NOT FOR PUBLICATION WITHOUT APPROVAL OF THE TAX COURT COMMITTEE ON OPINIONS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: December 14, 2018

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 plaintiff, 160 Chubb Properties, LLC's ("Chubb") motion for relief under N.J.S.A. 54:51A-8 (hereinafter the "Freeze Act") for the 2017 tax year based on the settled and adjudged assessment for tax year 2015. Defendant, Township of Lyndhurst ("Lyndhurst"), opposes the motion, and asserts that the settlement agreement between the parties limits Freeze Act relief to tax year 2016. Lyndhurst further claims that improvements were made to the property after 2015, which resulted in a change in value that precludes application of the Freeze Act.

For the reasons stated more fully below, the court concludes 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

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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.

FACTS

The following findings of fact and conclusions of law are based on the certifications and exhibits submitted in support of the parties' pleadings.

On December 3, 2013, Chubb purchased a multi-tenanted office building located at 160 Chubb Avenue, Lyndhurst, New Jersey, designated as Block 231, Lot 3 on the local tax map ("subject property"), for $10,300,000.

Chubb filed property tax appeals for the 2014 and 2015 tax years. For each tax year, the subject property's assessment was $16,250,000. Chubb alleged that the assessments were in excess of the true value of the subject property and that Lyndhurst assessed the property in an arbitrary, unreasonable, unequal, and discriminatory manner when compared to assessments of other properties within the taxing district.

During 2014 and 2015, Chubb obtained construction permits totaling $355,100[1] for the subject property on the following dates:

1. March 24, 2014 – building and electrical rehabilitation work in the amount of $6,900;
2. April 16, 2015 – building, electrical, plumbing, and fire protection rehabilitation work in the amount of $206,700;
3. April 27, 2015 – building electrical, and fire protection rehabilitation work in the amount of $20,000;
4. May 13, 2015 – electrical rehabilitation work in the amount of $75,000; and
5. September 17, 2015 – building, electrical, plumbing, and fire protection work in the amount of $46,500.

[1] The amounts reflected on the permits were the estimated cost of the work to be done.

On November 5, 2015, after the permits were issued, the parties were able to resolve the tax appeals and filed a Stipulation of Settlement for the 2014 and 2015 tax years. The Stipulation of Settlement reduced the assessments for both tax years as follows:

	Original Assessment 2014 - 2015	**Settled Assessment** 2014 - 2015
Land	$11,286,000	$11,286,000
Improvements	$ 4,964,000	$ 1,714,000
Total	$16,250,000	$13,000,000

With respect to the Freeze Act, Paragraph 4 of the Stipulation of Settlement included the following language:

> The parties agree that there has been no change in value or municipal-wide revaluation or reassessment adopted for the tax year 2016, and therefore agree that the provisions of [N.J.S.A.] 54:51A-8 (Freeze Act) shall be applicable to and a final disposition of this case and the entire controversy and of any actions pending or hereafter instituted by the parties concerning the assessment of the property referred to herein for said Freeze Act year. No Freeze Act year shall be the basis for application of the Freeze Act for any subsequent year.

The court entered judgments on December 18, 2015 for the 2014 tax year and December 4, 2015 for the 2015 tax year, in accordance with the agreed to assessment of $13,000,000. Based on the language in paragraph 4 of the Stipulation of Settlement, the Freeze Act was expressly adopted.

Although the 2015 tax year judgment was the "base year" for 2016 Freeze Act relief, Lyndhurst's tax assessor continued to assess the subject property at $16,250,000 for the 2016 tax year. The parties resolved this matter during the summer of 2016, reducing the 2016 assessment to the agreed $13,000,000 assessment. For tax year 2017, the assessor continued to assess the

subject property at $16,250,000, despite having resolved application of the Freeze Act for tax year 2016 prior to the October 1, 2016 valuation date.[2]

Chubb sold the subject property on November 17, 2016 to its current owner, CCC NJ Owner, LLC, for $20,025,000. Thereafter, Chubb filed a motion for entry of judgment applying the Freeze Act to the 2017 tax year based on the 2015 tax year judgment.

Given the proximity of the 2016 tax year assessment date at the time of the settlement, Chubb reasoned that the Stipulation of Settlement included normal language as to the applicability of the Freeze Act for the 2016 tax year. Chubb further noted that the Stipulation of Settlement did not address invocation of the Freeze Act for the 2017 tax year, instead maintaining that the parties were not in a position when the Stipulation of Settlement was executed to make the required recitations to invoke the Freeze Act for the 2017 tax year, that "no change in value" and "no revaluation or assessment" was contemplated for tax year 2017. Chubb additionally argued that a waiver of the Freeze Act for the 2017 tax year was not a term of the Stipulation of Settlement.

Lyndhurst opposed Chubb's Freeze Act application, claiming in its response that Chubb was trying to circumvent the clear intent of the settlement agreement by arguing 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 also needed substantial improvements; and (2) the parties had agreed that the Freeze Act would only apply to 2016, thus Chubb waived its application for 2017. Lyndhurst additionally emphasized that after the alleged improvements were made to the subject property, Chubb sold the property for $20,025,000, which is almost double the 2013 purchase price. In support, Lyndhurst's assessor certified that the

[2] For reference, the Chapter 123 average ratio for the municipality with respect to tax year 2017 is 85.10%.

"[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." Accordingly, Lyndhurst requested a plenary hearing with an opportunity for further discovery to resolve these matters.

In reply, Chubb submitted a certification by the subject property's manager who claimed, in part:

> 3. At no time since the time of the purchase of the property by 160 Chubb Properties, LLC on December 3[,] 2013 has the subject property been less than 75% occupied.
>
> 4. I have reviewed the Construction Permits dated March 24, 2014, April 16, 2015, April 27, 2015, May 13, 2015 and [September] 17, 2015 which were attached to the Certification of Denis J. McGuire, CTA, Tax Assessor for the Township of Lyndhurst, for construction on the building and electrical work; building, electrical, plumbing, and fire protection work; and electrical rehabilitation work. The work described in the permits, in each case, represents tenant fit-out work and capital repairs, replacements and rehabilitation of building systems and improvements in the ordinary course of operating a multi-tenanted office building.

Chubb reiterated that waiver of the Freeze Act for the 2017 tax year was never discussed at the time of settlement or during execution of the Stipulation of Settlement. Chubb also asserted that Lyndhurst failed to make a prima facie showing that Freeze Act relief is unavailable, as the issued construction permits do not rise to the level of evidentiary support needed to show a substantial and meaningful increase in value of the subject property. Chubb additionally pointed out that Lyndhurst failed to utilize the Chapter 91 "arsenal of devices" at a tax assessor's disposal to investigate occupancy status, relying on nothing more than the tax assessor's certification to support its claim that the subject property was substantially unoccupied when Chubb purchased the property in 2013.

ANALYSIS

I. Procedural Requirements

The court begins its analysis with a review of the Freeze Act, which does not contain any limitations period to file a motion to enforce its provisions. See N.J.S.A. 54:51A-8; R. 8:7(d). The Freeze Act specifically provides, in part:

> Where a judgment not subject to further appeal has been rendered by the Tax Court involving real property, the judgment shall be conclusive and binding upon the municipal assessor and the taxing district, parties to the proceeding, for the assessment year and for the two assessment years succeeding the assessment year covered by the final judgment, except as to changes in the value of the property occurring after the assessment date. The conclusive and binding effect of the judgment shall terminate with 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.
>
> [N.J.S.A. 54:51A-8.]

The historical background of changes to the Freeze Act is relevant to clarify the procedural posture of Lyndhurst's challenge to the freeze protections sought by Chubb. Prior to 1999, a taxing district had "to file a complaint seeking relief from the base year assessment" to prevent application of the Freeze Act on grounds of an alleged change in value. AVR Realty Co. v. Cranford Twp. ("AVR I"), 294 N.J. Super. 294, 299 (App. Div. 1996), cert. denied, 148 N.J. 460 (1997). However, in 1999 this procedural requirement was eliminated when the Freeze Act was amended.[3] Our courts have construed this deletion, "as relieving the municipality of the obligation to file a Freeze Act avoidance complaint when the base year judgment has been entered before the assessment date for the freeze year, as previously required . . . ." Entenmann's Inc. v. Totowa

[3] The following language was deleted from N.J.S.A. 54:51A-8, "Where those changes are alleged, the complaint shall specifically set forth the nature of the changes relied upon as the basis for the appeal." L. 1999, c. 208, § 16.

Borough, 19 N.J. Tax 505, 520 (Tax 2001), aff'd, 21 N.J. Tax 182 (App. Div. 2003). A municipal defendant is therefore allowed to resist a plaintiff's Freeze Act application without having filed a Freeze Act avoidance complaint. Id. at 521. However, the procedural change still requires the taxing district to make a prima facie showing of a change in value in order to obtain a plenary hearing. Ibid.

In the instant matter, the 2015 base year judgment was entered on December 4, 2015. Such judgment was entered before the October 1, 2016 assessment date for the 2017 tax year at issue. Prior to the 1999 amendment, the municipality was required to file a Freeze Act avoidance complaint to obtain relief. However, as this requirement is no longer applicable, the court will entertain Lyndhurst's opposition to Chubb's motion for Freeze Act relief.

II. Application of Freeze Act

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; R. 8:7(d). The Freeze Act applies equally to judgments issued pursuant to settlement negotiations as to judgments following a full trial on the merits. S. Plainfield Borough. v. Kentile Floors, Inc., 4 N.J. Tax 1 (Tax 1981), aff'd, 186 N.J. Super. 399 (App. Div. 1982), aff'd, 92 N.J. 483 (1983). Since the Freeze Act is self-executing, the taxpayer does not need to file a tax appeal to obtain protection from repetitive litigation concerning assessments "not related to or justified by any changes increasing [a property's] market value, and resulting in harassment of the taxpayer . . . ." See AVR Realty Co. v. Cranford Twp. ("AVR II"), 316 N.J. Super. 401, 405-06 (App. Div. 1998), certif. denied, 160 N.J. 476 (1999) (quoting Newark v. Fischer, 8 N.J. 191, 200 (1951)); Hackensack City v. Bergen Cty., 405 N.J. Super. 235, 247 (App. Div. 2009). The tax assessor is further obligated to conform assessments for the freeze years to the judgment, if the judgment for the base year was

entered prior to the assessment date for the applicable Freeze Act years. AVR II, 316 N.J. Super. at 406. Inclusion of the Freeze Act's applicability in a settlement is not a prerequisite for its operation. Kentile Floors, Inc., 4 N.J. Tax at 10. As such, Freeze Act relief can only be avoided if affirmatively waived by the taxpayer or if a statutory exception is present.

A. Waiver of Freeze Act

The Freeze Act provisions will apply unless the taxpayer affirmatively waives application. Ritchie & Page Distrib. Co., Inc. v. City of Trenton, 29 N.J. Tax 538, 543 (Tax 2016) (citing Zisapel v. Paramus Borough, 20 N.J. Tax 209, 212 & n.1 (Tax 2002)); see also Kentile Floors, Inc., 92 N.J. at 489. Our courts have traditionally defined waiver as "the voluntary relinquishment of a known right evidenced by a clear, unequivocal and decisive act from which an intention to relinquish the right can be based." Scibek v. Longette, 339 N.J. Super. 72, 82 (App. Div. 2001) (citing Country Chevrolet v. N. Brunswick Planning Bd., 190 N.J. Super. 376, 380 (App. Div. 1983)). A taxpayer's waiver of Freeze Act protection must necessarily involve the intentional relinquishment of a "known right" evidenced by "a clear, unequivocal, and decisive act" by the taxpayer. While an intention to waive freeze protection by a party does not need to be expressly stated, it must be demonstrated that the party had full knowledge of its legal rights and that the relinquishment of its rights was deliberate and intentional. Id. at 83. Therefore, one claiming an implied waiver must show intentional relinquishment of a known legal right. Ibid.; see also Merchants Indem. Corp. v. Eggleston, 68 N.J. Super. 235, 254 (App. Div. 1961), aff'd, 37 N.J. 114 (1962) (explaining that a waiver by a party may derive from a state of facts exhibiting full knowledge of the circumstances producing a right and continuing indifference in exercising that right). Additionally, the municipality's intent as to whether the Freeze Act is waived is irrelevant.

Kentile Floors, Inc., 92 N.J. at 491 (rejecting the Borough's contention that it did not intend to bind itself to a freeze act assessment).

Here, Lyndhurst asserted that at the time the Stipulation of Settlement was executed it believed that the proposed work to be done on the subject property would not be completed by October 1, 2015 and therefore, the parties agreed that the Freeze Act would only be applicable to the 2016 tax year and was waived for the 2017 tax year. To the contrary, Chubb argued that Freeze Act application was not waived for the 2017 tax year because it was not discussed by the parties at the time of settlement or execution of the Stipulation of Settlement.

As memorialized in Paragraph 4 of the Stipulation of Settlement, both parties agreed that the Freeze Act would be applicable to the 2016 tax year. Moreover, since the Freeze Act is self-executing, it is not necessary to expressly invoke its application. The court focuses instead on whether a taxpayer deliberately and intentionally waived Freeze Act protection. Here, the court observes that there is no express mention of the term waiver, nor is there any indication that Chubb requested or agreed to waive Freeze Act protection for the 2017 tax year. Notwithstanding the lack of written waiver by Chubb, Lyndhurst has not presented support for any action taken by Chubb implying an intentional surrender of Freeze Act protection or continued indifference in exercising its Freeze Act protection rights.

The court does not construe Paragraph 4 of the Stipulation of Settlement as a waiver of the Freeze Act. Accordingly, the court finds that Chubb did not waive its right to enforce Freeze Act relief for the 2017 tax year.

B. Statutory Exceptions to the Freeze Act

Since the court finds that Chubb did not expressly or intentionally waive application of the Freeze Act for the 2017 tax year, the court must evaluate whether Chubb is statutorily barred from

invoking Freeze Act protection. The legislative purpose of the Freeze Act is to prevent the "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." AVR II, 316 N.J. Super. at 405-06 (quoting Newark v. Fischer, 8 N.J. 191, 200 (1951)). However, the Freeze Act is not without its limitations.

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) when the taxing authority implements a revaluation program affecting all property in the tax district. N.J.S.A. 54:51A-8. Here, no allegation is made of a district-wide revaluation or reassessment of all real property.

To demonstrate circumstances that result in an increase in value of the property, the municipality "must make a prima facie showing that there was a change in . . . value between the assessment dates for the base year and freeze years" and further 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." Coastal Eagle Point Oil Co. v. Twp. of W. Deptford, 353 N.J. Super. 212, 218 (App. Div. 2002). Upon such a showing, the court will hold a plenary hearing to determine Freeze Act applicability. Id.; see also Rockstone Grp. v. Lakewood Twp., 18 N.J. Tax 117, 121 (Tax 1999) ("If the municipality has provided sufficient evidence to raise a debatable question as to whether there has been a change in value as such term is used in N.J.S.A. 54:51A-8, it is entitled to a plenary hearing."). However, if the municipality fails to make a prima facie showing, the taxpayer is entitled to summary relief. Coastal Eagle Point Oil Co., 353 N.J. Super. at 220.

Our courts have consistently found that internal changes consist of capital improvements that substantially and meaningfully increase the value of the subject property, while external changes consist of extreme economic changes or zoning changes in close proximity to the property that increase its value. See id. at 219 (examples of internal changes consist of physical refurbishments or additions such as added wings or added floors); Cumberland Arms Assocs. v. Burlington Twp., 10 N.J. Tax 255, 263 (Tax 1988) (concluding that the 1976 amendment to our State's constitution permitting casino gambling in Atlantic City is an example of an external change that increased property values). However, not just any change to a property can be used to overcome freeze protection, as this would render the Freeze Act meaningless. Mediterannean House v. Fort Lee Borough, 7 N.J. Tax 528, 535 (Tax 1985).

1. Occupancy of the Subject Property

The first of the two submitted proofs in this case consists of certifications made by the subject property's manager and Lyndhurst's tax assessor regarding occupancy of the subject property.

According to Lyndhurst's tax assessor, "[b]ased upon [Chubb's] representation, the building in 2013 was substantially unoccupied at [the] time of the sale and also needed substantial improvements." Conversely, the manager certified that the subject property had never been less than 75 percent occupied during Chubb's ownership. Here, Lyndhurst bears the burden of making a prima facie showing to obtain a hearing on its claim of change in value. Bare allegations that the subject property was 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 Distrib. Co., Inc., 29 N.J. Tax at 545 (citing Entenmann's Inc., 19 N.J. Tax at 514-15). See also 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.

In this case, Lyndhurst has made unsubstantiated assertions that, "[b]ased upon Plaintiff's representation," the subject property was substantially unoccupied at the time of Chubb's purchase without providing any corroborating evidence. In accordance with Ritchie & Page Distrib. Co., Inc. and Union Minerals and Alloys Corp., the court cannot find that bare allegations of increases in tenant occupancy, unrelated to changes in market conditions, are sufficient as a matter of law to demonstrate a substantial change in value.[4]

The court finds that Lyndhurst's heavy reliance on the tax assessor's certification concerning increased occupancy of the subject property, without supporting evidence, is insufficient as a matter of law to demonstrate a substantial and meaningful change in value.

2. Construction Permits

The second of the submitted proofs in this case consists of five construction permits. As a preliminary matter, the court recognizes that "physical change alone is not proof that a substantial

[4] Chubb additionally pointed out that Lyndhurst offers nothing to support its claim that the property was substantially unoccupied at the time of the 2013 purchase, highlighting that 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 for investigating occupancy of a property. However, in the hypothetical situation where Lyndhurst had availed itself of the Chapter 91 toolbox, the court would not automatically find for it if Chubb decided not to comply with the Chapter 91 requests. See Ritchie & Page Distrib. Co., Inc. 29 N.J. Tax at 545 (the Freeze Act denies relief only under specific circumstances, none of which is failure to respond to a Chapter 91 request).

and meaningful change in the market value of the property has occurred." 2nd Roc-Jersey Assocs. v. Morristown Town, 11 N.J. Tax 45, 52 (Tax 1990). For purposes of defeating a Freeze Act application, the municipality must show 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.

The construction permits reveal that the proposed work to be done on the subject property was related to tenant fit-out work and capital repairs, in addition to replacements and rehabilitation of building systems, and improvements made in the ordinary course of operation. Chubb argues that the $355,100 cost of improvements set forth in the permits is a small fraction of the sales price, thus it does not evidence a substantial increase in value of the subject property. While Lyndhurst emphasizes that Chubb sold the property in 2016 for double the original purchase price, 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. Harrison Town, 16 N.J. Tax 375, 381 (Tax 1997), aff'd, 17 N.J. Tax 174 (App. Div. 1997). See also Mediterannean House, 7 N.J. Tax at 537-38 (where the court determined that a better approach in evaluating changes in property value is analyzing the market activities in a specific area).

Here, the permits provided by the parties include a breakdown of work done and items added to the subject property. Chubb's manager certified that the work set forth in the permits was the rehabilitation of the subject property's electrical, plumbing, and fire protection systems. This court has similarly found that "the mere retrofitting, upgrading, or remediation of deferred maintenance does not constitute . . . an improvement," for purposes of imposing an added assessment. Otelsberg v. Bloomfield Twp., 18 N.J. Tax 243, 251-52 (Tax 1999). In Fifth Roc

Jersey Assoc., L.L.C. v. Town of Morristown, the court found that even after extensive discovery and plenary hearing, renovations to the guest rooms, lobby ballroom, bar, and elevators, in addition to the installation of eighteen smoke detectors and six heat detectors, did not qualify as improvements, but rather as retrofitting, upgrading, or remediation of deferred maintenance which did not warrant additional assessments or denial of relief under the Freeze Act. 26 N.J. Tax 212, 227-28 (Tax 2012). Although addressing improvements to a building under the added assessment statute, N.J.S.A. 54:4-63.2 to -63.3, the reasoning and conclusions in Fifth Roc provide guidance in determining the type of work that qualifies as substantial and meaningful that prima facie establish an increase in value as opposed to mere rehabilitation and retrofitting.

Since sales price is merely a 'guiding indicium' of value, it does not establish, per se, a change in value for purposes of the Freeze Act. Lyndhurst must first demonstrate that a substantial and meaningful change in value has occurred before the court will grant a request for a plenary hearing. Here, Lyndhurst has not provided any evidence in this regard. Rather, it asks the court to grant a plenary hearing based on bare unsupported allegations that the work performed under the permits impliedly constituted more than just retrofitting, upgrading, or remediation of deferred maintenance, based on the November 2016 sale price of the subject property. Without more, the court finds that Lyndhurst's reliance on the construction permits fails to demonstrate a substantial and meaningful change in value of the subject property to warrant denial of Chubb's Freeze Act application.

CONCLUSION

For the reasons set forth hereinabove, the court concludes that Chubb did not waive its Freeze Act rights for the 2017 tax year. Additionally, as Lyndhurst has not made a prima facie showing that a substantial and meaningful change in value occurred, it is not entitled to a plenary

hearing on the applicability of the Freeze Act. Therefore, the 2015 tax appeal judgment is binding on Lyndhurst for the 2017 tax year. Chubb's Freeze Act application is granted.