TAX COURT OF NEW JERSEY

Kathi F. Fiamingo
Judge

153 Halsey Street, 8th Floor
P.O. Box 47025
Newark, New Jersey 07101
Tel: (973) 648-2921 Fax: (973) 648-2149

NOT FOR PUBLICATION WITHOUT APPROVAL OF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

January 12, 2017

Robert E. Spiotti, Esq.
Spiotti & Esposito, P.C.
165 Passaic Avenue, Suite 103A
Fairfield, NJ 07004

John Bang, Esq.
The Choi Law Group
100 Challenger Road, Suite 302
Ridgefield Park, NJ 07660

Re: Borough of Bergenfield v. Juan C. and Vivana Carmona
Docket Nos. 018771-2013

Counsel:

This letter constitutes the court's opinion after trial in the above-referenced matter challenging the judgment of the Bergen County Board of Taxation which reduced the 2013 tax year assessment on plaintiff's two-family home. The court finds that plaintiff has failed to meet its burden of persuading the court that the judgment under review was erroneous. The complaint is dismissed and the judgment of the Bergen County Board of Taxation is affirmed.

I. **Procedural History and Factual Findings**

The court makes the following findings of fact and conclusions of law based on the evidence and testimony offered at trial in this matter.

*

In 2013, Juan C. and Vivana Carmona ("defendants") were the owners of a two-family home located at 87 Madison Avenue, in the Borough of Bergenfield, identified on the tax map of the Borough of Bergenfield as Block 166, Lot 4 (the "subject property.") For the 2013 tax year the subject property was assessed as follows:

Land:	$ 160,000
Improvements	179,900
Total	$ 339,900

The average ratio of assessed to true value, commonly referred to as the Chapter 123 ratio, for the Borough of Bergenfield ("plaintiff") for the 2013 tax year was 99.66. When the average ratio is applied to the assessment, the implied equalized value of the subject property was $341,000.

Defendants timely appealed the assessment to the Bergen County Tax Board ("BCTB") which reduced the assessment to $320,000. Again applying the ratio to the BCTB judgment, the implied equalized value of the subject property was $321,092. The court concludes that the BCTB found that the true value of the subject property was $321,092 and thus reduced the assessment by applying the ratio to the true value. [1]

Plaintiff appealed the BCTB judgment. The defendants filed a Counterclaim. The matter was tried to conclusion before this court. At trial, plaintiff offered the testimony of a State of New Jersey certified general real estate appraiser, who was accepted without objection as an expert in the field of real estate valuation (the "plaintiff's expert") and the testimony of its Assessor. Defendant did not offer the testimony of an expert or any witnesses.

[1] The judgment references Judgment Code #1A – Assessed Value exceeds 100%. See, N.J.S.A. 54:3-22(d) - "If the average ratio is below the county percentage level and the ratio of the assessed value of the subject property to its true value exceeds the county percentage level, the county board of taxation shall reduce the taxable value of the property by applying the average ratio to the true value of the property."

The subject property is a two-family residence constructed in 1926. It contains a total of 1,581 square feet with three bedrooms (two in one unit and one in the second unit) and two baths (one in each unit). In addition there is a basement with 892 square feet of which 847 square feet is finished. The basement contains a kitchen and one bathroom.[2] There is a two-car garage and a porch. There is no central air conditioning.

The subject property is located in a predominately residential neighborhood in the R-5 zone, allowing for one and two-family residential structures. The subject property is located on a 5,000 square foot lot, which is undersized in the zone for two-family residences for which 10,000 square feet is required. It is, however, a legal non-conforming use of the site.

II. Plaintiff's Valuation Evidence

The parties stipulated that the comparative sales approach was the appropriate valuation methodology to value the subject property. Plaintiff's expert examined three comparable sales, all of which were two-family homes located in the Borough. He opined that the value of the subject property on the valuation date was $360,000.

Comparable Sale One was a two-family residence with four bedrooms and two baths built in 1951 located at 135 Somers Avenue. The lot contained 7,000 square feet and the gross living area of the improvement was 2,039 square feet. Comparable Sales One had a basement of 1,143 square feet, none of which was finished. It contained one fireplace, a two-car detached garage and central air conditioning. The comparable property sold on May 9, 2012 for $350,000. Plaintiff's expert made the following adjustments:

Adjustment	Amount
Lot Size (@$4.50 per square foot)	($ 9,000)
Condition/Quality (5%)	$ 17,500
Room count ($15,000 per bathroom)	$ 15,000
Total Living Area (@$50/psf)	($ 22,900)
Basement (@$20/psf)	($ 5,020)

[2] There was no testimony as to which unit has access to the finished basement.

Basement Finish (@$10/psf)	$ 8,470
Fireplace (@$5,000)	($ 5,000)
Central Air conditioning	($ 5,000)
Basement Kitchen	$ 10,000
Total Adjustments	$ 4,050
Adjusted Sales Price	$ 354,100

Comparable Sale Two was a two-family residence located at 43 Anderson Avenue. It was built in 1916 and was situated on a lot of 5,000 square feet. It contained gross living area of 1,480 square feet, consisting of three bedrooms and two baths. It had a total basement area of 840 square feet of which 756 square feet were finished. Comparable Sale Two had a one-car garage and had no central air conditioning. Comparable Sale Two sold on July 11, 2012 for $309,000.

Plaintiff's expert made the following adjustments to Comparable Sale Two:

Condition/Quality (5%)	$ 15,450
Room count ($15,000 per bathroom)	$ 15,000
Total Living Area (@$50/psf)	$ 5,050
Basement (@$20/psf)	$ 1,040
Basement Finish (@$10/psf)	$ 910
Garage (@$5,000)	$ 5,000
Basement Kitchen	$ 10,000
Total Adjustments	$ 52,450
Adjusted Sales Price	$ 361,500

Comparable Sale Three was a two-family home built in 1949 which was located at 92 John Place on a 11,963 square foot lot. It contained 2,450 square feet with five bedrooms and three and one-half baths, a one-car garage, a finished basement containing 797 square feet and central air conditioning. It sold on November 22, 2011 for $425,000. Plaintiff's expert made the following adjustments to the purchase price:

Lot Size @$4.5/psf	($ 31,334)
Condition/Quality (5%)	$ 21,250
Room count ($15,000 per bathroom)	($ 7,500)

Total Living Area (@$50/psf)	($ 43,450)
Basement (@$20/psf)	$ 1,900
Basement Finish (@$10/psf)	$ 500
Garage (@$5,000)	$ 5,000
Central Air Conditioning	($ 5,000)
Basement Kitchen	$ 10,000
Total Adjustments	$ 48,634
Adjusted Sales Price	$ 376,400

After reviewing the comparable sales as adjusted, the expert arrived at a fair market value for the subject as of the valuation date of $360,000.

The expert maintained that the subject property was of average quality construction in "good condition" while each of the comparable sales were in of average quality construction and average condition. The expert testified that he had not inspected the interior of the subject property but determined its condition from an exterior inspection and a review of the property record card. Similarly, he made no inspection of the interior of any of the comparable sales. He testified that he based the condition assessment of Comparable Sale One based on an exterior inspection, review of the property record card, the "MLS" and his conversation with the real estate agent.

On cross examination, the expert acknowledged that the property record card for both Comparable Sale One and the subject property indicated that there were "updates" to both properties, but that he deemed Comparable Sale One as inferior to the subject property because the real estate agent stated that the updates to Comparable Sale One were "minor." When questioned, he was unable to describe what the indication of "updates" to the subject property meant.

He relied on the exterior inspection and property record card and MLS to determine the condition of Comparable Sale Two and Comparable Sale Three. The expert did not speak with any participant in either Comparable Sale Two or Three to confirm the details of the transaction,

although he attempted to do so. He deemed comparable Sales Two and Three in “inferior” condition to the subject because both property record cards indicated that they were in “typical” condition whereas the property record card of the subject property indicated “updates.”

The expert did not provide any other testimony or proofs as to what constituted “average”, “good”, or “typical” condition.

He testified that his 5% condition adjustment was based on his “knowledge of the market.” He also testified that he performed a comparable sale analysis of a two-family property deemed to be in good condition as compared to one deemed to be in average condition and observed an “extracted percentage” of 20%. He testified that properties compared for these purposes were substantially similar and sold within a “reasonable time frame” of each other. He thought the percentage (20%) seemed “somewhat extraordinary.” He utilized 5% adjustment because this was his “typical practice” although the extracted sales analysis he performed indicated that the adjustment should be higher. The expert did not identify the properties he compared or the manner in which he determined the condition of the compared properties as “good” or “average.”

Plaintiff’s expert testified his $50 per square foot adjustment for livable area was based on Marshall & Swift cost estimates. Copies of various costs were included in the report, but the expert did not expound upon how he had arrived at the adjustment based on those tables, what or whether local multipliers had been applied, or the resulting adjustment. He did testify that he performed a land sale extraction to determine the lot size adjustment. That produced an indicated value of $92 per square foot. He testified that he did not utilize that result because an adjustment of $50 per square foot would be what he typically relied upon and it was supported by the Marshall & Swift tables and the extracted sales analysis.

On cross examination, the expert testified that the data supporting his land sale extraction analysis utilized in determining the lot size adjustment was not included in his report. He testified that the land extraction analysis was determined by reviewing all twelve sales of two-family homes occurring in Bergenfield from April, 1, 2011, through October 1, 2012, "taking the sale price, deducting the improvement value that the properties are assessed at [for tax purposes], to get the land value." He then indicated that made a further "site estimate" adjustment for the "amount a builder would pay for a buildable lot in the market." That further site estimate adjustment was based solely on his opinion and was not supported by any documentation included in his report.

The expert testified that the basement adjustment of $20 per square foot was supported by the Marshall & Swift tables which were included in his report, as was the additional $10 per square foot adjustment for basement finishing. Similarly, he supported the garage adjustment at $5,000 per garage by referencing the Marshall & Swift tables included in his report. On cross examination, the expert acknowledged that applying the Marshall & Swift cost calculators for the garage would actually result in a value of $15,906. However, he deemed that amount "excessive." He testified that in his opinion he did not think that it would cost $15,906 to construct a garage similar to that at the subject and that the sales did not indicate that increase in value would be realized. No further documentation or studies were provided.

The expert testified that the fire place adjustment of $5,000 and the central air conditioning adjustment of $5,000 was also supported by the Marshall & Swift tables. He further testified that he also reviewed a lot of permit work in towns in Bergen County for added assessments for central air conditioning and $5,000 - $7,000 was typically the range in similar properties. There was nothing in his report to support this statement.

He further testified that the basement kitchen adjustment was also supported by the Marshall & Swift tables and his general knowledge of the cost of installing kitchens. He testified that $10,000 was on the "conservative end." On cross examination, the expert stated that he referenced the Marshall & Swift cost calculator for "some components" of kitchens, but conceded that he relied more heavily on his personal experience and his experience in reviewing added assessments than the Marshall & Swift calculator. Again, no documentation was included in his report with respect to such added assessments, nor did he specify if any of the added assessments he reviewed were for basement kitchens. He acknowledged that he had no information as to what was included in the basement kitchen or its actual condition.

While the expert initially testified that the adjustment for the additional bathrooms was based on cost factors in the Marshall & Swift calculator, the documentation included in the report did not support the adjustment made. On cross examination, the expert testified that his experience in performing added assessment work for bathroom renovations, as well as renovations of baths in his own home, supported the adjustment as to the cost to install a bathroom. He conceded that nothing in his report supported this adjustment and it was instead made on his general knowledge and experience.

Plaintiff's expert acknowledged on cross examination that in choosing the appropriate cost categories for the Marshall & Swift tables, he considered the quality of construction of the subject property as "average" based on his experience in the market place, and his review of the property record cards. As a result, he utilized the "average" categorization in determining the appropriate Marshall & Swift factors.

Plaintiff also presented the Borough's Tax Assessor as a witness. The assessor testified that the property record card indicated that the subject property was in "good condition." He

further testified that the condition of the subject property was determined by the revaluation company and that the condition of the comparable sale properties as indicated on the property record cards were consistent with what plaintiff's expert utilized in evaluating the subject property.

On cross examination, the assessor testified that the property record card indicated that the subject property was actually inspected on January 5, 2009. Furthermore, the property record card did not include a condition description of "good." Instead, under Building Information, the notation "updates" was included in the "condition" section. He was unable to advise as to what updates were included, when the updates were made, or the magnitude of the updates, nor could he testify as to the actual condition because he had not inspected the subject property.

Defendant presented no evidence.

II. Conclusions of Law

At the close of the plaintiff's case, defendant made a motion to dismiss under R. 4:37-2(b), for plaintiff's failure to overcome the presumption of correctness. The court reserved decision.

When confronted with a motion under R. 4:37-2(b), the court must be mindful of the principle that "original assessments and judgments of county boards of taxation are entitled to a presumption of validity." MSGW Real Estate Fund, LLC v. Borough of Mountain Lakes, 18 N.J. Tax 364, 373 (Tax 1998). The presumption "attaches to the quantum of the tax assessment. Based on this presumption, the appealing taxpayer has the burden of proving that the assessment is erroneous." Pantasote Co v. Passaic, 100 N.J. 408, 413 (citing Riverview Gardens v. North Arlington Borough, 9 N.J. 167, 174 (1952)). The "presumption is not simply an evidentiary presumption serving only as a mechanism to allocate the burden of proof. It is, rather, a construct that expresses the view that in tax matters, it is to be presumed that governmental authority has been exercised correctly and in accordance with law." MSGW Real Estate Fund, LLC, supra, 18

N.J. Tax at 374 (citing Powder Mill, I Assocs. v. Hamilton Township, 3 N.J. Tax 439 (Tax 1981)). "The presumption of correctness…stands, until sufficient competent evidence to the contrary is adduced." Little Egg Harbor Township v. Bonsangue, 316 N.J. Super. 271, 285-86 (App. Div. 1998). A taxpayer can only rebut the presumption by introducing "cogent evidence" of true value. That is, evidence "definite, positive and certain in quality and quantity." MSGW Real Estate Fund, LLC, supra, 18 N.J. Tax at 413 (quoting Aetna Life Ins. Co. v. Newark, 10 N.J. 99 (1952)). Therefore, at the close of plaintiffs' proofs, the court must be presented with evidence which raises a "debatable question as to the validity of the assessment." MSGW Real Estate Fund, LLC, supra, 18 N.J. Tax at 376.

The court, in evaluating whether the evidence presented meets the "cogent evidence" standard, "must accept such evidence as true and accord the plaintiff all legitimate inferences which can be deduced from the evidence." Id. at 376 (citing Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995)). However, the evidence presented, when viewed under the Brill standard "must be 'sufficient to determine the value of the property under appeal, thereby establishing the existence of a debatable question as to the correctness of the assessment.'" West Colonial Enters, LLC v. City of East Orange, 20 N.J. Tax 576, 579 (Tax 2003) (quoting Lenal Props., Inc. v. City of Jersey City, 18 N.J. Tax 405, 408 (Tax 1999), aff'd, 18 N.J. Tax 658 (App. Div. 2000), certif. denied, 165 N.J. 488 (2000)).

Based on those standards, the court finds that plaintiff's expert provided sufficient evidence sufficient to overcome the presumption of correctness.

Accepting such evidence as true, and according plaintiff all legitimate inferences which can be deduced therefrom, a debatable question existed as to the correctness of the 2013 tax year assessment on the subject property. MSGW Real Estate Fund, LLC v. Borough of Mountain

Lakes, 18 N.J. Tax 364, 376 (Tax 1998). The expert's opinion of value was based on a comparable sales analysis, which is an accepted approach to valuing two-family homes. Plaintiff's expert relied on the sale of three two-family residences in the taxing district, examined public tax records, and applied several adjustments to each comparable sale, in order to reach an opinion of value for the subject property. Plaintiff's evidence was "sufficient to determine the value of the property under appeal, thereby establishing the existence of a debatable question as to the correctness of the assessment." Lenal Props., Inc. v. City of Jersey City, 18 N.J. Tax 405, 408 (Tax 1999), aff'd, 18 N.J. Tax 658 (App. Div. 2004), certif. denied, 165 N.J. 488 (2000). Hence, the defendant's motion to dismiss is denied.

III. Plaintiff's valuation evidence and the burden of persuasion

Concluding the presumption of validity has been overcome does not equate to a finding by the court that the judgment is erroneous. Once the presumption is overcome, "the court must then turn to a consideration of the evidence adduced on behalf of both parties and conclude the matter based on a fair preponderance of the evidence." Ford Motor Co. v. Township of Edison, 127 N.J. 290, 312 (1992). The plaintiff continues to bear the burden of persuading the court that the "judgment under review" is erroneous. Id. at 314 – 15. Plaintiff's proofs, therefore, must be reviewed in order to determine whether plaintiff has met its burden.

Plaintiff's expert utilized a sales approach in concluding fair market value of the subject property. The sales comparison approach derives an opinion of market value "by comparing properties similar to the subject property that have recently sold, are listed for sale, or are under contract." Appraisal Institute, The Appraisal of Real Estate 377 (14th ed. 2013). The sales comparison approach involves a "comparative analysis of properties" and requires the expert to focus on the "similarities and differences that affect value…which may include variations in

property rights, financing, terms, market conditions and physical characteristics." Id. at 378. "When data is available, this [approach] is the most straight forward and simple way to explain and support an opinion of market value." Greenblatt v. Englewood City, 26 N.J. Tax 41 (Tax 2011)(citing Appraisal Institute, The Appraisal of Real Estate 300 (13th ed. 2008)). Here the court concludes, as did the expert, the sales comparison approach is the most appropriate method to determine the true market value of the subject property.

> [D]ifferences between a comparable property and the subject property are anticipated. They are dealt with by adjustments recognizing and explaining these differences, and then relating the two properties to each other in a meaningful way so that an estimate of the value of one can be determined from the value of the other.
>
> [U.S. Life Realty Corp. v. Jackson Township, 9 N.J. Tax 66, 72 (Tax 1987); see also Congoleum Corp. v. Township of Hamilton, 7 N.J. Tax 436, 451 (Tax 1985) (concluding that adjustments must be sufficiently supported by objective data).]

The court has significant concerns with the reliability of the plaintiff's expert's appraisal. In reaching a conclusion of value, the plaintiff's expert utilized comparable properties and made a number of adjustments based on their physical characteristics as compared to the subject property. Prior to making such adjustments, an expert must familiarize him or herself with the subject property. "In the valuation process, the appraiser gathers much of the information needed to describe and analyze the improvements by personally visiting the site of the real estate. Careless or inadequate inspection of the physical characteristics and features of the subject and comparable properties can create difficulties for an appraiser in later phases of the appraisal". The Appraisal of Real Estate 219 (14th ed. 2013). "[T]he accuracy of building descriptions directly affects the opinion of value produced . . ." Id. at 220. This is especially true where, as here, the expert makes adjustments based on the condition of the subject property. "A comparison sales approach . . . is only as good as the inspections made to determine the comparability between thepreoprty to be

assessed and the comparable sale." City of Atlantic City v. Atlantic County Bd. of Taxation, 2 N.J. Tax 30, 37 (Tax 1980).

The expert did not inspect the subject property and therefore has a minimal basis upon which to determine its condition. The expert's reliance on the property record card's indication of "updates" does not provide any support to the appraisal. As noted by the testimony, it is unknown what was updated or even when the updates were made. In fact, the property record card is completely devoid of any information upon which an assessment of the meaning of "updates" can be made. Furthermore, even though the property record card for Comparable Sale One had a similar indication of "updates" in its condition, the plaintiff's expert deemed Comparable Sale One as "inferior" to the subject because the agent indicated such updates were minor. Since plaintiff's expert never inspected the subject property there is no factual basis for his determination that "minor" updates were inferior to the subject's unknown updates.

Similarly, the expert's explanation as to the quantification of the adjustment for condition was lacking. He testified that his allocation of a 5% adjustment for good condition vs. the average condition of the comparable sales properties was based on his knowledge of the market and an "extraction" method, the support for which he did not supply, and the results of which he acknowledged did not support his adjustment.

In like manner, plaintiff's expert testified that his adjustment for lot size adjustment was based upon a land sales extraction study he conducted. This study was not included in the report, however, the expert testified that it was based on sales occurring during the valuation period and that he reduced the sales price of the comparables by the assessed value of the improvements to reach a land value, to which he made a further site estimate adjustment. "Market extraction is a valuation technique in which land value is extracted from the sale price of an improved property

by deducting the contributory value of improvements. The Appraisal of Real Estate 368 (14th ed. 2013). The expert did not provide any testimony or documentation to support his conclusion that the assessed value of improvements is equal to market value nor did he supply the data which was included in his study. Moreover, the expert testified that he made an additional "site estimate" adjustment to his extracted land value to account for buildable lots for which no support was provided. In fact, testimony revealed that the site estimate adjustment itself was subject to adjustment based on the "superiority" of one buildable lot versus another, based solely on the expert's opinion.

Additionally, while the expert referenced Marshall & Swift cost factors included in his report to support a number of his adjustments (gross living area, central air conditioning, basement kitchen, bathrooms, basement finish and garage), neither his testimony nor the report disclosed how those factors were applied. Furthermore, in utilizing the Marshall & Swift calculator method, the interior finishes are important factors. As noted above, plaintiff's expert did not inspect the subject property and was unable to gauge the quality of the interior finishes. Thus any use of the Marshall & Swift cost factors is compromised.

For an expert's testimony to be of any value to the trier of fact, it must have a proper foundation. See Peer v. City of Newark, 71 N.J. Super. 12, 21 (App. Div. 1961), certif. denied, 36 N.J. 300 (1962). When "an expert offers an opinion without providing specific underlying reasons . . . he ceases to be an aid to the trier of fact." Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540 (App. Div. 1996). An expert witness is required to "give the why and wherefore of his expert opinion, not just a mere conclusion." Ibid. The weight to be afforded an expert's testimony relative to adjustments "depends upon the facts and reasoning which form the basis of the opinion. An expert's conclusion can rise no higher than the data providing the foundation (citation omitted).

If the bases for the adjustments are not made evident the court cannot extrapolate value." Inmar Associates v. Edison Township, 2 N.J. Tax 59, 66 (Tax 1980). "Without explanation as to the basis, the opinion of the expert is entitled to little weight in this regard." Dworman v. Tinton Falls, 1 N.J. Tax 445, 458 (Tax 1980) (citing to Passaic v. Gera Mills, 55 N.J. Super. 73 (App. Div. 1959), certif. denied, 30 N.J. 153 (1959)).

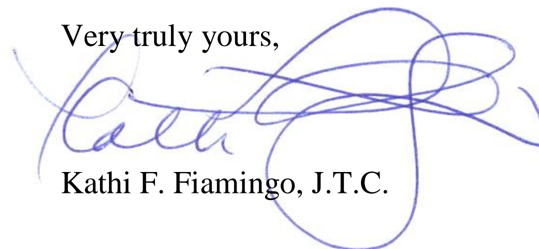
Plaintiff's expert's testimony suffers from a number of deficiencies as described herein. Those defects leave this court without a sufficient basis upon which to evaluate the competency of the expert's conclusions.

The court is mindful of its obligation to use its knowledge and expertise, in conjunction with the valuation data submitted, in an effort to ascertain an appropriate value for the subject property. However, that value and tax assessment can only be deduced when there is competent evidence in the record to support that determination. The court finds that it does not have sufficient and competent evidence upon which to determine the value of the subject property.

IV. Conclusion

The complaint is dismissed and the judgment of the BCBT is affirmed.

Very truly yours,



Kathi F. Fiamingo, J.T.C.