Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE JOSEPH RISI
A. J. S. C.

IA PART 3

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GCP REALTY II, LLC,

Petitioner,

-against-

THE TAX COMMISSION OF CITY OF NEW YORK AND THE COMMISSIONER OF FINANCE OF THE CITY OF NEW YORK,

Respondents.

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Consolidated
Index Number: 804507/2014

DECISION AFTER TRIAL

The instant proceedings were commenced by GCP Realty, LLC (hereinafter "petitioner") against the Tax Commission of the City of New York and the Tax Commissioner of Finance of the City of New York (hereinafter "respondents") challenging the assessments pursuant to Article 7 of the New York Real Property Tax Law for the subject property located at 90-10 Ditmars Blvd. in Queens County, designated on the Tax Map of the City of New York as Block 1068 and Lot 1. Petitioner challenges said assessments for tax years 2014-2015, 2015-2016, 2017-2018, and 2018-2019. A nonjury trial was conducted on November 14th and 15th of 2019.

Stipulations:

Prior to the commencement of testimony, the 2015/2016, 2017/2018 and 2018/2019 tax year proceedings which were filed under index numbers 805396/2015, 204427/2017 and 708838/2018, respectively, were consolidated under index number 804507/2014 and GCP Realty II, LLC was substituted as petitioner.

The parties agreed to utilize an equalization rate of 45% (ratio of assessed value to full market value) for each tax year under review. At trial, the parties stipulated that the respective appraisers, Sean Hennessey of Lodging Advisors, LLC, for the petitioner and Ivan Melendez of Cushman and Wakefield, for the respondents, qualified as expert witnesses in the field of real estate appraisal and valuation.

Subject Property

The subject property is located at 90-10 Grand Central Parkway, Queens County, City and State of New York, Block: 1068 and Lot: 1. The property was built circa 1962-1963 and is located adjacent to LaGuardia Airport. The property was improved with a 288-room hotel facility, covering approximately 189,250 square feet. The property during the subject tax years was operated as a Courtyard by Marriot hotel pursuant to a franchise agreement. It also had a full-service restaurant, lounge, conference space, gift shop, fitness center and seasonal outdoor pool. The hotel ceased operations on March 18, 2018.

Applicable Law

Every parcel of real property in the City of New York receives an annual assessment that represents a percentage of the market value estimated by the NYC Department of Finance. In a tax certiorari proceeding pursuant to RPTL Article 7, the taxing authority's assessment is initially presumed valid (*see Matter of Sterling Estates v Board of Assessors of County of Nassau,* 66 NY2d 122 [1985]; *Matter of FMC Corp. v Unmack*, 92 NY2d 179 [1998]). The presumption of validity can be overcome when a taxpayer challenging an assessment comes forward with substantial evidence that the property was overvalued by the assessor (*see Matter of Board of Mgrs. of French Oaks Condominium v Town of Amherst,* 23 NY3d 168 [2014]).

It is equally well settled that the burden is not an onerous one. "In the context of tax assessment cases, the 'substantial evidence' standard merely requires that petitioner demonstrate the existence of a valid and credible dispute regarding valuation" (s*ee Matter of FMC Corp.* at 188). The Court of Appeals has instructed courts to "determine whether documentary and testimonial evidence [presented at trial] is based on sound theory and objective data... [However], once petitioner has met [the] initial burden and rebutted the presumption of validity...a court must weigh the entire record, including evidence of claimed deficiencies in the assessment, to determine whether petitioner has established by a preponderance of the evidence that [the subject property] has been overvalued" (*Id*.).

The Court's function following its weighing of the proof presented at trial should reflect "the ultimate purpose of valuation...[which] is to arrive at a fair and realistic value of the property involved" (*see Matter of Great Atl. & Pac. Tea Co. v Kiernan,* 42 NY2d 236, 242 [1977]).

Uniform Court Rule §202.60(g)(3) requires written appraisals to "contain a statement of the method of appraisal relied on and the conclusions as to value reached by the expert, together with facts, figures and calculations by which the conclusions are reached." An appraisal report that fails to adequately "set forth facts, figures and calculations supporting the appraiser's conclusion" ought to be disregarded *(Matter of Board of Mgrs. of French Oaks Condominiums,* 23 NY3d at 168; *Long Island Lighting Co. v Assessor for Brookhaven,* 616 N.Y.S.2d 375, 380 [2d Dept 1994])[1]. As such, a party is incapable of meeting the standard of substantial evidence when an appraisal report has been disregarded. Moreover, an appraisal report that fails to disclose pertinent

[1] "22 NYCRR 202.59 applies to tax assessment review proceedings outside the City of New York. 22 NYCRR 202.60, applicable to tax certiorari proceedings brought in the counties within the City of New York, contains a provision with similar operative language (see 22 NYCRR 202.60 [g] [3]). The only distinction is that 22 NYCRR 202.60 (g) (3) generally requires appraisal reports to include photographs of the assessed property and any comparable properties, whereas 22 NYCRR 202.59 (g) (2) merely permits such photographs" *(Matter of Board of Mgrs. of French Oaks Condominiums,* 23 NY3d at 178 n 5).

information, even if confidential, runs afoul of 22 NYCRR §202.60 (*see Matter of Bove v. Town of Schodack,* 985 N.Y.S.2d 160 [3d Dept 2014] "If…[the] appraiser was precluded by ethical considerations from disclosing this information, then he should have either obtained permission to use the information from his former clients or used other sources that could be properly included in the appraisal report").

This Court finds that the petitioner has met its initial burden and has demonstrated the existence of a valid dispute concerning the value of the assessments during the tax years at issue herein. The Court will now look to and weigh the entire record to determine if petitioner has met its ultimate burden through the preponderance of the evidence.

Methodology and Testimony

Here, both appraisers adopted the direct income capitalization method in determining the value of the subject premises for each tax year at issue. This method involves deriving market value by subtracting operating expenses from the operating income to arrive a stabilized net operating income ("NOI"), which is then divided by an appropriate capitalization rate/rate of return. The capitalization rate is a risk adjusted rate that converts a single period of income into a present value amount. Direct capitalization converts an estimate of a single year's income into an estimate of value and assumes a continuous relationship between income and value over the holding period.

Both parties' appraisers agreed that in order to arrive at an accurate market value of a hotel's real estate, the non-real estate assets used in the hotel's operation must be deducted from the income. In addition, a portion of the overall income realized by the furniture, fixtures, and equipment ("FF&E") is also excluded from realty income. Adjustments are made to provide for the periodic replacement of personal property and for a yield on the investment in personal

property needed to run a hotel operation. Both appraisers made deductions for the return of and on the FF&E. However, despite both appraisers utilizing the same methodology, a contrast exists between the experts' opinions adduced at trial.

Respondents provide the following chart to illustrate the assessed values proffered by Mr. Hennessy and Mr. Melendez:

Taxable Year	Actual Assessed Values	Hennessey's Assessed Values	Melendez's Assessed Values
2014/2015	$22,995,450	$3,825,000	$16,200,000
2015/2016	$23,706,000	$3,510,000	$17,100,000
2017/2018	$24,792,300	$5,265,000	$17,100,000
2018/2019	$25,339,500	$1,935,000	$15,750,000

Petitioner's expert's report is based on sound appraisal technique and methods using the income approach to arrive at the valuation. In calculating the net income for the tax years at issue, Mr. Hennessey concluded that the actual operating income and expenses did not deviate in an "unacceptable manner." He testified that he compared the historical revenues and expenses to comparable hotels both in the LaGuardia Airport submarket and in New York City overall. He concluded that it could not increase revenue despite good management, as a result of being severely impacted by external market forces, physical limitations and competition with other select hotels in the LaGuardia submarket, and as such was operated until its closing in 2018. Thus, petitioner's report is suitable as it is in accordance with 22 NYCRR §202.60(g)(3).

With respect to respondents' appraisal report, petitioner alleges that Mr. Melendez utilized sources outside of New York State and Queens County to justify his value conclusion and relied on out of market hotels for revenue and expense comparables. Respondents contend that Mr. Hennessey attempted to undervalue the LaGuardia Airport hotel market and based his conclusions on unfounded or speculative assertions, without considering the perspective of the market. However, Mr. Hennessey testified that his assertions were based on the subject hotel's actual

revenue and expense values and comparable hotels in the New York City and LaGuardia Airport submarket. Whereas, Mr. Melendez derived his comparable data from Middle Atlantic hotels, chain affiliated hotels, airport hotels and upscale hotels, which included hotels in other cities/states.

As such, petitioner has overcome the validity of respondents' assessments by offering substantial evidence that the subject property was overvalued.

The Court is unable to find the testimony of Mr. Melendez to be a persuasive rebuttal to the appraisal as set forth by Mr. Hennessey. Respondents' appraisal report failed to comply with the 22 NYCRR §202.60(g)(3). Although Mr. Melendez also used the income capitalization method, he testified that the formulas and/or algorithms and in-house database that he utilized to assess the value of the subject property were proprietary in nature and such information is unavailable with respect thereto. He further testified that neither the program nor the algorithm used in the program was available for purchase nor was it available to anyone outside of the employ of Cushman & Wakefield. Resultingly, the values and information used in his calculations were not contained in the report for the Court to properly determine whether the assessed value was valid in conformity with the income capitalization method. Nor was Mr. Hennessey afforded the opportunity to "check or test" the figures and calculations utilized by Mr. Melendez in his appraisal report (*Matter of Board of Mgrs. of French Oaks Condominiums*, 23 NY3d at 177). As such, petitioner's counsel was also not afforded the opportunity to effectively prepare for cross-examination (*Matter of White Plains Props. Corp. v Tax Assessor of City of White Plains,* 58 AD2d 871, 874, [2d Dept 1977]) *aff'd* 44 NY2d 971 [1978]).

Moreover, while respondents contend that this "program" is merely an Excel model used to make calculations "using formulas and functions," they, nevertheless, concede that the in-house database consists of information that is confidential (*Northville Industries Corp. v. Board of*

Assessors, 531 N.Y.S.2d 592, 593 [2d Dept 1988]; *see also Matter of Bove*, 985 N.Y.S.2d at 162). Consequently, whereas respondents' appraisal report is defective as it failed to adequately set forth the facts, figures and calculations to support their conclusion, the Court is compelled to adopt the market value assessments as set forth in the petitioner's appraisal report as stated hereto: 2014/2015: $3,825,000; 2015/2016: $3,510,000; 2017/2018: $5,265,000 and 2018/2019: $1,935,000.

This is the decision and Order of the Court.

Date: June 3, 2021

Hon. Joseph Risi, A.J.S.C.