SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: SMALL CLAIMS ASSESSMENT REVIEW
_____x

In the Matters of JAY BOROFSKY, et al., and 39 * other Small Claims Assessment Review Petitioners represented by Rosenfeld and Mandenbaum, LLP,

*AR # 332708/06

Petitioners,

- against -

DECISION

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

Respondents.

Hon. Ira J. Raab
Hearing Officer

_____x

* Schedules of the 40 Petitions are annexed hereto.

Mark H. Miller, Esq.
Rosenfeld and Mandenbaum, LLP
Attorneys for Petitioners
132 Spruce Street
Cedarhurst, NY 11516
(516) 569-8100
(516) 569-8105-Fax

Ann-Margaret Barriga, Esq.
Senior Counsel to the Chairman
SCAR Administrative Director
Deputy County Attorney
Attorney for Respondents
240 Old Country Road
Mineola, NY 11501
(516) 571-2490
(516) 571-0481

THE ISSUE TO BE DETERMINED AND STIPULATION OF THE PARTIES

On June 6, 2007, hearings were held at the Supreme Court, Nassau County, on the Petitions of Jay Borofsky and 19 other Petitioners. On June 7, 2007, hearings were held on an additional 20 Petitions. Rosenfeld & Mandenbaum, LLP represented all 40 Petitioners. Susan C. Cohen, Esq., Anthony Montesano and Richard Clendenning, Real Property Tax Specialists of the office of the Nassau County Department of Assessment, represented the Respondents.

An issue to be determined, common to all Petitions, is the proper Class 1 residential

assessment ratio to apply to Small Claims Assessment Review (SCAR) matters for the purposes of equalizing assessments within the County of Nassau for the tax year of 2006/2007 for appeals purposes. The Petitioners contend that the proper ratio is .24%, .241% or .242%. The Respondents contend that the proper ratio is .25%.

Mark H. Miller, for the Petitioners, and Ann-Margaret Barriga, Esq., for the Respondents, stipulated to afford the parties the opportunity to submit post hearing Memoranda of Law and documents in support of their respective positions as to the proper ratio to be applied. Final submissions were received on September 17, 2007.

LEGAL PRESUMPTION, BURDEN OF PROOF, RULES OF EVIDENCE

There is a presumption under the law that the assessment made by the Respondents is correct or valid. The Petitioners have the burden to overcome or rebut this presumption by the submission of "substantial evidence" to the contrary. In SCAR cases, the proceedings are conducted on an informal basis, and the Petitioners' ultimate burden of proof may be stated to be that the quality of the totality of the evidence must be sufficient to convince a reasonable person that substantial justice was done between the parties according to the rules of substantive law. See Real Property Tax Law (RPTL) section 732 (2). The SCAR informal procedures and lower burden of proof are similar to the procedures and burden of proof required of Plaintiffs in Small Claims cases under Article 18 of the New York City Civil Court Act, the Uniform District Court Act, the Uniform City Court Act, and the Uniform Justice Court Act.

In submitting their evidentiary documents, the Respondents urge that their evidence is the "best evidence" of what constitutes the proper ratio of assessed to full value. This is not the same as the centuries old "best evidence" rule of evidence (primary evidence of a fact is preferred over secondary evidence of the fact). RPTL 732 (2) does not state that the SCAR hearing officer must adhere to the best evidence rule. Rather, it states that the hearing officer "shall consider the best evidence presented". The statute goes on to partially define "best evidence". "Such evidence may include, but shall not be limited to, the most recent (State) equalization rate established for such assessing unit, the residential assessment ratio (RAR) promulgated by the state board (of Real Property Services)"…,"the uniform percentage of value stated on the latest tax bill, and the assessment of comparable residential properties within the same assessing unit". By the inclusion of the words "but shall not be limited to", the statute provides room for the consideration of "other" evidence of what constitutes the proper ratio of assessed to full value, in order to reach the goal of achieving "substantial justice between the parties".

The Respondents correctly point out that the Petitions (pleadings) filed by the Petitioners, fail to set forth grounds for relief, or proffered evidence, to establish a ratio other than the .25% ratio established by the Respondents. However, formal rules of pleading do not apply to SCAR proceedings. RPTL 732 (2) provides that in SCAR proceedings, "The petitioner shall not be bound by statutory provisions or rules of…..pleadings….."

RESPONDENTS' EVIDENCE

The Respondents submitted the following items into evidence:

1) The August 30, 2006 report entitled, "Sales Ratio Study of 2006-2007 Residential Values in Nassau County, New York", prepared by Robert J. Gloudemans, of Almy, Gloudemans, Jacobs and Denne, property taxation and assessment consultants, of Phoenix Arizona. The Respondents also submitted Mr. Gloudemans' 17-page biographical resume'. It is determined that Mr. Gloudemans is an expert in property taxation and assessment.

Mr. Gloudemans was commissioned by the Respondents to prepare an independent sales ratio study for Class 1 residential properties within the County of Nassau for the 2006/2007 tax year. In his detailed analysis, he used the actual sales of real property within Nassau County that occurred during the year in which the assessment under review was made. That year was the 12-month period (January through December, 2004) immediately preceding the taxable status date of Nassau County. (He also reviewed the actual sales of tax year 2005-2006) The status tax date for Nassau County for that tax year was January 2, 2005. The Appellate Division, Third Department, approved this method. See In the Matter of JOHN MARCUS v. ASSESSORS OF THE TOWN OF TAGHKANIC, et al., 24 A.D.2d 1066, 1067; 806 N.Y.S.2d 295, 297 (2005).

Although the report makes reference to, and clearly describes the contents of, "Appendices" 1, 2, 3 and 4, they were not submitted with the report. The report will nevertheless be considered, because the absence of the Appendices does not invalidate the report's findings and conclusions, although such absence may affect

the "weight" to be considered. The report concludes that the appropriate ratio for purposes of equalizing 2006/2007 assessments for appeals purposes is .25%.

2) The July 26, 2006 stipulation between the County Attorney of the County of Nassau and the Nassau County Bar Association's Committee on Condemnation Law and Tax Certiorari. The Chairperson of the Committee and 25 law firms, which have partners or associates, who are members of this Committee, signed the stipulation. The parties to the stipulation agreed that the Class 1 property ratio for the resolution of assessment review proceedings for the 2006/2007 tax year is .25%. On August 5, 2005, the stipulation was submitted to Justice Anthony F. Marano, the Administrative Judge of Nassau County, and to Justice Joseph A. DeMaro, of the Nassau County Supreme Court. The attorneys for the within 40 Petitioners did not sign on to this stipulation. Nevertheless, these same attorneys, on behalf of client-Petitioners other than the within Petitioners, did accept settlements offered by the Assessment Review Commission (ARC) at the .25% ratio.

3) The August 14, 2006 publication by the New York State Office of Real Property Services (ORPS) entitled, "Class Ratios for Nassau County". ORPS is an independent agency within the Executive Department of the State of New York, and is responsible for overseeing the local administration of real property assessment and establishing rates and ratios, which allow for the equitable apportionment of local, non-income taxes and State aid between and within municipalities throughout the State. (ORPS 2006 Annual Report, Page 1).

The publication indicates that as of September 13, 2006, the established final Class 1 ratio for the 2006/2007 tax year for Nassau County would be .25%. ORPS further stated that pursuant to Real Property Tax Law section 720 (3) (c) (sic), such ratio "may be used as evidence of inequality in tax certiorari proceedings". It is noted that ORPS' own study found a ratio of .242%. However, ORPS accepted the .25% ratio urged by the Respondents because the Respondent's determined ratio of .25% was well within the 5% statistical margin of error of the .242% ratio found by the ORPS study. See RPTL 720 (3) (b) (3) (c).

4) The undated schedule of calculations by the Assessment Review Commission entitled, "2006-07 Class 1 Ratio Computation (ARC)". The Commission reports 15,684 sales from January 1 2004 to December 31, 2004, resulting in a total sales price of $8,236,107,552, and an average sales price of $525,128. The tentative assessed value of the properties sold during this period was $20,969,508, and the average tentative sales value was $1,337. The total tentative assessed value divided by the total sales price results in a ratio of .2546%. Of course, the average tentative assessed value divided by the average sales price results in the same ratio of .2546%.

5) Although no actual numerical statistics were submitted, the Respondents claim that approximately 95% of the hearing officers who have heard SCAR cases in Nassau County for the tax year 2006/2007 have utilized the ratio of .25%. The Petitioners do not contest this claim.

6) Several Receivers of Taxes within the County of Nassau have sent out their tax bills for the assessment roll containing the assessment under review (tax year 2006/2007). The uniform percentage of value stated on such tax bills is .25%. See RPTL 720 (3) (b) (3) (d); RPTL 732 (2).

The totality of the Respondents' evidence as described above supports a legal presumption that the assessment made by the Respondents, and the .25% Class 1 residential assessment ratio determined by the Respondents, are correct, proper and valid. However, this presumption may be rebutted by evidence submitted by the Petitioners.

PETITIONERS' EVIDENCE

The Petitioners submitted the following items into evidence:

1) The undated, although notarized, report (also, the Notary did not insert the notarization date) entitled, "Ratio Level of Assessment (LOA) Study for Nassau County, NY, 2006/2007 Roll", prepared by Gregory S. Burge, PhD (in Economics), of the University of Oklahoma, Department of Economics, Norman, Oklahoma. The Petitioners also submitted Dr. Burge's 3-page Curriculum Vita. It is determined that Dr. Burge is an expert in property taxation and assessment.

Dr. Burge was asked by Petitioners' attorneys to study, analyze and report on the level of assessment for residential properties found on the Nassau County 2006/2007 tax roll. In his detailed analysis, he used the assessment data dating back to the 20005/2006 roll supplied by Petitioners' attorneys, and sales information coming from ORPS. He

meticulously described the methodology that he employed, called an econometric model, which uses both sold and unsold properties in the final LOA calculation. This method is used in Florida. In this time trend method, he "predicts" or estimates the value as of the end of the year of the properties actually sold over the time period spread between January 1, 1004 and December 31, 2004. The LOA generated by the employed methodology is .00242, which he observes, "Is slightly lower than the claimed 0.0025" (.25%) by the Respondents, and that while "this difference seems relatively small, it is statistically significant at high levels of certainty".

2) The undated report entitled, "A Response to: 'Sales Ratio Level of 2006-2007 Residential Values In Nassau County, NY' submitted by Nassau County and prepared by Robert J. Gloudemans", which report was prepared by Dr. Burge as a critique of the report of Mr. Gloudemans. He mentions that the Gloudemans report's appendices had not been submitted to him for review because they were not made available. Yet, without these appendices, he was able to present a detailed critique of the report itself.

He lauds Mr. Gloudemans' professional competency and expertise:

> "From reading the report and his professional vita, it is abundantly clear that Dr. Gloudemans has a strong background in mass property appraisal techniques and possesses the skills needed to carry out a Level of Assessment (LOA) study. Therefore my critique of the report <u>will not question his professional competency or the accuracy with which his statistical results were obtained</u>." (Emphasis supplied)

He described the differences in the methodologies used by the two experts in using the same data. His econometric methodology and Mr. Gloudemans' sales ratio methodology

have “quite different targets”. His method is time adjusted, while Mr. Gloudemans' method is in the aggregate. His method avoids “sales chasing”, such as when sold properties are selectively “reappraised” based upon their sales prices, and then factored into the calculations. The Respondents deny that they are sales chasing.

3) The undated and unsigned “Ratio Study” prepared by YCA Corp. This study time trended the sales by both 11% and 12%. The study reduced the total sales during 2004 from 16,154, to 15,294, after deducting 744 unusable sales and 116 extreme adjustments. At 12%, the study calculated the true LOA of Class 1 residential properties in Nassau County as .2397%, which could be rounded off to .24%. At 11%, the calculation would be .2408%, which could be rounded off to .241%.

4) Petitioners’ attorneys claim that Mr. Gloudemans’ report should not be accepted into evidence because it is not signed before a notary, but that Mr. Burge’s report should be accepted into evidence because it is notarized. As pointed out above, although Dr. Burge’s report is signed and notarized, neither he nor the notary affixed the date of signature or the date of notarization. These omissions concern rules of evidence, which are not applicable to SCAR proceedings. Thus, both reports will be considered.

ANALYSIS AND FINDINGS

In weighing the evidence submitted, it appears that the main discrepancy between the arguments of the parties lies with the reports of the two experts. The Petitioners’ expert relies on sales trending or predictions based upon actual sales. The Respondents’ expert

relies on the actual sales without sales trending or predictions. The report of the Respondents' expert carries more weight than the report of the Petitioners' expert, even in the absence of the addendums referred to therein. Of note, the Petitioners' expert lauds the report accuracy and expertise of the Respondents' expert.

The statute refers to "actual sales" in the year that the assessment was made. The word "actual" has a clear meaning: "Existing in fact or reality; Being or acting at a present moment; Current" (American Heritage Dictionary, Second Edition); "Real; existing presently; having a valid objective existence as opposed to that which is merely theoretical or possible; Something real, in opposition to constructive or speculative". (Black's Law Dictionary, Fourth Edition) The converse for the word "actual" is "conjectural, hypothetical, theoretical, putative, reputed, suppositions" (Webster's Collegiate Thesaurus). By using the word "actual", it is more likely that the Legislative intent leaned more towards the word's dictionary meaning, rather than the word's thesaurus converse.

If the Legislature had intended to allow sales trending, predictions or estimates of sales, it would have said so. In any event, it is determined that as between the two methodologies used by the experts, the method using actual sales without predictions has greater validity than the method that uses predictions, estimates, and hypotheticals.

That the State of Florida, alone amongst the States, utilizes the Respondents' suggested methodology is of no moment. It is noted that the State of Florida also utilizes a method of Homestead Exemptions, which creates wide disparities in assessments for comparable

properties. See "Analysis of the Shift in the Property Tax Burden Due to the Implementation of Florida's Save Our Homes Amendment" by Troy Irwin, Florida State University, Economics Department, Article 295, 2007.

Considering the remainder of the evidence submitted by the parties, it is determined that from the totality of the evidence, that the Respondents have proven their entitlement to the legal presumption that the assessment made by the Respondents is correct. The evidence submitted by the Petitioners failed to sustain their burden of overcoming or rebutting such presumption by the substantial evidence standard.

CONCLUSION

The proper Class 1 residential assessment ratio to be applied to the within 40 Petitions for the purposes of equalizing assessments within the County of Nassau for the tax year of 2006/2007 for appeals purposes is .25%.

DISPARITY IN RESULTS BY HEARING OFFICERS

Petitioners contend that two Supreme Court Referees (as opposed to hearing officers) who regularly hear many SCAR cases, and who are experienced in SCAR cases, have used a .241% ratio. Further, other hearing officers have used ratios other than the Respondents' .25% ratio. As stated above, the Respondents contend that about 95 percent of the hearing officers have used the Respondent's .25% ratio. A third Supreme Court Referee used the Respondents' .25% ratio, after analyzing the very same evidence that

was presented to her two Referee colleagues. In reviewing a Decision by one of the above mentioned two Referees, it is noted that he indicates that in prior cases he used the Respondents' .25% ratio, but that after he read a Decision of the other of the two Referees, he changed his mind as to subsequent cases and used a .241% ratio. The parties' respective contentions regarding the official title, expertise and number of other hearing officers whose Decisions may have favored one side or the other, may not be considered in rendering decisions in the within cases. That is because the statute requires that the hearing officer shall consider the best evidence in "each particular case". See RPTL section732 (2).

It is clearly obvious that such divergent results arising out of the same exact evidence is a mockery of the statutory scheme of achieving uniformity, equality and fairness in property assessment and in SCAR proceedings. The Legislature, Counsel to the Office of Court Administration, Assessors and their Counsel, and the Practicing Bar, are urged to establish a Task Force to study this unequal and unfair phenomenon, and to come up with reforms to eliminate this disparity in the administration of justice, so as to assure that the same true substantial justice is done to the parties in all SCAR cases.

Now that the issue of the proper ratio has been determined, decisions on the 40 Petitions will be made on the merits.

Dated: Mineola, New York
October 2, 2007

_____
HON. IRA J. RAAB,
Hearing Officer
Small Claims Assessment Review

c.c.: Chris Farkas,
SCAR Clerk
Supreme Court
100 Supreme Court Dr.
Mineola, NY 11501
(516) 571-1645

Justice Anthony F. Marano,
Administrative Judge
Supreme Court
100 Supreme Court Dr.
Mineola, NY 11501
(516) 571-2684