TAX COURT OF NEW JERSEY

Joshua D. Novin
Judge

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NOT FOR PUBLICATION WITHOUT THE APPROVAL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

December 19, 2016

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Re: Elizabeth City v. Hartz Elizabeth, Inc.
Docket No. 003107-2016

Dear Mr. Leonard and Mr. Blau:

This letter constitutes the court's opinion on defendant's motion on short notice, under R. 1:9-2 and R. 4:10-3, for a Protective Order quashing plaintiff's Subpoena Duces Tecum issued to Investors Bank. For the reasons explained more fully below, the defendant's motion for a Protective Order is granted, in part, and denied, in part.

## I. Procedural History and Findings of Fact

In accordance with R. 1:7-4(a), the court makes the following findings of fact based upon the certifications and exhibits submitted by the parties.

Defendant, Hartz Elizabeth, Inc. ("defendant"), is the owner of the real property and improvements commonly known as 63-265 Bay Avenue, in the City of Elizabeth, County of Union and State of New Jersey (the "subject property").

On March 14, 2016, the City of Elizabeth ("plaintiff"), instituted this local property tax appeal challenging the 2016 tax year assessment on the subject property. Plaintiff's Complaint asserts that the 2016 tax year local property tax assessment is "less than the true or assessable value" of the subject property and that "plaintiff is discriminated against" by virtue of the 2016 tax year assessment.

In order to appreciate the context of defendant's motion, it is necessary to briefly delve into certain bank financing transactions engaged in by defendant. On or about May 29, 2015, defendant executed a Note in the sum of $35,000,000 in favor of Investors Bank (the "Note"). The Note was secured by a Mortgage against the subject property in the amount of $35,000,000, also in favor of Investors Bank (the "Mortgage"). In connection with said transaction, Investors Bank commissioned an appraiser to prepare an appraisal report for the subject property (the "Appraisal Report"). The Appraisal Report is dated February 12, 2015, however it has an effective date of February 6, 2015.

On or about July 6, 2016, plaintiff's counsel issued a Subpoena Duces Tecum to Investors Bank seeking production of the following: "[a]ll real estate appraisals, income and expense statements and rent rolls. . . associated with the mortgage for $35,000,000 placed on the properties known as 63-265 Bay Avenue, Elizabeth, New Jersey. . . The mortgage with Hartz Elizabeth, Inc. was executed on May 29, 2015 and is recorded in Book 13938 Page 0786 in the Union County New Jersey, registrar's office" (the "Subpoena").

On September 28, 2016, defendant moved on short notice, under R. 1:9-2 and R. 4:10-3, to quash the "subpoena duces tecum to Investors Bank in part." Thereafter, both defendant's counsel and plaintiff's counsel requested several adjournments of the return date of the motion.

On December 16, 2016, the court heard oral argument from counsel. During oral argument defendant's counsel clarified that he seeks to quash the Subpoena in its entirety. However, in the

alternative, he seeks an order allowing defendant to redact those portions of the Appraisal Report which relate to the appraiser's opinions and conclusions of value for the subject property. Moreover, defendant's counsel acknowledged possession of the Appraisal Report that is the subject matter of the Subpoena.

In support of its motion to quash the Subpoena, defendant advances four principal arguments: (1) the Appraisal Report is "singularly irrelevant [requiring] that this entire Subpoena. . . be quashed to prevent future fishing expeditions such as this that waste the court's time"; (2) because the Appraisal Report employs a "leased fee method" for valuing the subject property, this matter "is 'on all fours'" with the court's recent unreported decision in the matters Berkeley Heights Township v. Connell Corporate Center I, LLC, Docket Nos. 009767-2011, 003453-2013, 003237-2014 and Berkeley Heights Township v. The Connell Company, Docket Nos. 009765-2011, 003456-2013, 003168-2014, and that defendant should be permitted to "redact 'those portions of the [Appraisal] which relate to the author's opinions or conclusions of value of the property'"; (3) the Appraisal Report was prepared on February 12, 2015, approximately eight months prior to the October 1, 2015 valuation date involved herein, and "for purposes of a financing transaction, not for purposes of this or any other litigation" and thus, will not reasonably lead to the discovery of admissible evidence; and (4) although defendant's "Income and Expense Statements and Rent Rolls. . . are subject to discovery," plaintiff "has made no showing that the Income and Expense Statements and Rent Rolls in defendant's possession. . . are any different than those held by Investors Bank."

In its opposition brief to the court, plaintiff argues that it would be "unduly burdensome to require Investors Bank to do anything more than produce" the Appraisal Report and concedes that "the City has no objection to having the defendant redact the appraiser's conclusion of value before producing the appraisal." However, during oral argument plaintiff's counsel advised the court that

he reformed his position, instead asserting that the Appraisal Report and conclusions reached thereunder are admissible fact evidence thereby compelling its production in an unaltered form. Moreover, because defendant has failed to produce any discovery responsive to plaintiff's discovery demands, the court should permit discovery of defendant's rent rolls, leases and income and expense statements by requiring Investors Bank to produce them in response to the Subpoena.

## II. Conclusions of Law

The court's analysis begins with a principle that is axiomatic, the Tax Court is a court of limited jurisdiction. N.J.S.A. 2B:13-2. As our Supreme Court observed, the narrow jurisdiction of the Tax Court is "defined by statute. . . It is against this comprehensive mosaic of procedural safeguards -- one with which continuing strict and unerring compliance must be observed." McMahon v. City of Newark, 195 N.J. 526, 529 (2008). Here the court is charged with the responsibility, based upon the sufficiency of the evidence to be presented at trial, to make a determination of the true market value of the subject property as of October 1, 2015 valuation date.

As construed by applicable case law, a presumption of validity attaches to original tax assessments and judgments of the county boards of taxation. MSGW Real Estate Fund, LLC v. Borough of Mountain Lakes, 18 N.J. Tax 364, 373 (Tax 1998); Riverview Gardens, Section One, Inc. v. North Arlington, 9 N.J. 167, 174-175 (1952); Aetna Life Insurance Co. v. Newark City, 10 N.J. 99, 105 (1952); Pantasote Co. v. City of Passaic, 100 N.J. 408, 413 (1985). Based on this presumption, the appealing party bears "the burden of proving that the assessment is erroneous." Pantasote Co., supra, 100 N.J. at 413 (citing Riverview Gardens, supra, 9 N.J. at 174). The presumption is not an evidentiary device functioning "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." Pantasote Co.,

supra, 100 N.J. at 413 (quoting Powder Mill, I Assocs. v. Hamilton Township, 3 N.J. Tax 439 (Tax 1981)).

A litigant can only surmount this presumption of validity by introducing "cogent evidence" of true value — that is, evidence "definite, positive and certain in quality and quantity to overcome the presumption." Aetna Life Insurance Co., supra, 10 N.J. 99, 105 (1952). Thus, the appealing party shoulders the burden of presenting the court with credible evidence "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 Properties, 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)).

A. Pretrial Discovery

To afford litigants the opportunity to meet the burdens imposed upon them, our court rules favor "broad pretrial discovery." Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 535 (1996) (citing Jenkins v. Rainner 69 N.J. 50, 56 (1976)). See also Shanley & Fisher, P.C. v. Sisselman, 215 N.J. Super. 200, 215-216 (App. Div. 1987). A party may obtain discovery which "appears reasonably calculated to lead to the discovery of admissible evidence" pertaining to the cause of action. In re: Liquidation of Integrity Ins. Co., 165 N.J. 75, 82 (2000). The court rules afford litigants the right to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . ." R. 4:10-2(a). While not explicitly defined by our court rules, "relevant evidence" is defined as "evidence having any tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401. However, the relevancy of documents and materials is not predicated upon their admissibility at trial, instead it is founded upon whether the information sought is "reasonably calculated to lead to admissible evidence respecting the cause of action or its defense." Pressler & Verniero, Current

New Jersey Rules Governing the Courts, comment 1 on R. 4:10-2(a) (2016). Thus, disclosure of inadmissible evidence is nonetheless required "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." R. 4:10-2(a). See also Irval Realty Inc. v. Board of Public Utility Commissioners, 115 N.J. Super. 338, 346 (App. Div. 1971), aff'd, 61 N.J. 366 (1972); Berrie v. Berrie, 188 N.J. Super. 274, 278 (Ch. Div. 1983). Information which bears even a remote relevance to the subject matter of a cause of action is discoverable, if it is reasonably likely to lead to discovery of admissible evidence.

B. Motion to Quash

Although it is well-settled law that discovery should be liberally granted, the scope of pretrial discovery is not limitless. Meandering expeditions which seek irrelevant, oppressive or burdensome discovery are not permitted. "The discovery rights provided by our court rules are not instruments with which to annoy, harass or burden a litigant or a litigant's experts." Gensollen v. Pareja, 416 N.J. Super. 585, 591 (App. Div. 2010). R. 1:9-2 permits the court "on motion made promptly [to] quash or modify the subpoena or notice if compliance would be unreasonable or oppressive. . ." R. 1:9-2. See also In re: Grand Jury Proceedings of Guarino, 104 N.J. 218 (1986); In re Addonizio, 53 N.J. 107 (1968); In re Grand Jury Subpoenas Duces Tecum Served by Sussex County, 241 N.J. Super. 18 (App. Div. 1989).

Additionally, R. 4:10-3 allows a litigant or the person from whom discovery is sought to obtain relief from the court to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . ." R. 4:10-3. Our court rules afford trial courts expansive authority in discovery matters, including directing that discovery not be had — limiting the scope of discovery to certain information — establishing specified terms and conditions for discovery — by prescribed methods — and in the presence of only designated individuals. See R. 4:10-3(a) and 3(d). The determination of what discovery request is reasonable and relevant, and what

constitutes an annoying, embarrassing, oppressive or unduly burdensome request, must be measured by the trial court on a case-by-case basis. Berrie, supra, 188 N.J. Super. at 278.

1. Appraisal Report

The Subpoena seeks production of "[a]ll real estate appraisals, income and expense statements and rent rolls" associated with the Mortgage placed against the subject property. In this action, the central issue facing the court is the true market value of the subject property as of the October 1, 2015 valuation date. Here, the Appraisal Report was completed on February 12, 2015, and thus offers a window into the subject property's physical and financial condition, including the appraiser's conclusions and opinions of its true market value, as of a date approximately eight months prior to the October 1, 2015 valuation date.

a. Leased Fee

Defendant argues that the opinions and conclusions of the appraiser, contained in the Appraisal Report, should not be discoverable because the appraiser employed a leased fee analysis to value the subject property. A leased fee appraisal report values the "ownership interest held by the lessor, which includes the right to the contract rent specified in the lease plus the reversionary right when the lease expires." Appraisal Institute, The Appraisal of Real Estate 72 (14th ed. 2013). Because the leased fee approach is influenced by the leasehold interest and the stream of rental income, it is not often an independent reliable indicator of true or fair market value. Thus, defendant maintains that because the Appraisal Report employs a leased fee approach, the opinions and conclusions of the appraiser contained therein are not reasonably likely to lead to the discovery of admissible evidence. Accordingly, defendant asks the court to quash the Subpoena in its entirety, or enter a Protective Order allowing defendant to redact those portions of the Appraisal Report which relate to the author's opinions or conclusions of value of the subject property.

In support this position, defendant relies upon the court's recent unpublished decision in Berkeley Heights Township v. Connell Corporate Center I, LLC, Docket Nos. 009767-2011, 003453-2013, 003237-2014 and Berkeley Heights Township v. The Connell Company, Docket Nos. 009765-2011, 003456-2013, 003168-2014.[1] In Connell the parties exchanged their trial appraisal reports and, at their request, the trial date was briefly adjourned to allow depositions of fact witnesses. A deposition notice served on the taxpayer's Chief Financial Officer sought production of "[c]opies of any and all appraisal reports prepared from 2008 to 2015 with regard to the subject properties." Taxpayer's counsel advised counsel for the taxing district that an appraisal report was commissioned by the taxpayer's mortgage lender during the applicable time period, however the report was a "leased fee appraisal" and was not prepared for trial purposes. Therefore, it was taxpayer's counsel's "position that the report is not discoverable." Ultimately, taxpayer's counsel moved before the court for a protective order quashing the duces tecum portion of the deposition notice. The court observed that appraisal reports contain detailed data and information about the composition, income, expenses, environmental condition and use of the property for which the report was prepared, including its surrounding area. This type of information is routinely relied upon by our courts in making determinations of true market value of property. Although the court concluded in Connell that the appraisal report "may not buttress the opinions of the experts," disclosure of the appraisal report "may render factual information [upon which the experts' opinions were premised inaccurate,] which is probative to issues which are to be tried in these appeals." Thus, the court concluded that the factual information, property data and sources of data relied upon by the report's author, including tenant and lease information and income and

[1] The court acknowledges that "[n]o unpublished opinion shall constitute precedent or be binding upon any court." R. 1:36-3. However, because the Connell opinion was so heavily briefed and relied upon by defendant's counsel, the court finds it necessary to address the court's unpublished holding in Connell.

expense data were directly relevant to the subject matter of the action and were likely to lead to the discovery of admissible evidence. However, because the parties had already exchanged their trial appraisal reports, which laid out their experts' opinions of the fee simple value of the property, the court determined that those portions of the lending institution's appraisal report which offered the appraiser's leased fee analysis of value of the property were not relevant, and would not likely lead to the discovery of admissible evidence. Thus, in Connell the court permitted the taxpayer's counsel to redact those portions of the leased fee appraisal report which related to the author's opinions or conclusions of value of the property.

Here, plaintiff's counsel argues that the conclusions of value reach by Investors Bank's appraiser, together with the indicated loan amount, will lead to the discovery of admissible evidence, to wit, the loan-to-value ratio of the financing transaction. However, the court submits that it may not. In order to be capable of calculating the true loan-to-value ratio in a given financing transaction, one must know the internal value conclusions reached by the mortgage lender. Once a lending institution orders and receives an appraisal report, the lending institution conducts an internal review of such appraisal. That review may be conducted by another appraiser or through the use of an Automated Valuation Model ("AVM"). AVMs are frequently relied upon by mortgage lending institutions and have become "an integral part of today's mortgage market. . ."[2] The outputted value of the "AVM may be used as a basis for opinions and conclusions in an appraisal or [an] appraisal review assignment. . ." The Appraisal of Real Estate, supra, at 298. When use of an AVM or internal appraisal review discloses a property value lower than that contained in the ordered appraisal report, the mortgage lender will generally apply the lower value in order to compute the loan-to-value ratio for the transaction. Thus, disclosure of the conclusions of value of Investors Bank's appraiser will lead only to speculation and conjecture about what the

[2] http://www.freddiemac.com/hve/hve.html.

final loan-to-value ratio was for the financing transaction, and not to the discovery of admissible evidence.

Moreover, as stated by the court in Connell, leased fee appraisal reports can be affected by the "remaining term of a lease, the creditworthiness of the tenants, the influence of atypical lease clauses and stipulations, and other factors [that] can affect the value" and are therefore, of "dubious usefulness" to this court. The Appraisal of Real Estate, supra, at 505. Because of application of these factors, this court has generally rejected appraisers' conclusions of value which are premised upon a leased fee interest in property. See Marina Dist. Development Co., LLC v. City of Atlantic City, 27 N.J. Tax 469, 488 (Tax 2013), aff'd 28 N.J. Tax 568 (App. Div. 2015), certif. denied, 223 N.J. 354 (2015); Pine Plaza Associates, L.L.C. v. Hanover Twp., 16 N.J. Tax 194, 199 (Tax 1996); Harclay House, supra, 18 N.J. Tax 564; International Flavors & Fragrances, Inc. v. Union Beach Borough, 21 N.J. Tax 403, 423 (Tax 2004). The court acknowledges, as argued by plaintiff's counsel, that a leased fee appraisal report which employs market rents may produce a property value consistent with an appraisal report employing a fee simple approach. However, other elements of the leased fee analysis must be scrutinized and examined, including what consideration, if any, was accorded by the appraiser to lease terms deemed more favorable to the landlord or the tenant, in order to determine whether the leased fee approach produced a meaningful result.

Our court rules permit discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action." R. 4:10-2(a). Here, neither party asserts that the opinions expressed in the Appraisal Report are privileged or confidential. Thus, the locus of the court's inquiry rests upon the relevancy of the opinions and conclusions contained in the Appraisal Report. The standards of relevancy are to be measured by the court not by admissibility at trial, rather by whether the information sought is "reasonably calculated to lead to admissible evidence

respecting the cause of action or its defense." Pressler & Verniero, Current New Jersey Rules Governing the Courts, comment 1 on R. 4:10-2(a) (2016). Here, the court is charged with determining the true market value of the subject property as of October 1, 2015. In conducting that inquiry, the physical and financial condition of the subject property and comparable properties leased or sold during the preceding twelve months is directly germane to performing that task. The Appraisal Report was completed on February 12, 2015, less than eight months preceding the October 1, 2015 valuation date. Thus, the Appraisal Report offers insight into critical data and information about the subject property, and comparable properties in the marketplace, during a time period which is pivotal to determination of the subject property's true market value. The court therefore concludes that the data and information contained in the Appraisal Report about the subject property and comparable properties in the marketplace are relevant and likely to lead to the discovery of admissible evidence. However, the opinions and conclusions of Investors Bank's appraiser, which are founded upon a leased fee analysis and are expressed in the Appraisal Report — which report was not prepared for purposes of prosecuting or defending a local property tax appeal — are not likely to lead to the discovery of admissible evidence. Thus, the court will enter a Protective Order quashing that portion of the Subpoena which seeks production of the Appraisal Report and shall direct defendant's counsel to redact those portions of the Appraisal Report which relate to the author's opinion or conclusions of value, and to produce the redacted Appraisal Report to plaintiff within ten (10) days of the date hereof.

b. R. 4:10-2(d)

The court finds a lack of support for defendant's argument that because the Appraisal Report was not prepared in anticipation of litigation it is not required to be produced during pre-trial discovery. R. 4:10-2(d) limits the scope of discovery, which is otherwise discoverable to "facts known and opinions held by experts" that are "acquired or developed in anticipation of

litigation or for trial." R. 4:10-2(d) (emphasis added). For example, through interrogatories, a litigant is entitled to know the name and address of each expert witness expected to be called at trial, including a treating physician expected to testify, and the name of an expert who has conducted a physical or mental examination of an injured party, whether or not expected to testify. R. 4:10-2(d)(1). R. 4:10-2(d)(3) permits a litigant to "discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only upon a showing of exceptional circumstances under which it is impractical for the party seeking discovery to obtain facts or opinions on the same subject by other means." R. 4:10-2(d)(3) (emphasis added).

Here, the provisions of R. 4:10-2(d)(3) are not applicable to defendant's motion to quash because the Appraisal Report was not prepared in anticipation of litigation or in preparation for trial. The Appraisal Report was prepared for defendant's mortgage lender, Investors Bank, a non-party to the instant litigation. Thus, the Appraisal Report is not an expression of the opinions held by an expert of plaintiff or defendant that is not expected to be called to testify at trial under R. 4:10-2(d)(3).

2. Income and Expense Statements, Rent Rolls and Note

Although Investors Bank has not advanced a position before the court, defendant maintains that the Subpoena is oppressive and burdensome, and that less cumbersome means are available to obtain the income and expense statement information sought under the Subpoena, to wit, normal avenues of pre-trial discovery requests. Defendant further asserts that because the Note is "based on Hartz NJ's financial wherewithal" it has "absolutely nothing to do with the fee simple value of this property," is irrelevant and is not likely to lead to discovery of relevant evidence.

Conversely, plaintiff charges that "defendant has not responded to the City's discovery requests" and thus plaintiff is not seeking duplicative discovery, but rather the customary pre-trial

discovery to which it is otherwise entitled under our court rules. During oral argument, defendant's counsel was unable to present any good faith rationale to justify the withholding of such discovery to plaintiff, despite being made aware of the deficiency on November 18, 2016.

The Subpoena seeks all "income and expense statements and rent rolls" and the "$35,000,000 note" associated with the Mortgage placed on the subject property. The preferred method for determining the estimated market value of income-producing property is the income capitalization approach. Parkway Village Apartments Co. v. Township of Cranford, 8 N.J. Tax 430 (Tax 1985), aff'd, 9 N.J. Tax 199 (App. Div. 1986), rev'd on other grounds, 108 N.J. 266 (1987); Helmsley v. Borough of Fort Lee, 78 N.J. 200 (1978); Hull Junction Holding Corp. v. Borough of Princeton, 16 N.J. Tax 68, 79 (Tax 1996). "The income capitalization approach to value consists of methods, techniques, and mathematical procedures that an appraiser uses to analyze a property's capacity to generate benefits (i.e., usually the monetary benefits of income and reversion) and convert these benefits into an indication of present value." The Appraisal of Real Estate, supra, at 439. Central to the income capitalization approach is the appraiser's analysis of costs, market data and a property's capacity to generate future benefits. It is essential to the income capitalization approach that an appraiser perform a "comprehensive analysis of the annual expenses of property operation." Id. at 453. Thus, when engaging in the income capitalization approach to value, an appraiser would be remiss not to evaluate and analyze a property's own income and expense statements and rent rolls before computing items of potential gross income, effective gross income and net operating income. Similarly, in employing the band of investment technique to derive an overall capitalization rate, debt and equity components of an investment must be weighted and combined. The mortgage capitalization rate component of the equation "is a function of the [mortgage] interest rate, the frequency of amortization, and the amortization term of the loan." The Appraisal of Real Estate, supra, at 496. Thus, material to development of the

mortgage capitalization rate are market rates of interest and amortization terms identified for similar property types on or about the valuation date. Accordingly, the income and expense statements, rent rolls and Note likely contain information which is probative of, and relevant to, the true market value of the subject property as of October 1, 2015.

However, concluding that the income and expense statements and rent rolls and Note bear some relevance to the instant litigation does not end the court's inquiry. In considering whether to restrict the scope of discovery under R. 4:10-2 and R. 4:10-3, the court must balance the "beneficial effects of discovery against its disadvantages." State ex rel W.C., 85 N.J. 218, 224 (1981). In exercising this discretion, the court should weigh whether the evidence being sought would meaningfully contribute to prosecution or defense of the cause of action, or whether it would likely lead to unnecessary burdens, annoyance, harassment or embarrassment. The party moving to quash a subpoena bears the burden of demonstrating the request is oppressive or unreasonable. Here, defendant has simply not met that burden. Defendant offers no explanation or rationale for its refusal or failure to produce discovery responsive to plaintiff's demands. Moreover, defendant has not made application to this court for relief from the plaintiff's discovery demands, other than the Subpoena. One of the key factors employed by the courts in evaluating whether a subpoena is burdensome, oppressive or unreasonable, is the requesting party's need for the production. See Berrie, supra, 188 N.J. Super. at 286; Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 405 (D.C. Cir. 1984); In re Auto. Refinishing Paint Antitrust Litig., 229 F.R.D. 482, 495 (E.D. Pa. 2005). Although the court observes that a non-party to litigation should not be responsible for remedying the discovery deficiencies of a party, when the deficient party continues to ignore their discovery obligations, as long as the underlying demand on the non-party is not burdensome, oppressive or unreasonable, the court should not preclude production of the documents.

Here, defendant's counsel acknowledges in its moving papers that "Income and Expense Statements and Rent Rolls. . . are subject to discovery from defendant," however defendant's counsel offers no suitable explanation why these documents have not been furnished within the time periods accorded under our court rules. Thus, although plaintiff's counsel has a need for the production of these documents, defendant has been either reticent or unwilling to provide such documentation to plaintiff. Our rules of discovery are designed "to further the public policies of expeditious handling of cases, avoiding stale evidence, and providing uniformity, predictability and security in the conduct of litigation." Zaccardi v. Becker, 88 N.J. 245, 252 (1982). "The discovery rules were designed to eliminate, as far as possible, concealment and surprise in the trial of lawsuits to the end that judgments rest upon real merits of the causes and not upon the skill and maneuvering of counsel." Oliviero v. Porter Hayden Co., 241 N.J. Super. 381, 387 (App. Div. 1990).

When a party fails or refuses to provide material which is discoverable or which may be instrumental or critical to prosecution or defense of a matter, the adverse party can either seek relief from the court to compel production of the discovery from the delinquent party, or may pursue alternative means for the production of those documents. Here, plaintiff elected to pursue alternative means and served the Subpoena on Investors Bank attempting to secure the income and expense statements and rent rolls which formed the basis of the $35,000,000 loan to defendant. Although the court observes that the least invasive manner to furnish this discovery to plaintiff would be through defendant, when defendant has, without good cause, declined to provide it, the court will not quash a subpoena which seeks such information unless it is unreasonable, oppressive, or seeks information which is duplicative and already in the possession of the demanding party. Thus, the court declines to enter a Protective Order quashing that portion of the Subpoena which seeks production of defendant's income and expense statements and rent rolls.

Additionally, as stated hereinabove, material to development of a mortgage capitalization rate are the market rates of interest and amortization terms for loans given to similar or like properties on or about the valuation date. Here, on or about May 29, 2015 defendant executed and delivered a Note in favor of Investors Bank in the sum of $35,000,000. This date was approximately four months prior to October 1, 2015 valuation date. The Note contains information which may be directly relevant to development of the mortgage capitalization rate and correspondingly, integral to development of the true market value of the subject property under the income capitalization approach. Thus, the court concludes that the Note is relevant and reasonably likely to lead to the discovery of admissible evidence. Therefore, the court declines to enter a Protective Order quashing that portion of the Subpoena which seeks production of the Note.

## III. Conclusion

The court concludes that defendant's motion for a Protective Order, quashing plaintiff's Subpoena is granted, in part, and denied, in part. The court will enter a Protective Order quashing that portion of the Subpoena which seeks production of the Appraisal Report and shall direct defendant's counsel to redact those portions of the Appraisal Report which relate to the author's opinion or conclusions of value, and to produce the redacted Appraisal Report to plaintiff within ten (10) days of the date hereof. In addition, Investors Bank shall produce the Note, the income and expense statements and the rent rolls associated with the Mortgage and Note. Plaintiff shall be responsible for reimbursing Investors Bank all reasonable costs and expenses in duplicating and producing these documents.

An Order reflecting the foregoing will be issued by the court.

Very truly yours,

/s/Hon. Joshua D. Novin, J.T.C.