SUPREME COURT OF THE STATE OF NEW YORK, IAS PART - ORANGE COUNTY

Present: Hon. David S. Ritter, J.S.C.

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In the Matter of the Application of

CAMP COMFORT REALTY, LLC.

Petitioner,

- against –

THE ASSESSOR OF THE VILLAGE OF TUXEDO PARK and THE BOARD OF ASSESSMENT REVIEW of the VILLAGE OF TUXEDO PARK,

Respondents.

For Review of the Assessment of Certain Real Property pursuant to Article 7 of the Real Property tax Law.

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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. 4480/2009

DECISION AND ORDER

In a tax certiorari proceeding pursuant to Article 7 of the Real Property Tax Law, the petitioner moves pursuant to CPLR 3212 for summary judgment, and the respondents cross move pursuant to CPLR 3211 to dismiss the petition for failure to state a cause of action and for failure to comply with Real Property Tax Law § 708(3). On the motion and cross motion the following papers were read:

1. The petitioner's notice of motion.

2. The petitioner's affidavit in support with exhibits A through H;

3. The petitioner's affirmation in support with exhibits 1 through 4;

4. The respondents' notice of cross motion.

5. The respondents' affirmation in support of the cross motion and in opposition to the

petitioner's motion;

6. The respondents' affidavit in support of the cross motion and in opposition to the petitioner's motion;

7. The respondents' memorandum of law in support of the cross motion and in opposition to the petitioner's motion;

8. The petitioner's affirmation in opposition to the cross motion and reply to the opposition to the motion;

9. The petitioner's affidavit in opposition to the cross motion and reply to the opposition to the motion.

UPON the foregoing papers, it is hereby,

ORDERED that the motion and the cross motion are denied.

The petitioner commenced this proceeding to challenge the respondents' assessment of certain real property in the Village of Tuxedo Park. The basic background facts do not appear in dispute and may be summarized as follows: The subject property totals 56.9 acres and is comprised of two parcels. One parcel is 9.90 acres and the other is 47 acres. The prior owner of the property, Enno Vandermeer, burdened all but 12.6 acres of the property with a perpetual conservation easement. The easement prohibits, inter alia, any development or subdivision of the encumbered property (see Petitioner's Exh A). Around June 2008, Vandermeer approached non-party Diane Sugden and her husband about purchasing the property. The Sugdens owned property adjacent to the subject property. On September 20, 2008, the Sugdens agreed to purchase the property for $750,000. On October 14, 2008, the property was deeded to the

petitioner herein. Around January 2009, the petitioner received the 2009 Assessment Notifications from the respondents for the subject property. The 2009 Assessment showed on increase in the assessed value on the first parcel from $60,000 in 2008 to $84,000 in 2009, and a decrease in the assessed value on the second parcel from $200,000 in 2008 to $112,000 in 2009. Applying the relevant equalization rate, the petitioner asserts, this resulted in full values for the parcels of $600,000 and $800,000, respectively, for a total full value for the property of $1,400,000. On February 16, 2009, the petitioner filed grievances concerning the assessments. The petitioner argued that the recent sale of the property for $750,000 was an arm's length transaction and, therefore, the best indicator of the full value of the property. Thus, the petitioner asserted, the assessed values of the parcels should be adjusted accordingly. However, the respondents denied the challenges and established a final assessment roll. On April 29, 2009, the petitioner filed the petition at bar to challenge the respondents' assessments as illegal, unequal, unjust and erroneous.

The balance of the parties' contentions are in dispute.

The Motion

The petitioner moves for summary judgment. The petitioner presses its argument that the 2008 sale of the property was an arm's length transaction that accurately established the full value of the property, and that the assessed values of the subject parcels should be adjusted accordingly. Indeed, the petitioner notes, this argument has already been accepted by the Town of Tuxedo, which agreed to such a reduction, to wit: For the 2009 tax year, the Town established tentative assessed values for the parcels that reflected a full value of $2,000,000. However, after

negotiations, the Town agreed to reduce the assessed values to reflected a full value commensurate with the 2008 sale price of the property. According, the petitioner argues, the court should order the (Village) respondents to reduce the assessed values of the parcels to reflect the sale price.

The Cross Motion

The respondents cross move to dismiss the petition for failure to state a cause of action and for failure to comply with Real Property Tax Law § 718(3). The respondents argue that the petitioner failed to overcome the presumption of validity that attaches to an assessment, and failed to timely mail a copy of the petition to the superintendent of schools and the county treasurer. Thus, they assert, the motion must be denied and the petition dismissed.

In support of their contentions, the respondents submit, inter alia, the affidavit of John Ledwith, the Village assessor. Ledwith avers that he systematically analyzed all parcels of taxable property in the Village using a combination of reappraisal and trending analysis to determine which assessments needed to be adjusted and which required no change. Further, he asserts, he complied with all relevant statutes and regulations concerning the establishment and publication of assessment rates. In determining the assessed value of the subject property, Ledwith avers, he was aware of and considered the 2008 sale price of the property. However, he asserts, he determined that the sale price was "an abnormality and not the best evidence of the market value" of the property. Specifically, he notes, for the 2008 tax year, the subject property was assessed at a rate that reflected a full value of $1,857,142, and neither the petitioner nor its predecessor (Vandermeer) challenged the valuation. Ledwith opines that it is "highly unusual"

for a person to sell property for only $750,000 when they know it was recently valued at over $1.8 million. Second, Ledwith asserts, it is "highly unusual" that Vandermeer would encumber the property with a conservation easement without some counterbalancing interest. Ledwith opines that the conservation easement itself makes clear that Vandermeer was "primarily interested in the potentially enhanced value of the Subject Properties with such Conservation Easement." Further, Ledwith asserts, another "abnormality" of the sale is that parties "had a personal relationship since at least the year 2001." Specifically, he notes, Diane Sugden is the managing member of the petitioner herein and the husband owns the property adjacent to the subject property. Thus, Ledwith asserts, the parties were "neighbors." This relationship, Ledwith opines, "undoubtedly had an effect on the below-market-value 2008 Sale Price." In determining the value of a property, Ledwith notes, he takes into account the highest and best use of the property. Here, the subject property, which is currently vacant and unimproved, is located in a highly desirable area, and is surrounded by comparable properties valued in the range of $900,000 to $2,142,857. Further, the Village has a four acre zoning minimum for a single family residence. Thus, the petitioner could potentially subdivide the unencumbered 12.6 acres of the property into three building lots. Indeed, Ledwith asserts, even if the petitioner built only one home on the property, similar parcels in the Village are valued between $2,142,857 and $5,400,000. Moreover, Ledwith opines, the conservation easement actually increases the value of the unencumbered property, as it prevents development of adjacent land. This, he notes, was taken into account in valuing the property. In fact, Ledwith opines, the natural and undeveloped condition of the area is what draws purchasers and preserves the value of the properties. However, he notes, he did decrease the assessed value of one of the parcels based on the general

downturn in the real estate market in the area. Concerning the Town's assessment, Ledwith argues that the Town and Village are not "united municipalities" and that the Town's valuation is not binding and has no bearing on the Village's valuation. Indeed, he notes, the assessed values are not even established for the same date. In sum, he argues, the Village's assessed value for the subject property is fair and accurate, and the petitioner's motion should be denied.

In further support of their cross motion, the respondents argue that the petitioner failed to demonstrate by competent evidence in admissible form that the 2008 sale of the property was in fact an arm's length transaction. First, the respondents note, the New York State Office of Real Property Services (hereinafter ORPS) requires an RP-5217 form to be filed for every real estate transaction in the state. The form requires parties to disclose any unusual factors which might affect a sale price of property. One example of such an unusual factor noted by the ORPS on its website is a prior relationship between the parties, such as being neighbors on contiguous properties. Here, the respondents note, although Vandermeer and the Sugdens were neighbors on contiguous properties, the relationship was not disclosed on the RP-5217 form filed for the 2008 sale. As a result, the respondents argue, the 2008 sale was "mis-classified" by the ORPS as an arm's length transaction. Thus, the respondents argue, the ORPS's classification of the sale, which is the product of completely self-serving hearsay document, is not reliable and should not be relied upon. Thus, the respondents assert, the petitioner should not be granted summary judgment based on the same. By contrast, the respondents contend, the assessed value of the subject property was reached after consideration of all relevant factors, and properly and accurately valued the property at its best and highest usage.

In addition, the respondents note, the petitioner's arguments have fluctuated during the

various proceedings, to wit: In its grievance complaints, the petitioner sought a total reduction of $108,000 for a total assessment of $87,450. In the petition at bar, the petitioner seeks a total reduction of $121,000 for a total assessment of $75,000. The respondents argue that the petitioner is bound by its arguments before the Village and that the court lacks subject matter jurisdiction to consider a reduction of more than $108,000. Further, the respondents assert, the petitioner has used a variety of equalization rates, none of which are correct. Rather, the respondents note, the correct equalization rate for the Village if 14%. Finally, the respondents argue, the petitioner failed to satisfy Real Property Tax Law § 708(3), which requires service of a copy of the petition on both the superintendent of the relevant school district and on the county treasurer within 10 days of filing. This failure, the respondents assert, requires dismissal of the petition regardless of prejudice to the superintendent or county.

In reply, Diane Sugden denies that she or her husband had a personal relationship with Vandermeer prior to the 2008 sale. Moreover, she argues, as the subject property was vacant, the parties cannot be properly characterized as "neighbors." Indeed, she notes, for an extended period prior to the sale, Vandermeer resided in Thailand.

In addition, the petitioner argues, although it does not believe that it needed to mail a copy of the petition to either the superintendent of schools or the county treasurer, it did in fact do so on September 15, 2009. Further, the petitioner asserts, although this was not within 10 days of the filing of the petition, the case law arising under RPTL § 708(3) distinguishes between instances where there is no service and instances where there is late service. In the latter instance, the late service may be excused where there is a lack of prejudice to the school district and county. Here, the petitioner argues, neither the school district nor the county has been prejudiced.

Indeed, the petitioner asserts, neither the school district nor the county would have standing to intervene, as their taxes are established by the Town's tax rolls, not the Village's. Thus, the petitioner argues, its failure to timely comply with the mailing requirement was not fatal, and the petition may be considered on the merits. Concerning such, the petitioner asserts, the respondents offered nothing more than speculation that there was a personal relationship between Vandermeer and the Sugdens, and that there was an "abnormality" in the 2008 sale. Thus, the petitioner argues, the 2008 sale should control. Indeed, the petitioner notes, the Village assessor (Ledwith) offered no evidence in support of his contention that properties similar to the petitioner's were valued at $2,412,857 to $5,400,000. Moreover, the petitioner notes, a search of the ORPS website for sales of vacant properties 15 acres or greater since 2000 does not support the respondents' contentions, to wit: the search revealed (1) a sale on April 2, 2002, of a 280.2 acre tract for $3,330,008; and (2) a sale on April 4, 2005, of a 1,178.6 acre tract for $24,980,000. By contrast, the petitioner argues, the RP-5217 form is reliable and does not constitute inadmissible hearsay. Finally, the petitioner asserts, the court is not limited to a reduction no greater than that sought in the petitioner's administrative appeals. Rather, the court may order whatever reduction is appropriate.

Discussion

a. Real Property Tax Law § 708

The respondents' argument concerning Real Property Tax Law § 708(3) presents a threshold issue and will be addressed first. However, dismissal of the petition on that ground is denied.

In relevant part, section 708 (3) provides:

> "one copy of the petition and notice shall be mailed within ten days from the date of service thereof as above provided to the superintendent of schools of any school district within which any part of the real property on which the assessment to be reviewed is located and, in all instances, to the treasurer of any county in which any part of the real property is located * * * " Neither the school district nor any such county or village shall thereby be deemed to have been made a party to the proceeding. Proof of mailing one copy of the petition and notice to the superintendent of schools, the treasurer of the county and the clerk of the village which has enacted a local law as provided above shall be filed with the court within ten days of the mailing. Failure to comply with the provisions of this section shall result in the dismissal of the petition, unless excused for good cause shown.

(Real Property Tax Law § 708[3]). Here, the petitioner admittedly did not make the required mailings in a timely manner. Rather, the petitioner argues that it need not have made the mailings at all, and that, in any event, the mailings it did make, although untimely, were sufficient on the facts. The second argument has merit.

Initially, the petitioner cites nothing in support of its contention that the mailings need not have been made. Further, this case does not fall within the exceptions to the mailing requirements set forth in statute for a city school district governed by article 52 of the Education Law (i.e., the cities of New York, Buffalo, Rochester, Syracuse and Yonkers) and a special assessing unit as defined in article 18 of the Real Property Tax Law (i.e., an assessing unit with a population of one million or more). Thus, this argument is rejected.

However, the petitioner is correct that, on the facts presented, its failure to have made the required mailings in a timely manner is not fatal.

Initially, it is noted, the petitioner did not append the affidavits of mailing to its motion papers. Rather, the petitioner merely noted that the affidavits had been filed with the County Clerk. However, the court should not be compelled to retrieve the clerk's file in connection with

the consideration of a motion (cf., Gerhardt v New York City Transit Authority, 8 AD3d 427; Sheedy v Pataki, 236 AD2d 92). Nonetheless, given the potentially dispositive nature of the issue, the file was retrieved and the affidavits were located. The affidavits demonstrate that both the superintendent of schools and the county treasurer were mailed a copy of the petition on September 14, 2009. This was more than 10 days after the petition was filed on April 29, 2009. However, the petitioner is correct that the case law arising under Real Property Tax Law § 708(3) distinguishes between cases where the mailings are not made or are made on the wrong persons, and cases, as here, where the mailings are made on the correct persons but are not timely (see Landesman v Whitton, 46 AD3d 827). Where the required mailings are not made at all or are not made on the correct persons, the error is fatal to a petition in the absence of good cause shown. Further, in such cases, a lack of prejudice to the school district and county, without more, is insufficient to constitute good cause shown (see Landesman v Whitton, 46 AD3d 827; Orchard Heights, Inc. v Yancy, 15 AD3d 854; Premier Self Storage of Lancaster v Fusco, 12 AD3d 1135). Where the required mailings are made on the correct persons but are not timely, the error is still fatal in the absence of good cause shown. However, in such cases, a lack of prejudice alone may constitute good cause shown (see Landesman v Whitton, 46 AD3d 827; Bloomingdale's, Inc. v City of Assessor of City of White Plains, 294 AD2d 570). A lack of prejudice may be found, in general, where the school district and county will not be deprived of the opportunity to contest the petition and receive a full and fair opportunity to be heard on the issue of valuation (see Bloomingdale's, Inc. v City of Assessor of City of White Plains, 294 AD2d 570). Here, because no prejudice is argued or apparent to the school district or the county, the petitioner's failure to timely mail a copy of the petition to the same is not fatal.

b. Summary Judgment and Dismissal of the Petition

The petitioner argues that it demonstrated, as a matter of law, that the proper valuation of the subject property is the 2008 sale price. Thus, it asserts, it should be awarded summary judgment. The respondents argue that the petitioner failed to rebut the presumption of validity that attaches to an assessed value and, therefore, the petition should be dismissed. However, neither argument has merit.

A property valuation by a tax assessor is presumptively valid (see FMC Corp. (Peroxygen Chemicals Div.) v Unmack, 92 NY2d 179; Rainbow Diner v. Board of Assessors, – AD3d – [2nd Dept; May 16, 2010]; Century Realty, Inc. v Commissioner of Finance, 15 AD3d 652). In challenging an assessment, a petitioner has a threshold burden of coming forward with "substantial evidence" to rebut the presumption of validity (see FMC Corp. (Peroxygen Chemicals Div.) v Unmack, 92 NY2d 179; Rainbow Diner v. Board of Assessors, – AD3d – [2nd Dept; May 16, 2010]; Century Realty, Inc. v Commissioner of Finance, 15 AD3d 652). The substantial evidence standard is a "minimal standard" that merely requires that the petitioner demonstrate the existence of a valid and credible dispute regarding valuation through the presentation of documentary and testimonial evidence that is based on sound theory and objective data (see FMC Corp. (Peroxygen Chemicals Div.) v Unmack, 92 NY2d 179; Rainbow Diner v. Board of Assessors, – AD3d – [2nd Dept; May 16, 2010]; Century Realty, Inc. v Commissioner of Finance, 15 AD3d 652). During this threshold inquiry, the ultimate strength or credibility of the petitioner's arguments is not at issue, nor is the weight to be given either party's evidence (see FMC Corp. (Peroxygen Chemicals Div.) v Unmack, 92 NY2d 179; Rainbow Diner v. Board of Assessors, – AD3d – [2nd Dept; May 16, 2010]; Century Realty, Inc. v Commissioner of

Finance, 15 AD3d 652). Once a petitioner meets its burden of overcoming the presumption of validity, it is necessary for a court to weigh the entire record of evidence offered by both parties to determine whether the petitioner proved by a preponderance of the evidence that the property was overvalued (see FMC Corp. (Peroxygen Chemicals Div.) v Unmack, 92 NY2d 179; Rainbow Diner v. Board of Assessors, – AD3d – [2nd Dept; May 16, 2010]; Century Realty, Inc. v Commissioner of Finance, 15 AD3d 652). In reaching its determination, the court should consider the relative merits of the appraisal methods used by the parties' experts and make adjustments to the appraisals, where appropriate, to more accurately reflect the market value of the subject property, especially where both appraisers agree that the property is overvalued to some extent (see FMC Corp. (Peroxygen Chemicals Div.) v Unmack, 92 NY2d 179; Rainbow Diner v. Board of Assessors, – AD3d – [2nd Dept; May 16, 2010]; Century Realty, Inc. v Commissioner of Finance, 15 AD3d 652). In general, the best evidence of value is a recent sale of the subject property between a seller under no compulsion to sell and a buyer under no compulsion to buy (see FMC Corp. (Peroxygen Chemicals Div.) v Unmack, 92 NY2d 179).

Here, the petitioner's evidence of the 2008 sale constitutes substantial evidence to rebut the presumption of validity that attaches to the assessment. Thus, dismissal of the petition on that ground is denied. However, the petitioner failed to demonstrate, prima facie, by a preponderance of the evidence, that the property was overvalued. Rather, on the record presented, this presents a question of fact. Thus, summary judgment is denied.

\ **A conference on this matter is scheduled for May 10, 2010, at 9:00 a.m., in Courtroom 7 of the Orange County Government Center, 285 Main Street, Goshen, New**

York.

DATED: Goshen, New York

April 15, 2010

ENTER

HON. DAVID S. RITTER, JSC

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