NOT FOR PUBLICATION WITHOUT APPROVAL OF THE TAX COURT COMMITTEE ON OPINIONS

160 CHUBB PROPERTIES, LLC,

Plaintiff,

v.

TOWNSHIP OF LYNDHURST,

Defendant.

TAX COURT OF NEW JERSEY
DOCKET NOS. 002442-2014
006305-2015

Approved for Publication In the New Jersey Tax Court Reports

Decided: May 31, 2019

Joseph G. Ragno and Robert J. Guanci for plaintiff (Waters, McPherson, McNeill, P.C., attorneys).

Kenneth A. Porro for defendant (Chasan Lamparello Mallon & Cappuzzo, P.C., attorneys).

ORSEN, J.T.C.

This opinion constitutes the court's decision with respect to the motion of defendant, Township of Lyndhurst ("Lyndhurst"), seeking reconsideration of the court's December 14, 2018, decision and January 3, 2019 Order, granting relief to plaintiff, 160 Chubb Properties, LLC ("Chubb"), under N.J.S.A. 54:51A-8 ("Freeze Act") for the 2017 tax year based on the settled and adjudged assessment for base tax year 2015 as to property designated as Block 231, Lot 3 ("subject property"). In the court's December 14, 2018, published opinion, 160 Chubb Props., LLC v. Twp. of Lyndhurst, 30 N.J. Tax 613 (Tax 2018), the court held that:

> (1) Chubb did not waive [Freeze] Act protection for the 2017 tax year; and (2) Lyndhurst is not entitled to a plenary hearing on the applicability of the Freeze Act, since it has not made a prima facie showing that a substantial and meaningful change in value occurred between base year 2015 and freeze year 2017. Accordingly, the Freeze Act applies, and the 2017 assessment should be reduced to the amount reflected in the judgment for tax year 2015.

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[Id. at 618.]

Lyndhurst sought reconsideration, primarily based on the same arguments presented during the original motion, namely, (1) unsupported allegations of the subject property's occupancy; (2) unsupported allegations of a physical change made to the subject property based on issued construction permits; and (3) the subject property's sales price, demonstrated prima facie evidence that a substantial and meaningful change in value occurred between the base year 2015 and freeze year 2017, warranting a plenary hearing. Lyndhurst's only new arguments alleged that Chubb had no legal standing to file the Freeze Act motion and by receiving Freeze Act relief for tax year 2017, the subsequent owner of the property received a "windfall" that should not be permitted as the subsequent owner neither negotiated the base year settlement nor was it a named party to the Freeze Act motion.

For the reasons explained more fully below, the court denies Lyndhurst's motion for reconsideration.

FACTS

For purposes of providing context, the court will include a brief statement of facts. A detailed statement of facts can be found in the court's published opinion referenced above.

On December 3, 2013, Chubb purchased the subject property, a multi-tenanted office building located at 160 Chubb Avenue, Lyndhurst, New Jersey, designated as Block 231, Lot 3 on the local tax map for $10,300,000. Chubb filed local property tax appeals for the 2014 and 2015 tax years. The parties negotiated a settlement agreeing to an assessment of $13,000,000 for each tax year, which settlement agreement expressly adopted application of the Freeze Act for the 2016 tax year. The court entered judgments on December 18, 2015 for the 2014 tax year and December 4, 2015 for the 2015 tax years, reflecting the agreed-to assessment amounts.

Chubb sold the subject property on November 17, 2016, to its current owner, CCC NJ Owner, LLC ("CCC NJ Owner") for $20,025,000.

Notwithstanding the settlement, for the 2017 tax year, Lyndhurst again assessed the subject property at the pre-settlement amount of $16,250,000. Waters, McPherson, McNeill, P.C. ("WMM"), counsel for Chubb and the new owner, CCC NJ Owner, sought to file a consensual Freeze Act application on behalf of CCC NJ Owner. When it became apparent that Lyndhurst would not consent to the application, WMM filed a motion on July 19, 2017, for entry of judgment applying the Freeze Act to the 2017 tax year based on the 2015 tax year judgment. Lyndhurst opposed the Freeze Act motion alleging that: (1) the settlement reducing the assessments was based on Chubb's representation that the subject property was substantially unoccupied at the time of Chubb's purchase and in need of substantial improvements; and (2) Chubb waived Freeze Act protection for 2017. Lyndhurst additionally emphasized that after the alleged improvements were made to the subject property, Chubb sold the property for $20,025,000. In support, Lyndhurst's tax assessor certified that based on the construction permits, "[s]ubstantial building improvements along with the tenant occupancy undoubtedly increased the value of the property as it was sold for $20,025,000 on November 17, 2016."

Oral argument was heard and the court issued an opinion granting Freeze Act relief for the 2017 tax year.

Lyndhurst filed a motion for reconsideration under R. 4:49-2, claiming that it was entitled to a plenary hearing on the applicability of the Freeze Act and re-asserted the same arguments that the Freeze Act was inapplicable due to the subject property's occupancy and physical changes made to the subject property based on issued construction permits, and that the subject property's sales price demonstrated prima facie that a substantial and meaningful change in value occurred

between base year 2015 and freeze year 2017. Lyndhurst's only new arguments alleged that Chubb had no legal standing to file a Freeze Act motion, and by granting Freeze Act relief, the subsequent owner, CCC NJ Owner received a windfall.

The court heard the motion and requested that the parties submit supplemental briefs limited to issues raised and newly cited case law referenced during oral argument. During oral argument, and further outlined in its supplemental brief, Lyndhurst argued that by invoking the Freeze Act for tax year 2017 based on the 2015 base year judgment, the successor in title, CCC NJ Owner, received a "windfall," and that such a "windfall" should not be permitted as CCC NJ Owner neither negotiated the base year settlement nor was a named party to the Freeze Act motion. Further, Lyndhurst argued that conversations between the tax assessor and Chubb attest to an agreement that the Freeze Act would not be invoked for the 2017 tax year notwithstanding what was documented in the Stipulation of Settlement executed by the parties, and that the November 17, 2016, sales price of the subject property "tells us on its face" that a substantial and meaningful change in value has occurred, entitling Lyndhurst to a plenary hearing on the applicability of the Freeze Act.

STANDARD OF REVIEW

Motions for reconsideration are governed by R. 4:49-2. See also R. 8:10 (R. 4:49-2 applies to Tax Court matters). A motion for reconsideration shall "state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or to which it has erred." R. 4:49-2. Reconsideration is granted under very narrow circumstances and should only be used "for those cases which fall into that narrow corridor in which either 1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [c]ourt either did not consider, or failed to appreciate

the significance of probative, competent evidence." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990); R. 4:49-2; accord Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). "[I]f a litigant wishes to bring new or additional information . . . which it could not have" offered during the first motion, then the court "should, in the interests of justice (and in exercise of sound discretion), consider such evidence." D'Atria, 242 N.J. Super. at 401.

Our courts have held that "[a] litigant should not seek reconsideration merely because of dissatisfaction with a decision of the [c]ourt," as such arguments are best raised on appeal. Ibid. Reconsideration is also not appropriate to reiterate the merits of or "reargue a motion." Capital Fin. Co. of Delaware Valley, Inc. v. Asterbadi, 398 N.J. Super. 299, 310 (App. Div. 2008). "The standards for reconsideration are substantially harder to meet than are those for reversal of a judgment on appeal." Dantzler v. Dir., Div. of Taxation, 18 N.J. Tax 507, 508 (Tax 1999).

Before engaging in the reconsideration process, the "litigant must initially demonstrate that the [c]ourt acted in an arbitrary, capricious, or unreasonable manner." D'Atria, 242 N.J. Super. at 401; see also Palombi v. Palombi, 414 N.J. Super. 274, 289 (App. Div. 2010) (finding that "[t]he magnitude of the error cited must be a game-changer for reconsideration to be appropriate."). Critically here, reconsideration is not meant to re-litigate issues already decided or otherwise award a proverbial 'second bite at the apple' to a dissatisfied litigant. With these standards in mind, the court denies Lyndhurst's motion for reconsideration for the following reasons.

ANALYSIS

I. Standing

As a preliminary matter, the court will first address Lyndhurst's argument that Chubb had no legal standing to file the Freeze Act motion. Application of the Freeze Act is "mandatory and self-executing." Clearview Gardens Assocs. v. Twp. of Parsippany-Troy Hills, 196 N.J. Super.

323, 328 (App. Div. 1984). Our court has held that "[a] subsequent owner has the right to apply the Freeze Act, for a subsequent year, to a judgment obtained by a prior owner for a prior year." ADP of New Jersey, Inc. v. Twp. of Parsippany-Troy Hills, 14 N.J. Tax 372, 378 (Tax 1994); Zisapel v. Borough of Paramus, 20 N.J. Tax 209, 214 (Tax 2002) (finding that the authority to invoke motion of the Freeze Act is "an incident of ownership or other status as taxpayer" and not which party had "control of [the] base year litigation."). Standing to make a Freeze Act motion is therefore "dependent on the status of the applicant, i.e., one who has interest in the property when the application is made." Ritchie & Page Distrib. Co., Inc. v. City of Trenton, 29 N.J. Tax 538, 543 (Tax 2016). As for the procedural requirements, a party seeking to benefit from the Freeze Act must do so in accordance with R. 8:7(d), by filing a "motion for supplementary relief to the Tax Court under the caption of the Tax Court judgment for the base year to which the Freeze Act application is sought." See also Grandal Enterprises, Inc. v. Borough of Keansburg, 292 N.J. Super. 529, 538 (App. Div. 1996).

In making its argument, Lyndhurst ignores the reality that it is the new owner, CCC NJ Owner, and not Chubb, that is asserting entitlement to Freeze Act relief. Because the 2015 base year judgment caption identifies the plaintiff as 160 Chubb Properties, LLC, CCC NJ Owner was required, under R. 8:7(d), to adopt this caption for purposes of making the Freeze Act motion. CCC NJ Owner engaged WMM subsequent to the sale of the subject property to file an application under the Freeze Act on its behalf. Therefore, CCC NJ Owner, as successor in title, not only has standing to seek relief under the Freeze Act, but is entitled to invoke its protections.

II. Exceptions to Freeze Act Application

The Freeze Act protects a taxpayer by freezing the assessment for two years following entry of a final judgment by the Tax Court for a particular year. See N.J.S.A. 54:51A-8. However,

Freeze Act relief is not available: (1) when the taxing authority demonstrates circumstances occurring after the base year assessment date that result in an increase in the value of the property, or (2) in the tax year immediately preceding the year in which a program for a complete revaluation or complete reassessment of all real property within the district has been put into effect. Ibid. Here, no allegation is made that a complete revaluation or complete reassessment of all real property in Lyndhurst was implemented.

When opposing a motion seeking entry of judgment pursuant to the Freeze Act, the municipality has the burden to "make a prima facie showing that there was a change in . . . value between the assessment dates for the base year and freeze years." Coastal Eagle Point Oil Co. v. Twp. of W. Deptford, 353 N.J. Super. 212, 218 (App. Div. 2002). The municipality must demonstrate that "(1) the change in value result[ed] from an internal or external change; (2) the change materialized after the assessing date of the base year; and (3) the change substantially and meaningfully increased the value of the property." AVR Realty Co. v. Twp. of Cranford ("AVR II"), 316 N.J. Super. 401, 407 (App. Div. 1998). See also Mediterannean House v. Borough of Fort Lee, 7 N.J. Tax 528, 535 (Tax 1985) (holding that it is not just any change to a property that can be used to overcome freeze protection, as this would render the Freeze Act meaningless). If the municipality fails to make a prima facie showing, the taxpayer is entitled to summary relief. See AVR II, 316 N.J. Super. at 407.

Generally, Lyndhurst's motion for reconsideration as to the inapplicability of the Freeze Act restates the arguments initially raised in opposition to the motion, which the court addressed in its December 14, 2018, published opinion. As such, the court will begin by briefly addressing the substance of these arguments before addressing Lyndhurst's new windfall argument.

A. Occupancy and Improvements

Our courts have consistently held that when presented with a Freeze Act motion, bare allegations of a property being substantially unoccupied, without further evidentiary support as to either an increased occupancy, or that such increased occupancy concurrently increased the subject property's value, are unavailing. See Ritchie & Page, 29 N.J. Tax at 545-46 (citations omitted); Union Minerals and Alloys Corp. v. Town of Kearny, 11 N.J. Tax 280, 285 (Tax 1990), aff'd, 13 N.J. Tax 114 (App. Div. 1992) (determining that "mere increase[s] in tenant occupancy unrelated to a change in market conditions does not result in the change in value contemplated by the freeze act."). Such an "argument presupposes that the more tenants there are in a building, the higher the building's value." Ibid. However, as that court aptly pointed out, "a critical aspect of the freeze act [is] . . . that the value to which the statute refers is value for tax purposes." Ibid.

Lyndhurst argues that conversations between its tax assessor and Chubb demonstrate that the subject property was substantially unoccupied. As set forth in the court's December 14, 2018 opinion, presenting unsubstantiated assertions of the tax assessor, and "raising the issue," without further evidence of either an actual increase in occupancy, or evidence that such increased occupancy concurrently increased the subject property's value, are insufficient to warrant a plenary hearing. The municipality must demonstrate a substantial and meaningful change in the value of the subject property.

Lyndhurst's tax assessor further contends that construction permits outlining proposed work to be done on a property, without verifying the completion of the work done, is sufficient to defeat a Freeze Act application. As a preliminary matter "physical change alone is not proof that a substantial and meaningful change in the market value of the property has occurred." 2nd Roc-Jersey Assocs. v. Town of Morristown, 11 N.J. Tax 45, 52 (Tax 1990). The municipality bears

the burden of showing that the change in value of the property was substantial and meaningful by a comparison of the property's value before-and-after any physical changes. Ibid. This court found in its December 14, 2018 opinion that bare allegations of physical change alone are not proof that a substantial and meaningful change in the market value of the property has occurred.

For the purposes of assessing real property, N.J.S.A. 54:4-23 provides, in part:

> All real property shall be assessed to the person owning the same on October 1 in each year. The assessor shall . . . after examination and inquiry, determine the full and fair value of each parcel of real property situate in the taxing district at such price as, in his judgment, it would sell for at a fair and bona fide sale by private contract on October 1 next preceding the date on which the assessor shall complete his assessments[.]
>
> [Ibid.]

Lyndhurst's tax assessor was obligated to assess the property as of October 1, 2016, for the 2017 tax year, in order to reflect the subject property's full and fair value as a result of the alleged changes in occupancy and improvements made to the property. Lyndhurst acknowledged, however, that "no additional actions were taken by the Township for the 2017 tax year" and that "the assessment for all years remained the same." Lyndhurst bears the burden of showing that the change in value of the property was substantial and meaningful by a comparison of the subject property's value before-and-after any physical changes.

During oral argument, Lyndhurst alleged that it was prohibited from conducting any discovery regarding occupancy or any improvements made to the subject property, as the proper venue for discovery would be during a plenary hearing.[1] As highlighted in the court's December

[1] During oral argument, Lyndhurst argued that "construction officials [should] come in [the court, and that] we might want to look at the Uniform Construction Code. We would look at other things . . . . If you looked at the building and the building had changes, and we talk about the changes . . ." during the plenary hearing.

14, 2018 opinion, Lyndhurst failed to utilize the Chapter 91, N.J.S.A. 54:4-34, "arsenal of devices" that are at the tax assessor's disposal, or take any steps to re-examine the subject property prior to Chubb filing its Freeze Act motion. If a substantial change in valuation of a property has occurred, the "change would not have escaped the notice of the" taxing district. Brae Associate v. Borough of Park Ridge, 21 N.J. Tax 115, 118 (App. Div. 2003).

It is firmly established that a municipality has the burden to perform research to show that the change in value of the property was substantial and meaningful before opposing a Freeze Act motion. Entenmann's Inc. v. Borough of Totowa, 19 N.J. Tax 505, 515 (Tax 2001), aff'd, 21 N.J. Tax 182 (App. Div. 2003). "Engaging in discovery first in order to make a prima facie claim of value change, to thereafter engage in more discovery in furtherance of a plenary hearing, subverts the two-step process approved" by the Appellate Division. Ritchie & Page, 29 N.J. Tax at 546 (citing AVR Realty Co. v. Twp. of Cranford ("AVR I"), 294 N.J. Super. 294, 300 (App. Div. 1996)).

As articulated by our Supreme Court in Newark v. Fischer, 8 N.J. 191 (1951),

> The evil which the "freeze" statute sought to remedy was repeated yearly increases in the assessed value of property, not related to or justified by any changes increasing its market value, and resulting in harassment of the taxpayer, subjecting him to the trouble and expense of annual appeals to the county tax board.
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> [Id. at 199-200.]

To grant a plenary hearing on the basis of what amounts to nothing more than unsupported allegations in support of a change in value where, under the circumstances presented to the court, the change should not have escaped the notice of Lyndhurst, is wholly inconsistent with the rulings of our courts.

Here, Lyndhurst once again reaffirmed that no research was conducted before opposing the Freeze Act motion by concluding that "[t]he proof is in the pudding. The proof is that the [subject property] sold for $20,000,000." If the court allows Lyndhurst to reverse the process to meet its burden of proof, the Freeze Act and the already limited protections it affords taxpayers, will be eroded. As such, the court reaffirms the determination made in its December 14, 2018 opinion that unsupported allegations of changes to tenant occupancy and unsupported allegations of improvements made to the subject property fail to demonstrate a substantial and meaningful change in value to warrant denial of freeze protection.

B. Subject Property's 2016 Sales Price

Lyndhurst further argued that the subject property's November 17, 2016 sales price "tells us on its face"[2] that a substantial and meaningful change in value has occurred, entitling Lyndhurst to a plenary hearing on the applicability of the Freeze Act. However, our court has found that, "the selling price of real property involved in a judicial determination of its assessable value is a 'guiding indicium' of fair value and ordinarily is merely evidential." See Harrison Realty Corp. v. Town of Harrison, 16 N.J. Tax 375, 381 (Tax), aff'd, 17 N.J. Tax 174 (App. Div. 1997). Sales price does not establish, per se, a change in value for purposes of the Freeze Act.

[2] Lyndhurst's reasoning implicates a potential spot assessment. See Twp. of W. Milford v. Van Decker, 120 N.J. 354, 361-62 (1990) (holding that reassessment of a recently sold property based solely on its sales price is a prohibited spot assessment under the uniformity provisions of our State Constitution, N.J. Const. art. VIII, § 1, ¶ 1.). By not taking any additional action and keeping the subject property's assessment the same for all years, the question that presents itself to the court is as follows: what would the assessment of the subject property be for tax year 2017 if Chubb had retained ownership in 2017? Instead of WMM filing the Freeze Act motion for CCC NJ Owner on July 27, 2017, Chubb would have filed the motion for Freeze Act relief for tax year 2017. Since there would be (1) no sales price; (2) no affirmative waiver of 2017 freeze protection; and (3) no examination and inquiry by the tax assessor into the alleged occupancy and alleged improvements made to the subject property in order to determine the full and fair value by October 1, 2016, it is reasonable to conclude that the subject property would potentially have continued to be assessed at $13,000,000 per the 2015 Stipulation of Settlement.

C. Windfall

In support of its windfall argument, Lyndhurst relies on Borough of Harvey Cedars v. Karan, where our Supreme Court held that "[i]n a partial-takings case, homeowners are entitled to the fair market value of their loss, not to a windfall, not to a pay out that disregards the home's enhanced value resulting from a public project." 214 N.J. 384, 389 (2013). The court finds that Karan is unavailing to the case at hand. Lyndhurst's argument that CCC NJ Owner received a "windfall," and that such a "windfall" should not be permitted as CCC NJ Owner neither negotiated the base year settlement nor is it a named party to the Freeze Act motion, does not represent the legislative intent of the Freeze Act.

The Freeze Act is a legislatively conferred right that attaches to ownership. Zisapel, 20 N.J. Tax at 214. The Freeze Act provisions will apply unless the taxpayer affirmatively waives application, or one of the exceptions applies. Ritchie & Page, 29 N.J. Tax at 543. The court determined in its December 14, 2018 opinion that Chubb did not expressly or intentionally waive application of the Freeze Act for the 2017 tax year. Therefore, CCC NJ Owner, as a subsequent owner, was entitled to invoke Freeze Act protection. Lyndhurst had an opportunity to oppose the motion by making a prima facie showing of a substantial and meaningful change in value. The court ultimately determined that Lyndhurst failed to meet that burden.

In sum, Lyndhurst offers no new or additional facts or evidence in support of its motion for reconsideration, nor proffered any law or authority it believes the court failed to weigh or consider in these matters. Rather, Lyndhurst simply reasserts the same arguments based on the same evidential record before the court, hoping for a different result. While Lyndhurst disagrees with the analysis and reasoning adopted by the court in reaching its decisions, this does not establish that the court's decisions was palpably incorrect or irrational. Nor does it establish that

the court acted in an arbitrary, capricious, or unreasonable manner when it determined that Lyndhurst had failed to make a prima facie showing that a substantial and meaningful change in value of the subject property occurred between the 2015 base year and 2017 tax year, thus, not warranting a plenary hearing.

CONCLUSION

For the above stated reasons, the court denies Lyndhurst's motion for reconsideration of the court's December 14, 2018, decision and January 3, 2019, Order denying Lyndhurst's request for a plenary hearing and granting Freeze Act relief to CCC NJ Owner for tax year 2017.