

STATE OF MICHIGAN  
COURT OF APPEALS

---

HICKORY HOLLOW COOPERATIVE,  
  
Petitioner-Appellant,

UNPUBLISHED  
September 16, 2014

v

CITY OF WAYNE,

Respondent-Appellee.

---

No. 306022  
Tax Tribunal  
LC No. 00-277266

Before: FITZGERALD, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Petitioner appeals as of right from the Michigan Tax Tribunal's final opinion and judgment adopting the decision of a hearing referee and thereby dismissing petitioner's appeal of property tax assessments of petitioner's nonprofit housing cooperative property for tax years 2000 through 2011. We affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND AND PROCEDURAL HISTORY

Petitioner, a nonprofit corporation, owns a housing cooperative in respondent city of Wayne. The development was constructed in two phases under §§ 221(d)(3) and 236 of the National Housing Act, 12 USC 17151(d)(3), to provide housing for individuals through their membership in the corporation.<sup>1</sup> Both phases of the housing cooperative were subject to federal regulatory agreements during all tax years in question, the most recent of which was a flexible subsidy and use agreement entered into by petitioner and the United States Department of Housing and Urban Development in 2008 to enable petitioner to obtain federal approval of the prepayment of its §§ 221(d)(3) and 236 mortgages so that it could refinance the outstanding amounts due. The agreement requires that the housing cooperative continue to be operated to preserve housing for low and moderate income residents until July 1, 2038.

---

<sup>1</sup> Both programs provide federally-subsidized mortgage financing for nonprofit housing cooperatives. See *Forest Hills Coop v City of Ann Arbor*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket Nos. 305194 and 306479, issued June 12, 2014), slip op at 2 (§ 236 project), lv pending, and *Georgetown Place Coop v City of Taylor*, 226 Mich App 33, 36; 572 NW2d 232 (1997) (§ 221(d)(3) project).

This proceeding was initially filed in 2000 in the residential and small claim division of the Tax Tribunal. Petitioner initially filed a petition challenging the assessed and taxable values of the parcels for tax year 2000. The case was held in abeyance pending resolution of other cases involving nonprofit cooperative housing. In 2009, the case was transferred from the small claims division to the entire tribunal. In July 2010, the Tax Tribunal ordered the parties to file and exchange valuation disclosures by April 15, 2011, as part of an order placing this case on the prehearing general call commencing July 15, 2011. As the case approached the prehearing general call, it had expanded to include appeals of the tax assessments for tax years 2000 through 2011.

Respondent filed a valuation disclosure dated April 15, 2011, reflecting its contention that a sales approach to value would constitute the most reliable indicator of value, while petitioner refiled exhibits that it previously filed in 2008 in the small claims division as its valuation disclosure. Respondent moved for summary disposition under MCR 2.116(C)(8) and (10), arguing that petitioner had only offered an inapplicable income approach to valuation and, therefore, had not met its burden of proof under MCL 205.737(3). Petitioner opposed the motion, arguing in part that respondent was implicitly suggesting that the Tax Tribunal merely affirm the assessments on the tax rolls.

Respondent's motion was decided by a hearing referee who found that petitioner was pursuing the same income approach theory to valuation that had been rejected in other cases. The hearing referee also found deficiencies in petitioner's valuation disclosure, based on petitioner's failure to address all tax years through 2011 or to set forth valuation theories in the disclosure. Assuming that petitioner's "book value transfer" computations in the valuation disclosure were intended as a valuation theory, the hearing referee found them to be without merit. The hearing referee determined that petitioner could not meet its burden of proof under MCL 205.737(3). The hearing referee concluded that respondent's motion for summary disposition should be granted for failure to establish a genuine issue of material fact regarding valuation and for reliance on legal theories that were not legally valid, and that the appeal should be dismissed. After considering petitioner's exceptions to the hearing referee's decision, the Tax Tribunal adopted the hearing referee's decision.

## II. STANDARD OF REVIEW

The Tax Tribunal is required to review a hearing officer's or referee's proposed decision de novo. *President Inn Props, LLC v City of Grand Rapids*, 291 Mich App 625, 635-636; 806 NW2d 342 (2011). In the absence of fraud, we limit our review to whether the Tax Tribunal made an error of law or adopted a wrong principle. See Const 1963, art 6, § 28; *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 527-528; 817 NW2d 548 (2012). An error of law occurs where factual findings are not supported by competent, substantial, and material evidence on the whole record. *Forest Hills Coop v City of Ann Arbor*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket Nos. 305194 and 306479, issued June 12, 2014), slip op at 6, lv pending.

Issues of statutory construction and the Tax Tribunal's decision to grant a motion for summary disposition are both reviewed de novo. *Mich Props, LLC*, 491 Mich at 528 (statutory construction); *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 75; 780 NW2d 753 (2010) (summary disposition). The tribunal's decision whether to dismiss a case for failure to comply

with a tribunal rule or order is reviewed for an abuse of discretion. *Stevens v Bangor Twp*, 150 Mich App 756, 761; 389 NW2d 176 (1986).

### III. TRUE CASH VALUE

Petitioner argues as its sole issue that the Tax Tribunal committed an error of law and adopted a wrong principle by concluding as a matter of law that the net income and book value of a federally regulated housing cooperative can never be a reliable indicator of the property's true cash value. Substantively, however, petitioner presents several legal questions that go beyond the scope of the stated issue. Petitioner also failed to preserve its claim regarding the "book value transfer" computations by presenting this claim to the Tax Tribunal in its exceptions to the ALJ's decision. *Forest Hills Coop*, \_\_\_ Mich App at \_\_\_, slip op at 5. Nonetheless, we shall consider petitioner's arguments because they involve a question of law. *Id.*

This case involved a decision granting summary disposition under MCR 2.116(C)(8) and (C)(10). Because no tribunal rule addresses motions for summary disposition, review of such a motion is governed by MCR 2.116. See former TTR 111(4), Mich Admin Code, R 205.1111(4) (where an applicable rule does not exist, the Michigan Court Rules and the APA apply). A motion under MCR 2.116(C)(8) tests the legal basis of a claim based only on the pleadings. *PIC Maintenance, Inc v Dep't of Treasury*, 293 Mich App 403, 407; 809 NW2d 669 (2011). A motion under MCR 2.116(C)(10) tests the factual support for a claim and must be supported by documentary evidence. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Thus, where documents outside the pleadings are considered, the motion should be reviewed under MCR 2.116(C)(10). *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 457; 750 NW2d 615 (2008). A motion for under MCR 2.116(C)(10) should be granted if the evidence and all reasonable inferences arising therefrom, viewed in a light most favorable to the nonmoving party, establishes that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Walgreen Co v Macomb Twp*, 280 Mich App 58, 62; 760 NW2d 594 (2008). In reviewing the motion, "a court may not weigh the evidence before it or make findings of fact; if the evidence before it is conflicting, summary disposition is improper." *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 435-436; 566 NW2d 661 (1997).

In this case, although the hearing referee cited both MCR 2.116(C)(8) and (C)(10) as a basis for granting respondent's motion for summary disposition, because the hearing referee referred to and relied on evidence outside the pleadings, review is appropriate under MCR 2.116(C)(10). The hearing referee also found a violation of former TTR 101(1)(m) and ultimately concluded that dismissal was warranted. The Tax Tribunal adopted the hearing referee's decision granting summary disposition and dismissing the appeal, but indicated that it was "incorporating by reference the Findings of Fact, as corrected herein, and Conclusions of Law in the Proposed Order."

Former TTR 101, Mich Admin Code, R 205.1101, is merely a definitional rule. Subsection (1)(m) defined "valuation disclosure" as "documentary or other tangible evidence in a property tax appeal which a party relies upon in support of the party's contention as to the true

cash value of the subject property or any portion thereof and which contains the party's value conclusions and data, valuation methodology, analysis, or reasoning in support of the contention. See also R 205.1252 and R 205.1283."<sup>2</sup> But former TTR 252, Mich Admin Code, R 205.1252(1) provided in relevant part that "[a] party's valuation disclosure in a property tax appeal shall be filed with the tribunal and exchanged with the opposing party as provided by order of the tribunal."

Under former TTR 247(4), Mich Admin Code, R 205.1247(4), "[f]ailure of a party to properly prosecute the appeal, comply with these rules, or comply with an order of the tribunal is cause for dismissal of the appeal[.]" But before imposing a sanction of dismissal, the Tax Tribunal should consider several factors, including whether the petitioner's violation was willful, the petitioner's history of noncompliance with a rule or order, prejudice to the respondent, whether the petitioner had a history of deliberate delay, the degree of the petitioner's noncompliance, the petitioner's attempt to cure the defect, and whether a lesser sanction would better serve the interests of justice. *Grimm v Dep't of Treasury*, 291 Mich App 140, 149; 810 NW2d 65 (2010).

When considering the sanction of dismissal, the record should reflect that the Tax Tribunal "gave careful consideration to the factors involved and considered all its options in determining what sanction was just and proper in the context of the case before it." *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999) overruled in part on other grounds in *Dimmitt & Owens Fin, Inc v Deloitte & Touche (ISC), LCC*, 481 Mich 618, 628; 752 NW2d 37 (2008). [*Grimm*, 291 Mich App at 150.]

In this case, the Tax Tribunal ordered the parties to file and exchange valuation disclosures by April 15, 2011. Petitioner refiled exhibits that were previously filed in 2008, while the case was pending in the small claims division, as its valuation disclosure. It is apparent from the hearing referee's decision that the referee found petitioner's valuation disclosure insufficient to satisfy the definition of a "valuation disclosure" in former TTR 101(1)(m). The hearing referee determined that a petitioner may not merely allege that an assessment is excessive, but must disclose its valuation theories and support its contentions of value. The hearing referee criticized petitioner's filing because it did not contain an income, sales comparison, or cost approach to value, and it did not constitute an "appraisal" as defined in appraisal literature. To the extent that the hearing referee's order of dismissal may have been intended as a sanction for filing a nonconforming valuation disclosure, review under the standards applicable to such sanctions, as well as the standards for summary disposition, is appropriate.

Petitioner's specific claim on appeal is that the hearing referee effectively determined as a matter of law that its income approach was not relevant to a determination of the true cash

---

<sup>2</sup> The current definition of "valuation disclosure" is in TTR 237, Mich Admin Code, R 792.10237.

value<sup>3</sup> of a nonprofit housing cooperative. We find no merit to this argument because petitioner failed to include an income approach in its May 6, 2011 valuation disclosure, or in its response to respondent's motion for summary disposition. Petitioner was required to set forth specific facts in support of its valuation method when responding to respondent's motion for summary disposition. See *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). Petitioner also failed to include an income approach to value in its exceptions to the hearing referee's decision that were filed with the Tax Tribunal. It is apparent, however, that the Tax Tribunal considered the nature of the actual income and expenses incurred by petitioner as a federally regulated nonprofit housing cooperative when addressing the exceptions and adopting the hearing referee's proposed decision. Although we agree with petitioner that actual income is a factor to consider in determining the true cash value of property valued as a federally regulated nonprofit housing cooperative, the Tax Tribunal did not commit an error of law or adopt a wrong principle in determining that there is no mandate that a nonprofit housing cooperative be assessed under a capitalization-of-income approach to value. *Forest Hills Coop*, \_\_\_ Mich App at \_\_\_, slip op at 13-14; see also *Meadowlanes Ltd Dividend Housing Ass'n v City of Holland*, 437 Mich 473, 484; 473 NW2d 636 (1991) (“[t]he Legislature did not direct that specific methods be used”).

In addition, the Tax Tribunal has the authority to exclude a party's valuation evidence as irrelevant or immaterial. See former TTR 283, Mich Admin Code, R 205.1283. Considering petitioner's failure offer evidence of a capitalization-of-income or some other income-based approach to value the property, the Tax Tribunal did not commit an error of law or adopt a wrong principle in adopting the hearing referee's summary disposition ruling under MCR 2.116(C)(10) with respect to petitioner's proposed valuation methodology.

We are not persuaded that the “book value transfer” computations in petitioner's valuation disclosure precluded summary disposition with respect to petitioner's proposed valuation methodology. The computations contain no reasoning explaining why they are a reliable indicator of value. Further, nothing in the valuation disclosure indicates that petitioner was relying on the computations as its contention of value, nor did petitioner file an exception to the hearing referee's decision on the basis of these computations. Regardless, the hearing referee's rejection of the transfer approach is consistent with this Court's determination in *Forest Hills Coop*, \_\_\_ Mich App at \_\_\_, slip op at 17-18, that the petitioner there failed to establish that the Tax Tribunal adopted a wrong principle by not using a proposed “transfer value” approach because the consideration a person pays as the “transfer value” to acquire the right to occupy a unit does not bear a relationship to fair market value. Given petitioner's failure to establish that it presented evidence of a valuation methodology that was relevant to the

---

<sup>3</sup> MCL 211.27(1) defines “true cash value” in part, as “the usual selling price at the place where the property to which the term is applied is at the time of assessment, being the price that could be obtained for the property at private sale, and not at auction sale except as otherwise provided in this section, or at forced sale.” It essentially means fair market value. *Forest Hills Coop*, \_\_\_ Mich App at \_\_\_, slip op at 6; *Pontiac Country Club v Waterford Twp*, 299 Mich App 427, 434; 830 NW2d 785 (2013).

determination of true cash value, we uphold the Tax Tribunal's grant of summary disposition pursuant to MCR 2.116(C)(10) with respect to this issue.

We agree with petitioner, however, that the Tax Tribunal committed an error of law to the extent that it was determined that the appropriate disposition of the case for the failure of petitioner's proofs was dismissal. Although MCL 205.737(3) imposes a burden on the petitioner to establish true cash value, the Tax Tribunal also has a duty to independently determine the true cash value of property. See MCL 205.735(2) (proceedings commenced before January 1, 2007) and MCL 205.737a(2) (proceedings commenced after December 31, 2006); *Great Lakes Div of Nat'l Steel Corp v City of Ecorse*, 227 Mich App 379, 409; 576 NW2d 667 (1998). "[T]he Tax Tribunal has the overall duty to determine the most accurate valuation under the individual circumstances of the case." *President Inn Props, LLC*, 291 Mich App at 631. It may "adopt the assessed valuation on the tax rolls as its independent finding of true cash value when competent and substantial evidence supports doing so, as long as it does not afford the original assessment presumptive validity." *Pontiac Country Club v Waterford Twp*, 299 Mich App 427, 435-436; 830 NW2d 785 (2013). The mere fact that a petitioner's proofs fail does not relieve the Tax Tribunal of its duty to make an independent determination of true cash value. *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 355; 483 NW2d 416 (1992).

We reject respondent's argument that the Tax Tribunal adopted the assessments on the tax rolls as its independent determination of true cash value. Although the hearing referee indicated in his proposed decision that he had determined from a review of property record cards that the assessment were based on the cost-less-depreciation approach to value approved by the State Assessor's Manual, the only property record cards filed with respondent's valuation disclosure were computer-generated documents printed on April 15, 2011, containing current assessment information. Respondent's valuation disclosure also contained a valuation computation for tax year 2011 under the cost-less-depreciation approach that differed from the information in the property tax card. Respondent also presented a sales approach to value, which it claimed was the most reliable indicator of value, but the tribunal did not address that evidence. And while the hearing referee ultimately found that petitioner failed to establish a genuine issue of material fact, the hearing referee did not make any determination of true cash value. Rather, the hearing referee proposed that the appeal be dismissed.

We conclude that the Tax Tribunal committed an error of law by adopting the hearing referee's decision to dismiss the petition. To the extent that the hearing referee's concern was that the documents filed by petitioner as its "valuation disclosure" did not satisfy the definition in former TTR 101(1)(m), it should have determined whether dismissal for this deficiency was an appropriate sanction under the standards in *Grimm*, 291 Mich App at 149-150. Conversely, to the extent that the hearing referee's concern involved the failure of petitioner's proofs, the Tax Tribunal committed an error of law in adopting the hearing referee's proposed opinion and judgment because the tribunal still had a duty to make an independent determination of true cash value. *Jones & Laughlin Steel Corp*, 193 Mich App at 355.

In sum, we hold that the Tax Tribunal did not commit an error of law or adopt a wrong principle in rejecting petitioner's valuation evidence and granting summary disposition in favor of respondent with respect to that issue. But because the tribunal failed to properly apply the law in dismissing the petition, we reverse the order of dismissal and remand for further proceedings.

The tribunal shall determine whether dismissal is an appropriate sanction for the deficiencies in petitioner's valuation disclosure in light of all relevant considerations, see *Grimm*, 291 Mich App at 149-150, and, if dismissal is not ordered, make an independent determination of the true cash value of the property and decide any related issues for all tax years that are the subject of the petition.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Elizabeth L. Gleicher

/s/ Amy Ronayne Krause