STATE OF MICHIGAN
DEPARTMENT OF ENERGY, LABOR & ECONOMIC GROWTH
MICHIGAN TAX TRIBUNAL

Highland-Howell Development Company, LLC,
Petitioner,

v

MTT Docket No. 307906

Township of Marion,
Respondent.

Tribunal Judge Presiding
Kimbal R. Smith III

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

I. INTRODUCTION

Petitioner, Highland-Howell Development Company, LLC, is appealing the special assessment on the subject properties by Respondent, Township of Marion, for tax year 2004. This matter was appealed to the Court of Appeals (Docket # 262437) and subsequently to the Supreme Court of Michigan (Docket # 130698), which remanded it to the Tribunal in its June 29, 2007 decision. On May 19, 2009, Respondent filed a motion requesting the Tribunal to dismiss the above-captioned case pursuant to MCR 2.116(C)(10). On June 1, 2009, Petitioner filed a Response Opposing Respondent's Motion for Summary Disposition.

II. RESPONDENT'S CONTENTIONS

Respondent does not dispute that the Supreme Court's remand order permits the Petitioner to pursue its claim that the removal of the trunk line changed the benefit to its property and created disproportionality between the benefit and the amount of its assessment. Respondent contends that the May 13, 2004 Resolution did not itself levy a special assessment or confirm a special assessment roll and that its sole purpose was to formally approve and ratify plan changes that had been previously made in an informal manner. Respondent argues then that Petitioner is

not really appealing a special assessment, but a formal change in plans, and the case should not be treated as a regular special assessment challenge.

Respondent frames the issue upon remand as follows: whether as a matter of law, a plan change that does not affect the availability of the public improvement to the property has any effect in the "benefit" to the property by the improvement.

Respondent also contends that the removal of the trunk line in the sewer sanitation project did not amount to a change in the *benefit* to the property because the assessment, as implemented, still entitles it to receive sewer service to its property and the removal of the trunk line has no effect on the availability of such sewer service. Thus, Respondent takes the position that the removal of the trunk line from the original special assessment plan does not change the benefit to Petitioner's property as a matter of law.

Respondent also contends that benefits are to be measured by their potential uses and not by the immediate use to which it could be put. Respondent relies on the affidavit of its appraiser, Mr. Widmer, who opines that neither his nor the Petitioner's appraisals measure the effect of the removal of the trunk line on the benefit to the property. Respondent contends that the appraisal addendum filed by Respondent resolves any remaining factual issues by addressing the removal of the trunk line.

Respondent further contends that Petitioner cannot produce any competent, admissible evidence that the removal of the trunk line changed the benefit to its property and created a disproportionality between the benefit and the assessment, that the time for filing supplemental valuations has passed, and that Petitioner has failed to submit a valuation disclosure addressing the issue to be decided on remand, and thus cannot meet its burden of proof as a matter of law.

Respondent argues that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law.

III. PETITIONER'S CONTENTIONS

Petitioner frames the issue on remand as "whether the benefit conferred to Highland's property by the sewer system as it was actually built is proportional to the amount of the special assessment." Petitioner contends that the Supreme Court's Order did not narrow the original issues. Petitioner also contends that the removal of the trunk line from the plans was the action that cleared Petitioner's right to appeal and that the appeal was not dispositive as to the proportionality analysis.

Petitioner also relies on the fact that Administrative Law Judge Halick dismissed the original case (Docket # 261431) on jurisdictional grounds, but concluded in the Proposed Opinion and Judgment that "[t]he proposed trunk line clearly had value, and Petitioner credibly claimed that it would have conferred value upon the subject." *See* Exhibit 2 of Petitioner's Response Brief at pg. 2. Judge Halick also noted that the "testimony of Respondent's township Board member contradicts the argument that the trunk line was either inconsequential, or a 'windfall' as Respondent's counsel contended in opening argument." *Id.*

Petitioner also contends, based on the affidavit of its appraiser, Mr. Allen, that inclusion of the trunk line in the original sewer system would have affected the benefit conferred to the subject property by increasing the benefit to the subject property.

Petitioner argues that, because both parties' appraisers reached different valuation conclusions, that the proportionality analysis is an issue of fact that renders summary disposition improper.

IV. FINDINGS OF FACT

Petitioner originally brought this appeal to challenge the special assessment made on its property, parcel number 4710-01-100-015, which is composed of several smaller parcels and is zoned for manufactured housing. The subject property is located in Respondent Marion Township in Livingston County.

In 1996, Respondent approved plans for sewer improvements, which included the construction of a sewer trunk line approximately one mile long across Petitioner's property. These plans were in connection with Respondent's imposition of a special assessment on the subject property for sewer improvements on the subject property. The special assessment was $3,250,000 on December 2, 1996, was reduced to $2,875,000 in 1999, and later increased to $3,161,925 in the same year.

In 1997, Respondent informally eliminated the sewer trunk line across Petitioner's property from the plans. On May 13, 2004, Respondent's Board of Review adopted a resolution to formalize changes in the plans for the sewer project, including elimination of the sewer trunk line across Highland's property. The change in plans would require Petitioner to construct its own main line and/or lateral lines to service the planned development.

V. APPLICABLE LAW

A. SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10)

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim and must identify those issues regarding which the moving party asserts there is no genuine issue of material fact. Under subsection (C)(10), a motion for summary disposition will be granted if the documentary evidence demonstrates that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life*

Insurance, 460 Mich 446, 454-455; 597 NW2d 28 (1999). In the event, however, it is determined that an asserted claim can be supported by evidence at trial, a motion under subsection (C)(10) will be denied. *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).

The Michigan Supreme Court has established that a court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed by the parties in the light most favorable to the non-moving party. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-63; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)). The moving party bears the initial burden of supporting his position by presenting his documentary evidence for the court to consider. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id*. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1992).

B. SPECIAL ASSESSMENT & JURISDICTION

The general rule is well settled that the benefits derived from a special assessment to a property "should be determined by the difference in the market value of the property before and after the making of the improvement." *Dixon Road Group v City of Novi*, 426 Mich. 390, 399, 395 NW2d 211, 215 (1986). Also, "[a] special benefit may be found from an increase in value, relief from burden or in the creation of a special adaptability in the land." *Id.* (*quoting Soncoff v*

Inkster, 22 Mich App. 358, 361, 177 NW2d 243 (1979)). Lastly, "the amount of the property increased in value as a result of the expenditure had to be at least equal to the amount of the assessment." *Id.* at 402. Special assessments must be levied in proportion to special benefit received. *Stybel Plumbing, Inc v City of Oak Park*, 40 Mich App 108, 198 NW2d 782 (Mich App 1972).

The Supreme Court's June 29, 2007 decision provides a clear mandate for the Tribunal to "determine whether the special assessment levied against the petitioner's property is proportionate to the benefit to the property." *Highland-Howell Dev Co LLC v Township of Marion*, unpublished opinion per curiam of the Michigan Supreme Court, issued June 29, 2007 (Docket No. 130698). That Court found that "MCL 205.735(2) grants the tribunal jurisdiction over petitioner's 2004 petition because the 2004 resolution is a 'final decision' and petitioner filed a written petitioner within 30 days after the 'final decision.'" *Id.* at 1. The Court also found that Petitioner's claim is not barred by res judicata or collateral estoppel because the Board's Resolution was passed on March 13, 2004 and the Tribunal's March 14, 2004 opinion "could not have fully considered and rendered legal conclusions regarding official plan changes that had not yet occurred."

VI. CONCLUSIONS OF LAW

The Tribunal has carefully considered the motion under MCR 2.116(C)(10) and finds that denying this motion is warranted based on the pleadings and other documentary evidence filed with the Tribunal. Respondent has not proven through pleadings and documentary evidence that there is no genuine issue of material fact regarding the proportionality between the special assessment levied by Respondent against Petitioner's property and the benefit conferred to Petitioner's property from the sewer system as built. The Tribunal needs to take such action as

law and justice require that is not inconsistent with the judgment of the Michigan Supreme Court. Pursuant to MCL 41.726(3), the May 13, 2004 Marion Township Board of Review Resolution was a final decision. In 2004 this matter was dismissed by the Tribunal for lack of jurisdiction, but the Supreme Court decision jumped that jurisdictional hurdle and Petitioner is entitled to challenge the effect of the removal of the trunk line on the proportionality of its special assessment. The Tribunal finds that there are genuine issues of material fact in this matter and summary disposition is improper.

VII. JUDGMENT

IT IS ORDERED that Respondent's Motion for Summary Disposition is DENIED.

MICHIGAN TAX TRIBUNAL

Entered: September 23, 2009
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By: Kimbal R. Smith III