

Matter of Nicolia Bros. v Assessor of the County of Nassau

2009 NY Slip Op 33191(U)

December 22, 2009

Supreme Court, Nassau County

Docket Number: 402667/07

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
NICOLIA BROS.,

Petitioner(s),

MOTION DATE 11/19/09
INDEX NO.: 402667/07

-against-

THE ASSESSOR, THE BOARD OF ASSESSORS, AND
THE ASSESSMENT REVIEW COMMISSION OF THE
COUNTY OF NASSAU,

Respondent(s).

Motion by petitioner to set aside the court's decision is denied with leave to renew upon proper papers as described below.

This is a tax certiorari proceeding pursuant to Article 7 of the Real Property Tax Law (RPTL § 700 et seq.). Petitioner Nicolia Bros. Corp. is the owner of a parcel of commercial property located at 50 Hopper Street in Westbury. The building is leased by a single tenant who conducts a tire sales and road service business at the premises.

Although the lease covering the property was referred to by both appraisers, it was not introduced into evidence at the hearing conducted on July 1, 2009. Nevertheless, petitioner's appraiser testified that the lease was a "triple net lease" and described the lease as a triple net lease in his appraisal.¹ Under a triple net lease, in addition to rent, the tenant is responsible for paying real estate taxes, insurance, and maintenance charges (See *Mill River Club v Bd of Assessors*, 48 AD3d 169 [2d Dept 2007]).

Petitioner's appraiser utilized the income capitalization approach to valuing the property. Rather than capitalizing historical income for the years in question, petitioner's appraiser estimated "fair market rent" for tax years 2003/04 and 2004/05 based upon an analysis of seven comparable leases. The appraiser then trended the rent forward at a rate of 3.5%.

In calculating estimated gross income for the subject property, petitioner's appraiser added

¹Transcript at 10-11; petitioner's ex. 1 at 2, 58.

an allowance for real estate taxes. As the court noted in its main decision, the appraiser did not add the full amount of the real estate taxes, as would be consistent with the tenant's obligation under a triple net lease. While petitioner now asserts that the tenant was responsible for paying only the tax increase over a base year, the appraiser's allowance for real estate taxes has not been satisfactorily explained.

Despite characterizing the lease as a triple net lease, in calculating net operating income, petitioner's appraiser deducted estimated expenses for insurance and maintenance. In its decision, the court noted that those items should have been added to gross income because, under a triple net lease, they are paid by the tenant (*Senpikie Mall Co. v Assessor*, 136 AD2d 19 [4th Dept 1988]).

Respondent's appraiser utilized a weighted average of values developed from an income and a comparable sales approach to arrive at his final valuation of the property. In his income approach, respondent's appraiser analyzed five comparable leases and concluded that the fair market rent for tax year 2008/09 was \$11 per square foot, which was almost the exact rent which petitioner was currently receiving for the property. To estimate fair market rents per square foot for the previous years, respondent's appraiser discounted the rent for 2008/09 at an annual rate of 5%.

In his report, respondent's appraiser did not specifically refer to the lease as a net lease. However, respondent's appraiser accounted for real estate tax expense in the capitalization rate, as is consistent with a net lease.² Moreover, respondent's appraiser characterized all five of his comparable leases as "net leases," implying that the subject lease was also a net lease, imposing upon the tenant an obligation to pay real estate tax expenses.³ In his report, respondent's appraiser stated that, under the subject lease, the tenant was responsible for "any increase over base year tax," rather than the entire real estate tax assessed against the property.⁴ However, respondent's appraiser did not deny that the subject lease was a triple net lease when asked about the nature of the lease during his testimony.⁵ Moreover, while respondent's position at the hearing may have been ambiguous, its present position is that the lease was a triple net lease, or at least that fact was established by the evidence.⁶

Under one of respondent's comparable leases, the tenant was responsible for payment of all real estate taxes. Under three of the comparables, the tenant was responsible for tax increases over the base year. Nevertheless, in his analysis of the comparable leases, respondent's appraiser did not

²Respondent's A at 30. See also *Senpikie Mall Co. v Assessor*, supra, 136 AD2d at 22-23.

³Respondent's A at 26.

⁴Respondent's A at 30.

⁵Transcript at 56.

⁶Affirmation of Paul Reiser in opposition to motion at ¶ 2, 9.

add real estate taxes paid by the tenants to the rental income from the properties. Moreover, while not disputing petitioner's claim that the property was subject to a triple net lease, respondent's appraiser deducted insurance and maintenance expense, rather than adding these items to the rental income of the properties.

Based upon the evidence that petitioner was currently receiving fair market rent, and the lack of evidence of collusion or self-dealing, the court concluded that the appraisers should have capitalized actual, rather than estimated, income in order to estimate the value of the property. Based on the evidence that the property was subject to a triple net lease, the court added real estate taxes, historical insurance expense, and estimated maintenance to gross rental income for each tax year and deducted an allowance for management, professional fees, and a reserve for replacement. Because the actual real estate taxes for each year were not offered into evidence, the court acquired this information from the website of the Nassau County Department of Assessment.

After capitalizing the net income figures, the court concluded that the indicated assessed value was greater than the actual assessed value for each tax year. Thus, the court concluded that petitioner had not proved that the property was over-assessed in any tax year, except 2006/07 and 2007/08 for which respondent conceded there were slight over-assessments.

Petitioner moves to set aside the court's decision pursuant to CPLR 4404(b) on the ground that the property was not in fact subject to a triple net lease. Petitioner argues that the court erred by disregarding the methodology used by both appraisers with regard to capitalization of estimated income, and the treatment of real estate taxes, maintenance, and insurance. Petitioner asserts that the income attributable to the property should include only rent and the real estate taxes which exceed base year taxes and should not include maintenance or insurance.⁷ Nevertheless, the court notes that the testimony of petitioner's appraiser indicates that the amount of real estate taxes paid by the tenant was approximately equal to the total amount of taxes for each tax year.⁸ The court further notes that while petitioner requests that the lease be admitted into evidence at a reopened hearing, the lease has still not been submitted to the court.

Petitioner's argument that the court erred by rejecting both appraisers' methods and capitalizing actual income is clearly without merit. Capitalization of "realized," that is actual, income is ordinarily the surest indicator of full value, unless the property is owner-occupied, or the landlord and tenant are related, or there is some other factor indicating that the owner is not receiving fair market rent (*Merrick v Bd of Assessors*, 45 NY2d 538, 542 [1978]). Where the methods used by the appraisers are flawed, the court is to make adjustments to the appraisals to reflect more accurately the market value of the property (*Century Realty, Inc. v Commissioner*, 15 AD3d 652, 654

⁷Affirmation of Richard Fromewick at 6.

⁸Transcript at 15-16. For example, in 2004/05 actual taxes were \$32,897, and the appraiser testified that approximately \$32,081 was paid by the tenant. In 2005/06, actual taxes were \$34,768, and the appraiser testified that approximately \$33,645 was paid by the tenant.

[2d Dept 2005]).

At trial, there was no evidence that the property was owner-occupied, or that the lease was not negotiated at arm's length. Thus, the court properly attempted to estimate value by capitalizing "actual" income, including rent, taxes, insurance, and estimated maintenance expenses paid by the tenant, and deducting reasonable expenses paid by the landlord. Because the rent petitioner was receiving for 2008/09 was fair market value, the estimated rents derived by petitioner's appraiser were properly rejected by the court. Whether petitioner may reopen the hearing upon a showing that the property was not actually subject to a triple net lease requires more extended discussion by the court.

CPLR 4404(b) provides, "After a trial not triable of right by a jury, upon the motion of any party...the court may set aside its decision or any judgment entered thereon. It may make new findings of fact or conclusions of law, with or without taking additional testimony, render a new decision and direct entry of judgment, or it may order a new trial of a cause of action or separable issue." "When the trial is to the court instead of a jury, procedure is always more flexible" (Practice Commentary C4404:6). Thus, CPLR 4404(b) provides additional options to the court which are not available on a motion to set aside a jury verdict (*Id.*).

On a motion to set aside decision, the court may consider "newly-discovered evidence which, if introduced at trial, would probably have produced a different result" and which could not have been discovered with due diligence (Cf. CPLR 5015(a)[2]; *Tamara B. v Pete F.* 220 AD2d 318 [1st Dept 1995]). It is less clear whether the court may consider newly discovered evidence which could have been discovered with due diligence. CPLR 5015(a)(2) provides that after judgment has been rendered, the court may grant relief from the judgment on the basis of newly discovered evidence which "could not have been discovered in time to move for a new trial under [CPLR] 4404." Thus, CPLR 5015 seems to imply that on a motion to set aside decision pursuant to CPLR 4404(b), the court may consider newly discovered evidence which should have been discovered by the moving party. Nevertheless, the court should not consider evidence which the moving party deliberately chose not to offer. In exercising its discretion whether to give the delinquent party a "second bite at the apple," the court may consider any "misconduct" on the part of the adverse party, which may have led to the moving party's failure to offer the evidence (Cf. CPLR 5015[3]).

Despite the appraiser's testimony indicating that the tenant paid almost the entire real estate taxes, the lease itself is obviously the best evidence of the tenant's obligation. Offering the lease would probably have produced a different result, if it did not impose a duty on the tenant to pay base year taxes, maintenance, or insurance. However, the lease cannot be considered newly discovered evidence, and counsel's failure to offer it cannot be considered due diligence. Nevertheless, in his affirmation, petitioner's counsel states that he did not know that petitioner's appraisal incorrectly characterized the lease as a triple net lease.⁹ In view of counsel's admission of law office failure, the court cannot conclude that petitioner made a deliberate choice not to offer the lease into

⁹Affirmation of Richard Fromewick ¶ 7.

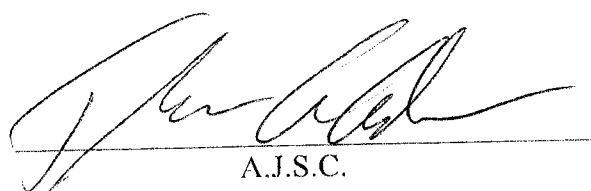
evidence.

Moreover, there is no dispute that the lease was provided to respondent in the course of discovery. In the context of a tax certiorari proceeding, counsel for respondent should not have stood silent and allowed inaccurate testimony as to the nature of the lease to mislead the court. The County has no interest in allowing petitioner's property to continue to be over-assessed.

Accordingly, petitioner's motion to set aside the court's decision is denied with leave to renew upon proper papers including, 1) a copy of the lease which was in effect for the tax years in question, 2) an affidavit sworn to by an officer of petitioner based upon personal knowledge that the landlord and the tenant were not under common ownership, or common control, or related in any fashion other than as landlord and tenant, 3) a schedule certified by petitioner's accountant showing the actual real estate taxes paid by petitioner, and the amount paid by the tenant, for each tax year.

This shall constitute the decision and order of the court.

DATED 12-22-09


A.J.S.C.

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NASSAU COUNTY
COUNTY CLERK'S OFFICE