SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 9
NASSAU COUNTY

In the Matter of the Application of
BENIGNO MACIAS and MILENA D. MACIAS,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

HARVEY B. LEVINSON, CHAIRMAN OF THE NASSAU COUNTY BOARD OF ASSESSORS, in his Official Capacity only, the NASSAU COUNTY DEPARTMENT OF ASSESSMENT and the NASSAU COUNTY ASSESSMENT REVIEW COMMISSION,

Respondents.

INDEX NO.: 017744/06

MOTION DATE: 11-20-06

MOTION SEQ # 001

The following papers having been read on the motion:

Notice of Petition and Exhibits.....1
Verified Answer.....2

This is an Article 78 proceeding in the nature of mandamus to review a decision of a Judicial Hearing Officer made in a small claims assessment review proceeding initiated pursuant to Article 7, Title 1-A of the Real Property Tax Law, RPTL § 729 et seq. For the reasons which follow, the petition is granted, the decision of the hearing officer is annulled, and the proceeding is remanded to the hearing officer for further proceedings consistent herewith.

Petitioners are the owners of a single-family home located at 63 Bucket Lane, Levittown, New York. The property is designated as Section 45, Block 220, Lot 29 on the Nassau County assessment roll. The home is a two-story, colonial-style structure which was originally

constructed in 1948. The lot size is 60 by 110 feet.

Respondents are the Nassau County Department of Assessment and the Nassau County Assessment Review Commission. For the 2006/2007 tax year, respondents assessed petitioners' property at $1,286.

On April 12, 2006, petitioners filed a small claims assessment review petition, claiming that the assessment was unequal and excessive. Petitioners claimed that their assessment was unequal because their property was assessed at a higher percentage of full market value than the average of residential property on the assessment roll. Petitioners claimed that their assessment was excessive because the total assessed value exceeded the full market value of the property. Petitioners asserted that the equalized or total assessed value of their property was $514,300.[1] In the review petition, petitioners alleged that they had purchased their property on September 2, 1996 for $159,000. Petitioners further alleged that for the period September 4, 2005 to September 4, 2006, the property was insured for $361,900.[2] Petitioners requested that their total assessment be reduced to a full value of $385,725.

Judicial Hearing Officer John D. Thirkield, Esq. held a hearing on the petition on September 21, 2006. At the hearing, petitioners submitted a table showing the assessed values of their home and 32 other properties on Bucket Lane. The table was prepared from data supplied by the Nassau County Department of Assessment. The assessed values of the properties other than petitioners' ranged from $768 to $1,118. Thus, the assessed value of petitioners' home clearly exceeded that of the other properties on the street.

Petitioners submitted a second table showing the assessed values of four properties described by petitioners as "similar homes" in the area. This table was also prepared from data

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[1]The review petition was on a prescribed form which required petitioners to calculate the equalized value of their property by dividing the assessed value of $1,286 by the "class one ratio" of .25%(See RPTL § 730[1][d]). However, dividing the assessed value by the class one ratio results in an equalized or total assessed value of $514,400.

[2]Since the insurance coverage became effective in September, 2005, petitioners may have actually acquired the property in September, 2005 rather than September, 2006 as they have alleged. However, the court does not consider the actual date on which petitioners took title to be material to this proceeding.

supplied by the Nassau County Department of Assessment. The photos submitted with the data reveal that the homes listed in the table are two-story dwellings which appear to have been expanded from their original structures. The range of the assessed values of these properties is $851 to $1,118. Thus, all of these properties had assessed values less than that of petitioners'.

Petitioners submitted a third table showing assessed values of five similar properties which were improved with in-ground swimming pools.[3] The range of the assessed values of these properties was $920 to $1,031. Since the subject property does not have a pool, petitioners apparently argued that their property should have a lower assessment because it lacks this feature.

Petitioners also submitted multiple listing service information sheets showing the asking prices and descriptions of numerous homes which were for sale in Levittown. According to the information sheets, these homes are expanded ranches which were originally built in 1948. With the information sheets, petitioners submitted selling prices on four similar homes which were sold between December 2005 and March 2006. The assessed values of these homes ranged from $860 to $935. Two of the homes sold for prices below their equalized value.[4] However, the other two properties sold for prices above their equalized value, and one sale exceeded equalized value by over $70,000.[5] While this sample is quite small, petitioners appear to have regarded the latter sales as some evidence of unequal assessment.

In addition, petitioners submitted a sales analysis of five comparable properties which sold between December, 2003 and March, 2005. All of these properties are two-story colonial style structures. One of the homes was built in 2001, but the others were originally constructed between 1948 and 1952. All of the properties have approximately the same frontage, but two of the lots are considerably deeper than petitioners' property. All of the homes are in good

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[3]One of these properties, 106 Squirrel Lane, was also listed on the second table.

[4]The equalized value is equal to the assessed value divided by the most recent equalization rate(RPTL § 730(1)[d]). 180 Sprucewood Drive has an equalized value of $374,000 and sold for $365,000. 50 Tower Lane has an equalized value of $346,300 and sold for $325,000.

[5]105 Bucket Lane has an equalized value of $344,000 and sold for $395,000. 17 Blossom Lane has an equalized value of $363,200 and sold for $439,000.

condition. The comparable properties are somewhat smaller than petitioners' property in terms of living area, ranging from 2,255 to 3,020 square feet. The total living area of petitioners' property is 3,232 square feet. Petitioners' property has eight rooms. Three of petitioners' comparable properties have eight rooms, but one has nine rooms, and one has eleven. Petitioners' property has three full bathrooms. While one of the comparable properties has three full baths, there are only two full, or one and a half, baths in the other comparables. Unlike petitioners' property, the comparables do not have a garage, perhaps because their garages have been converted to living space.

The selling prices of the comparable properties ranged from $370,500 to $600,000, and all but one of the selling prices were considerably below the equalized value of petitioners' property. Petitioners appear to have regarded this data as suggesting that the market value of petitioners' property was less than the equalized value and thus supporting a claim of excessive assessment. However, when the selling prices were adjusted based upon a January 2, 2006 valuation date, all of the comparable properties had an adjusted value which exceeded the equalized value of petitioners' property.

In opposition, respondents submitted a sales analysis of three comparable properties which sold between December, 2003 and December, 2005. Interestingly, one of respondents' comparables, 31 Boat Lane, is the eleven-room home used in petitioners' analysis. Two of respondents' comparables were originally built in 1948, and one was constructed in 1950. Two of the houses are colonials, and one is a Cape Cod-style structure. All three are situated on lots which are close in size to that of petitioners'. Two of respondents' comparables have garages, as does petitioners' property. The average adjusted sales price of respondents' comparables was $521,477. Thus, the County argued that because the equalized value of petitioners' property was less than the market value, the assessment was not excessive.

The Judicial Hearing Officer decided that there should be no change in the assessment. The JHO found that the subject property was a 3,232 square foot colonial and that it was "built" in 2003.[6] The JHO found that "the best evidence of market value" was the sales analysis

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[6]In view of the evidence as to the alteration of similar homes, the JHO appears to have meant that the home was expanded at that time.

submitted by respondent. The JHO indicated that he considered the dates of sale of respondents' comparables to be closer to the valuation date than were the dates of sale of the comparables submitted by petitioners. The JHO also considered the gross living area and location of respondents' comparables to more closely approximate the subject parcel.[7] The JHO stated that he did not consider the assessed values of the other homes on petitioners' street to be of any probative value because petitioners had not submitted the ages or any "statistics" as to those properties. Finally, the JHO found that the equalized value of the property was $514,400. Since respondents' sales analysis indicated a market value of $521,477, the JHO found that the assessment was not excessive.

The JHO made no express findings concerning petitioners' claim that the assessment was unequal. However, the JHO stated that, "In determining this matter, I have utilized a level of assessment of .25% for valuation purposes for the reasons set forth in the memorandum opinion accompanying the decision in Sikorski v. Nassau AR No. 354344/06(September 6, 2006, Rosenblum, R.)." Petitioners seek review of the JHO's decision on the ground that it is arbitrary and capricious and lacks a rational basis.

Background to this proceeding

Section 306 of the Real Property Tax Law, which was repealed in 1981, required that all real property in each assessing unit be assessed at "full value." In *Hellerstein v. Assessor*, 37 NY2d 1 (1975), the Court of Appeals held that § 306 prohibited the widespread practice of fractional assessment. In mandating assessment at full value, the court noted the "extreme difficulty" in ascertaining whether fractional assessment was being applied uniformly and also the vices associated with the practice(37 NY2d at 13).

In response to *Hellerstein*, the Legislature enacted RPTL § 305(2) which provides that "All real property in each assessing unit shall be assessed at a uniform percentage of full value." In the same legislation, the Legislature divided assessable properties into several classes, and allowed the classes to be assessed at different percentages of full value, provided the percentage of full value was consistent within each class. As a result, the assessing units "calculate real

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[7]The gross living areas of respondents' comparables were 2,340; 1,750; and 2,018 square feet respectively.

property taxes by determining the full value of each parcel, fixing the ratio of full value to assessed value in each class, and, finally, applying a uniform tax rate to the assessed value" of the property(See, *Briffel v. Nassau*, 31 AD3d 79 [2d Dep't 2006], appeal argued in Court of Appeals January 11, 2007).

Historically, Nassau County has determined the full market value of residential properties based on 1964 land values and 1938 construction costs(31 AD3d at 88). This unique method of valuation appears to have compounded the problems related to fractional assessment. The County's assessment practices were challenged in Coleman v. Nassau, Index No. 30380/97, where plaintiffs claimed that the assessment practices were racially discriminatory and violated federal fair housing laws. In March 2000, the litigation was settled pursuant to a consent decree which required the County to reassess residential property in a manner that is fair, nondiscriminatory, scientific and equitable and is based upon the fair market value of the property(*Briffel*, 31 AD3d at 89). Nevertheless, the consent decree continued to permit the practice of fractional assessment.

Small Claims Assessment Review Proceedings

Title 1-A of the Real Property Tax Law was enacted to "protect the wrongfully assessed homeowner by affording speedy and inexpensive relief ...through a simplified review procedure" (*New Castle v. Kaufmann*, 72 NY2d 684, 686 [1988]). Pursuant to this title, an owner of real property claiming to be aggrieved by an assessment may file a petition for review on the ground that the assessment is unequal or excessive(RPTL § 730[1]).

An assessment is "unequal" if it is made at "a higher proportion of full value than assessed valuation of other residential property" or if it is made at "a higher proportion of full value than the assessed valuation of all real property" on the same assessment roll(RPTL § 729[4]). The term "full value" is synonymous with market value(*Hellerstein v. Assessor*, 37 NY2d 1, 7 [1975]). Thus, subdivision(4) has been interpreted to require that to make a case of unequal assessment, the homeowner prove that his property is assessed at a higher percentage of full market value than either 1) the average of residential property or 2) the average of all other property, on the assessment roll(*Pace v. Assessor*, 252 AD2d 88, 90 [2d Dep't 1998]). An assessment is "excessive" if it "exceeds the full value" of the property(RPTL § 729[2][a]).

Section 732(2) of the RPTL provides that small claims assessment review hearings shall be conducted "on an informal basis in such manner as to do substantial justice between the parties according to the rules of substantive law." The petitioner shall not be bound by statutory provisions or rules of evidence(Id). The hearing officer shall consider the "best evidence" presented in each particular case. Such evidence may include, but shall not be limited to, the "most recent equalization rate established for [the] assessing unit, the residential assessment ratio promulgated by the state board..., the uniform percentage of value stated on the latest tax bill, and the assessment of comparable residential properties within the same assessing unit"(Id). Before proceeding to review the JHO's decision, the court will consider the nature and probative value of both equalization rates and residential assessment ratios.

Equalization rates

A state equalization rate is the percentage of full value at which taxable real property in a county, city, town or village is assessed as determined by the State Board of Real Property Services(RPTL § 102[19]; *Riverhead v. Board of Real Property Services*, 5 NY3d 36, 42 [2005]). Equalization rates are devices designed to ascertain whether the valuations in one tax district bear a just relation to the valuations in other tax districts within the state(*Ed Guth Realty, Inc. v. Gingold*, 34 NY2d 440, 448 (1974). The rates do not "purport to measure the ratio of assessed valuation to full value of any individual property" and are not "designed to insure that assessments are made at a uniform percentage of full value within the taxing unit"(*Hellerstein v. Assessor*, supra,37 NY2d 1, 9 [1975]

In *Ed Guth Realty, Inc. v. Gingold*, 34 NY2d 440 (1974), the Court of Appeals considered the question of whether equalization rates could form the basis of a finding of unequal assessment in a traditional tax certiorari case. In a tax certiorari proceeding claiming unequal assessment, the petitioner must prove a "proper ratio" of assessed value to fair market value and the fair market value of his property(34 NY2d at 446). Multiplying the proper ratio by the fair market value then yields the "proper assessed valuation" of the property(Id).

The court noted that equalization rates were originally inadmissible in tax certiorari proceedings because they were not intended to bear any relation to the value of individual properties(Id). Furthermore, it was considered unfair for the property owner to be bound by the

equalization rate because the rates were administratively determined and not reviewable by the individual taxpayer(Id at 449). In 1961, the Legislature amended RPTL § 720(b)(3) to allow for the admissibility of equalization rates in tax certiorari proceedings. However, the court initially held that equalization rates were entitled to little weight and other proof was required to show unequal assessment(Id at 448). However, after RPTL § 720(b)(3) was again amended, the court in *Ed Guth Realty* overruled its prior decision and held that equalization rates were not only admissible but could form the basis of a finding of unequal assessment. The court noted that equalization rates were objectively and expertly calculated, and utilization of the rates would simplify and narrow the scope of tax certiorari proceedings(Id at 450). However, the court stressed that equalization rates were not to be "automatically applied in all cases"(Id). Rather, the party who offers the equalization rate is required to prove that its use is justified in the particular case(Id).

Residential assessment ratios

The residential assessment ratio, or "RAR," is "the median ratio in the list of ratios of assessments to sales prices of properties sold in the assessing unit during the period between the filing of the latest and the filing of the preceding assessment roll(§ 738[1][a][b]). The ratios of assessments to sales prices shall be sorted in descending order, and only the ratios of residential properties sold at arms length may be included in the list(Id). Section 738(1)(a) of the RPTL provides that the State Board of Real Property Services shall determine the RAR for the assessing unit unless during the current year the assessing unit is completing a "revaluation or update." Subdivision(1)(b) provides that the State Board shall correct to the extent practicable or disregard materially erroneous sales reports and shall increase or decrease the RAR to account for a "change in the level of assessment" of five percent or more in the total assessed value of residential real property or, if not available, of all taxable real property.[8] Thus, it is clear that the determination of the RAR involves considerable administrative expertise by the state board.

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[8]The term "change in level of assessment" means the net percentage increase or decrease in the assessed valuation of all taxable real property in the assessing unit, subject to certain exceptions, including wholly exempt property, and other than increase or decreases in value attributable to physical or quantity changes in the property(RPTL § 1220[1]).

The RAR is admissible in a SCAR proceeding as part of the proof of unequal assessment (*Pace v. Assessor*, supra, 252 AD2d 88 [2d Dep't 1998]). "Its purpose is to demonstrate by recent market experience the relationship between the assessed valuation and the full value, expressed as a percentage, of residences in the assessing unit, and thereby to establish the average percentage of full value at which the residential property in the assessing unit is assessed"(252 AD2d at 91). To establish unequal assessment, the homeowner must first prove the market value of his property by such methods as a recent purchase price of the property, a professional appraisal, or proof of the sales price or appraised values of comparable properties(Id at 90). Once full market value has been established, petitioner must offer proof of what he believes to be the appropriate percentage of value to be used to determine the correct assessment. That proof may take the form of the equalization rate or RAR for the assessing unit, the assessor's statement of percentage, or the assessments of comparable properties(Id). Through this proof, the homeowner must show that the assessed valuation of his property is at a higher percentage of its full value than the percentage that the proof establishes to be the appropriate one for the assessing unit(Id at 90-91). For example, if the homeowner asserts that the RAR is the appropriate percentage for the assessing unit, the RAR would be multiplied by the full value of the property. If the resulting figure is less than the assessed valuation of the property, the homeowner has demonstrated unequal assessment(Id at 91).[9]

While the RAR is evidence as to the appropriate percentage of value, the hearing officer is not compelled to accept the RAR, given his broad discretion in considering evidence(*Meola v. Assessor*, 207 AD2d 593 [2d Dep't 1994]). Moreover, the parties are free to impeach the RAR by evidence that the sales reports upon which it is based were erroneous or by any other evidence that the RAR is not an accurate measure of the ratio of assessment to market value in the assessing unit(*Agosh v. Board of Assessment Review*, 150 Misc.2d 756 (Sup. Ct. On. Co. 1991). Indeed, the assessor gets "two bites at the apple" because it may present to the state board documentation that the RAR is materially in error and also mount a "collateral attack" on the

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[9]As noted above, full value is established by a recent purchase price, an appraisal, or an analysis of recent sales of comparable properties. Because full value is calculated without reference to an RAR, that ratio is not relevant to an excessive assessment case.

RAR in a SCAR proceeding(Id. at 760).[10] Moreover, "[T]here is no statutory requirement that a ratio be stated in the hearing officer's decision or even that one be computed by the officer"(Id. at 763). The JHO's task "is to determine whether the challenged assessment is unequal or excessive–a function that could be performed by comparisons of values and assessments without the intermediate step of ratio computation"(Id). Nonetheless, there must be a "sufficiently representative sample from which to determine the average of residential property on the assessment roll" in order to establish unequal assessment(*Sofia v. Assessor*, 294 AD2d 509 [2d Dep't 2002]).

The referee's decision to set the RAR

As noted above, the JHO utilized a "level of assessment of .25% for valuation purposes" for the reasons set forth in a separate decision issued by referee Rosenblum. If, by this language, the referee meant that he had applied a class one ratio of .25% to calculate the equalized value, there would have been nothing objectionable. Indeed, the JHO would have been merely following RPTL § 730(d)(1). However, the fact that the JHO was utilizing the .25% figure "for the reasons set forth" by the referee strongly suggests that he was not routinely applying the class one ratio. Rather, an analysis of Ms. Rosenblum's decision, which the JHO expressly incorporated, indicates that the JHO was using the term "level of assessment" to refer to a residential assessment ratio.

In her decision, the referee noted that the State Board of Real Property Services does not determine the RAR during a period of reassessment(RPTL § 738[1][a]). The referee found that until the 2006 tax year, RAR's had been set by agreement among members of the certiorari bar, homeowner representatives, and the County. The referee concluded that the failure of these groups to agree upon an RAR for the 2006 tax year, "plac[es] the determination of this ratio before the SCAR hearing officers." Pursuant to the referee's request, the parties submitted ratio

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[10]The rule is different with respect to equalization rates. In a traditional tax certiorari case, and probably in a SCAR proceeding as well, the assessor is prohibited from mounting a collateral attack and is required to challenge the equalization rate by filing a complaint with the state board(RPTL § 1206; *860 Executive Towers Inc. v. Board of Assessors*, 53 AD2d 463 [2d Dep't 1976], aff'd sub nom. *Pierre Pellation Apts. Inc. v. Board of Assessors*, 43 NY2d 769 [1977]).

studies and other technical material relevant to the issue of what would be an appropriate ratio of assessed value to market value for residential properties for the tax year in question. After reviewing the material, the referee concluded that "the ratio that I will utilize in the SCAR proceedings assigned to me will be .25%." Thus, it is clear that the referee was not merely finding an appropriate ratio of assessment to value for the specific case but rather was purporting to set a RAR for all SCAR proceedings to which she had been assigned.

The court notes that the referee appears to have done an admirable job of analyzing the technical material on ratio studies which had been submitted to her, including the need for "time trending," "filtering" the data, and allowing for "standard deviation." Thus, the referee's choice of an RAR of .25 may have been based upon the "best evidence" submitted to her. However, the RAR set by the referee cannot substitute for the ratio prescribed by RPTL § 738, namely the median ratio in a list of ratios of assessment to sales price in the relevant time period. Moreover, the determination of the median ratio based upon this data requires the administrative expertise which is possessed only by the state board.

RPTL § 738(1) is silent as to how the RAR is set, and indeed whether an RAR is to be set at all, while the assessing unit is "completing a revaluation or update." However, because the determination of unequal assessment may be made without the benefit of an RAR, and in view of the wide range of other evidence that the JHO may consider, the court concludes that the JHO may not set her own RAR during a reassessment period.

The court notes that with certain exceptions, RPTL § 735 provides that, "The hearing officer's decision of a petition for small claims assessment review shall not constitute precedent for any purpose or proceeding involving the parties or any other person." Because a decision in a SCAR petition does not have precedential value, the referee was not authorized to apply her RAR to other 2006 SCAR petitions to which she was assigned. Furthermore, giving precedential value to a previously determined RAR would deprive the parties of their right to impeach the RAR within the context of the SCAR proceeding. A fortiorari, the JHO in the case herein was not authorized to apply the RAR which had been calculated by the referee in another SCAR proceeding.

Although the JHO used the term "level of assessment" in his decision, as discussed

above it appears that he was referring to the RAR calculated by the referee.[11] Because the JHO's decision as to unequal assessment is predicated upon an RAR which neither the JHO nor the referee was authorized to set, the JHO's decision is arbitrary and capricious and must be vacated. Settle judgment in accordance with this decision.

Dated: Feb 28, 2007 ENTER:

J.S.C.

ENTERED

MAR 29 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE

[11]The referee as well used the terms RAR, level of assessment, and equalization rate interchangeably. However, the Legislature intended for all of these terms to have very specific functions and meanings(*Briffel v. Assessor*, 31 AD3d 79, 82 [2d Dep't 2006]).