

**LT PROPCO, LLC v Assessor of the County of  
Nassau**

2011 NY Slip Op 33087(U)

November 15, 2011

Sup Ct, Nassau County

Docket Number: 409731/07

Judge: Thomas A. Adams

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,  
Acting Supreme Court Justice

TRIAL/IAS, PART 33  
NASSAU COUNTY

LT PROPCO, LLC,

Plaintiff(s),

**DECISION AFTER TRIAL**

-against-

INDEX NOS.: 409731/07  
411002/08  
411565/09  
410021/10

ASSESSOR OF THE COUNTY OF NASSAU and THE NASSAU  
COUNTY ASSESSMENT REVIEW COMMISSION,

Defendant(s)

This a proceeding under Article 7 of the Real Property Tax Law for a review of the assessments for the tax years 2007/09, 2008/09, 2009/20 and 2010/11.

The subject property is commercial retail real property, and is located on the westerly side of Franklin Ave., Garden City, NY. The address is 1200 Franklin Ave., and known commonly as Lord & Taylor("L&T") department stores, Section 34, Block 514, Lots 9 - 30, 33 -34. The subject real property is situated on 2.3 acres of land and improved with a 148, 122 square foot, partial two-story commercial building occupied by the single tenant Lord & Taylor department store. Lord & Taylor has been the sole tenant during the tax years in review before this Court. A partial basement is for purposes of storage and the on-site parking is provided and controlled by the local municipality, the Village of Garden City.

The matter was heard before this Court on May 11, and May 12, 2011, with Herman, Katz, Cangemi & Clyne, LLP appearing for the petitioner, and Franklin Ormsten, and Mindy Krauss appearing on behalf of the Nassau County Attorney's Office, for the respondent. Each side submitted an appraisal report in conformity with § 202.59 (g) of the uniform Rules for the New York Trial Courts. Don Franklin of Goodman-Marks testified on behalf of petitioner, and John S. Goess of John S. Goess Realty Appraisal, Inc. testified for the respondent. A summary of their respective appraisals, based on the Income Capitalization Approach, used by both parties, is provided as follows:

Parties stipulated to the following;

Equity Ratios

<u>Year</u>	<u>Petitioner</u>	<u>Respondent</u>
2007/08	.965	.965
2008/09	.960	.960
2009/10	.975	.975
2010/11	1.00	1.00

Tax Factor

<u>Year</u>	<u>Petitioner</u>	<u>Respondent</u>
2007/08	4.28	4.28
2008/09	4.06	4.06
2009/10	3.94	3.94
2010/11	3.81	3.81

The following tables reflect the contrasting appraisals of the parties;

Subject Property Value

<u>Year</u>	<u>Petitioner</u>	<u>Respondent</u>
2007/08	14,660,000	21,427,000
2008/09	14,750,000	22,050,000
2009/10	14,830,000	21,427,000
2010/11	13,770,000	20,318,000

Rent per Square Foot

<u>Year</u>	<u>Petitioner</u>	<u>Respondent</u>
2007/08	15.50	19.00
2008/09	15.50	20.00
2009/10	15.50	20.00
2010/11	14.50	19.00

Gross Income

<u>Year</u>	<u>Petitioner</u>	<u>Respondent</u>
2007/08	2,222,000	2,673,602
2008/09	2,222,000	2,814,318

2009/10	2,222,000	2,814,318
2010/11	2,148,000	2,673,602

Vacancy & Collection Loss

<u>Year</u>	<u>Petitioner</u>		<u>Respondent</u>	
2007/08	111,000	5%	140,716	5%
2008/09	111,000	5%	148,122	5%
2009/10	111,000	5%	148,122	5%
2010/11	161,000	7.5%	140,176	5%

Effective Gross/Collectible Income

<u>Year</u>	<u>Petitioner</u>	<u>Respondent</u>
2007/08	2,111,000	2,673,602
2008/09	2,111,000	2,814,318
2009/10	2,111,000	2,814,318
2010/11	1,987,000	2,673,602

Expenses

<u>Year</u>	<u>Petitioner</u>	<u>Respondent</u>
2007/08	135,000	143,975
2008/09	135,000	157,009
2009/10	135,000	171,822
2010/11	126,000	166,193

Net Operating Income

<u>Year</u>	<u>Petitioner</u>	<u>Respondent</u>
2007/08	1,976,000	2,529,628
2008/09	1,976,000	2,657,309
2009/10	1,976,000	2,642,496
2010/11	1,858,000	2,507,409

Capitalization Rate

<u>Year</u>	<u>Petitioner</u>	<u>Respondent</u>
2007/08	.0920	.8241
2008/09	.0940	.8241
2009/10	.0950	.8262
2010/11	.0980	.8434

A property valuation by a tax assessor is presumptively valid. A petitioner may overcome that presumption by demonstrating the existence of a valid and credible dispute regarding valuation through the presentation of documentary evidence that is based on sound theory and objective data ( see *Frontier Park v. Assessor of Town of Babylon*, 293 AD2d 608 [2<sup>nd</sup> Dept 2002]). The parties relied on the expert testimony of experienced certified real estate appraisers who determined value using the income capitalization approach, a recognized appraisal method. However, the experts disagreed in their approaches to calculating income and capitalization rates.

The appraisers for both parties relied on shared lease comparables of similar establishments and deducted a percentage for vacancy losses to compute an effective gross income. Both are accepted methods of determining income. Accordingly, the instant petitioner met its initial burden of coming forward with substantial evidence to rebut the presumption of validity. 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 ( see *Century Realty, Inc. v. Commissioner of Finance*, 15 AD3d 652 [2<sup>nd</sup> Dept 2005]).

Here, the petitioner met its initial burden and thereby overcame the initial presumption in favor of the Board when it submitted an appraisal report and presented expert testimony that supported its claims ( see *Rainbow Diner v. Board of Assessors*, 71 AD3d 901 [2<sup>nd</sup> Dept 2010]). This Court is now required to reconcile the significant differences in the positions of the expert witnesses, particularly, in this case, the net operating income and capitalization rate.

In order to arrive at a dollar value of square footage, the court considered the respective appraisal reports with their annexed comparative appraisals as well as the trial testimony of the appraisers. In determining the market rent per square foot the respective appraisers reviewed the lease figures of other retail stores. The petitioner chose 10 comparables while the respondent selected 11.

Regarding the net operating income for tax years, 2008, 2009, 2010, the petitioner multiplied its selected rental value, (\$15.00) by square footage (148,122) to get potential gross rent, and annual rental income in dollars. Vacancy and collection factors of 5% were deducted from that number to get effective gross income of \$2,222,000. For the tax year, 2011, the petitioner selected a rental value of (14.50) and the vacancy and

a collection factor of 9.2% to arrive at \$2,148,000 as its net income. The petitioner's selected value of \$15.00 per square feet as its adjusted rental value, which appears to be the average of rental income based on 3% of its appraised gross sales per square foot of and 3% of its actual gross sales per square foot. The 3% figure represents the median percentage of net rent as reported by *Dollars and Cents*, 2006.

The respondents selected the rental value of \$19.00, an average of 9 of the 11 comparables used in its appraisal, for tax years 2008 and 2011, while using \$20.00 per square feet for years, 2009 and 2010. Respondents used 5% in all tax years in dispute, for vacancy and collection loss allowances. It determined that petitioner's net income for the years from 2008 through 2011, are \$2,673,602; \$2,814,318; \$2,814,318; and \$2,673,602. It is noteworthy that while the respondent suggests that figure of \$19.21 more accurately represents the rental value that this Court should consider, based on petitioner's actual gross sales, it concedes that the figure is unadjusted ( see Respondent's Memorandum of Law, p. 9, ¶ 4). Implicit in its concession is an acknowledgment that this figure should be downwardly adjusted.

In each party's determination of rental value, it is noted that out of the 10 and 11 comparables each party used in their respective appraisals, the petitioner and respondent agreed on four: Galylans, aka Dick's, Roosevelt Field; Wal-Mart, Westbury; Best Buy, Harbour Mall; and Bed, Bath, and Beyond in New Hyde Park. Based on petitioner's appraiser, the main feature that has been deemed as a negative factor and one that is basically obsolete in newer retail structures, is that L&T is a multi-story store. The trend is that retail establishments are now set in sprawling single story buildings such as Wal-Mart, and the other jointly selected comparables, Best Buy and Bed Bath and Beyond. This point was also conceded by respondent's appraiser.

With respect to any adjustments, this Court notes that the ultimate purpose of valuation, whether in eminent domain or tax certiorari proceedings, is to arrive at a fair and realistic value of the property involved. Further, in an assessment review, the court is granted great discretion in evaluating the appraisals presented by each party ( see *Oneonta Tennis Club v. City of Oneonta Assessor*, 163 Misc.2d 826 [Oneonta Supreme Ct. 1994]).

According to Costar Long Island Retail, Key Performance Metrics–Total Retail Market, the average asking rental rate, is 17.51 per square feet (see Respondent's

Appraisal, p.55). The petitioner's income rate, based on actual gross sales in 2007, reflects a figure of \$18.95 per square feet. Averaging the three figures, 19.00, 17.51, and 18.95, would net a result of 17.15. The Court, in considering the evidence of the economic decline of the historic hub where L&T is located, a factor also conceded to by the respondent ( see Tr. May 12, 2011, Cross Examination of J. Goess, p. 157, ln. 5 - 10), an adjustment of 20% is indicated. This yields the result of \$15.00 per square feet.

While respondent contends that petitioner's sales are relatively high in comparison to its retail counterparts, petitioner factually supported its argument that sales reflect merchandising and marketing not necessarily the economic climate. One such cited example was that Orbach's did not perform as well as Fortunoff's in the exact same Westbury location during better economic times.

The Court considered the petitioner's downward adjustment, based on its evidence that L&T's parking is inferior with access to only one floor and the lot is municipally owned and that Gaylan's, at 96, 127 sq. ft. is 50% smaller than L&T and larger stores tend to lease for less on a per SF basis than smaller comparables. The Court also notes that petitioner's reference to Dollars & Cents shopping Centers as a resource to set a rental value, should be limited to advisory purposes as its figures are based on shopping centers and not stand alone stores such as L&T. The Court also considers that while Gaylan's may be situated in a preferable retail setting, L&T does not have the common area costs associated with a mall.

Petitioner contends that other factors are to be taken into consideration besides actual sales, and the respondent has failed to do so. For example, the subject property is located in a declining area as far as retail establishments are concerned. Major department stores, such as the ones abutting Sak's Fifth Avenue, have either relocated to the mall or closed altogether. They were not replaced with other stores. The fact that Sears, located directly across the street, has a much lower sales margin underscores this point.

Further, as stated previously, this Court is granted great discretion in evaluating the appraisals presented by each party and it would not be improvident in downwardly adjusting the base rent of \$19.00 per sq. ft. by 20% to account for the economic impact of the declining shopping area on L& T. This would result in a \$15.00 per square and

as both parties used Gaylan's set value of \$15.60 as comparable value, it would not be improvident to use that figure as the value for gross rent per square foot ( see *York Sun Plaza Enterprises, Corp. v. Tax Com'n. of City of New York*, 304 AD2d 763 [2nd Dept 2003]).

The amount as set forth by the parties for expenses are not so disparate to warrant discussion. There, however, remains for consideration the calculation of the capitalization rate as any seemingly slight difference can yield a significant result.

The petitioner sets forth the components as follows:

<u>Year</u>	<u>Mtg. Rate</u>	<u>Mtg. Term</u>	<u>Mtg. Constant</u>	<u>Equity Rate</u>	<u>Mtg. Share</u>	<u>Equity Share</u>
07/08	6.75	20	.0912	.0950	.70	.30
08/09	7.00	20	.0930	.0950	.70	.30
09/10	7.00	20	.0930	.1000	.70	.30
10/11	7.00	20	.0930	.1050	.60	.40

The respondent sets forth the components as follows:

<u>Year</u>	<u>Mtg. Rate</u>	<u>Mtg. Term</u>	<u>Mtg. Constant</u>	<u>Equity Rate</u>	<u>Mtg. Share</u>	<u>Equity Share</u>
07/08	6.25	25	.0792	.0900	.70	.30
08/09	6.25	25	.0792	.0900	.70	.30
09/10	6.00	25	.0773	.0950	.70	.30
10/11	5.75	25	.0755	.1050	.70	.30

Both parties used the band of investment method to determine the capitalization rates. It is noted that respondent takes issue that petitioner used the data that was more favorable to it. Respondent, in actuality, argues that petitioner picked and chose which surveys to use for its computations depending on which survey cited figures that yielded the desired result. However, petitioner has set forth a cogent rationale for accepting one survey over another. As to certain factors, surveys such as Korpacz merely reflected opinions and not actual data. Further the number of participants actually surveyed, were minimal. As a result, petitioner used Realty Rates to calculate certain figures.

An overall capitalization rate is calculated by using a weighted average of the mortgage constant and the equity dividend rate. These two rates are weighted by the proportion of mortgage funds and the proportion of equity funds to be invested in the

property. The mortgage component of Mortgage/Equity Band of Investment should be readily determinable from actual market transactions, studies which extract mortgage rates from market transactions and contemporaneous publications which announce the availability of commercial financing ( see *Retail Property Trust v. Board of Assessors*, 20 Misc.3d 1127(A) [Nassau County Supreme Ct.,2008.]

Mr. Franklin testified that he utilized a 70%/30% ratio of mortgage financing to equity contribution for the first three tax years and a 60%/40% ratio for the year, 2011, and calculated a constant mortgage payment based on a 20-year term. He selected a 6.5% for one year and a 7% mortgage rate for the remaining three years, producing mortgage constants of 9.12 % and 9.30%. Mr. Goess also utilized the Mortgage/Equity Band of Investment Approach, with a ratio of 70% mortgage and 30% equity contribution over a 25-year term. He utilized mortgage rates of 6.25%, 6.00%, and 5.750% for the years under review. He calculated the mortgage constant over a 25-year payment term, arriving at a mortgage constants of 7.92%, 7.73% and 7.55%. The petitioner's overall rate based upon the foregoing is .0920, .0940, .0950, and .0980 for the four years. The petitioner added the stipulated tax factors of 4.28%, 4.06%, 3.94% and 3.81% for a composite capitalization rate of 13.48%, 13.46%, 13.44% and 13.61%. By dividing its calculated net operating incomes of \$1,976,000, \$1,976,000, \$1,976,000 and \$1,858,000, by the capitalization rate, produced indicated values of \$14,660,000, \$14,660,000, \$14,660,000 and \$13,650,000.

The respondent's overall rate for each of the years under review is .0824, .0824, .0826, and .0834 for the four years. The respondent added the stipulated tax factors of 4.28%, 4.06%, 3.94% and 3.81% for a composite capitalization rate of 12.369%, 12.148%, 12.005% and 12.108%. By dividing its calculated net operating incomes of \$2,259,628, \$2,657,309, \$2,642,496 and \$2,507,409, by the capitalization rate, produced indicated values of \$20,451,000, \$21,875,000, \$22,011,000, and \$20,708,000. Respondent's values showed no reductions from the actual assessment for any of the tax years, while the Petitioner's valuation reflected assessment reductions of \$39,303, \$41,988, \$48,680 and \$63,582.

In determining the appropriate level of mortgage and equity rates, the Court has considered the appraisals, and the testimony of the witnesses. Both parties included the extracts from Realty Rates, reflecting average mortgage rates for retail to be 6.47% for 2008, and 5.73% for 2009. The remaining two tax years were not included in the reports. The previous tax years, for 2006 and 2007 reflected average interest rates for retail

establishments at 7.12% and 7.05% respectively. The Korpacz survey, referenced by both parties reported interest rates for the New York metropolitan area for the years, 2006, 2007, and 2008 of 6.24%, 6.31%, and 6.00% respectively.

The Court also notes that valuation time period represented a time in which mortgage rates were at historical lows and that the parties both acknowledged that the region where L&T is located, despite L&T's high sales, is declining in terms of retail. The Court, reviewing the rates as reported by Korpacz and Realty Rates, therefore adopts mortgage rates of 6.50%, 6.25% and 6.00% for last two years, and calculates the mortgage constant payment based upon a 20-year term.

The equity component represents the anticipated return to the equity contributor. It is only one of a number of choices for an investor. The rates, to be attractive, must consider the level of risk and the relative illiquidity of the investment. The determination of the rate of return which an investor will demand is governed by the availability of alternatives. Historically, the equity rate has been guided by a 10-year Treasury Rate, while less risky, it is basically illiquid. As an investor's interest is subordinate to a mortgage and an investor expects that its interest will increase.

Here, the equity dividend rates selected by both parties are not so divergent from each other. The respondents equity rates are in part based upon the Korpacz study of retail establishments, and American Council of Life Insurance. Their selected rates are 9.00%, 9.00%, 9.50% and 10.50%.

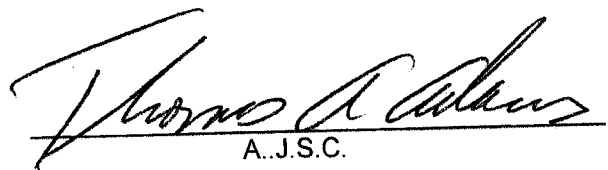
Included in the Petitioner's Addenda is information from Realty Rates indicating average equity dividends for free standing retail at 11.01 for 2008 and 10.37 for the year 2009. It selected an equity dividend rate of 9.50%, 9.50%, 10.00% and 10.50%. Based on the foregoing, considering all of the stated considerations with respect to the quality of the subject, the relatively low risk to an investor, but also considering the lack of liquidity of the investment, the Court adopts equity rates of 9.0%, 9.25%, 9.50% and 10.50%.

Without concluding the desirability of one approach over another, the Court has modified the petitioner's estimates, but substituted the foregoing mortgage rates, mortgage terms and equity dividend. The result is as follows:

	<u>2008</u>	<u>2009</u>	<u>2010</u>	<u>2011</u>
Gross Rentable Area	148,122	148,122	148,122	148,122
Rent per Sq. Foot	\$ 15.60	\$ 15.60	\$ 15.60	\$ 15.00
Gross Rental Income	\$2,310,703	\$2,310,703	\$2,310,703	\$2,221,830
LESS: Vacancy Rate	5.00%	5.00%	5.00%	5.00%
Vacancy Allowance	\$ 115,535	\$ 115,535	\$ 115,535	\$ 115,535
EFFECTIVE GROSS INCOME	\$ 2,195,168	\$2,195,168	\$2,195,168	\$2,110,739
EXPENSES				
Management (4%)	\$ 87,807	\$ 87,807	\$ 87,807	\$ 84,430
Reserve for Structural Repairs(2%)	\$ 43,903	43,903	43,903	42,215
TOTAL EXPENSES	\$ 131,701	\$ 131,710	\$ 131,710	\$ 126,644
NET OPERATING INCOME	\$2,063,458	\$2,063,458	\$2,063,458	\$1,984,094
CAPITALIZATION RATE	6.50%	6.25%	6.00%	6.00%
Mortgage Rate	20	20	20	20
Mortgage Term	8.95%	6.140%	6.018%	6.018%
Mortgage Constant	6.263%	5.54%	5.41%	5.41%
Mortgage Component (70%)	9.00%	9.25%	9.50%	10.50%
Equity Dividend Rate (30%)	2.700%	2.775%	2.850%	3.150%
Equity Component (3%)	8.963%	8.915%	8.868%	9.168%
Overall Rate	4.28%	4.06%	3.94%	3.81%
Tax Factor	13.243%	12.975%	12.808%	12.978%
COMPOSITE RATE				
INDICATED VALUE	\$15,581,500	\$15,903,337	\$16,110,696	\$ 15,288,234
Actual Assessment	\$ 180,772	\$ 182,916	\$ 192,005	\$ 200,082
Stipulated Equalization Rate	0.965%	0.960%	0.975%	1.000%
Indicated Assessment	\$ 150,361	\$ 152,672	\$ 157,079	\$ 152,881
INDICATED REDUCTION	\$30,441	\$30,243	\$34,925	\$47,200

Accordingly, the application to vacate, modify or otherwise correct the assessed valuation is granted for the tax years 2007/08, 2008/09, 2009/10, 2010/11 is granted to the extent as set forth herein above, and therefore shall be reduced accordingly.

DATED NOV 15 2011

  
A..J.S.C.

**ENTERED**

NOV 21 2011

NASSAU COUNTY  
COUNTY CLERK'S OFFICE