

2011 WL 3693786 (Mass.App.Ct.) (Appellate Brief)
Appeals Court of Massachusetts.

Beverly FALLON, Trustee of M.G.R. Realty Trust, Plaintiff-Appellant,
v.
TOWN OF SOUTHBOROUGH, Defendant - Appellee.

No. 2011-P-0377.

August 8, 2011.

Appeal from the Worcester Superior Court, Docket No. 10-2329, Judge D.J. Curran

Brief of Appellee

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***1 I. STATEMENT OF ISSUE**

Was there judicial error on the part of the Superior Court Justice in granting Defendant's Rule 12b Motion to Dismiss submitted pursuant to the provisions of [Superior Court Rule 9A](#), to which motion Plaintiff failed, after notice, to submit any opposition?

II. STATEMENT OF THE CASE

The Plaintiff filed on October 28, 2010 a complaint in Worcester Superior Court, WOCV 2010-0239. The Defendant served a Motion to Dismiss said Complaint (App. P's 18-21) on Plaintiff's Counsel by postage prepaid and facsimile transmission on November 22, 2010. The Plaintiff filed no opposition to the motion and on December 8, 2010 the Defendant filed an Affidavit of Compliance with [Rule 9A](#) and Receipt of No Opposition (App. P's 23-24) which pleading was also served on Plaintiff's counsel, and to which no response or objection was made.

On January 3, 2011 the Motion to Dismiss was presented to Dennis J Curran, Justice as unopposed at which time said motion was allowed and notices were sent to both parties. (App. P. 25)

*2 On or about January 28, 2011, Plaintiff filed a [Rule 60](#) Motion to Set Aside Judgment. (App. P's 26-55). No action was taken on Plaintiffs [Rule 60](#) motion due to no proof of compliance with [Superior Court Rule 9A](#). (App. P.61). On February 4, 2011 Plaintiff filed a Motion for Clarification of the basis for dismissal under Rule 12(b)(6). (App. P's 56-57). The Motion for Clarification was allowed. (App. P. 62). Justice Curran stated in part in his Memorandum of Decision and Order that (App. P's. 63-64):

The clarification is as follows:

The Defendant served a dispositive motion on plaintiff, the plaintiff, having been notified of the motion, chose or **neglected** to oppose it, the Defendant served a notice that it was filing the motion and further, informed the Court that no opposition had been received, and finally, plaintiff chose or **neglected**, a second time, to oppose that motion. Now, about a month after dismissal, the plaintiff seeks to know what happened. The Plaintiff's motion for clarification is ALLOWED, this clarification responds to the plaintiff's motion, and the original order of Dismissal stands. (App. P. 63-64).

III. STATEMENT OF FACTS

The Plaintiff and her husband are **elderly**. The Plaintiff is Trustee of the M.G. R. Realty Trust and she has stated that she is sole beneficiary of said Trust. The Plaintiff applied for and was granted a *3 veterans exemption for taxes in the amount of \$600.00 for fiscal 2002 under the provisions of [G.L., c. 59 §5](#), cl. 22E by the Defendant. No other applications for exemption were filed until fiscal 2009 which application was denied.

The Defendant has had no bad faith dealings with the Plaintiff. The Defendant has not failed to credit tax payments made by Plaintiff or to give Plaintiff any lawfully entitled exemptions.

IV. ARGUMENT

The issues before this Court have nothing to do with an error by the Superior Court in granting a motion to dismiss or Superior Court jurisdiction over tax refund claims under [M.G.L., c. 60 §98](#). The issues have little to do with the merits, or lack thereof, of Plaintiff's cause of action. The issue is very simple. The plaintiff's action in Superior Court was dismissed because Plaintiff chose to or **neglected** to file an opposition to Defendant's Motion to Dismiss. Under [Superior Court Rule 9A](#) the Motion went forward without opposition. The Motion to Dismiss was allowed. Plaintiff is appealing from the grant of an unopposed Motion to Dismiss.

*4 [Superior Court Rule 9A](#) sets forth the procedure to be followed in the Superior Court Department for Civil Motion Practice.

The moving party shall serve with the motion a statement of reasons including supporting authorities, why the motion should be granted. [Superior Court Rule 9A\(a\)\(1\)](#).

A party opposing a motion may serve an opposition within... 10 days after service of a motion.... [Superior Court Rule 9A\(a\) \(2\)](#).

All motions and oppositions shall be served on all parties and filed in Court in accordance with the procedure set forth in this Paragraph (b). [Superior Court Rule 9A\(b\)\(1\)](#).

The moving party shall serve a copy of the motion and the other documents specified in Paragraph (a)(1) of this rule on every other party. Every opposing party shall serve on the moving party an original and a copy,... of the opposition and the other documents specified in Paragraph (a) (2) of this rule Upon receipt of the opposition and associated documents, if any, the moving party shall physically attach the original of the opposition and associated documents to the original motion and associated documents and within ten days shall file with the clerk the combined documents.... If the moving party does not receive an opposition within three business days after expiration of the time permitted for service of oppositions, then the

moving party shall file with the clerk the motion and other documents initially served on the other parties with an affidavit reciting compliance with the rule and receipt of no opposition in a timely fashion.... The moving party shall give prompt notice of the filing of the motion to all other parties by serving thereon a copy of a certificate of service on a separate document. [Superior Court Rule 9A\(b\)\(2\)](#).

No party shall mark any motion for hearing. [Superior Court Rule 9A\(c\)\(1\)](#).

*5 Motions which are not set down for hearing in accordance with Paragraph (c) hereof will be decided on the papers filed in accordance with this rule. [Superior Court Rule 9A\(d\)](#).

Defendant complied with the [Superior Court Rule 9](#) Motion Practice. The motion was presented to the Court, with appropriate notice to Plaintiff, with no opposition.

Does the Trial Court have authority to grant a dispositive motion when there has been no opposition? Clearly the Trial Court does have this authority, which authority was duly exercised by Justice Curran. The Rules of Civil Procedure set forth specific time standards. The rules allow for extension of time by the Court under certain circumstances after the expiration of the prescribed time.

When by these rules or by a notice given thereunder or by order or rule of Court an act is required or allowed to be done at or within a specified time, the Court for cause shown may... (2) Upon motion made after the expiration of the specified period permit the act to be done where the failure was due to excusable **neglect**. [Mass. R. Civ. P. Rule 6\(b\)](#).

Similar standards are applied to Motions for Relief from Judgment or order:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons (1) mistake, inadvertence, surprise or excusable **neglect**... [Mass R. Civ. P. Rule 60\(b\)](#).

*6 The judgment of Dismissal should stand. Plaintiff's proper course of action under the Rules of Civil Procedure would have been to seek under [Rule 6\(b\)](#) an extension of time to file opposition before judgement entered or under [Rule 60\(b\)](#) Relief from the Judgment. Any such motion would have to be filed in compliance with the provisions of [Superior Court Rule 9A](#) and would have required a showing of excusable **neglect**.

The excusable **neglect** provisions of [Rules 6\(b\)](#) and [Rule 60\(b\)](#) have been frequently interpreted. Relief should be granted only if the party seeking relief demonstrates that the mistake, misunderstanding or **neglect** was excusable and was not due to his own carelessness. "A flat mistake of counsel about the meaning of a statute or rule may not justify relief: relief is not extended to cover any kind of garden variety oversight. "*Goldstein v. Barron*, 382 Mass. 181, 196, (1980)." Instead, the inadvertence, mistake or surprise, as well as **neglect** must be excusable in order to give the court power to set aside the judgment. *Cullen Enterprises v. Mass Property Ins*, 399 Mass 886, 884, (1987). Ignorance of the rules of civil procedure has been held not to be excusable **neglect**. *7 *Ohlinger v. US*, 308 F2d 667, (2nd Cir. 1967). The failure of Plaintiff to file an opposition to the Motion to Dismiss of the Town of Southborough does not constitute excusable **neglect**.

Although the Defendant submits that the merits, or lack thereof, of Plaintiff's cause of action are not relevant to this appeal, a brief review of the same may be appropriate. The Supreme Judicial Court has consistently refused to allow [G.L. c. 60 § 98](#) to be used as the basis for a cause of action unless the underlying tax is wholly void. In the case of *Sears, Roebuck and Co. v. City of Somerville*, 363 Mass. 757 the court stated in part that:

Sears argues that an action in contract is available to recover excessive illegal taxes, and relies exclusively on [G.L., c. 60, §98](#), and on the dictum in *Bettigole v. Assessors of Springfield*, 343 Mass. 223. The City on the other hand, argues that a contract

action for illegally assessed taxes does not lie unless the entire tax assessed to Plaintiff is void. If any part of the tax assessed is legally due, the City argues, then the Plaintiff must resort to the abatement procedure pursuant to G.L. c. 59 §'s 59, 64 and 65... .

There is no doubt that the italicized portion of *c. 60 §98*, (footnote. “In an action founded on an error or irregularity of the assessment or apportionment of a tax, only the amount in excess of the tax for which the Plaintiff was liable shall be recoverable” *G.L. c. 60 §98*), as well as the language of the Bettigole case... tend to support Sear's contention, (cases cited). It is equally clear however, that we have on several occasions stated unequivocally that an action under *c. 60 §98*, cannot be maintained unless the tax is wholly void, and the exclusive remedy to secure *8 adjustment on an excessive tax is by abatement. (cases cited).

The Plaintiff in the present action does not claim that the tax is wholly void. Under the reasoning of the Sears case the *c. 60 §98* claim of Plaintiff was the appropriate subject of a motion to dismiss for failure to state a claim upon which relief can be granted. Furthermore, the amount in controversy did not meet the Superior Court jurisdictional requirements, i.e. less than \$25,000.00, and there was and remains pending an action in Land Court, *Town of Southborough v. Fallon*, 07-TL 134883, in which the exemptions issues had been argued, and which issues the Land Court did not decline to entertain until following the dismissal of the Superior Court action. (App. P. 60).

The dismissal in Superior Court may have been granted as a result of Plaintiff's failure to comply with the requirements of the Rules of Civil Procedure, but the dismissal would also be proper under *G. L. c. 60 §98*, as well as for the issues of amount in controversy and pendency of a prior action.

***9 V. CONCLUSION**

The Appeal for the Plaintiff should be denied. The Superior Court Order of Dismissal should stand.