

**FILED AND
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July 28, 2004
WESTCHESTER
COUNTY CLERK**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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IN THE MATTER of

The Application for a Review under
Article 7 of the Real Property Tax
Law of a Tax Assessment by

THE BANK OF NEW YORK,

Petitioner,

- against -

The ASSESSOR of the Village of
Bronxville and the BOARD OF
ASSESSMENT REVIEW of the Village
of Bronxville,

Respondents.

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IN THE MATTER of

The Application for a Review under
Article 7 of the Real Property Tax
Law of a Tax Assessment by

THE BANK OF NEW YORK,

Petitioner,

- against -

The ASSESSOR of the Town of
Eastchester and the BOARD OF
ASSESSMENT REVIEW of the Town
of Eastchester,

Respondents.

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MOTION FOR A MISTRIAL

DICKERSON, J.

This matter involves a tax assessment review proceeding, commenced by the Petitioner, The Bank of New York [" BNY "], seeking review and reduction of Respondents' [the Assessor of the Village of Bronxville and the Board of Assessment Review of the Village of Bronxville (" the Village ") and The Assessor of the Town of Eastchester and the Board of Assessment Review of the Town of Eastchester (" the Town ")] 1991-2003 real property tax assessments of its Bank of New York branch bank [" the BNY Bank "] located at 132 Parkway Road, Bronxville, New York. Presently before the Court is the Petitioner's motion¹, pursuant to C.P.L.R. § 4402, seeking a new trial which is opposed² by the Respondents.

Background

The trial in this matter commenced on October 27, 2003 with the Petitioner calling as its first witness, Mr. John Lehman, a licenced professional engineer, who provided expert testimony on the cost to reconstruct the BNY Bank. Evidently, the Petitioner selected the cost of reconstruction approach as it's preferred valuation methodology [" Petitioners have submitted appraisals

from a qualified and competent practicing engineer and a MAI real estate appraiser. They demonstrate that the reconstruction costs of the subject property less depreciation plus the reasonable value of the underlying land justify a significant reduction in all assessments under review "³].

On direct Mr. Lehman's testimony was relatively brief consisting of an explanation of the contents of his eleven page engineering report⁴ [" the Report "]. Mr. Lehman, however, underwent three days⁵ of exhaustive cross examination during which, approximately, forty subjects were raised for the first time. The Petitioner wished to commence a redirect examination but the trial was adjourned to January 21, 2004, then to February 24, 2004 and then postponed indefinitely due to the illness of Mr. Lehman.

Mr. Lehman Undergoes Brain Surgery

In mid February, 2004, Petitioner's counsel learned that Mr. Lehman was seriously ill and would shortly undergo surgery at the Neurological Institute at New York Presbyterian Hospital for the removal of two malignant brain tumors. Sadly, Mr. Lehman was also suffering from lung cancer which had spread to a number of lymph nodes.

The Doctor's Letter

Petitioner's counsel received a letter, dated March 29, 2004, from Mr. Lehman's physician, Dr. Dennis F. Scharfenberger, stating that Mr. Lehman's condition " makes him an unsuitable candidate for being an expert witness for the foreseeable future, at least the next four months assuming he will be able to recover."

The Motion For A Mistrial

It seems clear that Mr. Lehman will be unable to resume his testimony for a considerable period of time, if at all. The Petitioner moves this Court for a mistrial, pursuant to CPLR 4402, arguing that an extensive redirect examination of Mr. Lehman would be essential otherwise it would suffer an injustice which would be fatal to its case. Respondents oppose the motion and demand that the trial proceed without further delay.

DISCUSSION

Pursuant to CPLR 4402, " At any time during the trial, the court, on motion of any party, may order a continuance or a new trial in the interest of justice on such terms as may be just." A motion for a mistrial " is granted in the discretion of the court, ' when it appears that owing to some accident or surprise,

defect of proof, unexpected and difficult questions of law, or like reason a trial cannot proceed without injustice to a party. ' Among the grounds which have been the basis for a new trial are inability of a material witness to testify because of illness." [See Weinstein, Korn, Miller, New York Civil Practice, § 4402.02, citing Concord Oil Corp. v. York Heat Serv., Inc., 262 A.D. 758, 27 N.Y.S.2d 738 (2d. Dept. 1941)].

Preventing An Injustice

" The decision to grant or deny a mistrial is within the sound discretion of the trial court and it is to be made on a case-by-case basis. " [See Chung v. Shakur, et al., 273 A.D.2d 340, 709 N.Y.S.2d 590 (2d. Dept. 2000) quoting Taylor v. Port Auth. Of N.Y. & N.J., 202 A.D.2d 414, 415, 608 N.Y.S.2d 499 (2d. Dept.1994); McNamara v. Hittner, 2 A.D.2d 417, 767 N.Y.S.2d 800 (2d. Dept. 2003); Torres v. City of New York, 306 A.D.2d 191, 762 N.Y.S.2d 67 (1st Dept. 2003)]. With regard to a motion for a mistrial, the law is clear in New York that " the facts in each case ` must be examined to determine the nature of the material placed before the jury and the likelihood that prejudice would be engendered ' " [See Taylor v. Port Auth. Of N.Y. & N.J., supra, at 202 A.D. 2d 415, quoting Alford v. Sventek, 53 N.Y.2d 743, 745, 439 N.Y.S. 2d 339 (1981)]. The denial of a motion for mistrial " may, given the facts of a particular case, constitute

reversible error *** where it appears that the motion should have been granted ' to prevent a substantial possibility of injustice ' " [See McNamara v. Hittner , supra at 417, citing Cohn v. Meyers, 125 A.D.2d 524,527, 509 N.Y.S.2d 603 (2d.Dept. 1986) quoting Halstead v. Sanky, 48 Misc.2d 586,588, 265 N.Y.S.2d 426 (1965)].

Criminal Law Analogy

Respondents argue that the Petitioner has no absolute entitlement to redirect examination of Mr. Lehman, analogizing it to a defendant's " right of confrontation " in a criminal case. Respondents assert that the matter at bar can be compared to an exception that exists to the right of a criminal defendant to confront witnesses who testify against him, citing People v. Simmons, 36 N.Y.2d 126, 365 N.Y.S.2d 812 (1975). Respondents assert that an exception to a defendant's " right to confrontation " is " the use of prior testimony in lieu of actual witness examination when a witness is unavailable, based upon the assumption that at the prior proceeding the defendant was represented by counsel who was afforded the opportunity to adequately cross-examine the witness in question. "

Respondents fail to explain how this exception in criminal cases is applicable herein. Such an analogy is inappropriate since a criminal defendant's " right of confrontation " is based upon the

Sixth Amendment constitutional right of a defendant to confront witnesses. Respondents appear to be referring to C.P.L. § 670.10 which is a statutorily created exception to the right of confrontation rule. C.P.L. § 670.10 applies when a witness testifies at a felony hearing and thereafter dies before trial. In that exceptional situation, the testimony of that witness may be received at trial despite the lack of further confrontation [See People v. Simmons, 36 N.Y.2d 126, 365 N.Y.S.2d 812 (1975)]. The situation contemplated by C.P.L. § 670.10, however, involves a defendant's right to confront witnesses and is inapplicable herein where a witness is unable to complete his testimony.

Additional Arguments Without Merit

Respondents contend that Petitioner had an opportunity to conduct a direct examination of Mr. Lehman, and should be precluded from any redirect examination. Respondents assert that (1) Mr. Lehman's engineering analysis and conclusions are contained in his Report which was admitted into evidence, (2) Mr. Lehman testified in great detail about his findings and conclusions during direct and cross-examination and (3) Petitioner's trial strategy was to limit Mr. Lehman's direct examination.

This Court rejects Respondents' arguments. The cross-examination of Mr. Lehman elicited numerous matters which were not addressed on direct examination. Petitioner would be unduly

prejudiced if it were denied redirect examination regarding such matters. On the other hand, the Respondents will not be prejudiced notwithstanding their absurd argument that Mr. Lehman's cross-examination disclosed their trial strategy.

The Rules: Redirect Testimony

It is well-settled that the scope of redirect examination is within the discretion of the trial court [See e.g., Feldsberg et al. v. Nitschke, 49 N.Y.2d 636, 642, 427 N.Y.S.2d 751 (1980) ("Nor can it be doubted that recall of a witness for redirect examination is subject to the discretion of the court "); Ingebretsen v. Manha, 218 A.D.2d 784, 631 N.Y.S.2d 72 (2d. Dept. 1995)(" [I]t is well-settled that the trial court has broad discretion in controlling the conduct of the trial, which includes limiting the scope of direct, cross, and redirect examination"); Maio v. Arnett, 203 A.D.2d 82, 610 N.Y.S.2d 781 (1st Dept. 1994) (" [T]he trial court's limiting the scope of the direct and redirect examination of plaintiff's expert witness was not an abuse of discretion "); People v. Duran, 6 A.D.3d 809, 2004 N.Y. Slip Op 02616, 775 N.Y.S.2d 390 (3rd Dept. 2004)(the trial court `` has broad discretion in controlling the conduct of the [hearing], which includes limiting the scope of direct, cross, and redirect examination ' (Ingebretsen v. Manha, 218 A.D.2d 784, 784, 631 N.Y.S.2d 72 [1975])"].

Conclusion

Due to Respondents' extensive three day cross examination of Petitioner's expert witness and the many new matters raised therein, Petitioner would be greatly prejudiced by not having an opportunity for redirect examination of its witness which this Court, in its discretion, would permit if the witness was available. Due to Mr. Lehman's grave medical condition, however, it is not likely that he will be able to resume his testimony for a considerable period of time, if at all.

Accordingly, Petitioner's motion for a mistrial, pursuant to CPLR 4402, is granted in the interests of justice.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, NY
July 28, 2004

HON. THOMAS A. DICKERSON
SUPREME COURT JUSTICE

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ENDNOTES

1. Petitioner's Notice of Motion dated April 16, 2004 and Affidavit in Support of Motion sworn to April 16, 2004; Petitioner's Reply Affidavit sworn to May 6, 2004.
2. Respondents' Affidavit in Opposition to Motion for Mistrial sworn to April 30, 2004.
3. Petitioner's Pre-Trial Memorandum dated October 1, 2003 at p. 10.
4. Petitioner's Trial Exhibit 12.
5. The cross examination took place on October 31, 2003, November 21, 2003 and December 18, 2003.