IN THE COURT OF APPEALS OF IOWA

No. 1999-586 (9-847) / 99-483
Filed June 28, 2000

EMPIRE CONSTRUCTION CO., INC.,
Plaintiff-Appellee,

vs.

DICKINSON COUNTY BOARD OF REVIEW,
Defendant-Appellant.

FILED
JUN 2 8 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Dickinson County, Frank B. Nelson, Judge.

The defendant appeals a district court ruling reducing the property tax assessment the county board of review imposed on plaintiff's property. **AFFIRMED.**

Michael J. Davenport and Frank W. Pechacek, Jr. of Willson & Pechacek, P.L.C., Council Bluffs, for appellant.

F. Richard Lyford of Dickinson, Mackaman, Tyler & Hagen, P.C., Des Moines, for appellee.

Considered by Streit, P.J., and Zimmer and Hecht, JJ.

PER CURIAM

The defendant, Dickinson County Board of Review, appeals the district court's reduction of the property tax assessment the Board imposed on Empire's landfill property. The Board argues the district court erred in: (1) ruling Empire had met its burden of proof that the assessment was excessive; (2) failing to grant its motion for directed judgment at the close of Empire's evidence; and (3) allowing Empire's expert rebuttal testimony. We affirm.

Background: Empire Construction Co., Inc. owns and operates a landfill in Dickinson County. The Dickinson County assessor increased the valuation of the property from $684,000 in 1994 to $2,326,000 in 1995. In 1996 the valuation was reduced to $1,901,200. In 1997 it was increased to $2,308,600, and to $2,493,300 in 1998. Empire did not contest the 1995 valuation. It did, however, appeal the 1996, 1997, and 1998 valuations. The Board upheld all three valuations. The three appeals were consolidated for judicial review by the district court.

Empire presented expert testimony from Jerry Jones, who valued the property using the income approach. He testified the valuations for the years at issue were $986,000, $1,021,000, and $856,000 respectively. The Board presented valuations from Robert Ehler and James Cleminshaw. Like Jones, Ehler used the income approach, but also tried the comparable sales approach, comparing sales of two landfills in Iowa, in determining the property value. He testified the valuations were $2,700,000, $2,400,000, and $2,250,000 respectively. Cleminshaw determined an estimated annual gross income stream

for the property, and then subtracted expenses to arrive at net income. He extrapolated the figures over the remaining useful life of the property. Cleminshaw set the property value at $5,050,550, $5,013,200, and $4,963,950 for the years on appeal. The Dickinson County Assessor testified she set the value on the property by determining a per-acre value and multiplying that figure by the number of acres in use. At the close of Empire's case in chief, the Board moved for a directed judgment. The court denied the motion. After the Board's experts testified, Empire introduced rebuttal testimony from another expert witness, Ernest Demba.

The district court concluded Empire met its burden to show the Board's valuation was excessive and supported by little, if any, rational basis. The court also concluded Empire met its burden to demonstrate its valuation was more correct than the Board's. The court explicitly found Jones's opinions more credible because he used actual figures for revenue and tonnage and his opinions used a "uniform and recognized approach" to value. The district court established the property valuation at the figures set by Jones. The Board appeals.

Scope of review: Our review is de novo. Iowa Code § 441.39 (1995); Iowa R. App. P. 4. An appealing party's attack on an assessment is a two-stage process. *Heritage Cablevision v. Board of Review*, 457 N.W.2d 594, 598 (Iowa 1990). First, the party challenging the assessment must show the board of review's valuation is excessive, inadequate, inequitable, or capricious. *Id.* (citing, *Richards v. Hardin County Bd. of Review*, 393 N.W.2d 148, 151 (Iowa 1986);

Wunschel v. Board of Review, 217 N.W.2d 576, 578 (Iowa 1974)). Second, the party must establish what the correct valuation should be. *Excel Corp. v. Pottawattamie County Bd. of Review*, 492 N.W.2d 225, 228 (Iowa App. 1992).

Appellate Claims: The Dickinson County Board of Review raises three claims on appeal. It claims the court should have granted its motion for a directed judgment at the close of Empire's evidence. The Board claims Empire did not meet its burden of proof in the two-stage process of challenging an assessment. The Board also claims the court erred in admitting the rebuttal testimony of Ernest Demba.

A. Directed judgment. Iowa Code section 441.21 places the burden of proof on the complaining taxpayer until "competent evidence by at least two disinterested witnesses that the market value of the property is less than the market value determined by the assessor," at which point the burden of proof shifts to the Board. *Id.*; *Eagle Food Centers v. Board of Review of the City of Davenport*, 497 N.W.2d 860, 862 (Iowa 1993). Because Empire only presented the testimony of one witness, the Board argues the court should have directed judgment in its favor. "Contrary to the Board's contentions, however, failing to shift the burden of proof is not equivalent to failing to satisfy the burden of proof." *Ross. v. Board of Review of Iowa City*, 417 N.W.2d 462, 466 (Iowa 1988). Because Empire did not present the testimony of two disinterested witnesses, the burden of proof remained with Empire. That is no basis, however, for granting a motion for directed judgment.

B. Burden of proof. Empire had the burden of proof to prove the Board's valuation was "excessive, inadequate, inequitable, or capricious." Iowa Code § 441.21(3). Once that burden was met, Empire had to establish the correct valuation. *Heritage Cablevision*, 457 N.W.2d at 598. There is "no presumption as to the correctness of the valuation of assessment appealed from." Iowa Code § 441.39; *Post-Newsweek Cable, Inc. v. Board of Review of Woodbury County*, 497 N.W.2d 810, 813 (Iowa 1993). The burden is met by a preponderance of the evidence. *Wunschel*, 217 N.W.2d at 578.

Under Iowa Code section 441.21(2), the market or comparable sales approach is preferred if the value can readily be established by that method. *Heritage Cablevision*, 457 N.W.2d at 598. All of the expert witnesses in this case utilized the "other factors" approach to determine the proper value of the landfill property, evaluating the income from the landfill. Ehler also used a comparable sales approach, using two other landfill sales. The assessor testified she estimated the value of the developed acres after reading an article in an appraisal journal. We conclude Empire met its burden of proof to show the County Assessor's valuation of the property was not proper.

The Board argues the income approach used by Jones is improper because it does not take into account the tenant's interest in the property. It asserts the approach used by Jones does not appraise the land in "fee simple" because it does not place a separate value on the improvements made by the tenant. We find the income or market rent approach Jones used to be the most accurate valuation of the landfill property in this case. The calculation was based

on the actual operation of the landfill. In making this finding, we have not considered the testimony of the rebuttal expert witness. We conclude Empire met its burden of proof to demonstrate the proper valuation of the property in question.

C. Rebuttal testimony. Finally, the Board claims the district court erred in admitting the rebuttal testimony of Empire's expert, Ernest Denby. In our de novo review of the record, we did not consider Denby's testimony in making our findings and conclusions. We need not determine, therefore, whether the admission of the testimony was error.

AFFIRMED.