TAX COURT OF NEW JERSEY

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Re: Jesse Wolosky v. Fredon Township, A Municipal Corporation of the State of New Jersey; Michael & Penny Holenstein
Appellate Docket No.: A-1980-16
Tax Court Docket No.: 008267-2016

Mr. Orlando and counsel:

This letter is issued pursuant to Rule 2:5-6(c) to amplify the court's bench opinion of December 9, 2016, whereby the case of plaintiff, Jesse Wolosky, was dismissed after presenting his evidence, for failure to overcome the presumption of validity of the assessment.[1] As a resident

[1] The court denied Defendants' pre-trial motion to dismiss this matter as frivolous. The court noted that the motion was premature; if Mr. Wolosky was able to overcome the presumption of validity at the conclusion of his proofs, the case would not be frivolous. The court further denied Mr. Wolosky's motion to secure a copy of an appraisal report prepared for the Holensteins' lender for purposes of a refinance of the Subject Property. While the report appeared to be timely, the court found the same to be irrelevant. The court reasoned that the objective of the tax appeal was to

of Sussex County Mr. Wolosky sought to increase the 2016 assessment on Block 2103, Lot 9.01, in defendant, Fredon Township in said county ("Subject Property"), which is owned by additional defendants Michael & Penny Holenstein. The defendants collectively moved to dismiss pursuant to R. 4:37-2(b). The motion was granted and this appeal ensued.[2]

In granting defendants' motion, the court read into the record the following excerpt from the unreported case of Disenso v. Township of Wyckoff, No. 014165-2015 (Tax Aug. 31, 2016) (letter op. at 7-16), which is directly on point with the present matter:

> When confronted with a R. 4:37-2(b) motion, the court must be mindful of the 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, supra, 100 N.J. 408, at 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." MSGW Real Estate Fund, LLC. v. Borough of Mountain Lakes, supra, 18 N.J. Tax at 373.
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> The "presumption is not simply an evidentiary presumption serving only as a mechanism to allocate the burden of proof. It is, rather, a construct that expresses the view that in tax matters, it is to be presumed that governmental authority has been exercised correctly and in accordance with law." Id. at 374 (citing Powder Mill, I Assocs. v. Hamilton Township, 3 N.J. Tax 439 (Tax 1981)). "The presumption of correctness . . . stands, until sufficient competent evidence to the contrary is adduced." Little Egg Harbor Township v. Bonsangue, 316 N.J. Super. 271, 285–86 (App. Div. 1998). A taxpayer can only rebut the presumption by introducing "cogent evidence" of true value. That is, evidence "definite, positive and certain in quality and quantity." MSGW Real Estate Fund, LLC v. Borough of Mountain Lakes, supra, 18 N.J. Tax at 413 (quoting Aetna Life Ins. Co. v. Newark, 10 N.J. 99 (1952)).

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determine the true value in the fee simple. A mortgage interest is but one part of a "complete bundle of rights" that comprise the fee simple. See discussion in The Appraisal of Real Estate 111-12 (13th ed. 2008). Furthermore, the parties had already exchanged their respective appraisal reports prior to argument on the motion.

[2] Appeal filed January 18, 2017, A-1980-16.

Therefore, at the close of plaintiff's proofs, the court must be presented with evidence that raises a "debatable question as to the validity of the assessment." MSGW Real Estate Fund, LLC v. Borough of Mountain Lakes, supra, 18 N.J. Tax at 376.

The court, in evaluating whether the evidence presented meets the "cogent evidence" standard, "must accept such evidence as true and accord the plaintiff all legitimate inferences which can be deduced from the evidence." Id. at 376 (citing Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995)). However, the evidence presented, when viewed under the Brill standard "must be 'sufficient to determine the value of the property under appeal, thereby establishing the existence of a debatable question as to the correctness of the assessment.'" West Colonial Enters, LLC v. City of East Orange, 20 N.J. Tax 576, 579 (Tax 2003) (quoting Lenal 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). "Only after the presumption is overcome with sufficient evidence . . . must the court 'appraise the testimony, make a determination of true value and fix the assessment.'" Greenblatt v. Englewood City, 26 N.J. Tax 41, 52 (Tax 2011) (quoting Rodwood Gardens, Inc. v. City of Summit, 188 N.J. Super. 34, 38–39 (App. Div. 1982)).

"[B]eing qualified as an expert is but the first part of accepting an expert's opinion." Greenblatt v. Englewood City, supra, 26 N.J. Tax at 54. Qualification may be based upon the expert's knowledge, skill, training, or experience. However, qualifying an individual as an expert does not translate into acceptance by the court of the testimony of the expert. In order for an expert's opinion to be meaningful to the trier of fact, it must be based upon credible facts and data. As set forth in Rosenberg v. Tavorath, 352 N.J. Super. 385, 401 (App. Div. 2002):

> In addition to determining whether a witness is qualified to testify as an expert, the trial court must also decide the closely related issue as to whether the expert's opinion is based on facts and data. Biunno, Current N.J. Rules of Evidence, comment 2 on N.J.R.E. 702 (2002). As construed by applicable case law, N.J.R.E. 703 requires that an expert's opinion be based on facts, data, or another expert's opinion, either perceived by or made known to the expert, at or before trial. Buckelew v. Grossbard, 87 N.J. 512, 524 (1981); Nguyen v. Tama, 298 N.J. Super. 41, 48–49 (App. Div. 1997) . . . The rule requires an expert to "give the why and wherefore" of his opinion, rather than a mere

> conclusion. Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540 (App. Div. 1996), certif. denied, 145 N.J. 374 (1996).
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> [See Greenblatt v. Englewood City, supra, 26 N.J. Tax at 54.]
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> While the facts and data upon which the expert bases his or her opinion need not be admissible, they must be of a type "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." N.J.R.E. 703. In order for an expert's testimony to be of any value it must have a proper foundation. See Peer v. City of Newark, 71 N.J. Super. 12, 21 (App. Div. 1961), certif. denied, 36 N.J. 300 (1962).
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> Taking all of the testimony and evidence presented by the plaintiff into account, the court finds that plaintiff failed to present sufficient competent evidence to overcome the presumption of correctness. Plaintiff's expert's reliance on the MLS as the sole source of data, and his failure to support any of his adjustments with any objective data put before this court leads to only this result.

Recognizing that Disenso v. Wyckoff Township is unpublished, the court adopted the above language as its own, given that the opinion and the published case law cited therein are well reasoned and pertinent to the facts of the present case.

The court found that Mr. Wolosky's expert relied *solely* on hearsay contained in internet sources such as Multiple Listing Service (MLS) and NJ Property Facts,[3] in an effort to demonstrate comparability of sales he claimed were similar to the Subject Property and impacted its value.[4] He

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[3] "These sources primarily contain data on residential properties listed for sale during the calendar year or fiscal quarter and cite their listing prices. They contain complete information about these properties, including descriptions and brokers' names. However, *details* about a property's square footage, basement area, or exact age *may be inaccurate or excluded*." The Appraisal of Real Estate 163 (13th ed. 2008), emphasis added.

[4] The expert testified that he spoke to tax assessors and realtors, but did not include that information in his field report. He used three comparable sales within Fredon Township. He obtained a useable sales list from Fredon's tax Assessor, which included roughly twenty sales; only two were over $500,000. The comparable sales chart on page 11 of the expert's report states that he verified data on that chart *via MLS, NJ Property Facts, and the NJ County Tax Board website.* The MLS data is pulled from realtors.

did not confirm square footage and age of the properties with buyers or sellers, brokers or attorneys, or with deeds or sales documents. He did not inspect any of the comparable sales properties; he relied upon pictures from the MLS. His expert report does not mention any other market research he did with relation to these comparable sales.

The court found that the origins and accuracy of the information contained in such sources as MLS and others, are unknown and unreliable. While an expert may utilize hearsay, they cannot *solely* rely upon it; clearly the court has discretion to reject or accept this hearsay.[5]

Furthermore, the expert failed to provide any data upon which he relied for making adjustments to his alleged comparable sales. His expert report is devoid of any market data supporting the adjustments he made to his alleged comparable sales.[6]

In terms of substance, Mr. Wolosky's claim to raise the assessment of the Subject Property defies logic. The original assessment of the Subject Property is $437,600, which in this particular case also happens to represent the Tax Assessor's opinion of the true value of said property given that the average ratio for Fredon Township for the 2016 tax year is 102.42 percent (say 100 percent). The expert concluded a true value of $535,000 (nearly $100,000 more) based, in part,[7]

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[5] "Appraisers should verify information with a party to the transaction to ensure its accuracy and to gain insight into the motivation behind each transaction. . . .To verify sales data, the appraiser confirms statements of fact with the principals to the transaction, if possible, or with the brokers, closing agents, or lenders involved. . . .Referencing public records and data services does not verify a sales transaction. . . .Generally, secondary sources do not provide adequate information about sales concessions, whether the sale was an arm's-length transaction, if multiple properties were involved in the sale, if personal property was included, and other factors influencing value." <u>The Appraisal of Real Estate</u> 304-05 (13th Ed. 2008), emphasis added.

[6] According to the expert, he based adjustments on what is *typical* for the market, but he provided no market data to substantiate that point.

[7] The expert also pointed to differences in location, lot size, finished attic, and garage slots as affecting value. However, the court finds that the difference in lot size between the Subject Property and the expert's alleged comparable properties is negligible and would not affect value; and all the adjustments he made for all specified items were unsupported.

upon what he claimed to be a discrepancy of 378 square feet (roughly the size of a room), between his measurements of the Subject Property, and the smaller measurements of the Tax Assessor contained in the property record card.[8] The expert asks the court to accept that a 378 square foot difference (assuming this figure is accurate)[9] in the size of the house on the Subject Property, somehow results in a nearly $100,000 increase in the value of the property. The court finds that such a conclusion is neither sustainable nor credible.

For all the foregoing reasons, the court granted the collective defendants' motion, at the conclusion of Mr. Wolosky's proofs, to dismiss the complaint pursuant to R. 4:37-2(b) for failure to overcome the presumption of validity of the assessment.

Most respectfully yours,

Vito L. Bianco, J.T.C.

Hon. Vito L. Bianco, J.T.C.

VLB/JB:tms
Encl.

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[8] The difference between the property record card and expert's measurements was likely due to the expert using a method unique from other assessors, according to his testimony.

[9] It appears that the expert uses a unique measuring method not universally embraced or utilized by assessors/appraisers. This may account for his larger square foot measurement for the Subject Property than appears in the Property Record Card.