STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

In the Matter of GEORGE WESTON BAKERIES,

Petitioner,

-against-

THE ASSESSOR AND THE BOARD OF ASSESS-MENT REVIEW OF THE CITY OF TROY, AND AND CITY OF TROY, COUNTY OF RENSSELAER, NEW YORK,

Respondents.

All Purpose Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI: 41-0377-04 Index Nos 211821
RJI: 41-0612-06 Index Nos 215240
RJI: 41-0406-06 Index Nos 218412

Appearances: Jerrold F. Janata & Associates
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DECISION/ORDER

George B. Ceresia, Jr., Justice

The petitioner has commenced proceedings pursuant to Real Property Tax Law ("RPTL") Article 7 seeking review of the 2004, 2005 and 2006 tax assessments of, as

relevant here, two[1] adjoining parcels of real property with a street address of 869 Second Avenue in the City of Troy, New York. At the time of the assessments, the property was improved by a former bakery facility constructed in the early 1900's. The petitions allege that the assessment is excessive, unequal and unlawful. The combined assessment[2] of the two parcels is $268,490.00 for each of the three years.[3] The petitioner maintains that the assessment should be adjusted as follows: 2004, $103,400.00; 2005, $94,000.00; 2006, $82,250.00.

The bakery facility was vacated and closed in 2003, and scheduled for demolition. A preservationist group thereafter commenced a CPLR Article 78 proceeding to prevent demolition of the buildings. The CPLR Article 78 petition was granted, and Supreme Court issued an injunction to prevent demolition (see Matter of Ziemba v City of Troy, 10 Misc3d 581[Sup. Ct., Renss. Co. 2006]). The decision was reversed on appeal (see Matter of Ziemba v City of Troy, 37 AD3d 68 [3d Dept., 2006]). Leave to appeal was denied (see Matter of Ziemba v City of Troy, 8 NY3d 806 [February 22, 2007]). In late February and March of 2007 the buildings were demolished. In the meantime, on December 1, 2006, the owner of the premises, Freihhofer Sales Company, Inc.[4] entered into an agreement ("Agreement") to convey the real property to an

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[1]Each of the petitions actually seeks review of the assessments of four parcels of real property identified by the following City of Troy tax map numbers: 70.80-3-3, 70.80-3-4, 70.80 - 4-7, 70.80-4-1. The parcels at issue on the instant motion are those numbered 70.80-3-3 and 70.80-3-4.

[2]No issue has been raised by the respondent with regard to the methodology utilized by the petitioner's appraiser of treating the parcels in the aggregate in determining their overall fair market value; and then rendering an opinion with regard to their combined assessment.

[3]The parcel identified as Tax Map No. 70.80-3--3 is assessed at $239,330. The parcel identified as Tax Map No. 70.80-3-4 is assessed at $29,160.

[4]It is the Court's understanding that Freihofer Sales Company, Inc. is a subsidiary of the petitioner.

entity known as 869 Second Avenue, LLC ("869 Second Avenue". The premises was conveyed to 869 Second Avenue by deed dated February 21, 2007. As will be explained more fully below, 869 Second Avenue paid $500,000.00 for the property.

The petitioner has made a motion for summary judgment, relying heavily upon the affidavit of its appraiser to establish a fair market value of the subject premises of $470,000.00 for each of the assessment years in question.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (see Zuckerman v City of NY, 49 NY2d 557, 562 [1980]; Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Ayotte v Gervasio, 81 NY2d 1062 [1993]; Smalls v AJI Industries, Inc., 10 NY3d 733 [2008]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (Smalls v AJI Industries, Inc.,supra, citing Alvarez v Prospect Hosp., supra). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to submit evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of NY, supra; Alvarez v Prospect Hosp., supra; see also Wahila v. Kerr 204 AD2d 935, 936-937 [3rd Dept., 1994]). The Court's function is to view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference, and determine whether there is any triable issue of fact outstanding (see Simpson v Simpson, 222 AD2d 984, 986 [3rd Dept., 1995]; Boyce v

Vazquez, 249 AD2d 724, 726 [3rd Dept., 1998]).

The respondent (which, incidentally, has not filed an appraisal) opposes the motion on grounds that there is a triable issue of fact which precludes the grant of summary judgment. The respondent maintains that under the Agreement (supra) the actual consideration for the real property was $2,000,000.00, not the $500,000.00 which 869 Second Avenue paid.

A review of the Agreement reveals that, indeed, the conveyance of the subject property from Freihofer Sales Company, Inc. (hereinafter "Freihofer") to 869 Second Avenue, was not structured in a fashion typical to most real estate transactions. The Agreement was among three parties, not two: Freihofer (identified therein as "Seller"), Icon Real Estate, Inc. (identified therein as "Icon") and 869 Second Avenue (identified therein as "Designee"). The Agreement, entitled "Purchase And Sale Agreement (For Straight Trade Credits)" contained the following provisions:

> "This Agreement made as the 1st day of December, 2006, by and among Freihofer Sales Company, Inc. . . . (hereinafter the 'Seller'), Icon Real Estate, Inc. . . . (hereinafter called 'Icon'), and 869 2nd Ave LLC. . . ('Designee').
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> Witnesseth:
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> "Whereas, the Seller owns the fee simple title to the real property consisting of land and improvements commonly known as 869 2nd Avenue located in Troy, New York and more specifically described on Exhibit A annexed hereto and made a part hereof; and
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> "Whereas, the Seller desires to sell such real property to Icon's designee, Icon desires to designate Designee to purchase such property from the Seller, and the Designee desires to be

designated by Icon to acquire the property from Seller, all in the manner and upon and subject to the terms and conditions set forth in this Agreement;

"Now, Therefore, for and in consideration of the mutual covenants and promises herein contained, the parties hereto agree as follows:

"1. Agreement To Buy and Sell. The Seller agrees to sell and convey to Icon's designee, and Icon agrees to designate Designee to purchase from the Seller, all in the manner and upon and subject to the terms and conditions set forth in this Agreement, the following property:

(a) that certain piece or parcel of land described in Exhibit A subject only to the Permitted Encumbrances (as defined in Section 5 hereof), together with the buildings and improvements thereon (such land, buildings and improvements as hereinafter collectively referred to as the 'Premises'); and . . .

"2. Purchase Price and Method of Payment.

(a) The total purchase price, payable in full by Icon to Seller at the Closing, as hereinafter defined, in straight trade credits ('Straight Trade Credits') with a face value of Two Million and 00/100 Dollars ($2,000,000.00) (the 'Trade Credit Purchase Price'). Straight Trade Credits and their usage are defined in Exhibit B attached hereto and made a part hereof.

(b) Designee shall pay to Icon Five Hundred Thousand and 00/100 Dollars ($500,000.00) (the 'Cash Purchase Price') to be named as Icon's designee to acquire the Property from Seller. . ."

The definition of the term "straight trade credits is set forth in Exhibit B of the Agreement as follows:

"1. Definition of Straight Trade Credits – 'Straight trade credits' shall mean the right, but not the obligation, to purchase

> services and goods made available to the Holder by Icon[5]. Such services and goods shall be purchasable in consideration of an amount of Straight Trade Credits and a cash payment which, when combined, equals the total purchase price."

In very general terms, the procedure to be followed by Freihofer to make use of the straight trade credits requires Freihofer to submit to Icon a purchase request for services or goods at a specific price. This is referred to as the "benchmark price". Icon would then respond with a "cash price". If the cash price was less than the benchmark price, Freihofer could purchase the services or goods by paying the cash price, and making up the difference between the cash price and the benchmark price by applying a portion of unused straight trade credits on a dollar for dollar basis. In effect, Freihofer was granted a limited right to purchase services and goods at a discount through Icon, the discount being the difference between the benchmark price and the cash price. It is clear from a review of the terms of the Agreement, that there was no guarantee that Freihofer would be able to utilize all of its straight trade credits.

As stated by the Court of Appeals "'[t]he best evidence of value, of course, is a recent sale of the subject property between a seller under no compulsion to sell and a buyer under no compulsion to buy'" (FMC Corp. v Unmack, 92 NY2d 179, 189 [1998, quoting Matter of Allied Corp. v Town of Camillus, 80 NY2d 351, 356; see also Matter of Eckerd v Gilchrist, 44 AD3d 1239, 1240 [3rd Dept., 2007]; Matter of Eckerd v Gilchrist, 44 AD3d 1239, 1240-1241 [3rd Dept., 2007]).

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[5]Services specifically mentioned in the Agreement include broadcast and media services and printing services.

In this instance, while 869 Second Avenue paid $500,000.00 for the real property, Freihofer has the potential to receive up to $2,000,000.00 in savings with respect to the purchase of services and goods through its arrangement with Icon. Since these terms are expressly made a part of the overall transaction of purchase and sale, it is the Court's view that the petitioner failed to satisfy its burden of proof on the motion of demonstrating that it was entitled to a determination, as a matter of law, establishing the fair market value of the property at $470,000.00. In other words, the petitioner did not demonstrate, as a matter of law, that the consideration received by Freihofer, $2,000,000.00 in straight trade credits, was not the best evidence of value. For this reason, petitioner's motion, insofar as it seeks a determination that the subject real property had a fair market value of $470,000.00 during the relevant tax years, must be denied.

Lastly, as pointed out by the petitioner, on February 20, 2008 it served upon the respondent a notice to admit that the respondent's equalization rates for the years 2004, 2005 and 2006 were as follows: 22% for 2004; 20% for 2005; and 17.5% for 2006. It is not controverted that the respondent failed to serve a response. Under CPLR 3123 a failure to respond to a notice to admit is deemed an admission of the facts set forth in the demand. (see CPLR 3123; see also Kowalski v Knox, 293 AD2d 892, 892-893 [3d Dept., 2002]). Thus, the Court will grant summary judgment to this limited extent.

Accordingly, it is

ORDERED, that the petitioner's motion for summary judgment be and hereby is denied, except with regard to petitioner's notice to admit, in which the respondent is deemed

to have admitted the equalization rates as set forth therein.

This shall constitute the decision and order of the Court. All papers are returned to the attorney for the respondent , who is directed to enter this Decision/Order without notice and to serve all attorneys of record with a copy of this Decision/Order with notice of entry.

Dated: ~~August~~ SEPTEMBER 2, 2008
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Notice of Motion dated June 25, 2008, Supporting Papers and Exhibits
2. Affidavit of Chris L. Harland, sworn to June 27, 2008
3. Affirmation in Opposition of Daniel G. Vincelette, Esq. dated July 31, 2008
4. Reply Affidavit of Henry LaCap, Esq., sworn to August 5, 2008