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THE TAX COURT COMMITTEE ON OPINIONS

TAX COURT OF NEW JERSEY

Mala Sundar
JUDGE

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Re: VNO 1105 State Hwy. 36, LLC % Stop & Shop v. Township of Hazlet
Docket No. 004038-2013
VNO 1105 State Hwy. 36, LLC by Stop & Shop v. Township of Hazlet
Docket Nos. 008116-2014, 007353-2015, 002076-2016, 003935-2017

Dear Counsel:

This is the court's opinion on the motion for reconsideration of its Order dated April 3, 2019. Plaintiff filed the motion claiming that the court's decision to bar plaintiff's expert, an assessor in a different municipality, from testifying at trial was palpably incorrect and lacked a rational basis. Defendant filed a letter with the court the day before the re-scheduled return date of the motion indicating that it believed the April 3, 2019, Order to be correctly decided.

For the reasons stated below, the court denies plaintiff's motion.

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(A) Prior Decision

Prior to the instant motion for reconsideration, defendant ("Township") made a motion in limine to bar the testimony of plaintiff's expert, returnable the first day the matters were scheduled for trial, claiming that 1) the expert's testimony should be barred because the expert had a conflict of interest, and 2) the expert's testimony should be barred because the expert willfully withheld discovery. Plaintiff ("VNO") duly opposed the motion, and the court heard oral argument on January 14, 2019.[1]

This court, in a published opinion issued April 2, 2019, granted the Township's motion in limine. The court concluded that the expert, an assessor, should be barred from testifying and attacking the assessment set by another assessor of another taxing district, and permitting him to do so via expert testimony would present an appearance of impropriety and impair the integrity of his public office as assessor. The court also dismissed the argument that barring testimony would constitute a violation of the assessor's First Amendment rights. On April 3, 2019, this court issued an Order accompanying the published opinion, allowing VNO time to obtain a different expert's appraisal report.[2]

[1] Oral argument was also heard on the Township's motion to quash the subpoena issued by VNO seeking information from the Township's expert, as to which the court issued an Order dated May 9, 2019, granting the motion in part. That issue is not the subject of this reconsideration motion.

[2] Since the court granted the Township's motion on appearance of impropriety grounds, it did not address the alternative reasons for the motion as to alleged discovery infractions.

(B) Reconsideration: Procedural

A motion for reconsideration is governed by R. 8:10. This rule provides, in part, that R. 4:49-2 "shall apply to Tax Court matters except that all such motions shall be filed and served not later than 20 days . . . after the date of the judgment or order, with respect to R. 4:49-2." However, a motion to reconsider interlocutory orders may be made at any time until final judgment in the court's discretion and in the interests of justice. See Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250 (App. Div. 1987) (". . .review of interlocutory orders by the court prior to final judgment. . . is a matter committed to the sound discretion of the court.").

Rule 4:49-2 does not address replies or cross-motions. The general rules of motion practice, R. 1:6, therefore applies. Under R. 1:6-3 (time for filing motions, which also applies to the Tax Court procedure, see R. 8:7(c)), any opposition to a motion for reconsideration should be filed and served no later than "8 days before the return date unless the court relaxes that time." R. 1:6-3(a). Thus, where the return date is a Friday, the opposition is due Thursday of the prior week. Ibid. Any reply to the opposition is due "4 days before the return date." Ibid. The court can extend these dates, however, outside of such time frame and pleadings, "[n]o other papers may be filed without leave of court." Ibid.

The non-movant can file a cross motion with its opposition and make the cross-motion returnable on the same date as the original motion "only if it relates to the subject matter of the original motion." R. 1:6-3(b). Thus, by these terms, i.e., combining a cross-motion with the opposition, the time to file a cross-motion is the same as the time to file the opposition, viz., 8 days

prior to the return date.[3] Any "response to the cross-motion shall be filed and served" within 4 days of the return date. Ibid. The court may "enlarge the time for filing an answer to the cross-motion, or fix a new return date for both." Ibid. "No other papers may be filed without leave of court." Ibid.

VNO's motion for reconsideration is timely.[4] The Township did not file a cross motion. Instead, on June 6, 2019 (one day before the re-scheduled return date), it filed a letter claiming that the court's decision was correct and VNO's reconsideration motion is meritless. It also promised to file a cross-motion "seeking fees, a stay of pre-judgment interest, and the opportunity to respond to a new appraisal from" VNO. The Township maintained that "without that relief to make it whole," it is "better off to not object to [VNO's] pending motion."

To place the Township's June 6, 2019, letter in perspective, the court recites certain events subsequent to the issuance of its April 3, 2019, Order. Initially, the April 3, 2019, Order stated that the Township's motion in limine was granted; the trial was adjourned; VNO could obtain a new expert and provide a report by September 3, 2019; the Township could depose the new expert by October 3, 2019; and that a follow-up telephonic conference call was scheduled for October 16, 2019.

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[3] Cf. R. 4:49-1 (motion for a new trial) which allows 20 days "after the court's conclusions are announced" to file a motion for a new trial, and 10 days after service for a cross-motion to be filed. Similarly, opposing affidavits are to be filed and served within 10 days of the service of the original motion unless the time is extended by not more than 20 days. Ibid.

[4] Had the April 3, 2019, Order been a Final Order, VNO's motion would still be timely since it was filed within 20 days of the order.

On April 4, 2019, the Township filed a letter asking this court to amend its Order to provide for costs it had incurred in bringing and arguing its motion in limine; an opportunity to amend its appraisal report after VNO provided a new one, but with VNO to pay the costs for the same; and a stay of any accrual of pre-judgment interest.

VNO then sought a telephonic conference call in connection with this letter. At the court's direction, it filed a reply on April 19, 2019, refuting the Township's basis or reasons for changing this court's April 3, 2019, Order and deeming the letter as a completely improper attempt to file a motion to alter the judgment.

The court then scheduled a telephonic conference for April 26, 2019.

The Township then wrote another letter dated April 22, 2019, disclaiming the labeling of its April 4, 2019, request to amend as being a motion to alter the court's judgment, and "reluctantly . . . without prejudice will consent to [VNO's] request that these issues be resolved by motion, if the court deems that appropriate." The Township stated that "[t]o preserve the record, [it would] then file a motion to be made whole" including seeking further costs for such motion.

During the April 26, 2019, telephonic conference (by which time VNO filed its timely reconsideration motion), the Township maintained that it was simply seeking additional relief in the context of "implement[ing]" the court's April 3, 2019, Order, but did not deem it a motion. When the court offered to treat the April 4, 2019, letter as a motion, the Township declined, and withdrew the letter on the record. The court then noted that "depending on how" the Township responded to VNO's reconsideration motion, VNO could amend the motion to include all of its arguments it made in its April 19, 2019, response to that letter. The Township then stated that it

would now not object if the trial went forward with the assessor being plaintiff's expert, due to the "overwhelming" costs and fees incurred thus far, if the court could "see [a] way of doing that" and that the Township would consent to his such testimony and "agree" with VNO's reconsideration motion. Since the Township withdrew the letter, and since VNO's motion for reconsideration had incorporated the arguments it had made in its response letter (on costs/fees and the lack of square corners turned by the Township), the court permitted VNO to reference amend its reconsideration motion should the Township file a cross-motion for costs/fees. The court then extended the return date of VNO's reconsideration motion at the request of the Township to June 7, 2019.

No cross-motion was filed. No timely opposition was filed. After the 8 days prior to the return date passed, VNO filed a "reply" brief on June 3, 2019 (even though there was no opposition or cross-motion, but probably, and in good faith, trying to keep in compliance with the time limits of R. 1:6-3(c) and the court's permission to incorporate its April 19, 2019, response into its reply although the court's permission was contingent on the Township's response to the reconsideration motion), incorporating its April 19, 2019, arguments against the Township's request for costs/fees and lack of turning square corners, and demanded that VNO be awarded such costs/fees.[5] The Township then filed a letter a day before the return date as explained above.

[5] On May 30, 2019, which would be the date the Township's opposition was due, the Attorney General (through a Deputy Attorney General) wrote a letter that the Division of Taxation and the Monmouth County Board of Taxation (these two public agencies having been invited by the court to participate in the initial motion in limine filed by the Township) were "monitor[ing] the activity" in the matters, and that if the Township filed any response, then the Attorney General be permitted to file a response on June 3, 2019, if deemed necessary. The Attorney General did not file any response presumably since the Township did not file any timely opposition on May 30, 2019.

The court will not consider the Township's June 6, 2019, letter as an opposition since it was filed untimely. It is also not, and does not profess to be, a cross-motion to VNO's reconsideration motion.

(C) Reconsideration: Merits

Pursuant to R. 4:49-2, a motion for reconsideration "shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred . . . ." Grant of such motion is "within the sound discretion of the Court, to be exercised in the interest of justice." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990) (citations omitted).

Reconsideration is appropriate in a "narrow corridor" of cases, where either "1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence." Ibid. In other words, it must be demonstrated that the court acted in a manner that is "arbitrary, capricious, or unreasonable," prior to the court engaging in the reconsideration process. Ibid.

Reconsideration is not a proxy for filing an appeal. See Palumbo v. Twp. of Old Bridge, 243 N.J. Super. 142, 147 n.3 (App. Div. 1990). It is not a means to challenge a court's decision merely because a party is dissatisfied with the court's decision. D'Atria, 242 N.J. Super. at 401. "[M]otion practice must come to an end at some point, and if repetitive bites at the apple are allowed, the core will swiftly sour." Ibid.

Despite the above restrictions on the use of a motion for reconsideration, "if a litigant wishes to bring new or additional information to the Court's attention which it could not have provided on the first application, the Court should, in the interest of justice (and in the exercise of sound discretion), consider the evidence." Ibid.

VNO articulates reasons why the court erred as follows: (1) it placed itself as both legislature and regulatory body without express and implied authority for either when it barred the assessor from testifying as an expert for a property owner which is challenging another assessor's local property tax assessment; (2) it exceeded its authority when it relied on a county board of taxation regulation that prohibits adverse testimony of an assessor (i.e., when an assessor testifies on behalf of a property owner which is challenging another assessor's assessment), to decide that an assessor also should not testify adversely in the Tax Court; (3) it improperly relied on the county board regulation that prohibits adverse assessor testimony because the rule applies only to appearances before the county board by its express terms; (4) the assessor's proffer of testimony on behalf of a property owner did not violate the Local Government Ethics Law ("LGEL") because, per VNO, there is nothing in the record that showed any violation of the LGEL and hypothetical conflicts cannot support a reasonable likelihood of conflict of interest; and (5) the assessor's testimony on behalf of a property owner did not violate the LGEL because the statute is limited to matters pending in the local government in which he serves.

The court is unconvinced that these are new facts, or new evidence, or profess to cite any controlling law this court overlooked or ignored. VNO's arguments, in the court's opinion, do not lead to a "loud guffaw or involuntary gasp" when reviewing its reasoning. See D'Atria, 242 N.J.

Super. at 401. Rather, they are VNO's preferred interpretations of why the county board regulation and the provisions of the LGEL should be narrowly interpreted as applicable to an assessor. VNO's reasons realistically state why the court is wrong, but dissatisfaction with the court's decision is not grounds for revisiting the same by filing a motion for reconsideration. Palumbo, 243 N.J. Super. at 147 n.3 ("We . . . disapprove of the excessive use of motions for reconsideration . . . [which are being] made with increasing frequency when essentially there is little more than disagreement with the court's decision. Motions for reconsideration were never meant to be a substitute for the filing of a timely appeal."). VNO's arguments are more appropriately addressed to the Appellate Division, and not to this court under the standards for reconsideration.

Nonetheless, a few points warrant mention. The first is VNO's allegation that this court exceeded its authority because it considered a county board regulation barring adverse assessor testimony when deciding that an assessor should also be barred from testifying adversely in the Tax Court. However, this court did not attempt to adopt, incorporate, or apply a county board regulation to the Tax Court. Rather, it considered the county board regulation's plain meaning together with its underpinnings found in the Handbook for New Jersey Assessors, which in turn were based on specific provisions from the LGEL and various published guidelines for assessors; N.J.A.C. 18:12A-1.9(l) and 18:17-4.1(a)(3); the constitutional mandates attendant of an assessor, and our court rules. All of these sources cumulatively supported this court's conclusion that adverse testimony by an assessor in the Tax Court causes an appearance of impropriety and impairs the integrity of an important constitutional-sensitive public office of an assessor.

Second, VNO's assignment that this court barred the assessor's testimony on behalf of the property owner because of an appearance of impropriety not supported in the factual record is incorrect. As noted above, the court made its conclusion based on the importance of the maintenance of the integrity of the assessor's office and position, which the court found a duty to control via its authority under R. 1:1-2(a).

VNO argues that the Township did not turn square corners when it moved to bar the assessor from testifying on the eve of trial, having known at least since his deposition months prior to the scheduled trial that the individual was an assessor in another municipality. It asserts that this failure of the Township to turn square corners entitles it to compensation for unnecessary expenses since all of its deposition and trial preparation expenses could easily have been avoided. It also sought compensation for the "frivolous motion" made by the Township to amend the court's April 3, 2019, Order. In its "reply" filed June 3, 2019 (despite the lack of any opposition or cross-motion by the Township), VNO requested additional fees associated with opposition to and preparation for the original motion in limine, as well as with their motion to reconsider.

VNO's square corners argument was not a position it took in opposition to the Township's motion in limine which the court considered and then rejected. Rather, this argument was in response to the Township's April 4, 2019, letter which had sought costs and fees from VNO. Although VNO filed a reply brief on June 3, 2019, reiterating these arguments, they were not in response to VNO's opposition or cross-motion since neither was filed as of June 3, 2019.

As succinctly noted, the "basis to such a motion [under R. 4:49-2], thus, focuses upon what was before the court in the first instance. The rule was not intended to become the vehicle for new

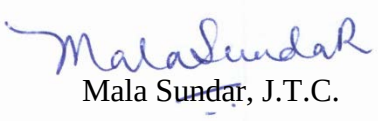
affirmative defenses." Lahue v. Pio Costa, 263 N.J. Super. 575, 598 (App. Div. 1993). Attorney fees and costs for failure to turn square corners was not the subject of the motion in limine and opposition thereto. Consequently, the court does not consider this argument as appropriately addressed in a reconsideration motion. Rather, if the Township should file a separate motion for costs/fees, or VNO files a separate such motion, the court will address the same independently.

Nonetheless, the court notes that other than costs/fees, VNO could not reasonably argue that it was prejudiced by the Township's eve-of-trial motion in limine because (1) the court adjourned the trial (at VNO's request and over objection of the Township); (2) the court did not dismiss VNO's complaints; and (3) the court allowed time for VNO to obtain a new expert report. While the courts should not encourage (or more appropriately, grant sparingly) motions in limine which "seek an action's termination" on the eve of trial, and even if evidentiary, such motions are "disfavored," see L.C. v. M.A.J., 451 N.J. Super. 408, 411 (App. Div. 2017) (citations omitted), here the court did not dismiss VNO's complaints. Rather, and since the issue was of first impression, the court refused to penalize VNO by allowing a dismissal of the complaints. Indeed, even the Township's proposed order in connection with its motion in limine did not provide for a dismissal of the complaints.

CONCLUSION

For all of the above reasons, the court denies VNO's motion for reconsideration.

Very Truly Yours,



Mala Sundar, J.T.C.