[Cite as *Schwartz v. Cuyahoga Cty. Bd. of Revision*, 2018-Ohio-4712.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106659

FRED P. SCHWARTZ, TRUSTEE

PLAINTIFF-APPELLANT

vs.

CUYAHOGA COUNTY BOARD OF REVISION, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Administrative Appeal from the
Board of Tax Appeals
Case No. 2017-433

BEFORE: Boyle, P.J., Blackmon, J., and Jones, J.

RELEASED AND JOURNALIZED: November 21, 2018

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MARY J. BOYLE, P.J.:

{¶1} Appellant, Fred Schwartz, Trustee, appeals from a decision of the Ohio Board of Tax Appeals ("BTA") affirming the decision of the Cuyahoga County Board of Revision ("BOR") that the "true value" of Schwartz's property for the 2015 tax year was $107,900. It is from this judgment that Schwartz now appeals, raising three assignments of error for our review:

> 1. The BTA order and decision is unreasonable and unlawful because it does not address Schwartz's claim that the BOR erred by not ordering the Fiscal Officer's

> Computer Assisted Mass Appraisal (CAMA) Systems Administrator to appear at the BOR hearing on Schwartz's complaint against valuation, to be examined by Schwartz concerning the basis for Fiscal Officer's determination that the true value of Schwartz's property was $107,900 for the 2015 tax year.
>
> 2. The BTA order and decision is unreasonable or unlawful because BTA unlawfully allocated the burden of proof, specifically the burden of production of evidence, to the property taxpayer, after he made a prima-facie case for value reduction to $5,000.
>
> 3. The BTA order and decision is unreasonable and unlawful because the BTA found to be irrelevant Schwartz's evidence concerning the invalidity of the Fiscal Officer's CAMA methodology.

{¶2} After review, we find no merit to Schwartz's assigned errors and affirm the decision of the BTA.

I. Procedural History and Factual Background

{¶3} In 2011, Schwartz purchased property in Cleveland Heights from the secretary of the United States Department of Housing and Urban Development ("HUD") for $5,000. The Cuyahoga County fiscal officer valued the property at $126,800 for 2011 tax year. Schwartz filed a complaint with the Cuyahoga County Board of Revision ("BOR"), seeking a reduction of value to $30,000. The BOR retained the fiscal officer's valuation and the BTA affirmed. Schwartz appealed the BTA's decision to the Ohio Supreme Court. *See Schwartz v. Cuyahoga Cty. Bd. of Revision*, 143 Ohio St.3d 496, 2015-Ohio-3431, 39 N.E.3d 1223. The Supreme Court reversed the BTA's decision, stating, "Under these circumstances, we hold that the BTA acted unreasonably when it found that the property's 2011 sale price was not the best evidence of its tax year 2011 value." *Id*. at ¶ 31. The Supreme Court reversed BTA's decision and "remand[ed] with instructions that the $5,000 sale price be used as the property's value for tax year 2011." *Id*. at ¶ 32.

{¶4} Schwartz and Cuyahoga County entered into an agreement with respect to the property's value for the years 2012, 2013, and 2014. They agreed that for those years, the value of the property would be $12,500.

{¶5} In 2015, however, the Cuyahoga County fiscal officer valued the property at $107,900 for tax purposes. Schwartz again filed a complaint with the BOR, arguing that the value of the property should be $5,000.

{¶6} Before the BOR hearing took place, Schwartz moved the BOR for an "Order Calling Persons to Appear for Hearing," requesting the BOR "call" Joe Toledo, systems administrator of computer-assisted mass appraisal ("CAMA") for the county fiscal office appraisal department, to appear and testify at the hearing regarding the methodology used to determine the value of the property. The BOR denied Schwartz's motion.

{¶7} The BOR held a hearing on Schwartz's complaint in February 2017. Schwartz's counsel argued that the property should be valued at $5,000 because that is what Schwartz purchased it for in October 2011. In support of his argument, Schwartz submitted a copy of the Supreme Court's decision in *Schwartz*, 143 Ohio St.3d 496, 2015-Ohio-3431, 39 N.E.3d 1223. Schwartz's counsel also submitted a settlement agreement between Schwartz and the county where the parties agreed to value the property at $12,500 for the 2012, 2013, and 2014 tax years. The BOR found the following: "Property owner was represented by counsel. 2011 sale was too remote from tax lien. No evidence regarding condition or valuation techniques used was provided to the Board. No change." Schwartz appealed this decision to the BTA.

{¶8} The BTA hearing took place in June 2017. At the hearing, Schwartz's attorney informed the hearing officer that Schwartz intended to rely on his submitted brief and

documents in the record. Thus, Schwartz did not testify or present any evidence at the hearing. In his prehearing brief to the BTA, Schwartz argued that the BOR violated his due process rights when it failed to compel Joe Toledo to testify at the BOR hearing. He asserted that by doing so, the BOR denied his "right to confront by cross-examination" the fiscal officer's determination of value. Schwartz further argued that his due process rights were violated because he was denied the right to "a fair and impartial BOR tribunal" because the BOR was biased in favor of the county.

{¶9} The BTA upheld the BOR's determination. In its "Decision and Order," the BTA found that the 2011 sale price "was not a reliable indicator of the subject property's value because it was too remote from the tax lien date." The BTA further noted that,

> the property owner failed to come forward with any evidence that demonstrates whether market conditions remained stagnant, or were otherwise in equilibrium, during the approximately fifty-one months between the sale date in October 2011 and tax lien date on January 1, 2015 such that the subject sale would be reflective of the subject property's value for tax year 2015.

{¶10} The BTA also found that a list of "unadjusted comparable sales data" from properties on the same street as the subject property was not probative. It noted that "[w]ith nothing more than a list of raw sales data, a trier of fact is left to speculate as to how common differences, e.g., location, size, quality of construction of improvements, nature of amenities, date of sale as opposed to tax lien date, etc, may affect a valuation determination." The BTA explained that Schwartz made "no effort" to "equalize the alleged comparable properties with the subject property."

{¶11} With respect to Schwartz's argument that the BOR was biased in favor of the county fiscal officer, the BTA found that Schwartz did not submit any evidence "to demonstrate that either the fiscal officer or the BOR acted improperly." The BTA further explained that

"the burden is placed upon the complainant, in this case the property owner, to bring forth sufficient evidence that the value is something other than that which was initially assessed." In absence of proof otherwise, the BTA noted that "county officials are presumed to have performed their duties properly and in good faith" and the burden is on the property owner "to prove with competent and probative evidence that the taxing official has committed error in valuing the property."

{¶12} The BTA further noted that the "statutory transcript" contained a number of documents "for which neither the property owner nor the county appellees have provided any explanation." Therefore, the BTA found that these documents were not relevant to the determination of the subject property's value.

{¶13} Based upon its review of the record, the BTA found that the property's "true value" for tax purposes was $107,900 for the 2015 tax year. It is from this judgment that Schwartz now appeals.

II. Standard of Review

{¶14} R.C. 5717.04 states that "[t]he proceeding to obtain a reversal, vacation, or modification of a decision of the board of tax appeals shall be by appeal to the supreme court or the court of appeals for the county in which the property taxed is situated or in which the taxpayer resides."

{¶15} R.C. 5717.04 further provides that the standard of review for appeals from the BTA is as follows:

> If upon hearing and consideration of such record and evidence the court decides that the decision of the board appealed from is reasonable and lawful it shall affirm the same, but if the court decides that such decision of the board is

> unreasonable or unlawful, the court shall reverse and vacate the decision or modify it and enter final judgment in accordance with such modification.

{¶16} The Ohio Supreme Court has also explained that when reviewing an appeal from a BTA decision:

> "The true value of property is a 'question of fact, the determination of which is primarily within the province of the taxing authorities' and accordingly we 'will not disturb a decision of the Board of Tax Appeals with respect to such valuation unless it affirmatively appears from the record that such decision is unreasonable or unlawful.'"

Akron City School Dist. Bd. of Edn. v. Summit Cty. Bd. of Revision, 139 Ohio St.3d 92, 2014-Ohio-1588, 9 N.E.3d 1004, ¶ 9, quoting *Cuyahoga Cty. Bd. of Revision v. Fodor*, 15 Ohio St.2d 52, 239 N.E.2d 25 (1968).

{¶17} Thus, this court reviews BTA decisions only to determine whether they are "reasonable and lawful." R.C. 5717.04. In doing so, we defer to the BTA's factual findings, including determinations of property value, as long as they are supported by reliable and probative evidence in the record. *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856, 856 N.E.2d 954, ¶ 14. By contrast, we review the BTA's legal determinations de novo. *Crown Communication, Inc. v. Testa*, 136 Ohio St.3d 209, 2013-Ohio-3126, 992 N.E.2d 1135, ¶ 16.

{¶18} We will address Schwartz's assigned errors out of order for ease of discussion.

III. Burden of Proof

{¶19} In his second assignment of error, Schwartz maintains that the BTA "unlawfully allocated the burden of proof" to him. We disagree.

{¶20} When an issue concerning the true value of real property for taxation purposes is presented to the BTA, the value set by a board of revision is not presumptively correct. *Cambridge Arms, Ltd. v. Hamilton Cty. Bd. of Revision*, 69 Ohio St.3d 337, 338, 632 N.E.2d

496 (1994). In a hearing before the BTA, however, the taxpayer is obliged to prove his right to a reduction in value. *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision*, 68 Ohio St.3d 493, 495, 628 N.E.2d 1365 (1994), citing *Mentor Exempted Village Bd. of Edn. v. Lake Cty. Bd. of Revision*, 37 Ohio St.3d 318, 526 N.E.2d 64 (1988).

{¶21} "A party seeking an increase or decrease in valuation bears the burden of proof before a board of revision." *Snavely v. Erie Cty. Bd. of Revision*, 78 Ohio St.3d 500, 503, 678 N.E.2d 1373 (1997). Similarly, "[w]hen cases are appealed from a board of revision to the BTA, the burden of proof is on the appellant * * * to prove its right to an increase [in] or decrease from the value determined by the board of revision." *Columbus City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 90 Ohio St.3d 564, 566, 740 N.E.2d 276 (2001). To meet that burden, the appellant "must present competent and probative evidence to make its case." *Id.* It is not enough to merely introduce evidence that calls the board of revision's valuation into question. *Id.*

{¶22} As a public official, the fiscal officer is presumed to carry out his statutorily prescribed duties in good faith and in the exercise of good judgment, absent a showing to the contrary. *See Dayton-Montgomery Cty. Port Auth. v. Montgomery Cty. Bd. of Revision*, 113 Ohio St.3d 281, 2007-Ohio-1948, 865 N.E.2d 22, ¶ 13.

{¶23} In this case, the BTA found that Schwartz failed to present any evidence of the property's 2015 value. Citing a number of cases, the BTA determined that the 2011 transfer of the subject property was too remote from the tax lien date of January 1, 2015. Notably, Schwartz does not challenge this finding of fact or the BTA's law supporting it.

{¶24} The BTA further found that Schwartz's list of "raw sales data" of surrounding properties, with nothing more, did not support Schwartz's argument that his property should

have been valued at $5,000. The BTA explained that there was nothing in the record to compare the properties, including, but not limited to, the properties' location, size, quality, and improvements. Indeed, the list does not indicate anything about the homes except the sale prices and dates of sale. The BTA cited to this court's decision in *Carr v. Cuyahoga Cty. Fiscal Officer*, 8th Dist. Cuyahoga No. 104652, 2017-Ohio-1050, where we explained:

> For example, if by some chance a nearby property was valued at $1 million for tax purposes and sold for $950,000, the county could not rely on that sales price alone to demonstrate Carr's property was worth $950,000. Such a position would defy logic. The same concept, however, must equally be applied to the homeowner. Carr cannot cherry-pick lower-valued nearby homes and use those predictably lower sales prices to justify a valuation of her property. There has to be some parity, or some method of establishing parity, between the properties before sales prices have any meaning.

Id. at ¶ 11.

{¶25} Schwartz also asks this court to take judicial notice of the list of home sales that occurred on the same street as the subject property near the tax lien date of January 1, 2015. But just as the BTA did, we decline to do so. We note, however, that even if we agreed to take judicial notice of these sales, they would not help Schwartz's case in any way for all of the reasons previously set forth by the BTA and this court in *Carr*.

{¶26} Schwartz further argues that he made a prima facie case that the value of the property is $5,000 based on the Supreme Court's decision in *Schwartz*, 143 Ohio St.3d 496, 2015-Ohio-3431, which held that the value of the property was $5,000 because that was the purchase price in October 2011. Schwartz maintains that because he met his burden of production on his prima facie case, the burden then shifted to the county fiscal officer to "produce evidence that the value of the property was $107,900."

{¶27} As the BTA states, however, the Ohio Supreme Court recently rejected this exact argument in *Moskowitz v. Cuyahoga Cty. Bd. of Revision*, 150 Ohio St.3d 69, 2017-Ohio-4002, 78 N.E.3d 870. In *Moskowitz*, the property owner successfully obtained a property value reduction for the tax year 2012 from $148,800 to $60,000 from the Cuyahoga County BOR. Seeking a further reduction to $25,000, Moskowitz appealed to the BTA, which upheld the BOR's value. Moskowitz appealed the BTA's order to the Ohio Supreme Court, arguing in part that he should prevail "because he shifted the burden of proof to the county and the county has not met its burden." *Id*. at ¶ 8. The Supreme Court stated:

> [T]he case law unequivocally refutes Moskowitz's burden-shifting theory. In *W. Industries, Inc. v. Hamilton Cty. Bd. of Revision*, 170 Ohio St. 340, 342, 164 N.E.2d 741 (1960), we stated that "[t]he burden is on the taxpayer to prove his right to a deduction" and that he is "not entitled to the deduction claimed merely because no evidence is adduced contra his claim." Numerous later cases develop this principle. *See Zindle v. Summit Cty. Bd. of Revision*, 44 Ohio St.3d 202, 203, 542 N.E.2d 650 (1989) (based on taxpayers' presentation, both the board of revision and the BTA reduced the true value of the property, and the court "defer[red] to the BTA's determination that the [owners had] not presented sufficient evidence to prove that a greater reduction [was] warranted"); *Westlake Med. Investors, L.P. v. Cuyahoga Cty. Bd. of Revision*, 74 Ohio St.3d 547, 549, 660 N.E.2d 467 (1996) ("the BTA may approve a board of revision's value if the taxpayer does not prove a right to a reduction in value"). *See also EOP-BP Tower, L.L.C. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 1, 2005-Ohio-3096, 829 N.E.2d 686, ¶ 6 (In order to meet its burden of proof at the BTA, "the appellant must come forward and *demonstrate that the value it advocates is a correct value*" [Emphasis added]); *Amsdell v. Cuyahoga Cty. Bd. of Revision*, 69 Ohio St.3d 572, 574, 1994 Ohio 314, 635 N.E.2d 11 (1994) (endorsing the BTA's declaration that a taxpayer "may successfully challenge a determination of a Board of Revision only where the taxpayer produces competent and probative evidence to establish the correct value of the subject property").
>
> Because of Moskowitz's failure to demonstrate a value below $60,000 — the value found by the BOR — the BTA reasonably and lawfully retained the BOR's value under these circumstances.

Id. at ¶ 9-10.[1]

{¶28} Schwartz acknowledges the holding in Ohio Supreme Court's decision in *Moskowitz*. In fact, Schwartz's counsel in the present appeal informs this court that he "is familiar with the *Moskowitz* decision because he was Moskowitz's attorney in that case and presented the case to the Ohio Supreme Court." Schwartz's counsel states that "[t]he *Moskowitz* decision is * * * bad law, designed to promote the political agenda of the *Moskowitz* court to maximize government tax revenue at the expense of the taxpayer." Schwartz's counsel continues to criticize several justices on the Ohio Supreme Court. This court, however, will not entertain these arguments.

{¶29} Schwartz further cites to several cases that he claims supports his burden-shifting argument. A cursory review of these cases, however, establishes that they do not support Schwartz's argument.

{¶30} Schwartz also argues that the BTA "seems to be advancing a political agenda." He asserts that the BTA misstates the law over and over again and submits that "the BTA's law is bad law, fake law in current terms, and like fake news is best understood as based upon someone's political agenda, in this case the BTA political agenda to maximize government tax revenue at the expense of the taxpayer."

{¶31} After review, however, we find that Schwartz, not the BTA, is disingenuous. For example, Schwartz maintains that the BTA incorrectly relies on *Fairlawn Assoc. Ltd. v. Summit Cty. Bd. of Revision*, 9th Dist. Summit No. 22238, 2005-Ohio-1951. He states, "[t]he BTA fabricated the holding of *Fairlawn* [*Assoc.*] to suit its purpose of shielding the government

[1]The Ohio Supreme Court reaffirmed the holding in *Moskowitz* on this exact issue five months later in *Jakobovitch v. Cuyahoga Cty. Bd. of Revision*, 152 Ohio St.3d 187, 2017-Ohio-8818, 94 N.E.3d 519, stating "[t]he burden-of-proof standards that apply in a real-property-valuation case are well settled[.]" *Id*. at ¶ 12.

assessing authorities from review of its appraisal methods." But the BTA did no such thing. The BTA cited to *Fairlawn Assoc*. for the proposition that "the burden is placed upon the complainant, in this case the property owner, to bring forth sufficient evidence that the value is something other than that which was initially assessed." The property owner in *Fairlawn Assoc.* presented an expert appraisal report of the value of the property, which was $2.6 million less than the county's value. The property owner filed a complaint with the BOR, which upheld the county's value of the property. The property owner appealed and won. The county then appealed to the Summit County Common Pleas Court, which found for the property owner. The county BOR then appealed to the Ohio Supreme Court. Although the common pleas court had framed the issue as one of burden shifting, the Supreme Court explained that in the case, "[t]he Board essentially challenges the trial court's acceptance of [the expert's] valuation as competent, probative evidence." *Id*. at ¶ 9. The Supreme Court affirmed the common pleas court's decision that the property owner's evidence was "in fact competent and credible." *Id*. at ¶ 15, citing *Black v. Bd. of Revision*, 16 Ohio St.3d 11, 475 N.E.2d 1264 (1985). Thus, after review, BTA's citation to and discussion of *Fairlawn Assoc.* was not a "fabrication."

{¶32} After reviewing the record before us, we find that the BTA's decision was reasonable and lawful. We therefore overrule Schwartz's second assignment of error.

IV. Evidentiary and Constitutional Issues

{¶33} In his first assignment of error, Schwartz argues that the BTA unlawfully avoided its duty because it failed to address his constitutional argument that he was denied due process of law when the BOR denied his motion to compel Joe Toledo, systems administrator of CAMA for the county fiscal office appraisal department, to testify regarding the methodology used to

value properties in Cuyahoga County. Because the BOR denied this motion, he claims that he was denied the right to confront the evidence against him.

{¶34} Although it is not entirely clear what Schwartz is arguing, he cites to *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). Schwartz submitted a copy of the title page of this opinion and the syllabus to the BTA and specifically circled the third paragraph of the syllabus, which states:

> A pre-termination evidentiary hearing is necessary to provide the welfare recipient with procedural due process. * * * Such hearing need not take the form of a judicial or quasi-judicial trial, but the recipient must be provided with timely and adequate notice detailing the reasons for termination, and an effective opportunity to defend by confronting adverse witnesses and by presenting his own arguments and evidence orally before the decision maker.

{¶35} Schwartz, however, was not denied notice or an opportunity to defend. In fact, he received an opportunity to defend at an evidentiary hearing before the BOR *and* the BTA, and he failed to present *any evidence* to establish the 2015 value of the property.[2] Schwartz could have presented his own testimony regarding the value of the property or an expert appraiser's testimony. He offered nothing but weak arguments and unrelated and unauthenticated documents (the Ohio Supreme Court opinion regarding the 2011 value of the property, the stipulated value between him and the county for the years 2012 through 2014, and a transcript from a county employee regarding another property altogether).

{¶36} To the extent that he argues that he was denied his due process rights because the BOR refused to compel Joe Toledo, administrator of the county's CAMA system, to testify, we disagree. First, the county is not required to defend its valuation of a property. *Jakobovitch*,

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[2] R.C. 5717.01 states that "[t]he board of tax appeals may order the appeal to be heard on the record and the evidence certified to it by the county board of revision, or it may order the hearing of additional evidence, and it may make such investigation concerning the appeal as it deems proper."

152 Ohio St.3d 187, 2017-Ohio-8818, 94 N.E.3d 519, at ¶ 12. Further, Schwartz could have properly subpoenaed Toledo to appear before the BTA. R.C. 5715.10 empowers a board of revision to "call persons before it and examine them under oath as to their own or another's real property." Ohio Adm.Code 5717-1-14(A) further provides:

> Upon written request of any party or by action of the board through a member, the secretary or its attorney examiners, subpoenas may be issued to compel the attendance of witnesses and the production of books, accounts, papers, records, documents, and testimony. If any party desires the issuance of subpoenas in order to compel the attendance of witnesses or the production of documents at a scheduled merit or motion hearing or deposition, the request shall be submitted to the board.

Under Ohio Adm.Code 5717-1-14(E), however, the subpoena must be served "at least twenty-one days prior to the hearing or deposition at which they are to appear." Here, Schwartz served the subpoena on Toledo eight days before the hearing. The county moved to quash it, which the BTA granted.

{¶37} Schwartz further argues that the BTA erred when it refused to address his constitutional arguments because it did not believe it had the authority to do so. We agree with Schwartz that the BTA could have addressed this argument because he was not asserting that a statute was unconstitutional. Nonetheless, Schwartz was not harmed by this error because his due process rights were not violated.

{¶38} Finally, in his third assignment of error, Schwartz asks this court to review the documents that he submitted to the BOR and the BTA and that are part of the statutory record on appeal. In addition to the Ohio Supreme Court's decision in *Schwartz*, 143 Ohio St.3d 496, 2015-Ohio-3431, 39 N.E.3d 1223, Schwartz also filed electronic documents that consisted of (1) a settlement agreement with the county that the property would be valued at $12,500 for the 2012, 2013, and 2014 tax years, (2) what he claimed to be "evidence discrediting the

methodology of the fiscal officer's CAMA systems administrator used to value the property, such evidence being the testimony of Mr. Toledo at a BTA hearing" in an unrelated case, and (3) his motion requesting the BOR to compel Toledo to appear at the hearing on his case. Schwartz, however, did not lay the foundation for any of these documents at either hearing.[3] We further note that several of the documents relating to the county's methodology are not even from his case. Moreover, we agree with the BTA that these documents are not relevant to the 2015 value of Schwartz's property.

{¶39} Accordingly, Schwartz's first and third assignments of error are overruled.

{¶40} After considering Schwartz's arguments and the record before us, we find that the BTA's decision was "reasonable and lawful," and therefore, we must affirm. R.C. 5717.04; *Terraza 8, L.L.C. v. Franklin Cty. Bd. of Revision*, 150 Ohio St.3d 527, 2017-Ohio-4415, 83 N.E.3d 916, ¶ 7.

{¶41} Judgment affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Board of Tax Appeals to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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[3] There is an audio recording in the record of the BOR hearing, but Schwartz did not have the relevant portions of the recording transcribed for this court as he is required to do under App.R. 9(B)(1) and (6).

MARY J. BOYLE, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and
LARRY A. JONES, SR., J., CONCUR