

**Matter of Evans Ave. Realty Corp. v Board of  
Assessors of the County of Nassau**

2009 NY Slip Op 33190(U)

December 22, 2009

Supreme Court, Nassau County

Docket Number: 401072/07

Judge: Thomas A. Adams

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,  
Acting Supreme Court Justice

TRIAL/IAS, PART 36  
NASSAU COUNTY

In the Matter of the Application of EVANS  
AVENUE REALTY CORP.,

Petitioner(s),

MOTION DATE: 9/15/09  
INDEX NO.: 401072/07

-against-

SEQ. NO. 1

THE BOARD OF ASSESSORS and THE BOARD OF  
ASSESSMENT REVIEW OF THE COUNTY OF NASSAU,

Respondent(s).

Motion by the respondents for an order to reargue/renew the order and judgment dated March 19, 2009, is granted and upon renewal/reargument the application to vacate this Court's order dated March 19, 2009, and set this matter down for a trial de novo, or in the alternative grant respondents' motion to review the issue of consolidation for joint trial of tax years 2003/04-2008/09, deny consolidation, and render a decision solely on the tax year 2003/04 is denied in its entirety.

It is well settled that a motion for reargument is addressed to the sound discretion of the Court, and may be granted upon a showing that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law (*see McGill v Goldman*, 261 AD2d 593, 594). It is not designed, however, to provide an unsuccessful party with successive opportunities to reargue issues previously decided or to present arguments different from those originally presented (*McGill v Goldman, supra; Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27).

Consolidation of 2003/04 through 2008/09 Tax Years

By letter dated October 1, 2008, the attorney for petitioner advised the respondent that the subject property was a one-story building used as an owner occupied taxi stand. Further, the letter indicated that the tax years 2003/04; 2004/05; 2005/06; 2006/07; 2007/08; and 2008/09 would be challenged. Respondent's attorney objected to the Court reviewing any year except for 2003/04 which corresponds to Nassau County Index No. 401072/07.

Respondents argue that prior to the trial of this action, respondents advised members of the tax certiorari bar, including counsel for petitioner, by way of letter dated May 13, 2008, that respondents would oppose consolidation for any tax year for which a note of issue has not been filed. The letter also stated:

“The County is amenable to stipulations of consolidation on a case-by-case basis when the County has received appropriate discovery and has been informed of tax years in dispute, all with sufficient time to analyze data and procure an appraisal if deemed appropriate.”

In the within action the County had the opportunity to conduct appropriate discovery; was informed in advance of all the tax years in dispute; had sufficient time to analyze data; and procure an appraisal if it deemed one necessary. The filing of Notes of Issue after trial, nunc pro tunc, in no way prejudiced the County nor did it deprive the State of the mandatory filing fees.

### The Appraisal Report

Respondent was denied a copy of petitioner’s appraisal due to its default in filing its own appraisal report on December 18, 2008, the trial appraisal exchange dated fixed by the Court.

... Because the respondents have failed to file an appraisal report, the simultaneous exchange contemplated by the 22 NYCRR 202.59(g) is not possible and therefore, the petitioner’s appraisal report is covered by the CPLR § 3101(d)(2) privilege.

Accordingly, the petitioner’s appraisal report shall not be made available to respondents’ attorney prior to the inquest. Upon the commencement of the inquest before the Court and upon completion of the direct examination of the petitioner’s appraiser/witness, the report shall be made available to the respondents’ attorney for use in his cross-examination. (*Corey Operating Corp. v Board of Assessors*, Supreme Ct., Nassau County, Index No. 403785/04, Justice Bucaria at pg. 7, July 25, 2006).

The County has not shown good cause for its failure to file a timely appraisal. Nor does it appear that the County ever had any intention of filing an appraisal. Nassau County had ample opportunity to procure its own independent appraisal of the subject property. For whatever reason respondents made a decision not to do its own appraisal.

Policy that in the long run may be penny wise and pound foolish. Nevertheless, it is disingenuous for the County to now suggest that it was “blind sided” by the petitioner’s independent appraisal report, as if it were presented to the Court on the eve of trial as a surprise witness in a grade B detective movie.

The issue in the within proceeding is the correct real estate tax assessment on real property described on the Land and Tax Map of Nassau County known as Sect. 35, Block 29, Lots 1-6, 7-8; School District H-16 (1305 Hempstead Turnpike, Elmont) for the tax years 2003/04-2008/09. At

trial, petitioner submitted a real estate tax appraisal (Petition Exhibit 1) prepared by John Chang, a real estate expert, and called Mr. Chang to the stand. Mr. Chang was examined by petitioner and cross-examined by the respondent. Respondent called no witnesses nor did it submit an appraisal.

The subject property is a one story brick building of approximately 9,000 square feet used as a taxi stand. It is over 50 years old, in average condition and has adequate parking. For the years under review the subject property was owner-occupied. (Page 2) (number references are to petitioner's appraisal report).

To value the subject property, Mr. Chang used the income approach. Under this approach, the net income of a property is calculated and then capitalized by a capitalization rate. The exact steps taken by Mr. Chang to calculate the fair market value of the subject property are reported on page 55 of the appraisal report.

Mr. Chang analyzed five comparable leases to obtain the rental value of the subject property. Since no space is totally comparable to another, Mr. Chang made minor adjustments to his comparables to adjust for different features. These adjustments are found on page 54 of the appraisal report. Since all the comparable leases took place immediately prior to or during the years under review, no time adjustment was needed. The income approach to value required a calculation of expenses as well as income. Mr. Chang did not use the actual expenses for the subject property because, as he testified, it has been his experience that the expenses for an owner-occupied building are not always reflective of the typical expenses experienced by a fully leased property. Therefore, Mr. Chang estimated the expenses based on a typical market analysis, market standards and his experience. Using the comparable income and expenses, Mr. Chang capitalized the net income to obtain the fair market value. Mr. Chang testified that the total capitalization rate is composed of a tax portion and an overall capitalization rate. The tax portion is objectively obtained. The tax rate is multiplied by the equalization rate. The overall capitalization rate is a subjective number calculated by Mr. Chang after reviewing and analyzing numerous economic data. This data appears in his report. (Pages 33-39). By capitalizing the net income by the total capitalization rate, Mr. Chang found the following fair market values of the subject property. (Page 3).

<u>Tax Year</u>	<u>Fair Market Value</u>
2003/04	\$107,644
2004/05	\$107,644
2005/06	\$110,212
2006/07	\$112,973
2007/08	\$120,235
2008/09	\$126,811

Respondent did not call a real estate expert to the stand nor did it introduce any expert testimony. Respondent merely cross-examined Mr. Chang in an attempt to discredit his prior testimony and his expert report.

In a real estate tax proceeding pursuant to RPTL Article 7 the assessment is presumptively

valid. Thus, the "burden of proving that an assessment is erroneous rests upon the petitioner" *Mobil Oil Co. v Tax Comm. of New York*, 50 AD2d 910. The presumption of validity ceases when the petitioner introduces "substantial evidence" to the contrary (*FMC Corp. v Unmack*, 92 NY2d 179), such as a "detailed, competent appraisal based on standard, accepted appraisal techniques and prepared by a qualified appraiser." *Matter of Niagara Mohawk Power Corp. v Assessor of Town of Geddes*, 92 NY2d 192, 196-197. The petitioner met this minimal standard by introducing a real estate expert who submitted a comprehensive appraisal report detailing the facts, figures and calculations upon which his opinion was based. Once the petitioner met its burden of proof, the presumption of validity disappeared and the court must weigh the entire record to determine whether, by a preponderance of the evidence, the subject property has been overvalued (*FMC Corp. v Unmack, supra*).

During the cross-examination, respondent questioned Mr. Chang concerning the appearance of his comparable rental properties. Mr. Chang testified that whenever necessary he adjusted his comparable for conditions and features and, in fact, some conditions/adjustments were made. (Page 54). When questioned about the location of his comparables, Mr. Chang explained why he adjusted his comparables for location and whether the location of the subject property was better or worse than the comparables. No evidence was introduced contradicting any of petitioner's adjustments. Since the expenses and the capitalization notes were qualified by Mr. Chang's experience with other rental buildings and the capitalization rate was adjusted by reference to other economic data, these numbers are accepted by the Court.

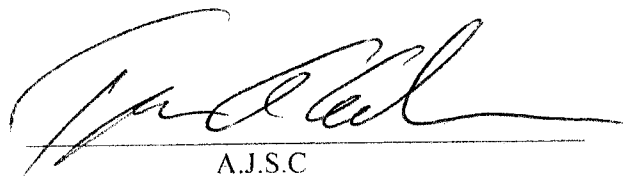
No contrary evidence of value was submitted by respondent. Respondent did not call any witness. Respondent did not discredit Mr. Chang or his appraisal. Petitioner's values were credible, substantiated with a clear economic method and reported in a convincing appraisal report.

Since the respondent presented no evidence to the contrary, this Court accepted the petitioner's findings of value.

A review of the submissions by the respondent establish that the instant application for reargument is, in substance, founded upon the same theories which this Court already considered and rejected in connection with the original application. None of the respondents' presently asserted allegations warrant a result different from that reached by this Court in its prior Order and Judgment. Accordingly, and inasmuch as the respondents' papers failed to establish that the Court misapprehended or overlooked relevant facts or misapplied any controlling principle of law with respect to their claims, the motion is dismissed in its entirety.

This decision is the order of the Court.

DATED 12-22-09

  
A.J.S.C

**ENTERED**  
JAN 07 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE