

[Cite as *Myers v. Keith*, 2009-Ohio-3435.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

BARBARA L. MYERS, as Trustee
of the Barbara Myers Trust,

Plaintiff-Appellant

v.

KARL L. KEITH, Montgomery County
Auditor, et al.

Defendant-Appellees

Appellate Case No. 22826

Trial Court Case No. 06-CV-7087

(Civil Appeal from
Common Pleas Court)

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OPINION

Rendered on the 10th day of July, 2009.

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BROGAN, J.

{¶ 1} Barbara L. Myers, as Trustee of the Barbara Myers Trust, appeals from a trial court judgment that adopts the Montgomery County Board of Revision's (BOR) determination of true, or fair market, value of property owned by the Trust.

{¶ 2} In support of the appeal, Barbara contends that the trial court wrongly rejected testimony and evidence that shows the subject property's true value is less than the value determined by the BOR. Barbara contends also that the evidence does not support the BOR's value.

{¶ 3} We conclude that the trial court committed no error by rejecting the Trust's evidence. We conclude also that the evidence supports the BOR's determination of value. Accordingly, the trial court's judgment adopting this value is Affirmed.

I

{¶ 4} In March 2006, the Trust's attorney filed a complaint with the BOR claiming that, for the 2005 tax-year, the Montgomery County Auditor, Karl L. Keith, had incorrectly valued real property located at 450 Rolling Timber Trail in Kettering, Ohio (the Subject Property). The Auditor had appraised the value of the land at \$120,000 and the value of the home at \$297,470, for a total fair market value of \$417,470. The Trust, however, believed the total value was \$330,400.¹ The BOR granted a hearing, which was held the following August. The only testimony and evidence presented came from Jacob Myers, who explained to the BOR why the Trust believed that the Subject Property's true value in

¹The Trust does not separate the value of the land and home.

2005 was \$330,400.²

{¶ 5} Jacob compared and contrasted certain characteristics of the Subject Property with four comparable properties. These properties are in the neighborhood, and each had been recently sold—one in late 2005, the other three in May 2006. Jacob obtained information about the four properties from public websites devoted to selling real estate and from the Auditor's own website.

{¶ 6} Jacob examined the number of square feet in the homes on these properties, placing the results in a chart. First, dividing the selling price by the number of square feet, he calculated the selling price-per-square-foot of each comparable property. Second, dividing the Auditor's appraisal value by the number of square feet, Jacob calculated each home's appraised value-per-square-foot. Finally, Jacob compared the selling price-per-square-foot with the appraised value-per-square-foot. The comparison revealed that, for the comparable properties, the appraised value-per-square-foot was 15%-27% higher than the selling price-per-square-foot. This is why Jacob believes that the Auditor's appraisal of the Subject Property is incorrect.³

{¶ 7} Jacob next explained to the BOR why he believed the value of the Subject Property was \$330,400. First, Jacob compared the age, amenities (as known to him), and style of the comparable properties with the Subject Property. Second, based on this

²At the hearing, and at various other times, Jacob claimed that he was an owner of the Subject Property. While he evidently lives on the Subject Property, and in all likelihood, is related to the Trustee, there is no evidence in the record to support his claim of ownership. For this reason, we will not consider Jacob a legal owner.

³There are a few arithmetic errors for the comparable property at 501 Timberlea Trail. The chart incorrectly states that the selling price-per-square-foot was \$89.78, but it was actually \$88.78. Similarly, the appraised value-per-square-foot was not \$172.52 but \$104.28.

comparison, Jacob subtracted 10% of the selling price-per-square-foot from one property (presumably believing it was worth less than the Subject Property), added 10% of the selling price-per-square-foot to two properties (presumably believing they were worth more than the Subject Property), and did not adjust the selling price-per-square-foot of the remaining property (presumably believing it to be of equal value with the Subject Property).

This gave an adjusted selling price-per-square-foot for each comparable property. Jacob then calculated that the average of the adjusted prices was \$99.53 per square foot, which he rounded up to \$100 per square foot.⁴ Finally, Jacob multiplied \$100 by 3,340 square feet, the number of square feet in the Subject Property. Thus, it was Jacob's opinion that, for the 2005 tax-year, the true value of the Subject Property was \$330,400.

{¶ 8} After Jacob had finished testifying, a BOR member pointed out that he had not addressed the Subject Property's decline in value, which is stated on the complaint as a reason for requesting the reduction in value. Jacob replied that market forces could be blamed for the decline. He then added that the Subject Property has a cedar exterior, which, he said, attracts animals and woodpeckers. He further noted that the Subject Property has only one air conditioner and one heating system—both original to the home—and they do not adequately cool or heat the second floor, particularly the bedroom that is cantilevered over the living room.

{¶ 9} On August 22, 2006, the BOR notified Barbara that it had modified the Auditor's appraisal by reducing the value of the home from \$297,470 to \$279,620, a reduction of \$17,850. The BOR offered no explanation for this reduction. It left the value

⁴As a result of the errors discussed above, the adjusted selling price-per-square-foot of 501 Timberlea Trail was \$79.90, not \$98.76. Therefore, the average selling price-per-square-foot was \$94.82, not \$99.53.

of the land (\$120,000) unchanged. Thus, the Property's total value for the 2005 tax-year, as determined by the BOR, was \$399,620.

{¶ 10} Barbara appealed to the Montgomery County Court of Common Pleas. The Auditor filed the statutorily-mandated transcript, which contained the correspondence between Barbara and the BOR, the transcript of the hearing before the BOR, and all the exhibits that Jacob had presented supporting his opinion. Both parties submitted briefs, and in March 2008, the trial court conducted a hearing. A transcript of the hearing is not part of the record on appeal, but according to the trial court, the Trust's attorney argued that Jacob's testimony was credible, probative evidence of the Auditor's erroneous appraisal and of a true value of \$330,400. The Auditor's attorney rebutted by arguing that Jacob's testimony was speculative and not credible and that, therefore, the BOR's reduced value of \$399,620 should be affirmed. Except for a photograph of the Subject Property, the property-record cards for the Subject Property and two of the comparable properties, which were all added to the statutory transcript by the Auditor, no new evidence was apparently presented to the trial court at the hearing.

{¶ 11} On June 17, 2008, the trial court, in a written decision, adopted the BOR's value. The court first made some observations about Jacob's testimony. It noted that Jacob said that the Subject Property had not been sold recently and remained titled in the name of the Barbara Myers Trust. The court also pointed out that Jacob did not really explain why he adjusted the comparable properties' selling prices by 10%, except to say it was his subjective belief that some differences existed between them and the Subject Property that affected the values. Finally, noted the court, Jacob did not claim that he was an expert in the field of home appraisals or that he had any qualifications in the field. The

trial court observed also that there was no evidence in the record describing how the BOR determined the value of the home on the Subject Property.

{¶ 12} The court then explained why it did not agree with Jacob's valuation. "The evidence submitted on behalf of the [Trust] is highly speculative and grounded in one person's subjective belief of a very small data set of comparable homes located near the Property. The [Trust] has shown that there existed a difference in the selling price of four homes compared to the tax valuation assigned by the [Auditor]. However, the [Trust] has not convinced this court that this difference was due solely to the [Auditor's] incorrect valuation, as there are a multitude of reasons why a given parcel of property sells for a given price (e.g. exigent circumstances, market conditions, structural and aesthetic conditions). Further, the methodology utilized by the [Trust] is arbitrary and inconsistent with the dictate mandated by statute that the [Auditor] follow[s] (i.e. that the Auditor use a consistent method of assessing property values for purposes of property taxes)." June 16, 2008 Decision, Order and Entry Adopting Without Modification the Board of Revision's Decision, p. 6.

{¶ 13} Barbara now appeals, assigning two errors to the trial court's decision.

II

{¶ 14} The first assignment of error alleges that the trial court erred by failing to value the Subject Property at \$330,400. Barbara argues that the trial court ignored Jacob's credible and probative evidence that proved this to be the true value. We will not disturb the trial court's decision "on credibility of witnesses and weight given to their testimony unless we find an abuse of discretion." *Simmons v. Cuyahoga Cty. Bd. of Revision* (1998),

81 Ohio St.3d 47, 49 (Citation omitted.). At issue, then, is whether the trial court abused its discretion by failing to accept Jacob's testimony.

{¶ 15} A trial court has broad discretion to weigh the evidence and judge the credibility of witnesses. *Amsdell v. Cuyahoga Cty. Bd. of Revision* (1994), 69 Ohio St.3d 572, 574. It is the trial court's duty, as trier of fact, "to evaluate and criticize" all testimony. *Id.* (Citation omitted.). Accordingly, the court "may accept all, part, or none of the testimony." *Simmons*, at 48 (Citation omitted.). This also means that the court is free to reject any particular method of valuing property used by a witness. *Murray & Co. Marina, Inc. v. Erie Cty. Bd. of Revision* (1997), 123 Ohio App.3d 166, 173. Nothing requires the court to accept any witness's opinion of value, be he owner or expert. *Simmons*, at 48.

{¶ 16} We do not think that the trial court failed to consider Jacob's testimony and evidence and simply dismissed it out of hand. Rather, it is clear from its decision that the court thoroughly reviewed the testimony and evidence and only then rejected them as speculative and subjective. The court's decision in this regard was not unreasonable or arbitrary. Jacob is not an expert in the field of real estate appraisal, nor has he had any training in the field. Also, the trial court's point regarding the possible exigent circumstances under which the comparable properties may have been sold validly raises questions about whether the selling prices accurately reflect the properties' market values. Upon review of the trial court's reasoning, and based on our own review of the evidence, we cannot say that the trial court abused its discretion by not accepting Jacob's opinion of the Subject Property's true value. The first assignment of error is overruled.

{¶ 17} The second assignment of error alleges that the trial court erred by adopting the BOR's value. Barbara argues that the value is contrary to the undisputed evidence (Jacob's evidence and testimony) that was before the court. We again review the trial court's decision for abuse of discretion.

{¶ 18} The taxpayer has the burden to prove affirmatively, with competent and probative evidence, that the subject property's true value should be decreased as he claims. *Columbus City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision* (2001), 90 Ohio St.3d 564, 566; *Amsdell*, at 574. The taxpayer is "not entitled to the deduction claimed merely because no evidence is adduced contra his claim." *Western Indus., Inc. v. Hamilton Cty. Bd. of Revision* (1960), 170 Ohio St. 340, 342. But this does not mean that the BOR's valuation is presumptively valid. *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision* (1996), 76 Ohio St.3d 13, 15. Rather, where the BOR modifies the Auditor's original appraisal, a trial court may adopt the BOR's value only if it is "supported by competent and probative evidence." *Columbus* (2001), at 567.⁵ This is because the court's determination of a property's true value is a finding of fact, and like all findings of fact, the value must be supported by the evidence. See *id.* at 565.

{¶ 19} A trial court has the duty in an appeal from a BOR to determine the (taxable) value⁶ of the subject property independently. See R.C. 5717.05; *Black v. Bd. of Revision*

⁵Had the BOR adopted the Auditor's appraised value without modification, the trial court may have been able simply to adopt the BOR's value without evidence. See *Simmons*.

⁶The "taxable value" of property is a percentage of the true, or fair market, value. For example, in Montgomery County, for the 2005 tax-year, the taxable value of property was 35% of its true value. The property's owner's tax bill would be based on the taxable value.

of *Cuyahoga Cty.* (1985), 16 Ohio St.3d 11, at paragraph one of the syllabus. To do this, the trial court must first weigh and evaluate all the evidence that the parties have presented. *Id.* at 13; *Columbus* (1996), at 16. It is not restricted only to the evidence that was before the BOR. See R.C. 5717.05 (“The court may hear the appeal on the record and the evidence thus submitted [from the BOR], or it may hear and consider additional evidence.”). The court must then make an independent determination of value based on the evidence. *Black*, at 13; *Columbus* (1996), at 16. In other words, the trial court must make a value finding de novo.

{¶ 20} The Ohio Supreme Court considered the question of sufficiency in *Columbus*, supra. In that case, the Court framed the issue as “whether the BTA may affirm a valuation made by a board of revision that is different from the auditor’s value where the record on appeal to the BTA contains no supporting evidence and no evidence is introduced before the BTA.” *Columbus*, 90 Ohio St.3d, at 565.⁷ The taxpayers in the case complained to the BOR that the true value of their property was \$850,000, not \$1,401,000 as the auditor had determined. The only testimony before the BOR came from the taxpayers’ expert appraiser, who testified that in his opinion the true value of the subject property was \$962,000. The BOR rejected all three values and determined that the true value of the subject property was only \$630,000.

{¶ 21} The BOR’s decision was appealed to the BTA. The parties waived an evidentiary hearing, so the only evidence before the BTA was the statutory transcript, which

⁷A taxpayer may appeal a BOR’s decision either to the Board of Tax Appeals (BTA) or to the appropriate court of common pleas. See R.C. 5717.05. Because the BTA and the trial court fulfill the same role when reviewing a BOR decision, BTA case-law may be applied to trial court proceedings. *Murray*, at 172.

contained the testimony and evidence that were before the BOR, and the parties' briefs. The BTA concluded that the taxpayers had proved, with the appraiser's testimony, their right to a reduction, so it adopted the BOR's value. By way of explanation, the BTA said that it found little evidentiary support in the record for either the auditor's value or the appraiser's value. The BTA also observed, however, that the record did not contain any testimony or evidence to support the BOR's valuation.

{¶ 22} The Supreme Court reversed and remanded, saying it could not affirm a value finding unsupported by any evidence. Said, the Court, "On remand, the BTA is to take whatever action it deems necessary in order to determine the valuation of the parcels of property at issue. The valuation determined by the BTA must be supported by competent and probative evidence. Without some evidence of record we are unable to determine whether the decision of the BTA is reasonable and lawful." *Columbus* (2001), at 567.

{¶ 23} Here, the decision of the Supreme Court of Ohio in *Columbus City School Dist. Bd. of Edn. V. Franklin Cty. Bd. Of Revision* (2001), 90 Ohio St.3d 564, is distinguishable. In that case, the Franklin County Auditor had appraised the value of the property in question at \$1,401,000. This constituted prima facie evidence that the property was worth that much. In the hearing before the Board of Revision, the appraiser for the owners testified that the value was \$962,000. The Board of Revision, confronted with this evidence, did not adopt either value, or decide that the value was somewhere in between the values for which it had evidence. Instead, the Board of Revision selected a value of \$630,000, an amount less than any value for which there was evidence in the record. The Board of Tax Appeals adopted the \$630,000 figure for the value of the property. The

Supreme Court of Ohio held that the Board of Tax Appeals erred by adopting a value that could not be supported by sufficient probative evidence.

{¶ 24} By contrast, in the case before us the Board of Revision adopted a value for the property that was less than the value of the auditor’s appraisal – \$417,000 – but more than the value supported by Jacob Myers’s testimony – \$330,400. It is not uncommon for a factfinder, confronted with conflicting evidence concerning the value of property, to make a finding lying somewhere between the two values presented by the evidence of the contending parties.

{¶ 25} In the *Columbus* case, there was no evidence to support a valuation less than \$962,000, but the Board of Revision nevertheless found the value to be less than that amount. In the case before us, there was prima facie evidence, in the form of the auditor’s appraisal, that the property was worth more than the amount of \$330,400 suggested by Jacob Myers’s testimony; but there was also evidence, in the form of Jacob Myers’s testimony, that the property was worth less than the amount of \$417,000 suggested by the auditor’s appraisal. In our view, then, there was sufficient probative evidence to support the value found by the Board of Revision.

{¶ 26} The second assignment of error is Overruled. Judgment Affirmed.

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FAIN and FRENCH, JJ., concur.

(Hon. Judith L. French, from the Tenth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio)

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