

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Melvyn L. Fisher,	:	
Appellant	:	
	:	
v.	:	No. 2203 C.D. 2008
	:	
Board of Revision of Taxes	:	
Melvyn L. Fisher,	:	
Appellant	:	
	:	
v.	:	No. 2204 C.D. 2008
	:	SUBMITTED: March 13, 2009
Board of Revision of Taxes	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER**, President Judge
 HONORABLE JOHNNY J. BUTLER, Judge
 HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: June 14, 2010

Melvyn L. Fisher (Fisher) appeals from an order of the Court of Common Pleas of Philadelphia County that reduced the market values of his properties as assessed by the City of Philadelphia, Board of Revision of Taxes (Board) for the tax years 2007 and 2008. Fisher argues that he is entitled to a further reduction of real property tax because the Board's assessment violates the uniformity requirement. The Board argues that Fisher waived his uniformity argument.

Fisher is the owner of two adjoining properties located at 807-809 N. Third Street and 811 N. Third Street in the Northern Liberties section of the City.

The size of the lots are 2400 square feet and 1600 square feet. Fisher's properties are located in the G-2 Industrial zoning district and classified as LC0 (Industrial Warehouse, Masonry Construction) and LD0 (Industrial Shop, Masonry Construction) under the building code. A one-story building, which was previously used as a bicycle manufacturing plant, occupies the entire area of the two lots. The building currently contains a sleeping loft, a bathroom, a kitchen, a sitting area, a garage and a workshop and has been used by Fisher, an artist, as his residence since 1983. He also stores his artwork in the building.

For the 2007 tax year, the Board set the market value of the 807-809 N. Third Street property as \$250,000 and a market value of the 811 N. Third Street property as \$150,000. On appeal, the Board reduced the market value of the 807-809 N. Third Street property to \$215,000 but did not change the market value of the 811 N. Third Street property. The Board determines the assessed value of property by multiplying the market value by the predetermined ratio of 32%. The real property tax rate was 8.264% of the assessed value for the 2007 tax year.

The trial court permitted Fisher to appeal the Board's assessment *nunc pro tunc* and issued a scheduling order directing Fisher and the Board to file pre-trial memoranda by March and April 2008, respectively. Reproduced Record (R.R.) at 36a. Because the appeal from the Board's assessment for the 2007 tax year was still pending in 2008, Fisher was considered to have also taken an appeal from the Board's 2008 assessment, pursuant to Section 518.1(b) of The General County Assessment Law, Act of May 22, 1933, P.L. 853, *as amended*, added by Section 2 of the Act of December 28, 1955, P.L. 917, 72 P.S. § 5020-518.1(b).

At a *de novo* hearing held on September 23, 2008, the Board presented Fisher's assessment records and the testimony of the Board's real

property evaluations supervisor, Joseph Solomon. Solomon testified that the Board uses all three approaches for determining market value: the comparable sales approach, the cost approach and the income approach.¹ Solomon determined market values of Fisher's properties based on his inspection of the properties and review of the Board's records for similar properties. Before the hearing, Solomon reviewed the assessment equalization study performed by Fisher's real estate appraiser, Gerald J. Reidy, and prepared a one-page spreadsheet, listing working/pending market values and certified market values of fourteen similar properties. He also listed working/pending market values for eighteen properties used in Reidy's uniformity analysis. Fisher presented Solomon's spreadsheet into evidence as his own exhibit. The trial court, however, disallowed Solomon to testify as to the comparable properties listed in the spreadsheet on the basis that he prepared the spreadsheet for the hearing and did not use it to assess Fisher's properties.

Fisher testified as to the condition of his properties, including a leaky roof and a lack of heat in the building. He claimed that his properties were taxed at a rate of almost \$2 per square foot, while other similar properties in the neighborhood were taxed at a rate of \$0.71 per square foot. Fisher presented Reidy's appraisal reports, in which Reidy considered sale prices of other properties in the area and determined that market values of the 807-809 N. Third Street and 811 N. Third Street properties were \$204,000 and \$112,000, respectively, as of

¹ The comparable sales approach compares sale prices of similar properties with consideration given to their size, age, physical condition, location and other factors. *Jackson v. Bd. of Assessment Appeals of Cumberland County*, 950 A.2d 1081 (Pa. Cmwlth. 2008). The cost approach considers reproduction or replacement cost of the property, less depreciation and obsolescence. *Id.* Under the income approach, the property's annual net rental income is divided by an investment rate of return. *Id.*

January 1, 2007. In his assessment equalization study, Reidy compared the real property tax assessed on Fisher's properties with the tax on twenty other properties (one property was listed twice). Reidy concluded that the average tax was \$2.43 per square foot for Fisher's properties and \$0.71 per square foot for the comparable properties.

Accepting Reidy's testimony and appraisal reports as credible and convincing, the trial court adopted his determination of market values. The market values assessed by the trial court resulted in the real property tax of \$5394.74 ($\$204,000 \times 0.32 \times 0.08264$) for the 807-809 N. Third Street property and \$2961.82 ($\$112,000 \times 0.32 \times 0.08264$) for the 811 N. Third Street property. Fisher filed separate appeals from the trial court's assessment of the properties, which were consolidated by this Court *sua sponte*.

Fisher argues that the trial court disregarded the evidence in the record showing that the Board's assessment lacked uniformity. Fisher demands that the tax on his properties be reduced to \$0.71 per square foot, the alleged average tax per square foot for the comparable properties in Reidy's assessment equalization study, or reduced to an amount calculated based on 36.7% of the fair market value, the alleged average "ratio of assessed value to sale price" for the seven comparable properties in Solomon's spreadsheet. Fisher's Brief at 8. Fisher further argues that the Board selectively applied its unfair policy of "gradualism" to his properties, which resulted in a tax increase in recent years.

The Board responds that the trial court fully granted the relief sought by Fisher, a reduction of the market value of his properties, and that he has waived the uniformity argument due to his failure to raise it before the trial court. The Board asserts that Fisher cannot fault the trial court "for failing to divine from raw

trial exhibits" his request for relief for the alleged violation of uniformity requirement. Board's Brief at 13. The Board maintains that even if Fisher has preserved the uniformity issue, he cannot prevail on the issue because he failed to present evidence of current market values of the comparable properties. Finally, the Board submits that Fisher cannot rely on the application of "gradualism" to support his uniformity argument because he was a beneficiary, not a victim, of that policy.

To support its waiver argument, the Board relies entirely on Fisher's pretrial statement/memorandum, in which he listed a reduction of the market values determined by the Board to specified amounts, as "damages claimed." R.R. 44a and 155a. Rule 212.1(a) and (b) of the Pennsylvania Rules of Civil Procedure, Pa. R.C.P. No. 212.1(a) and (b), requires parties to file a pre-trial statement in "civil actions to be tried by jury." A tax assessment appeal, however, is a statutory appeal, not a civil action subject to Rule 212.1(a) and (b). *Expressway 95 Bus. Ctr., LP v. Bucks County Bd. of Assessment*, 921 A.2d 70 (Pa. Cmwlth. 2007); *Terminal Freight Handling Corp. v. Bd. of Assessment Appeals*, 790 A.2d 1068 (Pa. Cmwlth. 2001).

Even assuming that Rule 212.1(a) and (b) applies, since it was ordered by the trial court, Fisher's failure to raise the uniformity issue in his pretrial memorandum did not result in a waiver of that issue. The purpose of a pretrial statement is "to prevent surprise." *Wiley v. Snedaker*, 765 A.2d 816, 817-18 (Pa. Super. 2000). The trial court may preclude or limit the testimony of any witness not disclosed in the pretrial statement and opinions of any expert witness not set forth in the report submitted with the pretrial statement, if the court determines that unfair prejudice will occur as the result of noncompliance with Rule 212(a) and

(b). Rule 212(c); *Estate of Ghaner v. Bindi*, 779 A.2d 585 (Pa. Super. 2001).

In its scheduling order, the trial court ordered Fisher and the Board to "exchange copies of all documents they plan to use during the trial ... and provide their opponents with a list of witnesses expected to testify." R.R. at 36a. Fisher listed Reidy and himself as witnesses and Reidy's appraisal reports as exhibits in the pretrial memorandum. Before the hearing, Fisher filed and served upon the Board Reidy's appraisal reports and Reidy's assessment equalization study as a supplemental expert report. *See* R.R. 220a. In a July 2, 2008 letter attached to the assessment equalization study, Reidy noted a "substantial difference in assessed values" of Fisher's properties and other similar properties. R.R. at 224a. Solomon reviewed Reidy's "uniformity analysis" in the assessment equalization study and prepared his own spreadsheet for the hearing. Notes of Testimony (N.T.) at 11; R.R. at 381a. In addition, Reidy and Fisher offered testimony related to the uniformity issue. The trial court noted that "uniformity or lack of it" seemed to be "the core issue." N.T. at 27-28; R.R. at 385a.

The record thus amply demonstrates that Fisher raised and preserved the uniformity issue before the trial court and that the Board was not in any way prejudiced by Fisher's failure to state the issue in his pretrial memorandum. Although the trial court did not address the uniformity issue, it is unnecessary to remand for the trial court's consideration of the issue because we conclude that the evidence in the record is insufficient to satisfy Fisher's burden of establishing a lack of uniformity. *See Pinn v. Workers' Comp. Appeal Bd. (Hemlock Girl Scout Council)*, 754 A.2d 40 (Pa. Cmwlth. 2000).

Article VIII, Section 1 of the Pennsylvania Constitution, Pa. CONST. art. 8, § 1, provides that "[a]ll taxes shall be uniform, upon the same class of

subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." This uniformity requirement is based on the general principle that taxpayers should pay no more or less than their proportionate share of government. *Clifton v. Allegheny County*, 600 Pa. 662, 969 A.2d 1197 (2009); *Downingtown Area Sch. Dist. v. Chester County Bd. of Assessment Appeals*, 590 Pa. 459, 913 A.2d 194 (2006). It is also well settled that taxation "is not a matter of exact science; hence absolute equality and perfect uniformity are not required to satisfy the constitutional uniformity requirement." *Clifton*, 600 Pa. at 685, 969 A.2d at 1210. The uniformity clause requires "only substantial uniformity and approximate equality." *Beattie v. Allegheny County*, 847 A.2d 185, 193 (Pa. Cmwlth. 2004), *aff'd*, 589 Pa. 113, 907 A.2d 519 (2006) [quoting *Lee Hosp. v. Cambria County Bd. of Assessment Appeals*, 638 A.2d 344, 351 (Pa. Cmwlth. 1994)].

Where, as here, the taxing authority admits its assessment record into evidence, a prima facie case of the assessment validity is established. *Deitch Co. v. Bd. of Prop. Assessment*, 417 Pa. 213, 209 A.2d 397 (1965). The taxpayer must then come forward with competent, credible and relevant evidence to rebut the validity of assessment. *Id.*; *Craftmaster Mfg., Inc. v. Bradford County Bd. of Assessment Appeals*, 903 A.2d 620 (Pa. Cmwlth. 2006). A taxpayer claiming a lack of uniformity has the burden of proving that a lower ratio of assessed to actual value has been applied to comparable properties. *Gitney v. Berks County Bd. of Assessment Appeals*, 635 A.2d 737 (Pa. Cmwlth. 1993). An "actual value" is a market value or a fair market value, i.e., the price which a purchaser, willing but not obligated to buy, would pay an owner, willing but not obligated to sell, taking into consideration all uses to which the property is adapted and might in reason be

applied. *Green v. Schuylkill County Bd. of Assessment Appeals*, 565 Pa. 185, 772 A.2d 419 (2001).

Fisher first relies on Solomon's spreadsheet to support his uniformity argument. Fisher maintains that the average ratio of assessment to sale price for the comparable properties in the spreadsheet is 36.7%. He claims that the same average ratio for his properties is 100% although the sale prices of his properties from the 1986 transactions are not listed in the spreadsheet. To obtain the average ratio for the comparable properties, Fisher first picks seven of the fourteen comparable properties sold in 2004 through 2006. He then divides the "working market value" of each property by its sale price and then averages the result.²

A working market value, however, is a "pending market value prior to certification," not an assessed value. N.T. at 17; R.R. at 383a. Fisher does not dispute that the assessed value is 32% of the market value certified by the Board. In order to prove that the comparable properties had lower assessed to actual market values, Fisher was required to establish the current market values of those properties. Fisher acknowledges that a taxpayer must "present appraisals of other properties in the area" to establish a lack of uniformity, but he failed to do so. Fisher's Brief at 11. He cannot just rely on the Board's assessment records to establish a lack of uniformity.

In *Albarano v. Board of Assessment & Revision of Taxes & Appeals*, 494 A.2d 47 (Pa. Cmwlth. 1985), the taxpayers relied on the taxing authority's

² The Board points out numerous errors made by Fisher in his analysis of the comparable properties listed in Solomon's spreadsheet. For example, the sale price of one property was \$1,000,000 not \$10,000,000 as indicated by Fisher. Fisher also included one property not listed in the spreadsheet and excluded two recently sold comparable properties. According to the Board, the average ratio of the working market values to sale prices of the comparable properties is 89.1%, not 36.7%, when those errors are corrected.

assessments of comparable properties and presented no evidence of their actual market values to support the uniformity challenge, as Fisher did in this case. This Court held:

Where a property owner presents proof of assessments of comparable properties but fails to offer any evidence as to market value, the property owner cannot sustain his burden of proof as a matter of law in that the common pleas court has no information upon which to make a finding as to the current market value and apply the established predetermined ratio to determine the issue of uniformity. ... As appellants were only offering evidence of the *assessments* of comparable properties and specifically stated that they were not prepared to offer evidence on the issue of *market value*, there was no way in which they could have prevailed as to their uniformity challenge.

Id. at 49 (citations omitted) (emphasis in original). *Accord Fosko v. Bd. of Assessment Appeals, Luzerne County*, 646 A.2d 1275 (Pa. Cmwlth. 1994). Fisher's failure to present evidence of the comparable properties' current market values, therefore, defeats his uniformity argument.

Reidy's assessment equalization study likewise fails to support the uniformity argument. In that study, Reidy determined that the 807-809 N. Third Street and 811 N. Third Street properties were taxed at the rate of \$2.43 per square foot, as compared to \$0.71 per square foot for the twenty comparable properties. In support, Reidy simply divides the tax amount for each comparable property by its square footage without presenting any evidence of current market value that can be affected by the property's location, age and type of construction. Reidy admitted that "[he] did not make any determination as to market value of any of these [comparable] properties." N.T. at 64; R.R. at 394a. Because Reidy failed to establish current market values of the comparable properties, his study cannot

support Fisher's uniformity argument.³

Finally, Fisher argues that the Board increased the assessed values of his properties in recent years without any evidence that they had appreciated in value. The Board's record shows that the assessed value of the 807-809 N. Third Street property was \$26,240 in 2002, decreased to \$24,000 in 2004 and then increased to \$43,200 in 2005, \$59,200 in 2006 and \$68,000 in 2007. The assessed value of the 811 N. Third Street property was \$17,280 in 2002, decreased to \$16,000 in 2004 and increased to \$20,800 in 2005, \$30,400 in 2006 and \$48,000 in 2007. Solomon explained that the assessed market values of Fisher's properties had been increased in recent years as a result of "gradualism," a policy used by the Board "to soften the impact to the taxpayer by suppressing an increase, a significant one over several years." N.T. at 76, and 83-84; R.R. at 397a and 399a. Fisher complains that the Board's unwritten gradualism policy was applied to his properties selectively and "at a glacial pace." Fisher's Brief at 14.

To prove a violation of the uniformity requirement, Fisher was required to demonstrate that the Board deliberately discriminated against him in the application of tax or that the Board's action had a discriminatory effect. *City of Lancaster v. County of Lancaster*, 599 A.2d 289 (Pa. Cmwlth. 1991). Fisher does not dispute Solomon's testimony that the Board lowered the assessed market value of Fisher's properties when he asked the Board to give him "a break for another year." N.T. at 84; R.R. at 399a. Fisher benefited from the application of gradualism and failed to cite any evidence in the record indicating that the Board

³ Without citing any supporting authority, Fisher asserts that he should not be required to submit costly appraisals to establish current market values of the comparable properties because his income is only from Social Security benefits. As already discussed, however, the uniformity issue cannot be decided without evidence of current market value. *Albarano; Fosko*.

deliberately discriminated against him in its application of the gradualism policy, asserting only that it was “obvious.” Fisher's Brief at 14.

Because the record fails to support Fisher's uniformity argument, the order of the trial court is affirmed.

BONNIE BRIGANCE LEADBETTER,
President Judge

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ORDER

AND NOW, this 14th day of June, 2010, the order of the Court of Common Pleas of Philadelphia County in the above-captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge