

Matter of Neufeld v Board of Assessors

2010 NY Slip Op 30277(U)

January 28, 2010

Supreme Court, Nassau County

Docket Number: 400427/08

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 33
NASSAU COUNTY

In the Matter of the Application of
STUART NEUFELD,

Petitioner(s), TRIAL DECISION
INDEX NO.: 400427/08

-against-

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

Respondent (s) .

This is a tax certiorari proceeding pursuant to Article 7 of the Real Property Tax Law (RPTL § 700 et seq.). Petitioner Stuart Neufeld is the owner of a commercial property located at 40 Atlantic Avenue in Lynbrook. The tax map identification of the property is section 38, block 521, lot 327. The tax years under review are 2004/05 through 2009/10, and the corresponding value dates are January 2, 2003 through January 2, 2008. A hearing was held before the undersigned on November 16, 2009.

The property consists of 4,552 square feet and is improved with a partial two-story building containing 4,311 square feet of retail and 1,680 square feet of storage, or "warehouse," space. The property is owner-occupied and petitioner uses it to conduct a retail housewares business. Among the products sold are hardware and supplies, greeting cards, and gifts.

The building is attached to other commercial premises and was constructed in approximately 1938. It is of masonry construction with concrete block walls and glass plated windows. There is no basement. The building is equipped with a 25-ton heating ventilating and air conditioning system which services the retail area and is located on the roof. There are two central air conditioning units which cool the storage section of the building.

Although the property is situated between two busy commercial thoroughfares, Merrick Road and Sunrise Highway, petitioner's appraiser concluded that access to the property is limited because it is located on a one-way street. There are four parking spots to the rear of the building which are accessed by a paved driveway. Although the subject property predates the zoning code, the building's parking facilities would not be in compliance with current regulation. While there is metered parking on both sides of Atlantic Avenue, petitioner's appraiser concluded that the property

has insufficient parking space.

Petitioner's appraiser utilized the income capitalization approach to valuing the property. Because the property is owner-occupied, petitioner's appraiser properly estimated "fair market rent" based upon an analysis of the adjusted rents on eight comparable commercial buildings (See *Merrick v Bd of Assessors*, 45 NY2d 538, 543 [1978]). The gross rents of petitioner's comparables varied between \$12.98 and \$22.28 per square foot, and the gross rents were adjusted based upon location, size, condition, and facilities.

All of petitioner's comparables are located on two-way streets. Thus, the appraiser reduced their rents per square foot by 2% to adjust for their locations being superior to that of the subject property. On the assumption that larger properties have a lower rent per square foot, the appraiser increased the rent of comparable # 2 by 10% to allow for its size being double that of the subject property. Conversely, the rents per square foot of the other comparables were reduced by 10 or 15% because their areas were 1/3 to 1/6 the size of the subject property. The rents per square foot were reduced by 5 or 10% to reflect the superior condition of the comparable properties. The rents per square foot of the comparables were reduced by a "facilities adjustment," which included a 2% reduction for a basement and a 5% reduction for on site parking. The facilities adjustment also included a 2% increase for all the comparable properties because they lacked second floor, or "mezzanine," storage facilities. According to petitioner's appraiser, because all of the comparable leases commenced during the tax years under review, no "time adjustment" was necessary.

After all of the adjustments, the rents per square foot of the comparable properties ranged between \$10.01 and \$16.56, with an average of \$13.74 and a median of \$14.12. From within this range, petitioner's appraiser chose a gross rent per square foot of \$14.25 for the 2004/05 tax year. By applying the gross rent per square foot to the subject property's total retail and storage area of 5,991 square feet, the appraiser arrived at gross rental income of \$85,372 for tax year 2004/05. By trending the gross rent per square foot at a rate of 3%, the appraiser estimated gross rental income for the subsequent years.

Petitioner's appraiser opined that under leases for typical premises, the tenant would be responsible for utilities, insurance, repairs of the air conditioning system, and real estate tax increases over a base year.¹ Nevertheless, apparently because the property was owner-occupied, petitioner's appraiser deducted estimated expenses for insurance and structural repair in estimating net operating income for the property. Petitioner's appraiser estimated the insurance expense and maintenance and repair expense for the subject property after analyzing the expenses of five other commercial buildings. The expense data was drawn from 2003 to 2007, although different years were utilized for each of the comparable buildings.

Although insurance expense for the comparable properties ranged between .40 and \$1.23 per square foot, insurance expense for the subject property was estimated at \$1.25 per square foot for

¹Petitioner's appraisal at 18.

tax year 2004/05. Applying this rate to the total area yielded an insurance expense of \$7,489. Maintenance and repair expense ranged between .05 and \$5.03 per square foot, and petitioner's appraiser estimated \$0.75 per square foot for the subject property. Since the structural repair expense for 2004/05 was \$2,825, it appears to have been estimated based upon an area of 3,767 square feet. Insurance and structural repair expense were trended at the rate of 3% for subsequent years. Management expense was estimated at 6% of effective gross income, that is gross income less a vacancy and collection allowance of 8%. Professional fees were estimated at \$2,000, on the assumption that legal and accounting services were performed on a single lease. The reserve for replacement was estimated at \$0.75 per square foot. Applying this rate to the total area yielded a reserve for replacement expense of \$4,493 for tax year 2004/05. Professional fees and the reserve for replacement were also trended at a growth rate of 3%.

By deducting operating expenses from effective gross income, petitioner's appraiser arrived at net operating income of \$57,022 for tax year 2004/05. Petitioner's appraiser derived a capitalization rate for each tax year based upon the "band of investment technique," which is a weighted average of mortgage and equity rates, increased by a tax factor. Dividing the net operating income for 2004/05 by a capitalization rate of 16.29% yielded an indicated market value of \$350,000. Multiplying the indicated market value by the stipulated equalization rate yielded an indicated assessed value of \$3,273 for tax year 2004/05.

Since the actual assessed value was less than the indicated assessed value, petitioner's appraiser did not claim that a reduction was indicated for tax year 2004/05. Nor did petitioner's appraiser claim that a reduction was indicated for tax year 2005/06 or 2006/07. However, for tax year 2007/08, petitioner's appraiser found an indicated market value of \$399,000 and an indicated reduction in the assessed value of \$193. Although the indicated market value for 2007/08 was the same as it had been in 2006/07, a reduction in assessed value was indicated because of the amount of the increase in the assessed value in 2007/08. Petitioner's appraiser found an indicated market value of \$416,000 and an indicated reduction in assessed value of \$1,586 for tax year 2008/09. Petitioner's appraiser found an indicated market value of \$433,000 and an indicated reduction in assessed value of \$1,617 for tax year 2009/10. The capitalization rates which petitioner's appraiser used for tax years 2007/08 through 2009/10 were 15.61 %, 15.44 %, and 15.25 % respectively.

Respondent's appraiser also utilized an income capitalization approach to valuing the property. Respondent's appraiser analyzed the rents on five comparable commercial properties whose gross rents varied between \$24.54 and \$30.70 per square foot. Respondent's appraiser adjusted the rents per square foot based on time, location, size, condition, and utility.

Since all of respondent's comparable leases commenced after January 2, 2003, the appraiser reduced the gross rents per square foot at the rate of 6% per year to adjust them to the first valuation date. The rents of two of the comparables were reduced by 5% to reflect their superior locations, while the rent of one comparable was increased by 10% to reflect a location inferior to the subject property. Comparables # 1 and # 2 did not receive a location adjustment, as they are situated on a one-way street, supposedly similar to the subject property. However, photos of these comparables

reveal that they are at, or in close proximity to, the “five corners” in Lynbrook and are exposed to traffic in several different directions.

Respondent’s comparables range in area from 1,000 to 2,700 square feet and are all considerably smaller than the subject property. Although the comparables ranged in size from approximately 1/6 to 1/2 of the area of the subject property, respondent’s appraiser reduced the comparables’ rents per square foot by only 10%, and in one case only 5%. The rents of two of the comparables were reduced by 5% to reflect their superior condition, and the rent of one comparable was increased by 5%, to reflect its inferior condition, as compared to the subject property. All of respondent’s comparables were on the ground floor. Thus, each comparable received a “utility adjustment” of 5% to reflect its lack of second floor, or “mezzanine,” storage space, which is possessed by the subject property. The rents of two of the comparables were reduced by 5% to allow for their on site parking facilities.

After all adjustments, the gross rent per square foot for respondent’s comparables ranged between \$18.63 and \$25.75. From this range, respondent’s appraiser chose a fair market rent for 2004/05 of \$21.00 per square foot. This figure represented the median value, rounded up to a whole dollar. To estimate fair market rent in subsequent years, respondent’s appraiser trended the base year by either 5 or 6%. Respondent’s appraiser applied the rent per square foot to the retail area of the subject property to arrive at gross income of \$90,531 for tax year 2004/05 and deducted an allowance for vacancy and collections of 5%.

Respondent’s appraiser estimated insurance expense at 2.5% of gross income, which translates to \$2,263 for tax year 2004/05.² Dividing this expense by the total area yields an insurance cost of .38 per square foot. Structural repair was estimated at 3% of gross income in each tax year. Management expense was estimated at 5% of effective gross income, that is gross income less the vacancy allowance. Respondent’s appraiser did not allow any expense for professional fees or a reserve for replacement.

Applying a capitalization rate of 15.337% to the net income for tax year 2007/08, respondent’s appraiser found an indicated value for the property of \$595,000. Because the indicated assessment for that value exceeded the actual assessment, respondent’s appraiser concluded that the property was not over-assessed. For tax year, 2008/09, respondent’s appraiser applied a capitalization rate of 14.271% to the net income and arrived at an indicated value of \$680,000. Based upon that value, respondent’s appraiser concluded that the property was not over-assessed for tax year 2008/09. Finally, respondent’s appraiser applied a capitalization rate of 13.895% to the net income for tax year 2009/10 and arrived at an indicated value of \$735,000. Based upon that value, respondent’s appraiser concluded that the property was not over-assessed for tax year 2009/10. Respondent’s capitalization rates were also based upon a band of investment analysis.

A real property tax assessment may be reviewed upon the grounds that the assessment is

²See respondent’s appraisal at 40-41.

excessive, unequal or unlawful, or that the property has been misclassified (RPTL § 706). A tax review proceeding “is in the nature of a trial *de novo* to decide whether the total assessment of the property is correct and, if it is not, to correct it” (*Pleasant Valley v Board of Real Property Services*, 253 AD2d 8, 14 [2d Dept 2009]). The court’s “concern is with the assessment imposed and not the manner in which the assessment was determined” (Id).

A property valuation by a tax assessor is presumptively valid (*Century Realty, Inc. v Commissioner*, 15 AD3d 652 [2d Dept 2005]). In challenging an assessment, petitioner has a threshold burden of coming forward with substantial evidence to rebut the presumption of validity (Id at 653). The substantial evidence standard is a “minimal standard” that merely requires the petitioner to 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” (Id). “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” (Id).

“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” (Id at 654). “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....” (Id).

The petitioner may meet its minimal burden of overcoming the presumption of validity by submitting an appraisal utilizing an accepted method of valuation (*Rosewood Property Co. v Bd of Assessment Review*, 309 AD2d 1163 [4th Dept 2003]). Despite having failed to meet his threshold burden for the first three years, petitioner met his burden as to the last three years because income capitalization is an accepted method of valuation. Thus, the court will proceed to determine based on the entire record whether the property is overvalued for tax years 2007/08 through 2009/10 and, if so, what are the correct assessments.

The court begins by crediting the comparables and gross rents analyzed by petitioner. Respondent’s comparables are of generally newer construction than the subject property. For example, respondent’s comparables #1 and #2 are both in the same building which was constructed in 2003. Respondent’s comparable #3 was built in 1946, expanded in 1952, and renovated in 1988. While respondent’s comparable #4 was built in 1946 and comparable #5 was built in 1921, both buildings appear to have been recently updated.

On the other hand, except for comparable #4 which was built in 1975, petitioner’s comparables are of much closer vintage to the subject property. Comparable #6 and #7 are located in the same building which was built four years before the subject property and has not been renovated since 1967. One of petitioner’s comparables was built in 1962, and four were built in the 1950’s.

The court further credits petitioner's adjustments and concludes that petitioner's gross rent of \$14.25 per square foot for tax year 2004/05 is reasonable. Respondent notes that petitioner's appraisal states at page 22 that the comparables did not warrant an adjustment for condition. However, this statement is clearly an error as the lease grid on the following page shows that condition adjustments were in fact taken for all the comparables. The failure to delete the erroneous statement does not detract from the reliability of petitioner's appraisal. Respondent also notes that petitioner's facilities adjustments cannot be reconciled in terms of the percentages allocated to storage, basement, and parking accommodations. However, the facilities adjustment by nature has a subjective component. Thus, the court concludes that petitioner's 8 and 10% facilities adjustments were reasonable.

The court further credits petitioner's 3% growth rate in the gross rent per square foot. Respondent's growth rate of somewhere between 5 and 6% does not appear consistent with the economic data, including Lynbrook's declining population, unemployment rate, and negative job growth.³ Indeed, respondent's appraiser acknowledged that "the aged downtown area of Lynbrook" is in need of revitalization.⁴ Accordingly, the court adopts petitioner's gross rent of \$93,288 for tax year 2007/08, gross rent of \$96,087 for 2008/09, and \$98,969 for 2009/10.

The court further credits petitioner's vacancy and collection rate of 8% of gross rent. Petitioner's appraiser asserts without contradiction that the Village of Lynbrook has "multiple vacancies" in retail stores along Atlantic Avenue, and nearby Merrick Road and Sunrise Highway.⁵ Thus, the 5% vacancy and collection rate assumed by respondent's appraiser does not appear adequate. Accordingly, the court adopts petitioner's effective gross income of \$85,825 for tax year 2007/08, effective gross income of \$88,400 for 2008/09, and effective gross income of \$91,052 for 2009/10.

Petitioner estimated management expense at 6% of effective gross income, while respondent estimated management expense at only 5%. However, because respondent estimated management expense based upon a higher effective gross income, its management expense estimate for 2007/08 is only \$30 less than is petitioner's estimate. Respondent's management expense estimate is actually greater than petitioner's estimate for 2008/09 and 2009/10. Accordingly, the court adopts petitioner's management expense estimates for tax years 2007/08 through 2009/10.

Respondent estimated structural repair based on 3% of gross income, while petitioner estimated structural repair at .75 per square foot on only a portion of the property. The court notes that for tax years 2007/08 through 2009/10 respondent's estimates as to structural repair were actually higher than those of petitioner. Accordingly, the court adopts petitioner's structural repair

³Petitioner's appraisal at 15.

⁴Respondent's appraisal at 27.

⁵Petitioner's appraisal at 15.

expense estimates for those three tax years.

Petitioner's estimates as to professional expense and the reserve for replacement appear reasonable, and no estimates were offered by respondent for those expenses. Accordingly, the court adopts petitioner's estimates as to professional fees and the reserve for replacement for tax years 2007/08 through 2009/10.

Petitioner's estimate as to insurance expense seems excessive, particularly because it is outside the range of petitioner's own data. On the other hand, respondent's appraiser described the expense as "fire insurance," suggesting he did not include liability coverage, and his estimate is not supported by data on comparable properties. From the insurance data provided by petitioner, the court determines that a reasonable rate for appropriate insurance coverage is .83 per square foot for the 2007/08 tax year. This is the rate applicable to a 4,440 square foot building which was built in 1925 and appears to be the closest comparable to the subject parcel for purposes of estimating insurance expense.⁶ Applying this rate to the building's total area of 5,991 square feet yields an insurance expense of \$4,973 for tax year 2007/08. Trending this expense at a growth rate of 3% yields an insurance expense of \$5,122 for tax year 2008/09 and \$5,276 for tax year 2009/10.

Substituting the insurance figures developed above yields net income of \$65,580 for tax year 2007/08, net income of \$67,487 for tax year 2008/09, and net income of \$69,448 for tax year 2009/10.⁷ For the tax years in question, petitioner's capitalization rates appear to be based upon a mortgage rate of 7.5% while respondent's capitalization rates appears to be based upon a mortgage interest rate of 6.0%.⁸ The court adopts respondent's slightly lower capitalization rates as being more in keeping with prevailing interest rates during these tax years. Dividing the net income figures derived above by respondent's capitalization rates, the court concludes that the subject property has an indicated value of \$427,593 for tax year 2007/08, an indicated value of \$472,896 for tax year 2008/09, and an indicated value of \$499,806 for tax year 2009/10.

Applying the equalization rate of .00965 to the 2007/08 indicated value yields an indicated assessed value of \$4,126. Since the assessed value is \$4,043, petitioner has not proved that the property was over-assessed for tax year 2007/08.

Applying the equalization rate of .0096 to the 2008/09 indicated value yields an indicated assessed value of \$4,540. Since the assessed value is \$5,580, there should be a reduction of \$1,040 for tax year 2008/09.

Applying the equalization rate of .00975 to the 2009/10 indicated value yields an indicated

⁶Petitioner's appraisal at 24.

⁷See petitioner's appraisal at 27.

⁸Compare petitioner's appraisal at 19 with respondent's appraisal at 35.

assessed value of \$4,873. Since the assessed value is \$5,839, there should be a reduction of \$966 for tax year 2009/10.

This shall constitute the decision, order, and judgment of the court.

DATED JAN 28 2010


A.J.S.C.

ENTERED

FEB 03 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**