that Rule, the failure to dispute a proposition means that it is admitted for purposes of this litigation. Yet the Law Division accepted both purported evidentiary submissions and "testimony" from the City's counsel at argument submitted for the purposes of rebutting precisely what the Rules deem irrebuttable. Despite Mr. Greenwald's repeatedly drawing this to the Court below's attention in writing, the Court below neither enforced this Rule, nor found good cause to allow (and require) the City to amend its R. 4:46-2(b) statement late, nor even enunciated an equitable basis on which the City was to be excused from compliance with the Rules.

The Court below also allowed the City completely and substantively to "reargue" the motion the Law Division had

When all is said and done, the Court below imposed, without asserting any legal or factual bases – which do not exist – a “pay to play” requirement on Mr. Greenwald. He must, in effect, pay a tax for the privilege of defending his constitutional rights **as appellee**, rights which both the Law Division and the Tax Court found to have been grievously offended. For these reasons, Mr. Greenwald will likely prevail on appeal of at least this part of the January 13th Order.

b. The Balance of Harms and Consideration of Irrevocable Injury Favor Mr. Greenwald.

The premise of this action, which has never been denied, is that City of Passaic **sold** tax liens arising from the alleged deficiency in tax payments on the Property for tax years 1993 and 1994. In other words, **the City of Passaic has already been paid** (by the lien purchaser) for these tax deficiencies. Yet the Law Division’s January 13th Order requires that the City be paid twice, or that it at least have recourse to Mr. Greenwald’s money regardless of the outcome of this litigation.

Furthermore, the City never suggested, much less demonstrated, that Mr. Greenwald would not be able to satisfy a judgment against him. Neither did the City demonstrate any legal or equitable reason that Mr. Greenwald’s right to continue this litigation should be contingent on his financial wherewithal. The burden on the City of a stay, therefore, is non-existent. Indeed, there is no way the City would have access to the money

in question before receiving a final adjudication of the matter in the Tax Court. What, then, is the rationale for imposing the burden of this payment on plaintiff?

In contrast, the burden of that part of the Order requiring Mr. Greenwald to pay the disputed taxes is substantial on him. This private citizen has already borne substantial legal fees and costs, and faces many thousands of dollars in additional fees merely to right the wrong done by the City's "unconscionable" conduct.

The final question is whether Mr. Greenwald would be irreparably harmed absent the stay. This question, while normally one of the elements in a stay application, is irrelevant to consideration of this one. The question of irreparable harm should have been considered by the Court below, if at all, on the City's motion, which amounted to an application for an injunction against Mr. Greenwald. In fact, no irreparable harm was demonstrated by the City before the January 13th ruling, and there is no legal or equitable reason the burden to demonstrate irreparable harm should shift to Mr. Greenwald, the prevailing litigant.

The Court below, faced with an admittedly confusing array of facts and an obscure area of law, did not do substantial justice in issuing its Order of January 13th. It as much as

admitted that it was not concerned about following the law in its resolution of the stay motion below. More than ignoring the maxim that "equity follows the law," the Law Division forgot that the legal precedents that properly govern this situation are in fact equity-based, and that "splitting the baby" is not an equitable concept but rather a dereliction of the chancellor's duty to judge. This Court can remedy this injustice by staying the most oppressive part of the January 13th Order pending appeal.

II. THIS COURT SHOULD ISSUE A STAY WITHOUT SUPERSEDEAS BOND

No bond is required for this Court to issue its stay. The only requirement for a supersedeas bond is found under R. 2:9-5, which provides as follows:

A judgment or order in a civil action adjudicating responsibility for a sum of money or the rights of liabilities of parties in respect to property which is the subject of an appeal or certification proceedings shall be stayed only upon the posting of a bond pursuant to R. 2:9-6 . . . unless the Court below otherwise orders on good cause shown.

This Rule does not apply here. The January 13th Order is not "a judgment or order in a civil action adjudicating responsibility for a sum of money or the rights of liabilities of parties in respect to property." Manifestly the Court below ordered the payment of the taxes into a City account as some sort


CONCLUSION

For the reasons set forth above, Mr. Greenwald requests that this Court issue a stay of the January 13th Order of the Superior Court, Law Division, without bond, pending the resolution of this appeal.

Respectfully submitted,

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Dated: March 29, 1999