TAX COURT OF NEW JERSEY

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Judge

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THE TAX COURT COMMITTEE ON OPINIONS

Corrected November 23, 2015 – fn. 1

November 20, 2015

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Re: Vaccaro v. Ho-Ho-Kus
Docket No. 011205-2013

Gentlemen:

This letter constitutes the court's opinion after trial in the above-referenced matter challenging the 2013 tax year assessment on plaintiff's single-family residence. For the reasons stated more fully below, the assessment is affirmed.

I. Procedural History and Factual Findings

The court makes the following findings of fact based on the evidence and testimony offered at trial in this matter. George A. Vaccaro and Ethel A. Vaccaro ("plaintiff") are the owners of the single-family home located at 14 Normandy Court, Borough of Ho-Ho-Kus, County of Bergen and State of New Jersey. The property is identified on the tax map of the Borough of Ho-Ho-Kus

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as Block 301, Lot 1.07, Unit CU 007 (the "subject property"). For the 2013 tax year, the subject property was assessed as follows:

Land:	300,000
Improvements:	569,400
Total	869,400

The average ratio of assessed to true value, commonly referred to as the Chapter 123 ratio, for the Borough of Ho-Ho-Kus ("defendant") for the 2013 tax year was 92.28%, making the implied equalized value of the subject property $942,133. Plaintiff filed a petition of appeal with the Bergen County Board of Taxation (the "Board") challenging the assessment on the subject property. The Board entered a Memorandum of Judgment ("Judgment") affirming the assessment without prejudice.

Plaintiff timely filed a Complaint in Tax Court contesting the Board's Judgment. The matter was tried to conclusion on November 10, 2015. Plaintiff George Vaccaro is a licensed New Jersey attorney and proceeded as a self-represented litigant. Plaintiff did not present the testimony of an expert, but did offer testimony as to "comparables." Defendant 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 "borough's expert"). The borough's expert prepared an appraisal report, which was admitted into evidence, without objection.

The subject property is a townhouse style property, containing 3,548 square feet, including three bedrooms and three and one-half bathrooms, a fireplace, a partially-finished basement, a two-car garage and a rear patio. The subject property is part of the Normandy Court Townhouse Complex (the "Complex"), which is a relatively small townhome community consisting of twenty four units.

Plaintiff provided testimony as to "comparable sales" of units in the Complex, as well as testimony as to the sale of a single-family detached dwelling located on a lot contiguous to the

Complex. The borough's expert used the comparable sales approach to value the subject property as of October 1, 2012, the appropriate valuation date. Plaintiff's evidence tended to support a conclusion that the assessment of the subject property was not correct. The borough's expert offered his opinion that the true market value of the subject property was $900,000.

II. Claim for Reimbursement pursuant to N.J.S.A. 40:67-23.2, et seq.

In certain correspondence sent to the court prior to the trial date in this matter, there was an indication that plaintiff would pursue a claim for reimbursement under N.J.S.A. 40:67-23.2, et seq. The referenced statute provides for the reimbursement to certain "qualified private communities" by municipalities for the cost of certain services performed by the private communities which are ordinarily performed by municipalities. Plaintiff neither included such a claim in the complaint filed in this matter, nor moved to amend the complaint to include such a claim prior to trial.

Prior to hearing testimony on the issues, the court questioned whether a claim pursuant to N.J.S.A. 40:67-23.2 was properly before this court—both because it had not been pleaded in the complaint filed in this action and because such a claim may not be within the limited jurisdiction of the tax court.

Plaintiff candidly admitted that the issue was not pleaded in the complaint but maintained that it was properly before the court because defendant was aware of his intention to try that claim by virtue of correspondence he had sent to the assessor. Plaintiff maintained that as he had sent correspondence to the assessor regarding the application of N.J.S.A. 40:67-23.2, that it was simply "pro forma" that it had not been included in the complaint.

The court notes that no motion to join the issue was ever made before this court. The correspondence plaintiff sent to the assessor was sent pre-suit and does not make any claim for reimbursement. Instead, that correspondence asks the assessor to consider that "sales at [the]

complex are at best very sluggish due to the substantial costs of maintenance" when reviewing his claim that his assessment should be reduced.

Correspondence to the court dated February 10, 2015, does mention the "Kelly Reimbursement Act" but does not clarify that plaintiff intended to make a claim thereunder. In fact, the court's review of plaintiff's correspondence leads one to believe only that plaintiff's position was that the Complex's provision of services ordinarily performed by the municipality had an impact on value. Plaintiff's correspondence neither constitutes a motion to amend the complaint, nor makes clear plaintiff's intention to pursue any claim other than a valuation appeal.

Thereafter, on October 19, 2015, plaintiff submitted a pretrial memorandum in which plaintiff set forth various alleged facts to the effect that the Complex assumed the obligation to provide certain services ordinarily performed by the municipality and maintained that plaintiff was not making a claim on behalf of Normandy Court Association for reimbursement of expenses, but for his 1/24 of the costs incurred for the period of August 8, 1998 through December 31, 2015.

Defendant thereafter submitted a letter memorandum in which it maintained that plaintiff's complaint did not include any claim for reimbursement under the statute in question and that the tax court's jurisdiction did not include a claim raised under N.J.S.A. 40:67-23.2.

Rule 8:3-8 provides that pleadings may be amended "at any time prior to the completion of the pretrial conference or, if there is no pretrial conference, at any time prior to the receipt of notice of the first date fixed for trial" and that "[a]mendment of the pleadings may be made thereafter only by motion for good cause shown."

At no time prior to the date of trial did plaintiff make a motion to amend the complaint to include a claim under N.J.S.A. 40:67-23.2. In fact, the only time plaintiff requested an amendment was after the court suggested one was necessary. Plaintiff argued that the complaint could be amended by the court on the trial date because the municipality was not prejudiced because it

knew, or should have known, that plaintiff intended to make a claim for reimbursement based on his prior correspondence to the tax assessor. The municipality counters that no discovery was had on the issue whatsoever and that the municipality's ability to defend such a claim was hampered as a result.

While the court notes that the plaintiff is a self-represented taxpayer, Mr. Vaccaro is a longstanding and respected member of the New Jersey Bar, associated with a well-respected firm. He did not claim that he was unware of the necessity of including a claim within his pleadings and candidly acknowledged the error while arguing that the error was excusable under the circumstances.

The court found that the plaintiff failed to plead any claim for reimbursement under N.J.S.A. 40:67-23.2 in plaintiff's complaint. Plaintiff made no motion to amend the complaint to include such a claim and only made an oral motion to do so once the court indicated that it did not believe the issue was properly before the court. Failure of the plaintiff to properly join the issue did prejudice the defendant municipality in its ability to defend the claim and to contest the propriety of the issue being pleaded before this court.[1] In light of the fact that the issue was not brought before the court until trial had opened and the questionability of the jurisdiction of this court to hear an issue under N.J.S.A. 40:67-23.2,[2] the court found that good cause was not shown to exist such that an oral motion to amend on the date of trial should be granted.

[1] Among other things, it appears that plaintiff's proofs consisted of the costs incurred by the Complex and not those incurred by the municipality to provide the services. See Stonehill Property Owners Ass'n v. Township of Vernon, 312 N.J. Super 68 (App. Div. 1998). Furthermore, it is doubtful that the statute confers a private right of action on a member of the qualified private community for reimbursement in light of the statute's requirement that reimbursement be used to provide the services by the community with any excess to be refunded. N.J.S.A. 40:67-23.5.

[2] The jurisdiction of this court is limited to the initial review of "all final decisions including any act, action, proceeding, ruling, decision, order or judgment including the promulgation of any rule or regulation of a County Board of Taxation, the Director of the Division of Taxation, any other state agency or official […] with respect to a tax matter […]. The Tax Court shall have initial jurisdiction to review those local property tax assessments when review is sought pursuant to N.J.S.A. 54:51A-2 […] The Tax Court shall also have jurisdiction over any action cognizable in the Superior Court that raises any issue as to which expertise in taxation is desirable and that has been transferred to the Tax Court pursuant to Rule 4:3-4(a).

Thereafter plaintiff proceeded to prosecute the valuation appeal set forth in plaintiff's complaint.

II. Valuation Evidence

In support of his claim, plaintiff testified as to three sales which he deemed comparable to the subject property, as follows:

Comparable sale one was located at 18 Normandy Court, Ho-Ho-Kus, NJ, a unit within the Complex. Plaintiff testified that comparable sale one was a corner unit, as opposed to the subject which was an "interior" unit, that he had been inside the unit, and that it was in a condition similar to that of the subject property. Comparable sale one sold for $716,000 on June 26, 2012. Plaintiff testified that comparable sale one was an exterior unit with "better ventilation" than the subject property and measured 200 square feet less than the subject property, but that it had "vaulted ceilings" which offset the difference in square footage.

On cross examination, plaintiff testified that he was not aware that the assessor had designated comparable sale one as non-usable because it was part of an estate sale, but conceded that the property was indeed sold as such. Plaintiff testified that he did not believe that this had any impact on the sales price of the property. He indicated that the sale was not a distressed sale and that it had been exposed to the market.

Comparable sale two, located within the Complex at 6 Normandy Court, sold on April 23, 2014 for $724,000. Plaintiff testified that it was an interior unit and was a "mirror image" of the subject property, except that the subject property had a partially finished basement which

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[Rule 8:2(a)]

As the court finds that plaintiff failed to properly join the issue in his complaint, the court does not reach the issue of jurisdiction before this court.

comparable sale two did not. On cross examination, plaintiff conceded that the sales price set forth in the deed was $730,000 and not $724,000 as he had testified.

Comparable sale three was a single-family detached ranch-style home on a one-acre parcel, with a swimming pool, that sold on November 15, 2012 for $712,000. Comparable sale three was located on a lot contiguous to the Complex.

At the close of plaintiff's testimony, defendant made a motion to dismiss plaintiff's complaint for failure to overcome the presumption of validity. The court denied defendant's motion finding that giving plaintiff's evidence every positive inference, his testimony presented a debatable question as to the correctness of the assessment.

Thereafter, defendant presented the evidence of a licensed NJ Real Estate Appraiser who was accepted by plaintiff without objection. Defendant's expert testified as to four comparable sales as follows:

Comparable sale one was located at 18 Normandy Court, Ho-Ho-Kus, NJ, the same comparable sale one presented by plaintiff, which sold on June 25, 2012 for $716,000. Defendant's expert made the following adjustments to comparable one:

Sales Price	$ 716,000
Total Living Area additional 173 square feet @$100.00 psf:	17,300
Basement 72 additional square feet @$10.00 psf:	(1,440)
Finished Basement 775 square feet @$20.00 psf:	7,750
Total Adjustments	$ 23,610
Adjusted Sales Price:	$ 739,610

Comparable sale two, located within the Complex at 17 Normandy Court, Ho-Ho-Kus, NJ, sold on September 9, 2010, for $965,000. Defendant's expert made the following adjustments to comparable sale two:

Sales Price:	$ 965,000
Total Living Area additional 364 square feet @$100 psf:	36,400
Basement 97 additional square feet @$10.00 psf:	(1,940)
Finished basement 775 square feet @$20.00 psf:	7,750
Total Adjustments:	$ 42,210
Adjusted Sales Price:	$1,007,210

Comparable sale three was located at 262 Barnstable Drive, Wyckoff, New Jersey, and sold on November 13, 2012 for $860,000. Defendant's expert made the following adjustments to comparable three:

Sales Price:	$ 860,000
Additional Bathroom @$15,000	15,000
Total Living Area 80 square feet less @$100 psf:	(8,000)
Basement 1,554 square feet @$20 psf:	31,080
Finished Basement - $775 square feet @$20.00 psf:	7,750
Elevator	(25,000)
Total Adjustments	$ 20,830
Adjusted Sales Price:	$ 880,830

Comparable sale four, located at 10 Normandy Court, Ho-Ho-Kus, NJ, again within the Complex, sold on July 24, 2014 for $999,999. Defendant's expert made the following adjustments to comparable four:

Sales Price:	$ 999,999
Basement 1,554 square feet @$20 psf:	31,080
Finished Basement - $775 square feet @$20.00 psf:	7,750
Total Adjustments	$ 38,830
Adjusted Sales Price:	$1,038,829[3]

[3] Defendant's expert report contained a $10,000 adjustment for a 2-car attached garage, but after questioning by the court acknowledged that no such adjustment was necessary and orally amended the report to reflect the foregoing adjustments.

Defendant's expert testified that all adjustments made were based both on his experience as well as the Marshall & Swift tables. Comparable sales one, two and three were all marked NU-10, but due to the infrequency of sales in the Complex, defendant's expert testified that he did consider the sales after verifying that each sale was properly exposed to the market. He further testified that with respect to comparable three, in his opinion Wyckoff is a similar town with similar housing stock and tax structure and he therefore considered the sale as comparable. In verifying the sales, defendant's expert testified that he spoke to the tax assessor and viewed the deeds of sale and consulted the "NJ multiple listing service." He also testified that he weighed all of the comparables equally in determining fair market value of the subject property.

Defendant's expert then testified that he did not consider plaintiff's comparable sale three (6 Normandy Court) because it was "so far out of the assessment date;" it had been listed as a nonusable sale (NU-4) by the tax assessor; that it was again listed for sale within eighteen months of the initial sale at a listing price $125,000 more than the comparable sale price; and that it was under contract of sale at the time of trial. Taking all of these factors into account he believed that the sale was not reliable and therefore did not consider it in coming to a conclusion of value.

Defendant's expert concluded that the fair market value of the subject property on the assessment date was $900,000.

III. Discussion

The court's analysis begins with the well-established principle that "[o]riginal 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 appealing taxpayer has the burden of proving that the assessment is erroneous." Pantasote Co. v. City of Passaic, 100 N.J. 408, 413 (1985) (citing Riverview Gardens v. North Arlington Borough,

9 N.J. 167, 174 (1952)). The evidence must be "definite, positive and certain in quality and quantity to overcome the presumption." Ibid.

The court finds that plaintiff produced sufficient evidence to overcome the presumption of correctness attached to the assessment. If taken as true, the facts upon which plaintiff relied created a debatable question about the correctness of the assessment. Giving the plaintiff's testimony every positive inference, the court concludes that the presumption of correctness has been overcome.

However, concluding that the presumption of validity has been overcome does not equate to a finding by the court that the assessment 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) (internal citations omitted). Accordingly, the court will then evaluate and weigh the evidence presented to determine if either party has met the requisite burden of persuading a change in the assessment.

With the exception of comparable sale one, plaintiff's proofs were not persuasive. Not only did comparable sale two occur almost nineteen months after the assessment date in question, the testimony of the defendant's expert about the circumstances surrounding that sale was persuasive such that the sale should not be considered. Additionally, plaintiff was unable to provide any testimony as to any necessary adjustments or their effect on value. Comparable sale three was a single-family ranch-style home for which no adjustments were made–nor could have been made–by plaintiff, who was not qualified as an expert. Furthermore, as defendant's expert testified, a single-family detached dwelling located on a one-acre lot is not comparable to a townhouse property and should not have been used to determine market value.

A transaction classified as non-usable may be considered "if after full investigation it clearly appears that the transaction was a sale between a willing buyer, not compelled to buy, and a willing seller, not compelled to sell, and that it meets all other requisites of a usable sale." N.J.A.C. 18:12-1.1(b). See Pepperidge Tree Realty Corp. v. Kinnelon Borough, 21 N.J. Tax 57, 67 (Tax 2003). The court found that plaintiff's testimony as to the facts surrounding comparable sale one overcame the potential issues of the sale being designated NU-10 by the tax assessor and thus could be considered.

As noted, the court found that the evidence submitted by plaintiff with respect to his comparable sale one was credible; however, plaintiff was not qualified to make adjustments to that sale to account for the differences between the properties, which he candidly admitted existed. Although the court found that plaintiff's testimony was sufficient to overcome the presumption of correctness, plaintiff did not submit testimony upon which the court could have concluded value; without more, the court would not have been in a position to determine the value of the subject property.

Thereafter, however, defendant's expert testified and provided credible evidence upon which this court could make a determination of value. Our Supreme Court has recognized that "[t]he Tax Court has not only the right, but the duty to apply its own judgment to valuation data submitted by experts in order to arrive at a true value and find an assessment for the years in question." Glen Wall Assocs. v. Twp. of Wall, 99 N.J. 265, 280 (1985) (citing New Cumberland Corp. v. Roselle, 3 N.J. Tax, 345, 353 (Tax 1981)).

Defendant's expert supplied several comparables to which adjustments were made. He testified that he relied both on his experience and data supplied by Marshall and Swift to support the adjustments made. The court finds the adjustments reasonable and supported by the evidence.

Both plaintiff and defendant's expert presented testimony as to post-assessment date sales. As noted, plaintiff presented information regarding 6 Normandy Court, which sold some eighteen months after the assessment date. Defendant's expert testified that he did not rely on the sale for the reasons expressed above, including the fact that it was listed NU-4 ("Transfers of convenience; for example, for the sole purpose of correcting defects in title, a transfer by a husband either through a third party or directly to himself and his wife for the purpose of creating a tenancy by the entirety, etc…" N.J.A.C. 18:12-1.1(a)(4)). Plaintiff presented no evidence that the designation was not correctly asserted, and the court therefore is unable to determine whether the transaction was, in fact, a usable sale. See Pepperidge Tree Realty, supra, 21 N.J. Tax at 67. The court finds that defendant's expert correctly excluded that sale from his considerations.

Due to the paucity of sales of units in the complex, defendant's expert relied on sales that were both prior to and after the assessment date to support his opinion of value. Both of those transactions were for units within the same townhouse complex as the subject property for units that were similar, although not identical to the subject. Appropriate adjustments were made for the dissimilarities. These adjustments were relatively minor, ranging from 4.37% to 4.88% for net adjustments and 4.8 to 4.9% on a gross adjustment basis. No adjustment was made for time because the assessor opined that the market did not warrant such an adjustment.

The trial court may, in its discretion, allow comparable sales occurring after the date of valuation. New Jersey courts have considered the issue of comparable sales after a date of valuation in terms of remoteness. Rek Inv. Co. v. City of Newark, 80 N.J. Super. 552, 560 (App. Div. 1963) (sale of subject property two months after assessment date "entitled to great weight"); Samuel Hird & Sons, Inc. v. City of Garfield, 87 N.J. Super. 65, 70–71 (App. Div. 1965) (sale eight and a half months after assessing date considered); Almax Builders, Inc. v. City of Perth Amboy, 1 N.J. Tax 31, 37 (Tax 1980) (sale seven months after assessing date "admitted for its

rational probative valuation inference"); Glen Wall Assocs. v. Twp. of Wall, supra, 99 N.J. at 283 (holding a sale less than three months after assessment date as an indicator of value). While defendant's expert's comparable sale four occurred some twenty-one months after the assessment date, it is corroborative of the value of the subject property. See Borough of Little Ferry v. Vecchiotti, 7 N.J. Tax 389, 398 (Tax 1985) (noting that "unless a subsequent event is clearly barred by considerations such as remoteness in time or location, or is virtually totally dissimilar to the property in question, the mere fact that it took place subsequent to the assessment date should not bar it from consideration in the valuation process"); see also Borough of Fort Lee v. Invesco Holding Corp., 3 N.J. Tax 332, 340–42 (Tax 1981) (explaining that subsequent events should not be used as direct evidence of value, but can be used to corroborate an opinion independently arrived at and based on facts known or reasonably ascertainable as of the assessment date); and see Almax Builders, supra, 1 N.J. Tax at 37 (applying the concept of relevance to such sales and concluding that "[s]o long as a proffered sale is not remote, the sale should be admitted for its rational probative valuation inference").

IV. Conclusion

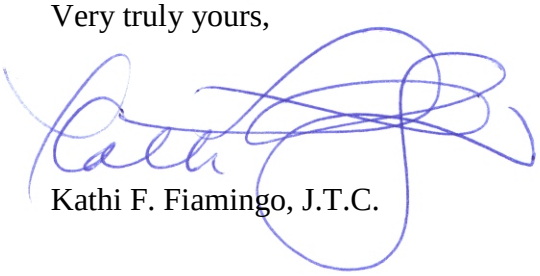
The court finds, based on the evidence before it, that the fair market value of the subject property on the assessment date was $900,000.

Having reached a conclusion of the true market value of the subject property, the court will turn its attention to a determination of the correct assessment for the 2013 tax year. Under N.J.S.A. 54:51A-6(a), commonly referred to as Chapter 123, when the court is satisfied in a non-revaluation year by the evidence presented "that the ratio of the assessed valuation of the subject property to its true value exceeds the upper limit or falls below the lower limit of the common level range, it shall enter judgment revising the taxable value of the property by applying the average ratio to the true value of the property..." N.J.S.A. 54:51A-6(a). This process involves application of the

Chapter 123 common level range. N.J.S.A. 54:1-35a(b). The Chapter 123 common level range for the Borough of Ho-Ho-Kus for the 2013 tax year has a lower limit of 78.44% and an upper limit of 100%. The ratio of assessed value, $869,400, to true market value, $900,000, is 96.6%, which is positioned between the lower limit and upper limit of the Chapter 123 common level range for the year in question. Consequently, because the ratio does not exceed the upper limit of the common level range, plaintiff is not entitled to relief from the 2013 tax year assessment.

The assessment is affirmed and plaintiff's complaint is dismissed. Judgment will be entered accordingly.

Very truly yours,



Kathi F. Fiamingo, J.T.C.