

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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MIRIAM OSBORN MEMORIAL HOME ASSOCIATION,

Petitioner,

-against-

THE ASSESSOR OF THE CITY OF RYE, THE
BOARD OF ASSESSMENT REVIEW OF THE CITY
OF RYE, AND THE CITY OF RYE,

Respondents,

-and-

THE RYE CITY SCHOOL DISTRICT,

Intervenor-Respondent.

-----X

DICKERSON, J.

**FILED AND
ENTERED ON
DATE
March 20, 2006
WESTCHESTER
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18077/98
16567/99
16113/00
16626/01
18115/02
16987/03

DECISION & ORDER

THE ADMISSIBILITY OF THE HOTEL APPRAISALS

During the trial of this Real Property Tax Law [" RPTL "] Article
7 matter, now in its 70th day, the Intervenor-Respondent sought to admit

into evidence Respondent's Exhibits 274 and 275. The Petitioner, The Miriam Osborn Memorial Home Association [" the Osborn "] objects to the admissibility of Intervenor-Respondent's, The Rye City School District, Exhibits 274 and 275, and they "move to strike all of the testimony regarding those exhibits"¹.

Exhibits 274 and 275

Exhibits 274 and 275 consist of the appraisal reports of the Concord Hotel in the Town of Thompson, New York, and of the Villa Roma Resort Hotel in the Town of Delaware, New York, respectively. Both appraisal reports were prepared by Mr. Sterling, the Petitioner's appraiser. According to the Intervenor-Respondent, both appraisals " were filed with the Sullivan County Supreme Court; Mr. Sterling testified in support of his appraisal report of the Villa Roma Resort." Exhibit 274 " was utilized by the owners of the Concord Hotel for tax certiorari proceedings."² The Petitioner insists that " Contrary to the conclusory statement by Mr. Vincelette...no evidence has been presented that Exhibit 274 was ever 'filed and exchanged' "³.

THE SCHOOL DISTRICT'S POSITION

The Going Concern

The Intervenor-Respondent states that in the Concord Hotel appraisal, " Mr. Sterling employed an income valuation of the hotel that included a consideration of the going concern; a value of the going concern was derived by considering the actual revenues and expenses of that property, and the discreet values of the personal property, business enterprise and real property were then allocated."⁴

As to Exhibit 275, the Intervenor-Respondent contends, "As set forth in the exhibit and witnesses' testimony, Mr. Sterling was able to analyze the income and expenses of that going concern, the Villa Roma hotel, and consider revenues received by that entity for services such as food, lodging, recreation and entertainment."⁵

Prior Inconsistent Statement

The Intervenor-Respondent states that Exhibits 274 and 275 have been offered to impeach specific testimony given by Mr. Sterling as to prior inconsistent statements. They claim that Mr. Sterling testified that he was under a self-imposed limitation that precluded him from considering market data related to continuing care retirement communities. " In response to the Court's questions at trial, Mr.

Sterling testified that he has not appraised Continuing Care Retirement Communities because 'I don't do going concern appraisals'...Mr. Sterling has testified that he was unable to appraise the subject property as a Continuing Care Retirement Community because he perceived it as a 'going concern' preventing what he considered to be a proper appraisal valuation of the property. In his appraisal of the Concord and Villa Roma properties, however, the fact that both properties were operated as going concerns did not prevent Mr. Sterling's consideration of the revenues and expenses in an income capitalization approach in his respective appraisals of those properties."⁶

It is the position of the Intervenor-Respondent that Mr. Sterling's prior appraisals of the Concord and the Villa Roma properties are admissible, since they are relevant and germane to the instant proceedings and are being utilized to impeach Mr. Sterling's credibility by developing prior statements inconsistent with his testimony at trial.

THE OSBORN'S POSITION

Relevance

The Petitioner asserts that Exhibits 274 and 275 are appraisals of properties that are not located near the subject property [they are located in the Towns of Thompson and Delaware respectively, both in Sullivan County, in the Catskills]. In addition, the Petitioner

contends that the appraisals "are of properties that are hotels, which is not the same type of property as the subject property. Thus, on their face it is clear that these appraisals are not relevant to the valuation in the instant case...The only potential relevance to the instant case would be if the Intervenor-Respondent was somehow able to use those appraisals 'to impeach the expert with inconsistent statements contained therein'."7

Prior Inconsistent Statements

The Petitioner asserts that Exhibits 274 and 275 are inadmissible as prior inconsistent statements. " The Intervenor-Respondent was purportedly attempting to show that in the instant case Mr. Sterling had not valued the going concern and that in Exhibits 274 and 275 Mr. Sterling valued the going concern of the two hotel properties... Mr. Vincelette's own transcript reference provides no support for the contention that Mr. Sterling admitted to deriving a value of the going concern in those two appraisals. To the contrary, Mr. Sterling states:

A. I never - this appraisal and The Concord appraisal does not include a valuation of the going concern. It is not in there. I never said the value of The Concord Hotel with its reputation, its assembled workforce. All this furniture, fixtures and equipment is worth a certain value, I never said that, and that's why I said I didn't do a going concern appraisal. Q. On page 63 of the appraisal, do you not derive a net

operating income before taxes, reserves and income to the business and FF&E? A. Yes, but there are steps after that to do a going-concern valuation which I did not do in this appraisal or The Concord appraisal." The Petitioner further contends, " Thus, "Exhibits 274 and 275 are inadmissible as a 'prior inconsistent statement' because the presumed factual premise - i.e. that Mr. Sterling admitted to having derived a going concern value in performing those appraisals - is belied by the very testimony cited by Mr. Vincelette. "8

" Inconsistent " Defined

Petitioner cites BLACK'S LAW DICTIONARY 1193 [6th ed. 1990] wherein "inconsistent" is defined as "Mutually repugnant or contradictory. Contrary, to one another, so that both cannot stand, but the acceptance or establishment of the one implies the abrogation or abandonment of the other."⁹. The Petitioner claims that the Intervenor-Respondent was attempting to show an inconsistent methodology rather than any alleged inconsistent statement, contending that "An appraiser utilizing a particular valuation methodology for one property and utilizing a different valuation methodology for another property is not a 'prior inconsistent statement' because the use of one is not 'Mutually repugnant or contradictory. Contrary, the one to the other...".¹⁰

The Rushmore Approach

In addition, the Petitioner insists that Mr. Sterling specifically denied that there was an inconsistency in that he testified with respect to Exhibits 274 and 275 that "he did not value the going concern in those appraisals but rather he used a commonly accepted methodology specifically for hotels called the 'Rushmore approach'. (TR. 9/28/05 at 9288-9294)." ¹¹ The Petitioner insists that the "evidence before the Court clearly demonstrates that The Osborn is not a hotel. A statement based on different facts is not inconsistent or contradictory... it is not inconsistent for an appraiser to use the 'Rushmore approach' a commonly accepted methodology for hotels, when preparing two hotel appraisals, but not to use the 'Rushmore approach' for the subject property, which is not a hotel. It is not 'mutually repugnant or contradictory' for the same appraiser to utilize one income capitalization approach for the subject property when he utilized a different type of income capitalization approach called the 'Rushmore approach', which is specifically for hotels, for two hotels. Thus, there is no inconsistency..." ¹²

DISCUSSION

Prior Inconsistent Statements

A prior statement of a witness "made out of court, orally or in writing, if contradictory of a material part of his testimony, may be, if properly proven, introduced into evidence, not as substantive proof of the truth of such statement, but as tending to discredit him" [See e.g., Ahmed v. Board of Education of the City of Yonkers, 98 A.D.2d 736, 469 N.Y.S.2d 435 (2d Dept. 1983) quoting Larkin v. Nassau Elec. R.R. Co., 205 N.Y. 267, 268-269)]. Hence, to be admissible, a prior statement of a witness must be contradictory of a material part of the witness's testimony.

Use Of Rushmore Approach Is Not Inconsistent

In the instant matter, Mr. Sterling specifically denied that there was an inconsistency. He testified with respect to Exhibits 274 and 275 that he did not value the going concern in those appraisals but rather he used a commonly accepted methodology specifically for hotels called the "Rushmore Approach". This Court does not view it to be inconsistent for an appraiser to use the "Rushmore Approach", a commonly accepted methodology for the valuation of hotels, when preparing two hotel appraisals, and not use the "Rushmore Approach" for the subject

property, which is not a hotel. It is not " mutually repugnant or contradictory " for the same appraiser to utilize one income capitalization approach for the subject property when he utilized a different type of income capitalization approach for two hotels. Thus, there is no " inconsistency " such that the use of the valuation method in Exhibits 274 and 275 is somehow " mutually repugnant or " contradictory " to the method used in the instant case.

Neither Relevant Or Inconsistent

Hence, the Intervenor-Respondent failed to show that Exhibits 274 and 275 are relevant and germane to the instant proceedings or that they contain statements inconsistent with the testimony and appraisal of Mr. Sterling in the instant matter.

Conclusion

Accordingly, Intervenor-Respondent's Exhibits 274 and 275 will not be admitted into evidence, and all testimony regarding them will be stricken from the record.

The foregoing constitutes the Decision and Order of this Court.

Dated: March 20, 2006
White Plains, N.Y.

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ENDNOTES

1. Letter of John E. Watkins, Jr. dated November 11, 2005
[" Watkins Ltr. I "] at p. 1.
2. Letter of Daniel G. Vincelette dated November 23, 2005
[" Vincelette Ltr. I "] at pp. 1-2.
3. Letter of John E. Watkins, Jr. dated December 23, 2005
[" Watkins Ltr. II "] at p. 2.
4. Vincelette Ltr. I at p. 1.
5. Vincelette Ltr. I at p. 2.
6. Vincelette Ltr. I at p. 2.
7. Watkins Ltr. I at p. 2.
8. Watkins Ltr. II at p. 2.
9. Watkins Ltr. I at p. 1.
10. Watkins Ltr. I at p. 1.
11. Watkins Ltr. I at p. 3.
12. Watkins Ltr. I at p. 3.