

OHIO BOARD OF TAX APPEALS

Board of Education of the Willoughby- Eastlake City School District,)	
)	CASE NOS. 2007-V-1476
Appellant,)	
)	(REAL PROPERTY TAX)
vs.)	
)	ORDER
Cuyahoga County Board of Revision, the Cuyahoga County Auditor, and R E Services No. 34 LLC,)	(Denying Motion to Quash and Motion for Protective Order)
)	
Appellees.)	

APPEARANCES:

For the Appellant	-	Brindza McIntyre & Seed LLP David H. Seed 1111 Superior Avenue, Suite 1025 Cleveland, Ohio 44114
For the County Appellees	-	William D. Mason Cuyahoga County Prosecuting Attorney Timothy J. Kollin Assistant Prosecuting Attorney 1200 Ontario Street, 8 th Floor Cleveland, Ohio 44113
For the Appellee Property Owner	-	Siegel, Siegel, Johnson & Jennings Co., LPA Steven J. Vivarronda 25700 Science Park Dr., Suite 210 Cleveland, Ohio 44122
Copy to	-	M&T Realty Corporation c/o CT Corporation System 1300 E. 9 th Street Cleveland, Ohio 44114

Entered February 17, 2009

This cause and matter came on to be considered by the Board of Tax Appeals upon a motion to quash subpoena and a motion for protective order filed by

the property owner R E Services No. 34 LLC. (“R E Services”).¹ On August 18, 2008, the appellant Board of Education of the Willoughby-Eastlake City School District (“BOE”) served a subpoena to M&T Realty Capital Corporation (“M&T”) to appear at a deposition and to produce a “copy of any appraisal, valuation, analysis or document regarding valuation of the subject property for a date of valuation between January 1, 2002 and January 1, 2008.” In its subpoena, the BOE indicated that M&T entered into a mortgage with R E Services, concerning the subject property, on or about May 30, 2007. The BOE filed a reply brief to said motions. No representative of M&T has made an appearance before this board or filed any response.

R E Services argues in its motion and brief in support thereof, that the subpoena was issued beyond the 120-day discovery period set forth by this board’s rule; that M&T is a non-party out-of-state entity not subject to this board’s subpoena power; and that the appraisal report possessed by M&T is “undiscoverable” because it “would have valued the leased fee interest of the subject property for purposes of financing” and further would have expressed an opinion of value for a date other than tax lien date. See Memorandum in Support at unnumbered pages 1-2.

Although R E Services brings its motion for a protective order “pursuant to Ohio Civ. R. 45(C),” it has failed to allege that the subpoena fails to allow reasonable time to comply; asks for privileged or protected matters; asks for opinions of facts not in dispute. Further, R E Services provides no affidavit or showing of any attempt to resolve the dispute prior to seeking under Civ. R. 45(C)(4). Counsel for R

¹ Now known as Winchester Apts. Ltd.

E Services does not appear to represent M&T, therefore this board finds no basis for granting the request for a protective order pursuant to Civ.R. 45(C)(3).

R E Services correctly points out that the subpoena was issued to a non-party and seeks documents executed by a non-party. M&T is not a party to the instant appeal. Through its subpoena, the BOE is seeking any appraisal, valuation, analysis or document regarding valuation of the subject property for a date of valuation between January 1, 2002 and January 1, 2008.

This board is mindful of its pronouncements in *South Euclid-Lyndhurst City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (Interim Order, Mar. 15, 2002), BTA Nos. 2001-A-439, 2001-A-454, unreported, wherein this board determined that Civ.R. 35(C) clearly provides for the participation of persons who are not parties to an action in discovery matters. It was noted in such order that Civ.R. 26 sets forth the general provisions governing discovery and provides in part:

“(B) Scope of discovery. Unless ordered by the court in accordance with these rules, the scope of discovery is as follows:

“(1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”

Clearly, Civ.R. 26(B)(1) allows for broad discovery. While discoverable material is restricted to relevant evidence in a particular case, irrelevancy is determined only under Civ.R. 26(B)(1) when the information sought will not reasonably lead to the discovery of admissible evidence.² *Tschantz v. Ferguson* (1994), 97 Ohio App.3d 693. As all of the foregoing rules of civil procedure are considered, this board finds no basis upon which to quash the subpoena in question, as the only information sought, documents, including any appraisal reports or other related information on the subject property, may clearly provide relevant information concerning the value of the subject property. See *South Euclid*, supra.

Although R E Services argues that M&T should be “considered an out-of-state corporation, the subpoena is directed to an address in Cleveland, Ohio.

R E Services’ reliance upon *WCI Steel, Inc. v. Wilkins* (Interim Order May 21, 2007), BTA No. 2005-V-1565, unreported, and *Rich’s Dept. Stores, Inc. v. Wilkins* (Interim Order, Jan. 18, 2007), BTA No. 2005-T-1609, unreported are misplaced. In both of those cases, this board quashed subpoenas that were issued within a month’s time of the BTA’s scheduled hearing, seeking voluminous amounts of material from opposing parties. The facts of the instant matter, however, are

² This board acknowledges that the information which the board of education is seeking *may* have been created for purposes other than the tax valuation of the subject property as of the tax lien date at issue. The appraisal and related valuation documents being sought by the BOE appear to be dated in May 2007, the time frame of the mortgage extended by M&T. While this board has been disinclined to rely on such evidence for purposes of determining the taxable value of real property, the information being sought by the BOE nevertheless appears to be reasonably calculated to lead to the discovery of admissible evidence. See Civ.R. 26(B)(1) and *Freshwater v. Belmont Cty. Bd. of Revision* (1997), 80 Ohio St.3d 26.

distinguishable from those in *WCI* and *Rich's*. Herein, the BOE has made a specific request seeking appraisal information related to the subject property. Such request does not appear to be voluminous or burdensome, and, in fact, no representative of M&T has objected to the subpoena on such basis.

Further, the BOE also issued the subject subpoena in August 2008, prior to any previously scheduled hearing in this matter. In *WCI* and *Rich's*, the subpoenas in question were issued less than one month prior to the scheduled hearing, and again, were seeking voluminous amounts of information, not easily obtained by the hearing date. In addition, in *WCI* and *Rich's*, the subpoenas were not issued until after the cases had been set for hearing on multiple occasions, whereas herein, the subpoena was issued prior to the first time the case was set for hearing.

Although the subpoena was issued after the 120 day time-frame in which to seek this board's assistance to resolve any discovery dispute, nothing in this board's rule prohibits the BOE from seeking the appraisal report via subpoena. Ohio Adm. Code 5717-1-11 provides in pertinent part:

“[A](1) Discovery should be commenced by all parties promptly after the filing of a notice of appeal and should be completed as expeditiously as possible. Discovery should be completed not more than one hundred twenty days after filing of the notice of appeal, which shall also be the last day for a party to seek involvement of the board in discovery matters.
***”

The information sought by the board of education has been held to be discoverable by this board on numerous occasions. See *Cleveland Mun. School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (Interim Order, March 7, 2008), BTA

Nos. 2005-Z-1745, 2006-Z-44, unreported; *Bd. of Edn. for the Orange City School Dist. v. Cuyahoga Cty. Bd. of Revision* (Interim Order, Jan. 14, 2005), BTA Nos. 2004-A-738-748, unreported; *Cleveland Mun. School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (Interim Order, June 18, 2004), BTA No. 2003-R-1903, unreported; *South Euclid*, supra. There is nothing in the record currently before the board to distinguish the instant facts from those previously considered where discovery was permitted.

Accordingly, based upon the foregoing, R E Services' motion to quash the subpoena and request for a protective order must be denied.

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