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THE TAX COURT COMMITTEE ON OPINIONS

TAX COURT OF NEW JERSEY

Patrick DeAlmeida
Presiding Judge

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September 11, 2015

Corrected 09/14/2015
page 2 "Ocean County" to "Atlantic County"
page 3 "did fully account" to "did not fully account"

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Re: Dennis P. & Mary G. Connelly v.
Township of Galloway
Docket No. 014672-2014

Dear Mr. Connelly, Mrs. Connelly and Mr. Smith:

This letter constitutes the court's opinion with respect to plaintiffs' motion pursuant to R. 4:49-1 and R. 4:49-2 for a new trial and to vacate the June 5, 2015 Judgment in the above-referenced matter. For the reasons stated more fully below, plaintiffs' motion is denied.

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I. Findings of Fact and Procedural History

This letter opinion sets forth the court's findings of fact and conclusions of law based on the submissions of the parties on the motion.

Plaintiffs Dennis P. Connelly and Mary G. Connelly are the owners of real property in defendant Galloway Township, Atlantic County. The property is designated in the records of the municipality as Block 953.08, Lot 13 and is commonly known as 11 Fulham Street. A single-family home is situated on the property, which is located in an age-restricted development.

Galloway Township implemented a municipality-wide reassessment for tax year 2014. The municipal tax assessor set the assessment on the property as follows:

Land	$ 60,600
Improvements	$190,100
Total	$250,700

Plaintiffs challenged the tax year 2014 assessment before the Atlantic County Board of Taxation. The county board thereafter issued a Judgment affirming the assessment.

On September 25, 2014, plaintiffs filed a Complaint in this court challenging the county board Judgment.

After one adjournment, the matter was scheduled for trial on June 5, 2015. Mr. Connelly appeared for trial. Mrs. Connelly did not.

At trial, Mr. Connelly, a licensed real estate broker, testified on his own behalf. He described the subject property and identified several comparable sales which he argued were credible evidence of the true market value of the residence on the relevant valuation date. In addition, Mr. Connelly called as a witness Steven M. Repetti, a neighboring property owner. The primary issued raised by Mr. Connelly was the construction around the time of the relevant valuation date of an electricity transfer station on property adjacent to the development in which

the subject property is located. Mr. Connelly argued that the tax assessor did not fully account for the impact of the transfer station on the true market value of his home.

At the conclusion of Mr. Connelly's case-in-chief, the court denied a motion by the municipality to dismiss the Complaint for failure to overcome the presumption of validity that attaches to the assessment and county board judgment. See MSGW Real Estate Fund, LLC v. Borough of Mountain Lakes, 18 N.J. Tax 364, 373 (Tax 1998).

The municipality thereafter called as its only witness a licensed real estate appraiser. Mr. Connelly did not object to the witness. He did not alert the court to the fact that the expert's report was served on plaintiffs less than twenty days prior to the start of the trial, in contravention of R. 8:6-1(b)(1)(ii). To the contrary, Mr. Connelly readily agreed to the municipality's motion to qualify the witness as an expert.

The expert testified with respect to the comparable sales that he identified as credible evidence of the true market value of the subject property, his process for verifying those sales as arm's length transactions, and the adjustments he made to the sales prices as he compared the comparable sales to the subject property. He ultimately offered his opinion as to the true market value of the subject property on the relevant valuation date.

Mr. Connelly cross-examined the expert witness. He successfully convinced the court that one of the comparable sales on which the expert relied was too remote in time to be considered credible evidence of market value for tax year 2014. On the basis of Mr. Connelly's questions, the court disregarded that sale.

At the conclusion of trial, the court delivered its findings of fact and conclusions of law from the bench in an oral opinion. The court concluded that the comparable sales offered by Mr. Connelly were not credible evidence of the true market value of the subject property, in part

because the sales were not verified as arm's length transactions and, in part because Mr. Connelly offered no adjustments to the sales prices. The court instead concluded that two of the comparable sales offered by the expert witness were the most credible evidence in the trial record of the subject property's true market value. The court applied various adjustments to the sales prices of the comparable sales and concluded that the $250,700 assessment on the subject property accurately reflected its true market value as of October 1, 2013, the relevant valuation date. The value conclusion reached by the court is less than the value offered by the expert.

Because the municipality implemented a district-wide reassessment for tax year 2014, N.J.S.A. 54:51A-6, commonly known as Chapter 123, and the Director's average ratio for the municipality were not implicated in determining the correct assessment for the subject property. N.J.S.A. 54:51A-6(d). Instead, the assessment was set at 100% of the property's true market value as of the relevant valuation date: $250,700.

On June 8, 2015, the court entered Judgment affirming the Judgment of the county board of taxation, which set the assessment on the subject property at $250,700, the true market value concluded by the court.

On July 2, 2015, plaintiffs moved pursuant to R. 4:49-1 and R. 4:49-2 "to reconsider, rehear and vacate" the June 8, 2015 Judgment and "to allow for the submission of plaintiff's expert appraisal" and for "a new trial." Plaintiffs' argument is based on the contention that "the appraisal submitted by the township contains material errors" and was received by plaintiffs less than 20 days from the trial date. Plaintiffs state that if the Judgment is vacated and a new trial scheduled they "will submit an appraisal performed (sic) by an independent appraiser which will contradict, oppose and correct the mistakes submitted by the township."

The municipality opposes the motion.

II. Conclusions of Law

According to R. 4:49-1,

> A new trial may be granted to all or any of the parties and as to all or part of the issues on motion made to the trial judge. On a motion for a new trial in an action tried without a jury, the trial judge may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment. The trial judge shall grant the motion if . . . it clearly and convincingly appears that there was a miscarriage of justice under the law.

Rule 4:49-2 allows a party to move to alter or amend a Judgment. The rule provides that:

> The motion 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, and shall have annexed thereto a copy of the judgment or order sought to be reconsidered and a copy of the court's corresponding written opinion, if any.
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> [R. 4:49-2.]

The Appellate Division has limited the circumstances in which relief under R. 4:49-2 is appropriate:

> Reconsideration should be utilized only for those cases which fall into that narrow corridor in which 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 . . . .
>
> Alternatively, 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. Nevertheless, motion practice most come to an end at some point, and if repetitive bites at the apple are allowed, the core will swiftly sour. Thus, the Court must be sensitive and scrupulous in its analysis of the issues in a motion for reconsideration.
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> [Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996).]

In order to secure reconsideration

> a litigant must initially demonstrate that the Court acted in an arbitrary, capricious, or unreasonable manner, before the Court should engage in the actual reconsideration process. . . . Although it is an overstatement to say that a decision is not arbitrary, capricious or unreasonable whenever a Court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement. The arbitrary, capricious or unreasonable standard is the least demanding form of judicial review.
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> [D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990).]

Relief after entry of Judgment "is a matter within the sound discretion of the Court, to be exercised in the interest of justice." Ibid.; Housing Auth. v. Little, 135 N.J. 274 (1994); Regional Constr. Corp. v. Ray, 364 N.J. Super. 534 (App. Div. 2003).

In support of their motion, plaintiffs rely primarily on perceived flaws and omissions in the written report of the municipality's expert. Plaintiffs had a full opportunity at trial to cross-examine the municipality's expert with respect to any weaknesses or omissions in his report and testimony. Mrs. Connelly did not appear for the trial. She therefore forfeited her chance to cross-examine the expert. Mr. Connelly cross-examined the expert at length. His cross-examination explored several topics, including the construction of the electric transfer station, the selection of comparable sales, and market conditions on or around the relevant valuation date. Mr. Connelly's cross-examination was successful in convincing the court that one of the comparable sales on which the municipality's expert relied was not credible evidence of the true market value of the subject property.

Plaintiffs offer no explanation for why they should be given a second chance to cross-examine the municipality's expert. They had a first bite at the apple at the June 5, 2015 trial. Their

dissatisfaction with the outcome of the proceeding is not a basis to vacate the court's Judgment and hold the trial again.

To the extent that plaintiffs' arguments may be viewed as being based on newly acquired evidence, their position is no stronger. Legal precedents highlight the difficult burden a party faces when seeking a new trial based on newly discovered evidence. A motion pursuant to R. 4:49-1 for a new trial based on new evidence shall be granted "when that evidence would probably alter the judgment and by due diligence could not have been discovered before the court announced its decision." Quick Chek Food Stores v. Township of Springfield, 83 N.J. 438, 445 (1980)(citing Nieves v. Baran, 164 N.J. Super. 86 (App. Div. 1978)). "'[N]ewly discovered evidence' does not include an attempt to remedy a belated realization of the inaccuracy of an adversary's proofs." DEG, LLC v. Township of Fairfield, 198 N.J. 242, 264 (2009)(citing Posta v. Chung-Loy, 306 N.J. Super. 182, 206 (App. Div. 1997)).

There is no suggestion in plaintiffs' moving papers that any of the perceived flaws in the report of the municipality's expert are based on evidence which plaintiffs' due diligence would not have uncovered prior to trial. In fact, plaintiffs' motion is replete with references to facts that were explored at trial, both during plaintiffs' case-in-chief and the cross-examination of the expert. It is clear to the court that Mr. Connelly was fully aware of the facts that he believed had an impact on the true market value of his home and that he explored those facts at trial.

Plaintiffs' motion appears to be little more than an excuse to make a belated, post-trial request to obtain their own expert. The trial of this matter took place approximately nine months after the Complaint was filed. Plaintiffs had ample opportunity to obtain the services of an expert real estate appraiser. They elected instead to proceed to trial without an expert witness. Having made that strategic election, plaintiffs are bound by the outcome of the trial.

In addition, plaintiffs argue that a new trial is justified because defendant served its expert report on plaintiffs less than twenty days before the trial in contravention of R. 8:6-1(b)(1)(ii). The court was unaware of this issue on the day of trial. Plaintiffs did not raise the question of late service of the report. They did not seek an adjournment of the trial. Mr. Connelly appeared for the trial, presented his witnesses, and cross-examined the municipality's expert without lodging an objection. His motion papers offer no explanation for his failure to note the timing of the service of the report until after Judgment was entered affirming the assessment on his property. By proceeding to trial without objection, plaintiffs effectively waived any defect in the timing of the service of the municipality's report.

Finally, plaintiffs argue that the court overlooked N.J.S.A. 54:51A-6 when setting the assessment on the subject property. While plaintiffs quote subparagraphs (a) through (c) of the statute in their moving papers, they omit subparagraph (d), the crucial provision here. That subparagraph provides as follows:

> d. The provisions of this section shall not apply to any proceeding to review an assessment of real property taken with respect to the tax year in which the taxing district shall have completed and put into operation a district-wide revaluation program approved by the Director of the Division of Taxation pursuant to P.L. 1971, c. 424 (C. 54:1-35.35, et seq.), or a reassessment program approved by the county board of taxation.
>
> [N.J.S.A. 54:51A-6(d).]

It is quite plain that N.J.S.A. 54:51A-6 and its provisions concerning the average ratio for the taxing district, the upper limit and lower limit of the common level range, and the county percentage level do not apply here. Elrabie v. Borough of Franklin Lakes, 24 N.J. Tax 158, 179-280 (Tax 2008). Galloway Township instituted a district-wide reassessment for tax year 2014. As

a result, the assessment on the subject property must reflect 100% of its true market value as of October 1, 2013, the relevant valuation date.

The remainder of plaintiffs' arguments challenge the factual findings and legal conclusions of this court. Plaintiffs are unhappy with the outcome of their trial. They have the right to file an appeal if they believe this court erred in reaching its decision. A post-trial motion for relief from a Judgment, however, is not a substitute for an appeal. In re: Estate of Schifftner, 385 N.J. Super. 37, 43 (App. Div. 2006); Wausau Ins. Co. v. Prudential Prop. & Cas. Ins. Co., 312 N.J. Super. 516, 519 (App. Div. 1998); DiPietro v. DiPietro, 193 N.J. Super. 533, 539 (App. Div. 1984).

In light of the above, the court concludes that there was no miscarriage of justice in the trial of this matter and the court did not overlook controlling decisions or relevant statutes. As a result, plaintiffs' motion for a new trial and to vacate the June 8, 2005 Judgment is denied.[1]

Very truly yours,

Patrick DeAlmeida, P.J.T.C.

[1] The court notes that plaintiffs and other taxpayer from their community have informed the court that they intend to engage an expert witness for the trials of their tax year 2015 appeals. This intended course of action does not have an impact on the plaintiffs' tax year 2014 appeal, which plaintiffs elected to try without presenting an expert witness. They are bound by the outcome of that trial. The just adjudication of tax appeals, the efficient operation of the Tax Court, and the orderly administration of local property taxation would be disrupted if the court were to reopen and try for a second time every local property tax appeal in which a party first elects to proceed to trial without an expert witness and, when dissatisfied with the outcome, seeks a second trial in which the party intends to present expert testimony. A second trial would put the taxing district at a disadvantage, would duplicate the expenditure of judicial resources, and would insert uncertainty into tax administration, given that the taxing district, which presented its evidence to the court and prevailed in the 2014 tax appeal, is entitled to finality as it conducts its financial affairs. While it is the court's obligation to ensure that plaintiffs are afforded a fair opportunity to present their claims, that obligation was fulfilled at the June 5, 2015 trial.