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THE TAX COURT COMMITTEE ON OPINIONS

TAX COURT OF NEW JERSEY



Patrick DeAlmeida  
Presiding Judge

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February 14, 2011

Ellen E. Nevins  
1 Silverthorn Lane  
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Re: Ellen Nevins v. Township of Montgomery  
Docket No. 012882-2009

Dear Ms. Nevins and Mr. Adezio:

This letter constitutes the court's opinion after trial in the above-referenced matter challenging the assessment on plaintiff's single-family residence for tax year 2009. For the reasons explained more fully below, the assessment is reduced.

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### I. Findings of Fact and Procedural History

Plaintiff, Eileen Nevins, is the owner of a single-family residence in defendant Montgomery Township, Somerset County. The property is designated by the township as Block 18017, Lot 16 and is known as 1 Silverthorn Lane. For tax year 2009, the subject property was assessed as follows:

Land	\$ 323,500
Improvement	\$ 506,600
Total	\$ 830,100

The Chapter 123 average ratio for Montgomery Township for tax year 2009 is .7340.

On May 27, 2009, the Somerset County Board of Taxation issued a Judgment affirming the assessment.

On July 13, 2009, plaintiff filed a complaint in this court challenging the board's determination. The matter was thereafter tried.

The subject property is a ten-room home on 3.26 acres at the end of a cul-de-sac in an upscale subdivision in a desirable, semi-rural suburb in Somerset County. The home has four bedrooms, and three full and one half bathrooms in 4,379 square feet of living space. The property features a master bedroom suite with walk-in closets, a living room, dining room, family room, sun room, laundry room, a two-story, cathedral-ceiling foyer, hardwood floors, three fireplaces, a three-car, attached garage and a pool. The kitchen has a ceramic tile floor, double oven, center island with gas range, and other modern features. On paper and on casual inspection, the home appears to be a high-quality, desirable residence of considerable value.

The uncontested evidence introduced at trial through expert testimony, however, revealed that the home is plagued with serious construction flaws that have a significant negative effect on its value and marketability. The residence was constructed for plaintiff between 1996 and 1997.

One of the main structural walls appearing on the plans for the home was not installed. A structural beam, which should be set six inches into a beam pocket is set only three inches into the pocket. As a result, an approximately six-inch crack has developed in a central support wall of the home. The front wall of the house is out of plumb, tilting away from the house approximately two inches, making it impossible for plaintiff to fully close and lock the front door.<sup>1</sup>

Because the home was constructed on unbalanced fill, the concrete walls in the basement should have been reinforced with horizontal rebar. Sufficient reinforcing rebar, however, is not present in the home. As a result, forty linear feet of horizontal cracks and twenty linear feet of vertical cracks exist in the basement walls. A large crack also crosses the basement floor. Mud and water regularly seep through the cracks in the basement walls and into the home. Mold is present on the basement walls, including within the crevices of the concrete. Although plaintiff has had the mold remediated on three occasions, the condition persists. This is not surprising, given the photographic evidence introduced at trial of basement walls streaked with water and fresh mud. One wall in the basement is bowed. A window in the basement is nailed shut with a steel plate and cannot be opened, an apparent code violation. It appears that the steel plate was installed to act as a structural support for the home. The plans for the home do not call for a steel plate against a window to act as a structural component of the building. The basement floor

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<sup>1</sup> The only construction plans for the home on file with the township construction office depict a mirror image of the home. All of the data on the plans, including the words, figures and measurements, cannot be read without holding the plans up to a mirror or placing the plans face down on a light source strong enough to shine through the plans. Plaintiff's expert speculated that the building crew used the mirror image plans when constructing the home, which, if true, might well explain the numerous construction defects. The court makes no factual finding with respect to whether the mirror image plans were a contributing factor to the condition of plaintiff's home.

drops two inches from one side of the home to the other. The floor on the first floor of the home bows up in the main part of the home, apparently as the result of the incorrectly installed structural beam in the basement. The sloping floor is readily apparent and is evident in bookcases that are not level, closet doors that do not meet, and shelves that drop from one side of a closet to another.

Water has extensively damaged the living room ceiling and appeared in virtually every other room in the house. The leaks are severe enough to drip from ceiling to floor in steady streams during rain showers. The overflow drain in the Jacuzzi is off center and not connected to a pipe. Thus, when the Jacuzzi is filled, water flows through the overflow drain, behind the Jacuzzi, along a wall, into an overheat light on the floor below and drips on the kitchen counter. The condition is an obvious hazard. The electrical box for the Jacuzzi was installed behind the tub, requiring demolition of an adjoining tile-covered wall to provide access for even the smallest of service repairs. A sink in one of the bathrooms has no overflow hole at all, creating a flood hazard.

The home is infested with yellow jackets. On the exterior of the house a large opening exists between the framing for the roof and a wall at the top of the house in the area of the attic. Yellow jackets enter the home through that gap and have colonized the attic. The insects travel to the remainder of the house through a heating and cooling duct that opens into the sitting room. Attempts at extermination have been unsuccessful, given the opening to the attic, which has proven difficult to repair without rebuilding the exterior wall of the house. Several trusses in the attic are not in compliance with the building code, having been modified without the approval of the manufacturer. Photographs introduced into evidence depict attic trusses that appear to be supplemented with pieces of plywood at the point where they hold up the roof. Heating and

cooling units in two rooms do not function and air conditioning units outside the home were installed on tilted platforms, affecting their functionality.

In one room on the first floor of the home, two walls and the ceiling do not meet in one corner. An approximately five-inch gap exists where the walls and ceiling should come together. The gap appears to have been filled with plaster, which raises concerns regarding the structural integrity of the room.

The exterior wood frame at the front door is rotting as the result of water flowing down the front of the house from improperly installed gutters. Because the exterior wood was not primed before it was painted, the paint on the exterior of the house is peeling. The brick facing on the wall outside the home is cracking.

The backyard of the home was improperly graded. When it rains a significant amount of water collects on the property, creating pools of standing water. In addition, the soil is graded toward plaintiff's home, contributing to the flooding issues in the basement. Top soil has been removed from the backyard; the remaining subsoil is not suitable for growth of anything of a permanent nature.

Windows throughout the home appear to have been incorrectly installed. Large gaps exist between window sills and windows, exposing the home to outside air. In addition, windows on the second floor of the home were installed without latches. None of those windows can be locked shut.

An expert engineer who inspected the home offered testimony detailing the defects noted above, as well as additional defects. He offered the view that reconstruction of the walls, floor and basement of the home would be a major undertaking requiring the home to be vacant during

lengthy repairs. He opined that the cost and logistics of reconstruction are so significant that the only feasible alternative is to demolish the home.

Plaintiff filed suit against the builder with respect to these defects, alleging breach of contract, breach of warranty and other claims. She seeks damages sufficient to permit her to demolish the home and rebuild it on the subject parcel. The court makes no findings with respect to the cause of the defects in plaintiff's home or the liability of the builder. Those issues are outside of the jurisdiction of this court. Nor did the court undertake to detail each of the defects in plaintiff's residence. The court, however, is convinced that the condition of plaintiff's residence on October 1, 2008, including apparent structural defects, affected its true market value.

Plaintiff introduced into evidence a seller's disclosure statement required by a local real estate broker of anyone listing a home for sale. The statement would require plaintiff to reveal to potential purchasers of the home the defects cataloged above, as well as other defects of which she is aware. While the form is merely illustrative, it is clear that a homeowner has a duty to disclose defects of which they are aware. See Weintraub v. Krobatsch, 64 N.J. 445 (1974) (holding that seller is liable to a buyer for non-disclosure of defects known to a seller and unobservable by the buyer where facts not disclosed would be material to the buyer's decision to purchase).

Plaintiff takes the position that the house was not marketable on October 1, 2008 and had no value. In support of her argument, she offered a real estate agent who qualified as an expert in the sale of residential real estate in the area that includes Montgomery Township. The expert inspected the property in the company of engineers who pointed out the structural defects in the house. He offered the opinion that the home is not marketable as a viable residence. He credibly

testified that no purchaser, aware of the defects detailed above, would buy the home for habitation.

He opined, however, that the lot on which the home is located is large, attractive, nicely located and in a desirable community. He offered the view that there may be a market for the purchase of the property for the demolition of the existing home and construction of a new residence. He offered the opinion that the lot could support a home valued at approximately \$1 million. Although there are not comparable sales of vacant lots in otherwise completed subdivisions in Montgomery Township, he opined that the value of a lot in a suburban development of the type at issue here is roughly 25% of the value of the property with a home appropriate for the neighborhood. Given the size of the lot and his estimate that it would support a \$1 million home, he offered the opinion that the lot had a true market value of \$325,000 on October 1, 2008 for demolition and reconstruction purposes.

The municipality presented no engineering testimony and did not contest in any significant fashion the evidence introduced by plaintiff with respect to the defects in the home. Defendant's sole witness was an expert appraiser, who also serves as a tax assessor in two New Jersey municipalities. The appraiser offered an opinion with respect to the true market value of the subject property on the valuation date. She relied on three comparable sales of single-family homes in Montgomery Township and made various adjustments to account for differences between the comparable sales and the subject property.

While she made an adjustment for what she referred to as deferred maintenance at the subject property, she made no adjustments for the significant structural defects established by plaintiff's evidence. During her testimony, the appraiser stated that she "does not delve into structural issues" when determining the true market value of a home. She made a 10%

adjustment for the cosmetic defects. After application of the adjustment, and consideration of the adjusted sales prices of the comparable sales, the expert offered the opinion that the subject property had a true market value of \$905,000 on October 1, 2008. In light of the chapter 123 average ratio for Montgomery Township for 2009, even if defendant's expert's opinion were adopted in its entirety, the assessment on the subject property would be reduced to \$664,000.

## II. Conclusions of Law

The court's analysis begins with the well-established principle that "[o]riginal assessments and judgments of county boards of taxation are entitled to a presumption of validity." MSGW Real Estate Fund, LLC v. Borough of Mountain Lakes, 18 N.J. Tax 364, 373 (Tax 1998). As Judge Kuskin explained, our Supreme Court has defined the parameters of the presumption as follows:

The presumption attaches to the quantum of the tax assessment. Based on this presumption the appealing taxpayer has the burden of proving that the assessment is erroneous. The presumption in favor of the taxing authority can be rebutted only by cogent evidence, a proposition that has long been settled. The strength of the presumption is exemplified by the nature of the evidence that is required to overcome it. That evidence must be "definite, positive and certain in quality and quantity to overcome the presumption."

Ibid. (quoting Pantasote Co. v. City of Passaic, 100 N.J. 408, 413 (1985)(citations omitted)).

The presumption of correctness arises from the view "that in tax matters it is to be presumed that governmental authority has been exercised correctly and in accordance with law." Pantasote, supra, 100 N.J. at 413 (citing Powder Mill, I Assocs. v. Township of Hamilton, 3 N.J. Tax 439 (Tax 1981)); see also Byram Twp. v. Western World, Inc., 111 N.J. 222 (1988). The presumption remains "in place even if the municipality utilized a flawed valuation methodology, so long as the quantum of the assessment is not so far removed from the true value of the



property or the method of assessment itself is so patently defective as to justify removal of the presumption of validity.” Transcontinental Gas Pipe Line Corp. v. Township of Bernards, 111 N.J. 507, 517 (1988)(citation omitted).

“In the absence of a R. 4:37-2(b) motion . . . the presumption of validity remains in the case through the close of all proofs.” MSGW Real Estate Fund, LLC, supra, 18 N.J. Tax at 377. In making the determination of whether the presumption has been overcome, the court should weigh and analyze the evidence “as if a motion for judgment at the close of all the evidence had been made pursuant to R. 4:40-1 (whether or not the defendant or plaintiff actually so moves), employing the evidentiary standard applicable to such a motion.” Ibid. The court must accept as true the proofs of the party challenging the assessment and accord that party all legitimate favorable inferences from that evidence. Id. at 376 (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 535 (1995)). In order to overcome the presumption, the evidence “must be ‘sufficient to determine the value of the property under appeal, thereby establishing the existence of a debatable question as to the correctness of the assessment.’” West Colonial Enters, LLC v. City of East Orange, 20 N.J. Tax 576, 579 (Tax 2003)(quoting Lenal Props., Inc. v. City of Jersey City, 18 N.J. Tax 405, 408 (Tax 1999), aff’d, 18 N.J. Tax 658 (App. Div.), certif. denied, 165 N.J. 488 (2000)).

Only after the presumption is overcome with sufficient evidence at the close of trial must the court “appraise the testimony, make a determination of true value and fix the assessment.” Rodwood Gardens, Inc. v. City of Summit, 188 N.J. Super. 34, 38-39 (App. Div. 1982)(citations omitted). If the court determines that sufficient evidence to overcome the presumption has not been produced, the assessment shall be affirmed and the court need not proceed to making an independent determination of value. Ford Motor Co. v. Township of Edison, 127 N.J. 290, 312

(1992); Global Terminal & Container Serv. v. City of Jersey City, 15 N.J. Tax 698, 703-704 (App. Div. 1996).

Plaintiff produced sufficient evidence to overcome the presumption of correctness attached to the assessment. The court finds that the testimony of plaintiff's experts was credible and that the structural defects in the home are so severe that the building is not marketable as a viable residence and would have to be demolished to be repaired. The township offered nothing to counter plaintiff's contentions regarding a missing structural wall, significant cracks in the basement walls through which water and mud regularly flow, bowed floors, improperly installed structural beams, plumbing defects, walls and ceilings that do not meet, a front wall of the home that tilts so severely that the front door cannot be closed properly, a flooded backyard, and other defects. Plaintiff would have to disclose these defects if the house were to be placed on the market. Notably, even defendant's expert, if her testimony were to be accepted in its entirety by the court, offered the opinion that the assessment on the subject property should be reduced by approximately \$166,000. A sufficient doubt has been raised in the court's mind as to whether the assessment on the property reflects its true market value as of October 1, 2008.

This determination alone does not end the court's inquiry. Having found that the presumption of correctness was overcome, it is the court's obligation to determine the true market value of the subject property on October 1, 2008 based on the evidence in the record.

The comparable sales approach is generally accepted as an appropriate method of estimating value for a residence. Brown v. Borough of Glen Rock, 19 N.J. Tax 366, 377 (App. Div. 2001); Appraisal Institute, The Appraisal of Real Estate, 419 (12<sup>th</sup> ed 2001)(the comparable sales approach "usually provides the primary indication of market value in appraisals of properties that are not usually purchased for their income-producing characteristics."). This

method of valuation has been defined as “[a] set of procedures in which a value indication is derived by comparing the property being appraised to similar properties that have been sold recently, applying appropriate units of comparison, and making adjustments to the sales prices of the comparables based on the elements of comparison.” Id. at 417. The court finds that this approach is the best method for determining the true market value of plaintiff’s residence.

The court rejects the opinion of value offered by defendant’s expert. In light of the uncontested testimony regarding the structural defects present at plaintiff’s home, the comparable sales on which defendant’s expert relied are not credible evidence of the true market value of plaintiff’s home. As plaintiff established, were the subject property to be put on the market plaintiff would be required to disclose the numerous, serious defects that have been identified at her home. A typical purchaser in the marketplace would consider those defects when determining the value of the subject property. Given the nature of the defects, the court concludes that the subject property’s primary value in the marketplace is for sale to purchasers who would demolish the home to make way for construction of a new home. Thus, the principle value in the subject property is in the building lot, which the parties agree is large, attractive and located in a desirable neighborhood.

The court finds that the opinion of value offered by plaintiff’s real estate expert is reasonable. Although it is true that plaintiff’s expert did not offer comparable sales in support of his opinion, the court finds it unlikely that comparable sales would exist. Nothing in the record suggests that a market exists for the purchase of large, relatively new, single-family homes in established developments in Montgomery Township for the purpose of demolition and construction of a new home. The subject property is located in a development of high-quality

homes which were approximately 10 years old on the valuation date. Sales in the neighborhood generally are for the purpose of habitation of the home.<sup>2</sup>

“Hearings in the Small Claims Division shall be informal, and the judge may receive evidence as the judge deems appropriate for a determination of the case, except that all testimony shall be given under oath.” N.J.S.A. 2B:13-15. Because this is a small claims matter, see R. 8:11 (providing that all local property tax cases concerning one through four family residences be heard in Small Claims Division of Tax Court), the court has leeway to accept plaintiff’s expert’s testimony regarding value, even in the absence of comparable sales. The court finds credible the expert’s opinion that the subject property had a market value of \$325,000 on October 1, 2008. Defendant did not challenge this opinion in any serious fashion and the court finds credible the expert’s explanation for arriving at that figure. The court will attribute a nominal value of \$25,000 to the improvements, as the construction materials, appliances and other features have inherent value.

Pursuant to N.J.S.A. 54:51A-6a, in a non-revaluation year an assessment must be reduced when the ratio of the assessed value of the property to its true value exceeds the upper limit or falls below the lower limit of the of the common level range. The common level range is defined by N.J.S.A. 54:1-35a(b) as “that range which is plus or minus 15% of the average ratio” for the

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<sup>2</sup> Plaintiff testified that some, but not all, of the other homes in her development suffer from structural defects. According to plaintiff, different phases of the development were constructed by different construction crews and not all of the crews were negligent in their construction. In addition, she testified that some of the homeowners in her neighborhood are not aware of structural defects which are latent. There is no evidence in the record regarding the condition of any other home in plaintiff’s neighborhood and the court makes no findings with respect to construction defects other than in plaintiff’s home. None of the comparable sales offered by defendant, some of which were in plaintiff’s development, were of homes about which were disclosed significant structural defects.

municipality in which the subject property is located. The formula for determining the subject property's ratio is:

$$\text{Assessment} \div \text{True Value} = \text{Ratio}$$

The ratio for the subject property, therefore, is determined as follows:

$$\$830,100 \div \$350,000 = 2.37$$

The chapter 123 average ratio for Montgomery Township for 2009 was .7340 with an upper limit of .8441 and a lower limit of .6239. The ratio for the subject property is 2.37, which exceeds the common level range. Pursuant to N.J.S.A. 54:51A-6b, if the average ratio for the municipality is below the county percentage level (1.00), and the ratio of the assessed value of the subject property to its true value exceeds the county percentage level (1.00), the court shall enter judgment revising the assessment by applying the average ratio for the municipality to the property's true market value.

$$\$350,000 \times .7340 = \$256,900$$

A Judgment will be entered by the Tax Court Clerk setting the assessment on the subject property for tax year 2009 as follows:

Land	\$ 230,000
Improvement	<u>\$ 25,000</u>
Total	\$ 255,000

Very truly yours,



Patrick DeAlmeida, P.J.T.C.