RECEIVED
DEC 19 2024
Land Use Department

KeyCite Yellow Flag - Negative Treatment
Distinguished by Tirado v. City of Torrington, Conn.App., January 9, 2018

320 Conn. 332
Supreme Court of Connecticut.

WHEELABRATOR BRIDGEPORT, L.P.
v.
CITY OF BRIDGEPORT.
Wheelabrator Bridgeport, L.P., et al.
v.
City of Bridgeport.

No. 19288
|
Argued Sept. 17, 2015.
|
Decided Feb. 2, 2016.

Synopsis

Background: Taxpayers, which were a waste-to-energy (WTE) facility and its owner trustees, appealed assessor's valuation as to their real and personal property on the Grand Lists. Appeals were consolidated. The Superior Court, Judicial District of Fairfield, Arnold W. Aronson, Judge Trial Referee, 2013 WL 3769393, dismissed in part, and entered judgment. Taxpayers appealed, and city cross-appealed.

Holdings: The Supreme Court, Zarella, J., held that:

[1] trial court's improper rejection as a matter of law of the cash flow approach required a new trial;

[2] trial court was required to determine whether the appraisals by experts included the value of personal property;

[3] evidence that the city engaged in wrongdoing was admissible;

[4] any failure by taxpayer to provide a copy of an appraisal would not deprive the trial court of jurisdiction;

[5] an otherwise qualified expert is not disqualified merely because of a lack of a Connecticut real estate appraiser's license; and

[6] trial court did not abuse its discretion when it deducted developer's profit of 15% from its reproduction cost approach calculations.

Reversed and remanded.

Robinson, J., concurred and filed opinion in which Espinosa, J., joined.

Procedural Posture(s): On Appeal.

West Headnotes (22)

[1] **Judgment** Application of general rules of construction

As an issue of law, the interpretation of a judgment may involve the circumstances surrounding the making of the judgment.

[2] **Judgment** Construction with reference to decision or findings

The determinative factor in interpreting a judgment is the intention of the court as gathered from all parts of the judgment.

3 Cases that cite this headnote

[3] **Judgment** Application of general rules of construction

In interpreting a judgment, effect must be given to that which is clearly implied, as well as to that which is expressed.

2 Cases that cite this headnote

[4] **Judgment** Application of general rules of construction

The construction of a judgment is a question of law for the court.

2 Cases that cite this headnote

[5] **Judgment** Application of general rules of construction

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

demurred to the plaintiff's claim on the ground that, after the plaintiff appealed to the "board of relief," she had failed to appear before that board as required by the predecessor to § 12–113, and the trial court sustained the demurrer. Id., at 109, 58 A. 748. On appeal, this court held that, "[w]aiving the question as to what effect a failure to pursue an appeal ****427** before the board of relief may have [on] the relief [that] the Superior Court may properly grant, the mere failure to appear cannot ... deprive the applicant of her right to be heard [on] the claimed illegality of this assessment. The appeal presented to the board of relief primarily a question of law, viz. does the statute directing the assessors, when a taxpayer refuses to return a list to them as required by law, to make out a list for him and to add to that list an amount equal to [10 percent] of their valuation, authorize them to make such an addition to the list of the applicant under the circumstances of this case? [On] that question the applicant is entitled to a decision of the Superior Court, after the action of the board of relief has made the alleged[ly] illegal assessment binding [on] her, and it is immaterial, as affecting this right, what reason may have induced the board to take the action it did." Id. But cf. *Wilcox v. Madison,* 103 Conn. 149, 156, 130 A. 84 (1925) (board of relief properly declined to consider reducing valuation of plaintiff's property when plaintiff failed to appear before board and to answer its questions, and trial court's conclusion that board of assessors had properly considered value ***376** of property as house lots in determining its value for tax purposes was supported by evidence).[38] Thus, in the present case, even if we were to agree with the city that Wheelabrator's refusal to provide the board with a copy of its draft appraisal report was the effective equivalent of a failure to appear before the board and to answer its questions —an issue on which we express no opinion—under *Morris* and *Wilcox,* that failure would go, at most, to the merits of the trial court's decision sustaining Wheelabrator's appeal and would not deprive the trial court of jurisdiction to hear the appeal.[39] Accordingly, we reject this claim.

VI

Because it is likely to arise on remand, we next address the city's claim on cross appeal that the trial ***377** court improperly admitted the appraisal testimony of Wheelabrator's expert witnesses on the ground that they were not licensed real ****428** estate appraisers in this state. We disagree.

The following additional facts and procedural history are relevant to our resolution of this issue. Before trial, the city filed two motions in limine to preclude the admission of Kettell's and Hazen's testimony and any appraisal report prepared by them. The city contended that Kettell and Hazen, by preparing an appraisal report for the property, had violated General Statutes (Rev. to 2011) §§ 20–501(a)[40] and 20–523,[41] and any opinion ***378** testimony about the value of the property at trial also would violate those statutes. The trial court apparently did not rule on those motions. After trial, the city filed a motion to strike Kettell's and Hazen's testimony and their report for the same reasons. The trial court concluded that, as long as Hazen and Kettell qualified as experts in the appraisal of real estate, no other qualification to testify in court was required. Accordingly, it denied the city's motion to strike. The city now challenges that ruling.

[16] **[17]** We begin our analysis with the standard of review. "The trial court has wide discretion in ruling on the qualification of expert witnesses and the admissibility of their opinions.... The court's decision is not to be disturbed unless [its] discretion has been abused or the error is clear and involves a misconception of the law.... Generally, expert testimony is admissible if (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues." (Citations omitted; internal quotation marks omitted.) *State v. Kemp,* 199 Conn. 473, 476, 507 A.2d 1387 (1986), overruled in part on other grounds by *State v. Guilbert,* 306 Conn. 218, 49 A.3d 705 (2012).

****429** The Appellate Court repeatedly has rejected the claim that the city has raised. One of the relevant cases, *Taylor v. King,* 121 Conn.App. 105, 109, 994 A.2d 330 (2010), involved a construction contract dispute between the plaintiff homeowner and the defendant contractor. The plaintiff indicated that he intended to call a realtor as an expert witness to testify about the value that his residence would have had if it had been properly constructedand ***379** the value that it had as it was actually constructed. Id., at 118–19, 994 A.2d 330. The defendant moved to preclude the realtor's testimony on the ground that he was not a licensed real estate appraiser. See id. The trial court denied the motion. Id., at 119, 994 A.2d 330. On appeal, the Appellate Court concluded that the fact that the realtor was prohibited from engaging in real estate appraisal pursuant to General Statutes (Rev. to 2007) § 20–501 did not mean that he was precluded "from testifying as to his opinion of the diminution in value of

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

the plaintiff's property, where the trial court found that the witness' education, training and experience qualified him to testify as an expert...." (Internal quotation marks omitted.) Id., at 120, 994 A.2d 330. The court further concluded that testifying as to the value of property did not constitute " 'engaging in the real estate appraisal business' " for purposes of General Statutes (Rev. to 2007) § 20–500(5).[42] Id.; see also *Hutchinson v. Andover*, 49 Conn.App. 781, 788–89, 715 A.2d 831 (1998) (General Statutes [Rev. to 1997] § 20–501 did not preclude witness from testifying as to his opinion of value of property when trial court had determined that he was qualified as expert);[43] *Conway v. American Excavating, Inc.*, 41 Conn.App. 437, 448–49, 676 A.2d 881 (1996) ("[e]xcept in malpractice cases, it is not essential that an expert witness possess any particular credential, such as a license, in order to be qualified to testify, so long as his education or experience ***380** indicate [s] that he has knowledge on a relevant subject significantly greater than that of persons lacking such education or experience"); *Lance v. Luzerne County Manufacturers Assn.*, 366 Pa. 398, 403, 77 A.2d 386 (1951) ("[A]n expert is one who qualifies as such by reason of special knowledge and experience, and it is quite obvious that an individual may possess knowledge and experience of a special nature whether or not he is authorized to practice in his special field by virtue of any restriction or licensing requirement imposed by law. The inquiry by the trial judge ... as to qualifications, therefore, should be whether ... the witness possesses the special knowledge and experience. As a result of this inquiry, usually conducted as examination and cross-examination by the respective counsel, the ... trial judge may reach the conclusion that the witness does not possess the requisite qualifications entitling him to be classed as an expert, but the test must be as to the alleged expert's possession of knowledge and experience and not ****430** of a piece of paper [that] authorizes him to practice a profession." [Internal quotation marks omitted.]).

[18] **[19]** We agree that a person who otherwise would be qualified as an expert witness to testify regarding the value of real property is not disqualified merely because the person is not a licensed real estate appraiser in this state. As we have explained, whether a person is qualified to testify as an expert witness in a judicial proceeding turns on whether the person has special skills and knowledge that will shed light on an issue that is beyond the ken of the ordinary juror or trial judge. See *State v. Kemp*, supra, 199 Conn. at 476, 507 A.2d 1387. The trial court is presumed to have the skills and experience to make this determination, as with any other expert witness, with the assistance of the parties in an adversarial process. See *Blanchard v. Bridgeport*, 190 Conn. 798, 808, 463 A.2d 553 (1983) ("[t]he qualifications of ***381** an expert presents a preliminary question for the trial judge"). Moreover, once the trial court has made that determination, the expert witness will be required to testify under oath to ensure that he or she testifies truthfully.

In contrast to the evidentiary and procedural rules governing expert testimony, the purpose of the statutory scheme governing the licensure of real estate appraisers is to protect members of the general public—who do not have the skills and experience of a trial judge to assess a person's competence to determine the value of real estate, and who do not have access to the tools of discovery and cross-examination under oath to assist them in making that assessment or in assessing the person's honesty—by requiring persons who wish to engage in the business of real estate appraisal first to establish their competence and honesty. See General Statutes (Rev. to 2011) § 20–509(a) ("[c]ertifications, licenses, limited licenses and provisional licenses under sections 20–500 to 20–528, inclusive, shall be granted only to persons who bear a good reputation for honesty, truthfulness and fair dealing and who are competent to transact the business of a real estate appraiser in such manner as to safeguard the interests of the public"); General Statutes (Rev. to 2011) § 20–510 ("[i]n order to determine the competency of any applicant for a real estate appraiser's certification or license, the [Connecticut Real Estate Appraisal] [C]ommission shall, and, in the case of an applicant for a provisional license, may subject such applicant to personal written examination as to the applicant's competency to act as a real estate appraiser"). In our view, nothing would be gained by barring a person who is qualified to assist the finder of fact in a judicial proceeding in its determination of the true and actual value of real property from doing so merely because the person is not licensed. Doing so would advance neither the ***382** truth-finding function of the judicial process nor the consumer protection purpose of the statutory licensing scheme.

[20] The city claims, however, that a person who does not have a license to appraise real estate cannot testify in court as an expert witness as to the valuation of real property because such conduct would subject the person to fines and imprisonment pursuant to § 20–523. We disagree. We see no evidence that the legislature had any intention of interfering with the judicial fact-finding function by authorizing the prosecution of such conduct, which, as we have explained, would in no way undermine the primary purpose of the statutory licensing scheme—to protect members of the public

from unscrupulous and incompetent real estate appraisers. We further note that an interpretation of § 20–523 that would allow the prosecution of a person **431 who has assisted the fact finder in judicial proceedings by testifying as an expert witness as to the value of real property would raise serious constitutional questions under the separation of powers doctrine.[44] See *State v. Clemente*, 166 Conn. 501, 514, 353 A.2d 723 (1974) ("courts have an inherent power, independent of statutory authorization, to prescribe rules to regulate their proceedings and [to] facilitate the administration of justice as they deem necessary"); see also *State v. Cook*, 287 Conn. 237, 245, 947 A.2d 307 ("[i]t is well established that this court has a duty to construe statutes, whenever possible, to avoid constitutional infirmities" [internal quotation marks omitted]), cert. denied, 555 U.S. 970, 129 S.Ct. 464, 172 L.Ed.2d 328 (2008). Accordingly, we agree with the Appellate Court that, for purposes of General Statutes (Rev. to 2011) § 20–500 et seq., testifying *383 in court regarding the value of real property does not constitute "engaging in the real estate appraisal business" for purposes of the statutory scheme. (Internal quotation marks omitted.) *Taylor v. King*, supra, 121 Conn.App. at 120, 994 A.2d 330, quoting General Statutes (Rev. to 2007) § 20–500(5). Rather, such conduct constitutes the provision of forensic services by an expert witness. We therefore reject this claim.

VII

Finally, because it may arise on remand, we address the city's claim that the trial court abused its discretion when it excluded developer's profit from its reproduction cost calculations in determining the value of the property. We disagree.

The following facts and procedural history are relevant to our resolution of this claim. In his appraisal report, Pomykacz explained that he was "provided with a copy of [an] [a]mendment ... to the Solid Waste Disposal Agreement dated May 1, 1988. On page 7 of the [a]mendment, it can be seen that the aggregate historical cost basis of the [f]acility is $241,949,000. We then added 15 percent of the historical cost basis for developer's profit. Developer's profit is the profit that a developer expects to earn from the development of the project. Even a developer/owner who intends to continue to own and manage the property after construction has an expectation of some profit on the development of the property; otherwise [the] owner would simply purchase an existing property instead of going through the effort and risk of building a new one."

The trial court concluded that "Pomykacz' inclusion of a developer's profit of 15 [percent] of the historical cost lacks credibility. It is logical to assume that when the original facility was constructed, all costs, including a developer's profit, would have been included in the historical costs." Accordingly, the trial court excluded *384 the 15 percent developer's profit from its calculation of the value of the property using Pomykacz' reproduction cost approach.

[21] [22] The trial court's valuation of a property in a property tax appeal is subject to review for abuse of discretion. See, e.g., *Davis v. Westport*, 61 Conn.App. 834, 842, 767 A.2d 1237 (2001) (once trial court has found that taxpayer is aggrieved, court has "broad discretionary power to grant appropriate relief"). Although the city has cited authority for the proposition that developer's profit is a proper element of cost **432 when valuing real property, it has cited no evidence that would support a finding that the property's historical cost of $241,949,000, on which Pomykacz based his reproduction cost figures, did not include developer's profit. Thus, although the city contends that the trial court improperly *assumed* that the figure included developer's profit, the trial court reasonably could have concluded, on the basis of the record before it, that Pomykacz simply had assumed that it did not. Accordingly, we conclude that the trial court did not abuse its discretion when it deducted developer's profit of 15 percent from its reproduction cost approach calculations. We emphasize, however, that the city is not precluded from presenting evidence on remand that the historical cost did not include developer's profit, and the court is not precluded from crediting that evidence.

The judgment in the first appeal filed in 2009 is reversed and the case is remanded with direction to deny the city's motion to dismiss and for further proceedings in connection with that appeal; the portion of the judgment in the second appeal filed in 2011 sustaining that appeal on the ground that Wheelabrator was subject to an unlawful tax is affirmed; the portion of the judgment in the second appeal denying the appeal from the valuation of the personal property is affirmed; the portion of the judgment in the second appeal *385 assigning a new valuation to the property is reversed, and the case is remanded for a new trial in the second appeal with respect to that valuation.