STATE OF MICHIGAN

COURT OF APPEALS

ALVIN C. SALLEN,

Petitioner-Appellant,

v

CITY OF BIRMINGHAM,

Respondent-Appellee.

UNPUBLISHED
November 15, 2005

No. 254788
Tax Tribunal
LC No. 00-275507

Before: Murphy, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

Petitioner appeals as of right an opinion and judgment of the Michigan Tax Tribunal (the Tax Tribunal) following rehearing. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. Background

Petitioner filed a petition in the Tax Tribunal's small claims division challenging the 2000 tax assessment of his residential real estate in the City of Birmingham.[1] Respondent had maintained that the home's taxable value (TV) for 2000 was $460,670. Petitioner initially countered that the home had a true cash value (TCV)[2] of $850,000 and a taxable value of no more than $453,680. Petitioner retained Myles Hoffert, an agent of Collier International, to represent him at the hearing.

Both parties submitted proposed valuations. Following the unfavorable disposition of the original hearing, petitioner moved for and was granted a rehearing. On February 27, 2002, the Tax Tribunal sent petitioner a notice of rehearing for May 22, 2002. On May 10, 2002,

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[1] Petitioner added a challenge to his 2001 property tax assessment during the pending litigation, although the timing is not clear from the materials presented on appeal.

[2] This Court has previously used this term and fair market value (FMV) interchangeably to refer to this amount. See *WPW Acquisition Co v City of Troy*, 250 Mich App 287, 298; 646 NW2d 487 (2002).

petitioner moved to adjourn the hearing. He maintained that he had received no formal notice of the hearing scheduled for May 22, 2002, and that Hoffert was unavailable on that date.

On May 16, 2002, the Tax Tribunal denied petitioner's motion. On May 17, 2002, petitioner moved to transfer his hearing from the small claims division to the entire Tax Tribunal. He argued that he needed more than the usual thirty-minute small claims proceeding to present his case, that he wanted a formal record of proceedings for a possible appeal, and that he wanted to proceed before the entire Tax Tribunal in order to be able to fully cross-examine respondent's witnesses. The Tax Tribunal denied petitioner's motion. We subsequently denied petitioner's application for leave for failure to persuade of the need for immediate review.

Petitioner, accompanied by another Collier's representative, attended the rehearing, but refused to participate. Respondent submitted an updated appraisal for the property, which included a 2002 evaluation. The new appraisal reduced the 2000 calculated TCV to $921,380 and the 2001 TCV to $966,620. The calculated TVs remained the same. The Tax Tribunal rejected petitioner's valuation, finding respondent's appraisals convincing and stating that the new appraisal had "clarified" its earlier concerns.

II. Refusal to Adjourn

Petitioner argues that the Tax Tribunal erred when it refused to adjourn the May 22, 2002, proceedings where his agents testified, without contradiction, that he did not receive adequate notice for the hearing. He argues that, pursuant to *Goodyear Tire & Rubber Co v Roseville*, 468 Mich 947; 664 NW2d 751 (2003), the Tax Tribunal should not be permitted to rely on the fact that the notice was properly mailed to find that he actually received it. Petitioner claims that he was severely disadvantaged by the lack of notice because he was barred from submitting evidence under the Tax Tribunal's rule, 1999 AC, R 205.1342(2). He also maintains that he was placed at a disadvantage because Hoffert could not represent him at the hearing.

Where fraud has not been alleged, our review of a Tax Tribunal decision is limited to determining whether the Tribunal's decision was supported by competent, material, and substantial evidence on the whole record, and whether the Tribunal committed an error of law or applied the wrong principles. *Kadzban v Grandville*, 442 Mich 495, 502-503; 502 NW2d 299 (1993); *Meadowlanes Ltd Dividend Housing Ass'n v Holland*, 437 Mich 473, 482-483; 473 NW2d 636 (1991); *Oldenburg v Dryden Twp*, 198 Mich App 696, 698; 499 NW2d 416 (1993).

Denial of an adjournment is reviewed for an abuse of discretion. *Lansing v Hartsuff*, 213 Mich App 338, 350; 539 NW2d 781 (1995); *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1992). In reviewing the decision, we have traditionally focused on whether the movant shows good cause for the request for an adjournment and whether he can demonstrate prejudice by the failure to adjourn. *Id*.

Petitioner's claims are undercut in large part by the fact that this case involved a rehearing, rather than an initial hearing. Petitioner had already submitted his valuation and raised legitimate questions about the validity of respondent's valuation to the extent that he was granted rehearing. Even if petitioner's claims are true, he still had twelve days before the scheduled hearing to review and respond to the new valuation he received on May 10, 2002. Instead, he chose to file a motion for adjournment of the hearing, prepare affidavits in support of

the motion, file an emergency motion to move the proceedings from the small claims division to the entire Tribunal, and file an emergency application in this Court.

Petitioner filed for rehearing and received a favorable ruling on November 27, 2001. He was undoubtedly aware that another hearing would be scheduled, and had ample time to procure another valuation. Petitioner's claims are further weakened by the fact that he admitted to the Tax Tribunal during a conference on May 16, 2002, that he did not intend to introduce additional written material. We are not persuaded by petitioner's argument that he could not meet the deadline outlined in Tribunal rule 1999 AC, R 205.1342(2) for submission of another valuation due solely to the alleged lack of notice.

In addition, petitioner has failed to provide support for his assertion of prejudice regarding his inability to have Hoffert attend the hearing. He has not explained why Hoffert, rather than others in his firm, including his present appellate attorney who attended the rehearing, was required to be present to ask the relevant questions concerning respondent's valuations. Petitioner has failed to provide an explanation as to why, once he knew that the hearing would not be postponed, Hoffert's scheduling difficulty could not have been resolved. See MCR 2.503(C)(2).

Unlike the situation in *Goodyear Tire & Rubber Co*, *supra*, the Tax Tribunal made further inquiries as to the validity of petitioner's claims that he did not receive notice and to the actual need for a continuance. We find that the Tax Tribunal did not abuse its discretion in refusing petitioner's request to postpone the rehearing.

III. Denial of Motion to Transfer

Petitioner argues that the Tax Tribunal improperly denied his motion to transfer this case before rehearing from the small claims tribunal to the entire Tribunal, and that this error subjected him to the unconstitutional, unwritten rules of procedure applicable to the small claims division alone. We disagree.

As the Tax Tribunal pointed out in its May 17, 2002, decision, petitioner initiated proceedings in the small claims division and knew or should have known that these hearings involved simplified procedures with regard to presentation of evidence and examination of witnesses. Petitioner cannot now complain about the deficiencies of the small claims division procedures when he chose to proceed in small claims. See *Weiss v Hodge (After Remand)*, 223 Mich App 620, 636; 567 NW2d 468 (1997)(where a party stipulates to an arrangement that limits his rights to less than that which is otherwise required, he may not later complain on appeal about this restriction). Moreover, petitioner's assertion that the denial of his request to transfer was improper is incorrect. 1999 AC, R 205.1315, which addresses transfers, does not make reference to rehearings. Rehearings are governed by separate administrative rules. See 1999 AC, R 205.1348. Petitioner did not choose to move the original hearing to the entire Tribunal. His rehearing was properly heard by a tribunal judge pursuant to MCL 205.762(3). Furthermore, we do not read MCR 4.306 as being applicable here, where 1999 AC, R 205.1315 already addresses transfers, and where a rehearing is involved as opposed to a transfer request before an original hearing. We also reject petitioner's argument that he was deprived of due process while proceeding in the small claims division because, although minimal, the process

was sufficient to protect his rights. We have reviewed all of petitioner's claims relative to this issue and conclude that reversal is unwarranted.

IV. Property Valuation

Petitioner challenges the Tax Tribunal's final determination of the valuation of the subject property after rehearing. He maintains that respondent's calculation of the home's TV, which was accepted by the Tax Tribunal, failed to take into account that he had demolished his home and replaced it in 1998. He contends that the Tax Tribunal committed an error of law when it failed to recognize that a portion of his property was capped under Const 1963, art IX, § 3, as amended by Proposal A, and MCL 211.27a, when it arrived at a taxable value for the property. Petitioner utilizes this alleged error to challenge respondent's calculated TCV.

However, petitioner declined to participate in the rehearing in the face of the Tax Tribunal's proper refusal to grant a continuance or to transfer this matter to the entire Tribunal. Instead, the member of Colliers who did attend the rehearing - petitioner's appellate counsel - chose to protest the hearing and claim that he was not "authorized" to represent petitioner, despite a lack of objection by respondent or the Tax Tribunal, and the petitioner personally attended the hearing. Petitioner refused to avail himself of the opportunity to raise questions about this valuation when he had a chance to do so. To permit him to do so now would effectively allow him to harbor error as an appellate parachute. We decline to do so. See *Hilgendorf v St John Hosp & Medical Ctr Corp*, 245 Mich App 670, 683; 630 NW2d 356 (2001); *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989).

Nor do we find error in the Tax Tribunal's decision to agree with respondent's valuation, given the evidence presented in support of this valuation and in light of the deficiencies in petitioner's calculations. We note that petitioner's calculations do not properly address the fact that the majority of the new dwelling was completed in 1998, not in 1999, and that any improper uncapping would arguably have occurred prior to the tax years at issue in this appeal. Pursuant to MCL 205.735, petitioner is now precluded from challenging this earlier action. Thus, his present calculations are flawed to the extent that they rely on this event. In addition, petitioner's argument that the Tax Tribunal was required to utilize the proportionate actual cost of construction to arrive at a TCV for the property is incorrect. See *Kok v Cascade Charter Twp (After Remand)*, 265 Mich App 413, 418; 695 NW2d 545 (2005). Under the circumstances, we agree with the Tax Tribunal that petitioner has failed to meet his burden of proof. MCL 205.737(3); *Jones & Laughlin Steel Corp v Warren*, 193 Mich App 348, 354-355; 483 NW2d 416 (1992).

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Patrick M. Meter