

NOT FOR PUBLICATION WITHOUT APPROVAL OF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

TAX COURT OF NEW JERSEY



Mala Sundar
JUDGE

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March 31, 2014

BY FIRST-CLASS MAIL

Henry Lupinski, Pro Se
28 Oak Street
Old Bridge, New Jersey 08857

BY ELECTRONIC MAIL

Harry Haushalter, Esq.
Lexington Square Commons
2119 Route 33, Suite A
Hamilton Square, New Jersey 08690

Re: Lupinski v. Township of Old Bridge
Block 18092, Lot 20.12 (28 Oak Street)
Dkt No. 012183-2013

Dear Mr. Lupinski and Counsel:

This letter constitutes the court's opinion deciding defendant's motion to dismiss the above captioned complaint due to plaintiff's refusal to permit defendant's expert to inspect the subject property. The undisputed facts are as follows. Plaintiff filed an appeal from the judgment of the county board of taxation which affirmed the assessment on the above captioned property ("Subject") for tax year 2013 in the amount of \$163,400.

The expert retained by defendant ("Township") made several attempts to gain entry into the Subject for inspection purposes so he could prepare his expert report. Plaintiff denied the

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expert permission to enter the Subject.

Thereafter, the Township, through counsel, issued a Notice of Inspection under the court rules. Plaintiff appeared on the scheduled inspection date at the assessor's office and announced that he would not permit the expert to enter the Subject for purposes of the inspection.

The Township filed the instant motion requesting a dismissal of the complaint without prejudice pursuant to R. 4:23-5(a)(1) for failure to comply with the Township's discovery request. Plaintiff opposed the motion on grounds that law presumes the assessment to be correct therefore, defendant "has no grounds to make an inspection."

Rule 8:6-1(a)(4) provides that discovery in matters such as the present appeal, which are assigned to the small claims track, "shall be limited to the property record card for the subject premises, inspection of the subject premises, a closing statement if there has been a sale of the subject premises within three (3) years of the assessing date, the costs of improvements within three (3) years of the assessing date, and income, expense and lease information for income-producing property. The court in its discretion may grant additional discovery for good cause shown." (emphasis added). Clearly, inspection of the Subject is authorized under the court rules.

Plaintiff correctly points out that assessments are presumptively correct. MSGW Real Estate Fund, LLC v. Borough of Mountain Lakes, 18 N.J. Tax 364, 373 (Tax 1998). This means plaintiff taxpayer has the burden of proving that the assessment is erroneous with evidence that is "definite, positive and certain in quality and quantity." Ibid. (citations and quotations omitted).

However, this does not mean that the Township is barred from discovery, such as inspection of the property. First, discovery rules are equally available to each party to the litigation. Court rules do not generally reserve or permit discovery rights to only one or a

specific party to the litigation. Second, the trial system in our courts is not one where one party can obtain leverage or advantage by concealment or surprise. See Pressler, Current N.J. Court Rules, comment 1 on R. 4:10-2 (2014). The Township, as defendant, should not be at a disadvantage in regards to the knowledge or information as to any of the physical aspects or characteristics of the Subject which may be known only to plaintiff. Therefore, it should be permitted to inspect the Subject.

Third, the Township should not be deprived of knowledge and information in this regard when the same is required for its expert's opinion as to the true market value of the Subject, the only issue which this court must decide. A presumption by law is just that, a presumption. It can be overcome or rebutted. Thus, the assessment's presumptive correctness can be rebutted by the plaintiff through a credible opinion of the Subject property's fair market value as of the assessment date. If and when this is done, the Township also has a right to (although it may choose not to and rely instead on the presumption of validity attached to assessment) present its own opinion of the Subject's fair market value as of the assessment date through its expert's opinion. In order to render that opinion, which would be the Township's defense to this litigation, the Township should be permitted factual discovery. The Township is therefore entitled to have its expert inspect the Subject in order to assist the expert in reaching an opinion on the Subject's fair market value.

The Township correctly points out that the complaint can be dismissed under R. 4:23-5(a)(1). That Rule allows dismissal if a party fails to comply with a request for inspection. However, given that plaintiff may have been under a reasonable but misguided impression that when law presumes the correctness of an assessment an inspection is redundant, the court will convert the dismissal motion to one seeking to compel inspection. That alternative, though

provided to a moving party under R. 4:23-5(c), does not prevent this court from ordering the same.

Plaintiff is hereby directed to permit the Township's expert to gain access to and entry into the Subject (land and improvements). The inspection shall be completed on or before **May 8, 2014** at a time and date convenient to both parties. If plaintiff refuses to provide access to the Subject and the Township's expert is unable to inspect the property on or before May 8, 2014, the Township shall so advise this court on **May 9, 2014**. Upon receipt of such notice, the court will dismiss plaintiff's complaint without prejudice under R. 4:23-5(a)(1). An Order reflecting the above will accompany this memorandum opinion.

Very truly yours,

A handwritten signature in blue ink that reads "Mala Sundar". The signature is written in a cursive style with a horizontal line under the name.

Mala Sundar, J.T.C.