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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0748-12T1

MICHELE BAILEY-HOROVITS,

Plaintiff-Respondent,

v.

LONG BRANCH CITY,

Defendant-Appellant.

Argued November 6, 2013 – Decided February 20, 2014

Before Judges Alvarez, Ostrer and Carroll.

On appeal from the Tax Court of New Jersey, Docket No. 7416-2011.

Frederick C. Raffetto argued the cause for appellant (Ansell Grimm & Aaron, P.C., attorneys; Mr. Raffetto, of counsel and on the brief; Lynne Petillo, on the brief).

Steven R. Irwin argued the cause for respondent (The Irwin Law Firm, P.A., attorneys; Mr. Irwin, on the brief).

PER CURIAM

Defendant Long Branch City (Long Branch) appeals from the June 27, 2012 decision of the Tax Court reducing the assessment on plaintiff Michele Bailey-Horovits's home by $1,556,600, from $5,870,400 to $4,313,800. The final judgment was entered on August 31, 2012. We affirm.

We briefly describe the relevant proofs presented during the day-long trial. Plaintiff's property, consisting of 1.26 acres, block 1, lots 6 and 7 on the Long Branch tax map, is located in the Elberon neighborhood near Deal. Plaintiff's single-family dwelling was built in 2008 and consists of 6877 square feet, including eight full and two half-baths, a pool and pool house, tennis court, fireplace, partially finished basement, five second-floor balconies, a patio and deck, and six bedrooms including a master bedroom with its own bathrooms and dressing rooms.

Plaintiff's expert witness, Abe Schubert, opined that the home had a fair market value of $4,000,000. He visited the home in the process of preparing his report, but mistakenly described it as having "4.2" bathrooms, which he claimed was a typographical error. Schubert stated that the property had "a pool, tennis court[,] and many porches," as well as a "finished basement." He rated the quality of construction as "good."

Schubert, who employed the sales comparison approach, explained that the limited number of transactions in Long Branch necessitated reliance on comparables from Deal, which he described as a more desirable community because taxes were lower, although it had smaller properties and homes. Schubert personally contacted the real estate agents or parties involved

in the comparable sales he included in his calculations to verify the information, and he made significant upward adjustments to the figures in order to account for relative differences.

Schubert did not employ the cost approach method as he believed he was able to arrive at a realistic value based on sufficient comparable sales. He took into account the downward fluctuation in the real estate market from 2007 to 2009, and stated that the high end and "very high end" homes in Long Branch and Deal were one of the hardest hit real estate sales sectors, despite the "stabilizing of the market" from 2010 to 2011.

Schubert considered the cost approach analysis to be atypical, inappropriate, and unnecessary. Even though there were no comparable sales in the immediate area of the subject property, in his view, there were sufficient comparable sales in the surrounding area for a reliable valuation. Plaintiff had paid $5.4 million in 2005 for the house, which is built on two combined lots, but market conditions had substantially changed since the purchase.

Schubert did not examine the property record card maintained by the Long Branch tax assessor in reaching his valuation. He acknowledged on cross-examination that he had not

entered the pool house, but did not consider the amenities included in that structure to be consequential on the overall value of the property.

Defendant's appraiser, Donna Sarkady, valued the premises at $5,900,000. She arrived at the figure using not only the comparable sales approach, but also the cost approach. In her opinion, the cost approach was legitimate since the house was relatively new, and comparable sales were so few in number. She described the home as having ten full and two half-baths, five second-floor balconies, a small patio and deck, tennis courts, and a luxury pool house including a kitchenette. Sarkady included the information regarding the characteristics of the home from the municipality's property record card in her valuation, and considered the home to have "high value quality of construction in good condition."

For the cost approach, Sarkady used three comparable sales, estimating the value of the lot at $3,485,000, construction costs at $1,975,950, and adding an estimated twenty percent "entrepreneurial incentive." She criticized plaintiff's appraiser's figures as unrealistically low, and rejected his use of one comparable in Deal because it was located in a failed development.

At the close of plaintiff's case, defendant moved for dismissal under Rule 4:37-2(b), asserting that plaintiff failed to meet her burden of demonstrating that the tax assessment, presumptively valid, was mistaken. Defendant contended that plaintiff's expert's report and testimony were fatally flawed, based solely on speculation and hearsay. The judge denied the motion, finding the arguments went to the expert's credibility and that pursuant to the rule, at that point, she had to accept his testimony as true. Accordingly, she denied the motion.

When the Tax Court judge rendered her decision, she reviewed in some detail the comparable sales employed by the experts, and agreed with plaintiff that the sales comparison approach is preferred in valuing residential properties. She also noted that none of the comparables were the same. The judge deleted from her consideration one of defendant's expert's sales, as that property was purchased for the land. She calculated the value taking into account plaintiff's three comparable sales and four of defendant's comparable sales. The judge noted that plaintiff's appraiser valued an acre of land in the area at $1 million but defendant's expert valued it at $1.5 million. She accepted defendant's expert's adjustment as to site size and adopted defendant's figure. The judge

substantially reduced the upward adjustment made by defendant for the quality of construction and the view.

The judge observed that plaintiff's comparables were too low, and required upward adjustment for amenities. She increased each of plaintiff's adjusted sales prices by about $300,000 and reduced defendant's, primarily for the quality of construction. Therefore she fixed the value at $5,075,000 as of the valuation date. Dividing that by the assessment, she considered it to be 1.1567 over the ratio. She rounded the figure upwards to $800 so that she came to a value of $4,313,800. In the judge's view, the better indicator was the comparable sales and not the figures presented in the cost approach. The land valuation remained at $2,559,500 while the improvements came to $1,753,900, for a total assessment of $4,313,800.

I

"The scope of appellate review from a determination of the Tax Court is the same as that applicable to a non-jury determination of any other trial court." 125 Monitor St. v. City of Jersey City, 23 N.J. Tax 9, 13 (App. Div. 2005). Findings of fact by a trial court in a nonjury case should not be disturbed upon review unless "they are so wholly insupportable as to result in a denial of justice." Rova Farms

Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 483-84 (1974) (internal quotation marks omitted). These findings are considered binding on appeal when supported by adequate, substantial, and credible evidence. Id. at 484.

We do "not disturb the factual findings and legal conclusions of the [Tax Court] judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Fagliarone v. Twp. of N. Bergen, 78 N.J. Super. 154, 155 (App. Div.), certif. denied, 40 N.J. 221 (1963). When reviewing a decision of the Tax Court on appeal, "we generally defer to the expertise of the Tax Court in this 'specialized and complex area.'" Disabilities Res. Ctr./Atl. & Cape May, Inc. v. City of Somers Point, 371 N.J. Super. 1, 9 (App. Div. 2004) (quoting Reck v. Dir., Div. of Taxation, 345 N.J. Super. 443, 446 (App. Div. 2001), aff'd, 175 N.J. 54 (2002)); see also Brown v. Borough of Glen Rock, 19 N.J. Tax 366, 375 (App. Div.) ("Decisions of the Tax Court are accorded a highly deferential standard of review."), certif. denied, 168 N.J. 291 (2001).

On appeal, defendant argues:

> POINT I
> THE TRIAL COURT ERRED IN NOT GRANTING DEFENDANT-APPELLANT'S MOTION TO DISMISS AT

THE CONCLUSION OF PLAINTIFF-RESPONDENT'S CASE.

POINT II
PLAINTIFF-RESPONDENT FAILED TO OVERCOME THE PRESUMPTION OF VALIDITY OF THE ORIGINAL ASSESSMENT.

POINT III
THE TRIAL COURT'S DECISION LACKED ADEQUATE FINDINGS OF FACT AND CONCLUSIONS OF LAW, WAS NOT SUPPORED BY THE RECORD AND CONSTITUTES REVERSIBLE ERROR.

On a Rule 4:37-2(b) motion, "'[t]he trial court is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion.'" MSGW Real Estate Fund, LLC v. Borough of Mountain Lakes, 18 N.J. Tax 364, 378 (Tax 1998) (quoting Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969)). The Tax Court employs the same standard in deciding a motion to dismiss as does any other trial court. Passarella v. Twp. of Wall, 22 N.J. Tax 600, 603 (App. Div. 2004).

The judge gave plaintiff's expert the benefit of all favorable inferences, including credibility. Therefore his testimony overcame the presumption of correctness vested in the municipal assessment. We therefore conclude that the judge did not err in denying the motion.

Defendant raises a number of issues it contends makes the Tax Court's reliance on plaintiff's expert improper, which it

proffers in support of its second and third points of error. As an initial matter, we do not agree with defendant's position that a property record card must be reviewed in the process of conducting an appraisal. Although defendant cites to an authority titled Real Property Appraisal Manual For Assessors (3d Ed. 2002) for the contention that a property card is necessary to any appraisal, no actual citation is provided. It is not a self-evident proposition. Additionally, the work generally pertains to the manner in which tax assessors perform their role. See Nash v. Bd. of Adjustment of Morris Twp., 96 N.J. 97, 114 (1984) ("The New Jersey Assessors' Manual prescribes standard criteria for residential assessment.") (emphasis added). Furthermore, as we have long ago stated:

> We are satisfied and we hold that the Real Property Appraisal Manual for New Jersey Assessors promulgated by the Division of Taxation in 1955, while intended to serve as a guide for those charged with the assessment of real property, was not intended to preclude the use by the Division of Tax Appeals of other established and accepted means of arriving at the true value of real property.
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> [Frater Corp. v. State of N.J., Div. of Tax Appeals, 80 N.J. Super. 427, 432 (App. Div. 1963).]

Just because on the assessor's card, plaintiff's property might have been rated as having the highest level of construction quality, for example, did not mean that plaintiff's expert's

appraisal, in which the quality of construction was merely described as "good," should have been disregarded. Schubert actually viewed the property, and although he may not have entered the pool house, he entered the actual premises and had the opportunity to directly observe the quality of the construction.

Furthermore, the expert had all the information found in the card, albeit gained from other sources, that is, Schubert's physical inspection of the property, as well as his procurement of information from the tax assessor and the tax collector.

That the expert failed to notice the precise number of bathrooms in the house, did not detail the amenities available in the pool house, or the presence of a fireplace, does not mean that his overall description was inaccurate and his assessment thereby a nullity. He explained that the report contained a typographical error with reference to the number of bathrooms, and accorded the value of each bathroom at $7500 as opposed to defendant's expert, who valued the bathrooms at $10,000 and $5000 for half-bathrooms. Again, the difference is not so consequential as to undercut the court's reliance on the report.

Similarly, the report noted the tennis court and the pool house, although Schubert did not mention the presence of a fireplace. These discrepancies appear to us to be only minor in

nature. Again, that they exist is no reason to reject the entire report. See Elrabie v. Borough of Franklin Lakes, 24 N.J. Tax. 158, 164-65 n.2 (Tax 2008); Appel v. Englewood, 15 N.J. Tax. 537, 538-39 (Tax 1996).

Defendant also objects to the expert's use of hearsay, asserting that his reliance on such information makes his analysis "fatally flawed." That argument is simply not supported by precedent. See N.J.R.E. 703; Jablin v. Borough of Northvale, 13 N.J. Tax 103, 106-07 (App. Div. 1991).

Defendant's own expert agreed that the sales comparison approach yields more valid results, and is the preferred method, in appraising single-family homes. That the judge chose to rely upon the expert who employed the comparable sales analysis seems unremarkable.

Defendant also complains that plaintiff's expert erroneously calculated the net and gross percentage adjustments of comparable sales, and that the method he used was so exaggerated as to render them unusable. Certainly there is an element of subjectivity in such calculations.

It is well-established, however, that the methodology is necessary, and that the comparable sales analysis is not a precise science. "In using comparable properties to value property for real property tax purposes, comparable properties

must be analyzed and adjustments must be made which recognize and explain differences and which relate two properties to each other in a meaningful way so that an estimate of value can be determined." Little Egg Harbor Twp. v. Bonsangue, 316 N.J. Super. 271, 283 (App. Div. 1998). "The probative utility of an expert's opinion stands or falls on the facts and reasoning offered in its support." Id. at 284. The sales must be sufficiently alike to permit a finding of comparability. Ford Motor Co. v. Twp. of Edison, 127 N.J. 290, 307 (1992).

Defendant alleges that grantor/grantee information is required in the appraisal, and that it is necessary for verification of sales data. Defendant offers no support for the proposition. In any event, plaintiff's expert did contact the realtors involved in the comparable sales for verification and did verify sales figures with relevant public records and documents.

Defendant further asserts that plaintiff's expert's opinion was essentially a net opinion, unreliable, and not a sufficient basis for the trial court's conclusion that the presumption of validity of the original tax appraisal was overcome. It is undisputed that the presumption of validity must be overcome with "evidence that is definite, positive and certain in quality and quantity to overcome the presumption." 1530 Owners Corp. v.

Borough of Fort Lee, 135 N.J. 394, 404 (1994) (internal quotation marks omitted). But, a tax court's factual findings will not be disturbed unless they are plainly arbitrary or lack substantial evidence to support them. See Southbridge Park, Inc. v. Borough of Fort Lee, 201 N.J. Super. 91, 94 (App. Div. 1985).

In attempting to establish that Schubert's valuation was nothing more than a net opinion, defendant attacks each and every comparable sale on the basis that the manner in which the appraiser made adjustments was improper, or ignored amenities found in the subject property not found in the other homes. This argument was not made to the Tax Court, and nothing in the record supports it.

Furthermore, the trial judge can accept or reject the opinion of the expert. See Romulus Dev. Corp. v. Twp. of Weehawken, 15 N.J. Tax 209, 211-12 (App. Div. 1995). "We [] give deference to the Tax Court's decision and our review is limited," Phillips v. Township of Hamilton, 15 N.J. Tax 222, 227 (App. Div. 1995), in large part, because "[t]he judges presiding in the Tax Court have special expertise," see Glenpointe Assocs. v. Twp. of Teaneck, 241 N.J. Super. 37, 46 (App. Div.), certif. denied, 122 N.J. 391 (1990).

We therefore find that the Tax Court judge's reliance on plaintiff's expert value, as adjusted upwards, taking into account some of defendant's expert's comments, was not arbitrary. There was substantial evidence supporting her decision to do so. The admission of the expert's opinion, and the court's reliance upon it, was simply not an abuse of discretion.

A Tax Court may determine "a true value different from the original assessment, the County Board's assessment, or the taxpayer's valuation." Pantasote Co. v. City of Passaic, 100 N.J. 408, 416 (1985). A Tax Court judge is "not obliged to accept the opinions of experts." Glenpointe Assocs. v. Twp. of Teaneck, 10 N.J. Tax 380, 396 (Tax 1989). However, the Tax Court's right to make an independent assessment is "not boundless"; it must be "based on the evidence before it and the data that are properly at its disposal." F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 430 (1985). "When a court has available two valuation approaches which indicate different values, the court must reconcile the approaches." Lenal Props., Inc. v. City of Jersey City, 18 N.J. Tax 405, 412 (Tax 1999), aff'd, 18 N.J. Tax. 658 (App. Div.), certif. denied, 165 N.J. 488 (2000). "The process of weighing different value indications is more subjective than objective, and depends in

large part on the expertise and judgment of . . . the court." Lenal Props., Inc., supra, 18 N.J. Tax at 412. Although "specific weighting . . . could be articulated, . . . [b]acking into specific weighting factors accomplishes little," and the mathematical factors would be "illusory." Ibid.

Here, the judge did not accept Schubert's report in its entirety. Rather, she adjusted the comparable sale values "for site size" and "amenities" by adding roughly $300,000 to each adjusted sales price. The judge also reduced Sarkady's sales prices "primarily for quality of construction." The judge gave the sales comparison approach the "most weight," but also "looked at . . . the defendant's cost approach," although she did not "attempt to reconcile" the two approaches. The judge actually relied on both expert's reports in her determination of final value based on the sales comparison approach.

Despite the few comparables, the judge did not err by rejecting the cost approach. She made her "best judgment after viewing the evidence, much like a determination of credibility after observing and listening to a witness." See Lenal Props., Inc., supra, 18 N.J. Tax at 413.

The Tax Court judge was presented with the indisputable context in which plaintiff's expert calculated value, the poor real estate market, particularly the area of Long Branch, and

particularly with high end homes such as this, thereby explaining the difference between the purchase price and the later value. The trial judge had the discretion to adjust comparable sales after review of the evidence, and consideration of both experts' reports. She reconciled them to arrive at her final value calculation, which is permitted. Id. at 414-15. Ultimately, the trial judge selected a market value of $5,075,000, more than a million dollars greater than plaintiff's expert's figure, and $825,000 less than defendant's expert's figure. Accordingly, this was not an abuse of discretion, and she engaged in adequate analysis and fact-finding in reaching that result.

To reiterate, we do not consider the Tax Court's reliance on plaintiff's expert report to be so "'wide of the mark' as to constitute a 'manifest denial of justice' and an abuse of discretion." Hisenaj v. Kuehner, 194 N.J. 6, 25 (2008) (quoting State v. Wakefield, 190 N.J. 397, 435 (2007), cert. denied, 522 U.S. 1146, 128 S. Ct. 1074, 169 L. Ed. 2d 817 (2008)); Verdicchio v. Ricca, 179 N.J. 1, 34 (2004). The Tax Court's findings were not "plainly arbitrary," were based on "substantial evidence," and should be affirmed. Glenpointe Assocs., supra, 241 N.J. Super. at 46.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION