

NOT FOR PUBLICATION WITHOUT APPROVAL OF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

TAX COURT OF NEW JERSEY

Patrick DeAlmeida
Presiding Judge



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Re: The Bedford Falls Land Co. v. Township of Raritan
Docket No. 007191-2012
Docket No. 001556-2013
Docket No. 002135-2014

204 Bedford Falls, LLC v. Township of Raritan
Docket No. 007199-2012
Docket No. 001555-2013
Docket No. 002136-2014

213 Bedford Falls, LLC v. Township of Raritan
Docket No. 007185-2012

298 Bedford Falls, LLC v. Township of Raritan
Docket No. 015418-2012
Docket No. 011240-2013
Docket No. 011968-2014

18 Bedford Falls, LLC v. Township of Raritan
Docket No. 007181-2012
Docket No. 001558-2013
Docket No. 002133-2014

210 Bedford Falls, LLC v. Township of Raritan
Docket No. 015419-2012
Docket No. 011239-2013
Docket No. 011967-2014

206 Bedford Falls, LLC v. Township of Raritan
Docket No. 015421-2012
Docket No. 011237-2013
Docket No. 011966-2014

249 Bedford Falls, LLC v. Township of Raritan
Docket No. 007195-2012
Docket No. 001557-2013
Docket No. 002134-2014

282 Bedford Falls, LLC v. Township of Raritan
Docket No. 015408-2012
Docket No. 011241-2013
Docket No. 011969-2014

Dear Counsel:

This letter constitutes the court's opinion with respect to plaintiffs' motions pursuant to R. 1:9-2 to quash Subpoenas Duces Tecum served by defendant on George Copeland of Copeland Appraisal Associates, Inc. in each of the above-referenced matters. The objective of the Subpoenas is to compel the production of real estate appraisal reports prepared by Mr. Copeland's firm for estate planning purposes for a principal of the plaintiffs. The expert reports offer opinions of the true market value of the properties that are the subject of these appeals. Although the reports are relevant to the subject matter of these appeals and, therefore, fall within the scope of discovery, the court concludes that the reports are protected from disclosure by the attorney-client privilege. As a result, plaintiffs' motions to quash are granted.

I. Findings of Fact and Procedural History

The following findings of fact are based on the submissions of the parties with respect to plaintiffs' motions.

In each of the above-listed matters the plaintiff is a limited liability company which owns real property in Raritan Township, Hunterdon County. Plaintiffs filed Complaints challenging the assessments on the properties for local property tax purposes. For all but one parcel the Complaints concern tax years 2012 through 2014. For the remaining parcel only tax year 2012 is at issue. It is not necessary for purposes of this motion to describe the properties or their respective assessments in detail, as those facts are not relevant to plaintiffs' motion.

During the course of discovery, defendant became aware that George Copeland, a licensed real estate appraiser, had appraised the properties that are the subject of these appeals close in time to the relevant valuation dates. On April 1, 2014, defendant served on plaintiffs' counsel in each case a Notice to Produce

Appraisal Report; Appraisal Opinion; Preliminary, Restricted and/or Final Appraisal Report prepared by George Copeland on the property which is the subject matter of this tax appeal for any time period from the valuation date to the date of this Notice to Produce.

On April 10, 2014, plaintiffs' counsel informed defendant's counsel in each case as follows: "Our client is not in possession of any such appraisal and, accordingly, cannot produce same."

On April 21, 2014, defendant served on Mr. Copeland a Subpoena Duces Tecum in each of the above-referenced matters. The Subpoenas demand production of

Any and all appraisal reports; appraisal opinions; preliminary, restricted and/or final appraisal reports prepared by George Copeland and/or Copeland Appraisal Associates, Inc. on the

property located at [relevant address] and designated on the Tax Map of the Township of Raritan as [relevant Block and Lot] for any time period from October 1, 2011 to the date of this Subpoena.

On May 7, 2014, plaintiffs moved pursuant to R. 1:9-2 to quash the Subpoenas Duces Tecum. Plaintiffs acknowledge that Mr. Copeland is in possession of appraisal reports identified in the Subpoenas. According to plaintiffs, they did not retain Mr. Copeland for purposes of the tax appeals and do not intend to call him as an expert witness in these matters. As a result, plaintiffs argue, the reports fall outside of the expert witness discovery allowed by R. 4:10-2(d)(3). In addition, plaintiffs assert that Mr. Copeland was engaged to create the appraisal reports by an attorney representing plaintiffs and a principal of plaintiffs to assist with the provision of legal advice regarding the principal's personal estate planning. As a result, plaintiffs argue, the reports are protected from disclosure by the attorney-client and attorney work product privileges.

Defendant opposes the motion. Defendant argues that R. 4:10-2(d)(3) applies and that under the rule exceptional circumstances warrant disclosure of Mr. Copeland's appraisal reports. Defendant's argument is predicated on the presumption of validity that attaches to local property tax assessments. According to defendant, because it is possible that Mr. Copeland's appraisal reports will provide evidence that is sufficiently definite and positive in quality and quantity to overcome the presumption, Pantasote Co. v. City of Passaic, 100 N.J. 408, 413 (1985), the court should order the production of those reports. In addition, defendant argues that it is possible that Mr. Copeland's appraisal reports will demonstrate that plaintiffs' Complaints set forth frivolous claims, subjecting plaintiffs to the sanctions authorized by N.J.S.A. 2A:15-59.1. Finally, defendant argues that plaintiffs have not provided sufficient evidence to establish the existence of any privilege protecting the appraisal reports from disclosure.

After reviewing the parties' written submissions, the court directed plaintiffs to submit Mr. Copeland's appraisal reports for in camera review. The reports, along with certifications from an attorney who represents plaintiffs and a principal of plaintiffs, were subsequently submitted to the court.

On October 3, 2014, the court heard oral argument from counsel. At the conclusion of argument, the court placed its preliminary legal conclusions on the record. In addition, the court directed counsel to submit further briefing and certifications.

The motion record was completed with plaintiffs' November 17, 2014 submission.

Based on the parties' submissions, the court finds as fact that an attorney admitted to practice law in this State was retained by plaintiffs, as well as a person who is a principal in each plaintiff. The attorney had a longstanding professional relationship with the principal with respect to a broad variety of legal matters. The attorney thereafter retained Mr. Copeland and his firm to perform appraisals of the real property that is the subject of these appeals. The sole purpose of the retention of Mr. Copeland was to assist the attorney in providing legal advice with respect to personal estate planning for plaintiffs' principal. Mr. Copeland's reports were transmitted to the attorney, whose firm paid for the reports. The reports were not commissioned for purposes of litigation of any type, including these tax appeals.

II. Conclusions of Law

Defendant served the Subpoenas on Mr. Copeland pursuant to R. 4:14-7 for information defendant believes to be within the scope of permissible discovery. A party "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action," R. 4:10-2(a), or which "appears reasonably calculated to lead to the discovery of admissible evidence." In re: Liquidation of Integrity Ins. Co., 165 N.J. 75, 82

(2000). There shall be a substantial liberality in the granting of discovery in New Jersey courts. Shanley & Fisher, P.C. v. Sisselman, 215 N.J. Super. 200, 215-216 (App. Div. 1987). This court has the discretion to determine the scope and manner of permissible discovery between the parties. Payton v. New Jersey Turnpike Auth., 148 N.J. 524, 559 (1997).

The central issue before the court in each of these matters is the true market value of the subject properties on the relevant valuation dates. Mr. Copeland's expert appraisal reports offer opinions of the true market value of the subject properties as of valuation dates near in time to those relevant to these appeals. It is readily apparent that Mr. Copeland's reports fall within the scope of permissible discovery. The reports contain information directly relevant to the true market value of the subject properties and might reasonably be seen as leading to the discovery of admissible evidence. Expert appraisal reports are routinely relied on by the court in making a determination of the true market value of real property.

A finding that Mr. Copeland's reports are within the scope of permissible discovery does not end the court's inquiry. Rule 1:9-2 permits the court "on motion made promptly [to] quash or modify the subpoena . . . if compliance would be unreasonable or oppressive" The rule allows a Subpoena to be quashed on the grounds of privilege. In re: Grand Jury Proceedings of Guarino, 104 N.J. 218 (1986); In re Addonizio, 53 N.J. 107 (1968). The court concludes that Mr. Copeland's reports are protected from disclosure by the attorney-client privilege.

The Appellate Division provided a concise description of the attorney-client privilege as it applies to an expert real estate appraisal in Tractenberg v. Township of West Orange, 416 N.J. Super. 354 (App. Div. 2010). Judge Sapp-Peterson explained the basis for the privilege:

The attorney-client privilege in New Jersey is statutory. See N.J.S.A. 2A:84A-20. The purpose of the attorney-client privilege is "to encourage clients to make full disclosure to their attorneys,"

Macey v. Rollins Eenvt'l Servs., 179 N.J. Super. 535, 539, 432 A.2d 960 (App. Div. 1981), because such confidentiality is an “indispensable ingredient in our legal system.” In re Grand Jury Subpoenas, 241 N.J. Super. 18, 28, 574 A.2d 449 (App. Div. 1989).

To qualify for the privilege, a party must show that there was a confidential communication “between lawyer and his client in the course of that relationship and in professional confidence[.]” N.J.R.E. 504(1). Confidential communications are only those “communications which the client either expressly made confidential or which he could reasonably assume under the circumstances would be understood by the attorney as so intended.” State v. Schubert, 235 N.J. Super. 212, 221, 561 A.2d 1186 (App. Div. 1989), certif. denied, 121 N.J. 597, 583 A.2d 302 (1990).

[Id. at 375.]

The privilege

extends to “the necessary intermediaries and agents through whom the communications are made.” State v. Kociolek, 23 N.J. 400, 413, 129 A.2d 417 (1957). Such “necessary intermediaries” have been held to include a psychiatrist retained by defense counsel, ibid., arson experts hired by defense counsel, State v. Melvins, 155 N.J. Super. 316, 322-23, 382 A. 2d 925 (App. Div. 1978), certif. denied, 87 N.J. 320, 434 A.2d 72 (1981), a handwriting expert employed by defense counsel, State v. Mingo, 77 N.J. 576, 584, 392 A.2d 590 (1978), and an engineering firm hired as a consultant for litigation assistance, Conforti & Eisele, Inc. v. Division of Building & Construction, 170 N.J. Super. 64, 69-70, 405 A.2d 487 (Law Div. 1979).

[Id. at 376.]

In Tractenberg, a community group sought to preserve a track of vacant land slated for development. The group urged the municipality to purchase the track for dedication as open space. The Mayor in communications with the group and in a newspaper column represented that the municipality retained appraisals of the parcel from licensed real estate appraisers who

opined that the vacant land had a market value that exceeded available municipal funds. Id. at 360-361.

The community group subsequently requested copies of the appraisal reports under the Open Public Records Act, N.J.S.A. 47:1A-1 to -13. The municipality resisted, citing the deliberative process, attorney-client and attorney work product privileges. The group filed an action in Superior Court seeking disclosure of the appraisal reports. Id. at 362.

With respect to the attorney-client privilege, the Appellate Division's reasoning was clear:

The record unequivocally shows that the Township Council, not the Township attorney, authorized the appraisals. As [the township Planning Director] testified, the appraisals were ordered to "see how much [the property] was worth" and thus aid in the council's consideration of whether the Township should acquire the [property.] The mere fact that the completed appraisals were addressed to the Township attorney did not establish an attorney-client relationship.

The Township produced no evidence before the trial court that there was any confidential communication between the Township Council and the Township attorney relating to the appraisals. The decision to order the appraisals was reached in a public forum and, according to the testimony of plaintiff during the summary proceeding, the Township Council adopted the resolution to order the appraisals at his urging during a Township Council meeting, and the Township acquiesced to this request. It is doubtful that elected officials would acquiesce to a request for appraisals from a member of the public in a public forum and then adopt a resolution in furtherance of that request, with the intention that the results of the appraisals would be kept from the public.

Moreover, even assuming the appraisals arose out of an attorney-client relationship between the Township attorney and the Township Council, the parties had no reasonable expectation that the appraisals would remain confidential. See N.J.S.A. 20:3-6; see also State, Comm'n of Transp. v. Testa, 247 N.J. Super. 335, 338, 589 A.2d 190 (App. Div. 1991); and R. 4:73-1. Therefore, the trial

court's finding that the attorney-client privilege did not apply is supported by the record.

[Id. at 376-377.]

Here, the appraisal reports were commissioned by private counsel for a private parties for the purpose of securing legal advice regarding personal estate planning. The record contains credible evidence that an attorney admitted to practice law in this State, and who maintained a long-standing professional relationship with one of the principals of plaintiffs, was retained by his client to provide legal advice personal to the principal. In the course of providing that advice, the attorney found it necessary to retain a licensed real estate appraiser to opine on the value of the real property that is the subject of these local property tax appeals. The appraisal reports, which were not obtained in contemplation of litigation, were transmitted by the expert to the attorney, who paid for the appraisal reports. The attorney used the value conclusions in the appraisal reports to provide legal advice to the principal of plaintiffs. The court concludes that the appraiser was a necessary intermediary for the attorney to provide the requested legal advice.

It is also clear from the record that the principal of plaintiffs intended for his communications with his counsel to remain confidential. There was no public interest in the principal's private estate planning and the record contains no evidence suggesting that the principal intended to use the information contained in the appraisal reports for any non-privileged purpose. The authorities cited by the Appellate Division in Tractenberg for the proposition that the municipality did not have a reasonable expectation of confidentiality in the publicly funded appraisal reports at issue in that case are not applicable here. Those authorities concern the municipality's disclosure obligations in the area of condemnation. See N.J.S.A. 20:3-6; Testa, supra; R. 4:73-1.

Because Mr. Copeland's appraisal reports are protected from disclosure by the attorney-client privilege, plaintiffs' motions to quash the Subpoenas Duce Tecum served on Mr. Copeland are granted. The court will enter appropriate Orders.¹

The court will return to plaintiffs' counsel under separate cover the materials submitted for in camera review.

Very truly yours,


Patrick DeAlmeida, P.J.T.C.

¹ While the court's determination that Mr. Copeland's appraisal reports are protected from disclosure by the attorney-client privilege resolves plaintiffs' motions, for the sake of completeness the court notes that: (1) the appraisal reports are not protected from disclosure by the attorney work product privilege, which applies only to documents "prepared in anticipation of litigation rather than in the ordinary course of business," Tractenberg, supra, 416 N.J. Super. at 374 (citing Pressler, Current N.J. Court Rules, comment 4 on R. 4:10-2(c)(2010)); and (2) R. 4:10-2(d)(3) also does not apply here as Mr. Copeland was not retained "in anticipation of litigation or preparation for a trial" The "extraordinary circumstances" provision of the rule, therefore, is inapplicable here. The court rejected defendant's argument that the frivolous litigation statute, N.J.S.A. 2A:15-59.1, trumps the attorney-client privilege. Defendant cites no legal precedent in support of this argument.