FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

FRANKLIN COURT APARTMENTS, LTD.,

Plaintiff/Cross-Appellant,

vs.

BOARD OF REVIEW OF THE CITY OF DES MOINES, IOWA, ET AL.,

Defendants-Appellants.

Filed January 29, 1985

4-497
2-69077

Appeal from the Iowa District Court for Polk County - Ray A. Fenton, Judge.

Defendants appeal and plaintiff cross-appeals from the district court decision reducing the assessed value of plaintiff's property. AFFIRMED.

Alan A. Herrick and William R. Clark, Jr., of Herrick, Langdon & Langdon, Des Moines, Iowa, for defendants-appellants.

James E. Brick of Brick, Seckington, Bowers, Swartz & Gentry, Des Moines, Iowa, and J. R. McManus, Des Moines, Iowa, for plaintiff/cross-appellant.

Considered by Schlegel, P.J., Hayden, and Sackett, JJ.

PER CURIAM

Defendants appeal from the district court decision lowering the property tax assessment of plaintiff's apartment complex. Plaintiffs cross-appeal alleging the trial court erred in failing to reduce plaintiff's valuation to the amount of $2,070,000, the amount sought in its petition. We affirm.

Plaintiff owners unsuccessfully protested the 1981 assessment at a value of $2,681,000 of a 172 unit apartment complex in Des Moines, asserting that the correct value was $2,070,000. On appeal to district court the assessment was reduced to $2,316,800.

The property consists of thirteen buildings constructed in 1948 and 1949 and purchased by plaintiff on contract for $2,440,000 in 1977. Plaintiff presented evidence showing various aspects of the property needing repairs and rehabilitation. The property has shown a tax loss every year since 1977.

Plaintiff's first expert appraisal witness valued the property at $1,696,000. He used solely an income approach for the purposes of determining value due to various factors rendering other approaches inappropriate. The same factors led plaintiff's second expert to rely primarily on the income approach when he arrived at a value of $1,732,850. The trial court sustained a relevancy and materiality objection to an exhibit showing that the firm employing the second expert had entered into a contingent fee agreement with plaintiff. The expert testified that he was paid on a salary basis by his firm and had no knowledge of the details of its agreement with plaintiff.

Defendant's first expert valued the property at $2,740,000 using a formula weighted 60%/20%/20% in favor of the market data approach over income and cost approaches. One of the comparable sales he used in the market data approach was the 1977 sale of the subject property. A second expert valued the property at a total of $2,750,000 after obtaining very similar results under all three appraoches. The chief deputy assessor testified concerning the assessed

value of the property. In reducing the assessment the trial court found, inter alia, that the market data approach was not appropriate and that defendants should have given greater consideration to factors of obsolescence and physical depreciation as well as the income stream produced.

Defendants claim: (1) that the evidence was insufficient to support a reduction in the assessed value of the property and that the trial court's determination to the contrary failed to comply with requirements of Iowa Code section 441.21; (2) that the trial court should not have sustained relevancy and materiality objection to an exhibit showing a contingent fee agreement between plaintiff property owners and the firm employing one of their expert witnesses; and (3) that plaintiff's two appraisal experts did not offer "competent" proof due to their use of a single approach to valuation and one was not "disinterested" due to a contingent fee agreement between his firm and plaintiff, thereby rendering their testimony insufficient under section 441.21 to shift to defendant board the burden of showing reasonableness of its assessment.

A relevant portion and synopsis of the respective expert witnesses' testimony is noted as follows:

Mr. Work, for plaintiff: "The property needs painting, roofs had been patched, steps were deteriorated, spalling and crumbling of sidewalks and driveways, the 1-bedroom apartments were 550 square feet and the 2-bedroom apartments were 660 square feet." Further, "that his opinion was based on the income approach, that the cost approach was not good or valid when buildings get to be 30 or 35 years old, that there were too many judgment calls in the amount of depreciation. He did not use the market approach because he felt there were no adjustable comparables in the City of Des Moines. In his opinion of market value as of January 1, 1981, was $1,696,000 and his income approach was based upon a capitalization rate of .1396 because an investor would be looking for a 14% return and not 7 or 7 and one-half percent."

Mr. Fogery, for plaintiff: "His opinion as to the value of the property as of January 1, 1981 was $1,732,850. He relied primarily on the income approach, that he explored the cost approach but did not use it because of the problems in adjustments referred to by Mr. Work, but in utilizing the cost approach he arrived at a value of $1,638,542. He was not able to find sales of comparable properties, he was not familiar with the Des Moines market but he checked with some local realtors and any sales at that time were not comparable to plaintiff's property. That he considered the other approaches but determined they were not adequate or applicable."

As to a contingent fee contract between plaintiff and the Tenenbaum-Hill firm, Mr. Fogery's employer, he testified "he worked for a salary only and did not receive a commission or bonus and clearly indicated he had no pecuniary interest in the outcome of the trial."[1]

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[1] The contract between Tenenbaum-Hill Associates and plaintiff provided in part:

> Only if THA is successful in causing the assessed valuation of said property to be reduced shall you or the owner of the property be obligated to pay a fee. In such event, the fee payable to THA is agreed to be fifty percent (50%) of the first two years' tax savings, payable as follows: (1) fifty percent (50%) of the first year's tax savings to be paid within thirty (30) days of notice to you of the reduced assessed valuation for that year; and (2) fifty percent (50%) of the second year's tax savings to be paid within one (1) year of the date of said notice to you. The tax savings shall be the amount by which the reduced assessed valuation is less than the appealed assessed valuation, multiplied by the then current tax levy rate.
>
> Should it become necessary in the opinion of THA to appeal the assessed valuation of said property to any board, tribunal, commission or court and, in such event, should the services of an outside appraiser or attorney be required in the opinion of THA, you hereby appoint THA as your agent to select and employ an appraiser and/or attorney to represent you in such proceedings, at no cost to you.

We do not find this contract gives Mr. Fogery a pecuniary interest in the outcome of the trial. He was paid a salary for his work just as any other appraiser would be.

Mr. Stewart, for defendants: "His estimate of value of plaintiff's property of $2,750,000 was arrived at by use of a weighted average of 60% to his market approach, 20% to his income approach, and 20% to his cost approach. His valuation in his market data approach was $2,900,000 based upon use of his five comparable sales, which included plaintiff's property. He did not know the contract terms of any of the sales he used and could not make adjustments. He had only looked at the comparable properties from the exterior. In his income appraoch he allowed 9% to return to the investor in his capitalization rate and arrived at a value of $2,380,200. In his cost approach he calculated a value of $2,623,100 and allowed 35% for physical depreciation and 15% for functional obsolescence."

Harry Winegar, for defendants: "He used three approaches to value plaintiff's property at $2,750,000 as follows: cost approach $2,751,000, market data approach $2,750,000, and income approach $2,740,000. He allowed total depreciation of 35% in his cost approach. He gave four comparable sales, which included the sale of plaintiff's property, however he gave little weight to any of the sales except the sale of plaintiff's subject property. He stated there were only two similar complexes in Des Moines and they had not been sold recently. He did not know the interest rate in plaintiff's sale contract."[2]

The trial court found that the property had been excessively assessed and reduced the assessment to $2,316,800.

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[2] In 1977 the subject property was purchased by plaintiff for $2,440,000. As part of that transaction a mortgage of $850,000 was assumed at five and one-half percent interest and a contract was entered into with the sellers for $850,000 with an interest rate of six percent for the first five years and seven percent for the remaining five years. The details of this transaction should have been considered in the appraisal because the sale price was increased due to the favorable financing terms. Mr. Galinsky, one of plaintiff's limited partners, testified that originally plaintiff offered a cash price of $1,900,000 to $2,000,000, but later agreed to a higher price if the mortgage was assumable.

When a taxpayer challenges an assessment as excessive, inadequate, inequitable, or capricious, the taxpayer has the burden of proof. However, if the taxpayer "offers 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, the burden of proof thereafter shall be upon the officials or persons seeking to uphold such valuation to be assessed." Iowa Code § 441.21(3) (1983). In this case, plaintiff offered competent evidence by two disinterested appraisers that the assessed value was excessive. Therefore, the burden of proof shifted to defendants to uphold the assessment. No presumption exists that the assessor's valuation is correct. Iowa Code § 441.39.

An appeal of the board's decision to the district court is heard in equity and issues before the board are triable anew. Id. Review of the district court decision by this court is de novo. Iowa R. App. P. 4. While we are not bound by the findings of the district court, we do give weight to them, especially where the credibility of witnesses is involved. Iowa R. App. P. 14(f)(7).

Iowa Code section 441.21 provides fo the use of two approaches for ascertaining market value. If sales prices of comparable properties in normal transactions are available, the sales prices approach is to be used. If market value cannot be readily established in that manner, the other factors approach is used. Equitable Life Insurance Co. v. Board of Review, 281 N.W.2d 821, 823 (Iowa 1979).

Defendants argue that their experts should be believed because they used both the sales prices and other factor approaches whereas plaintiff's experts ignored the sales prices approach and did not use the cost approach. Plaintiff's experts testified, however, that the sales prices approach was not feasible because there were no comparable sales which did not require extensive adjustments to reflect market value, and the cost approach was not good nor valid because of the age of plaintiff's property.

Iowa Code section 441.21(b) provides in part:

> Sale prices of the property or comparable property in normal transactions reflecting market value, and the probable availability or unavailability of persons interested in purchasing the property, shall be taken into consideration in arriving at its market value. In arriving at market value, sale prices of property in abnormal transactions not reflecting market value shall not be taken into account, or shall be adjusted to eliminate the effect of factors which distort market value, including but not limited to sales to immediate family of the seller, foreclosure or other forced sales, contract sales, discounted purchase transactions or purchase of adjoining land or other land to be operated as a unit. (emphasis added).

The supreme court has also recognized that contract sales prices should be adjusted to reflect the market value of property. Foreman & Clark of Iowa, Inc. v. Board of Review, 286 N.W.2d 169, 172-73 (Iowa 1979). In Redfield v. Iowa State Highway Commission, 252 Iowa 1256, 110 N.W.2d 397 (1961), the court considered whether contract sales should be admitted as evidence of the market value of property for purposes of condemnation proceedings. The court noted that market value refers to a sale for cash. Id. at 1262-63, 110 N.W.2d at 401. The court further stated:

> While we have above announced the principle that sales on contract in which part of the purchase price is to be paid in deferred installments are not necessarily to be excluded as not having any relation to fair cash market value, we think this is a rule which should be applied with considerable care. Many considerations enter into deferred payment sales which are not present when cash must be paid. The American people are characteristically users of credit; homes, automobiles, and household appliances and furniture are sold daily on long-term credits with installment payments; and it is common knowledge that these purchases eventually cost the buyer more than if he could provide the cash. On the other hand, there are tax questions sometimes involved which make the vendor prefer to secure his money in several yearly payments rather than in a lump sum which might involve him with the capital gains tax or other governmental muletings.

Id. at 1265, 110 N.W.2d at 402-03.

Both of defendants' expert witnesses used unadjusted contract sales as comparable sales under the sales prices approach and relied upon plaintiff's sale contract without being cognizant of its terms.

We believe the trial court was correct in being skeptical of the valuation reached based on unadjusted contract sales. Our statute and caselaw warn that such sales must be carefully examined to ensure they reflect the market value of the property.

The trial court found the income approach to be the most revealing of market value. After reviewing the entire record de novo, the decision of the trial court is affirmed.

AFFIRMED.