COURT OF APPEALS
DECISION
DATED AND FILED

May 23, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0493 **Cir. Ct. No. 00-CV-101**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

MARY A. KLOVERS,

PETITIONER-RESPONDENT,

V.

CITY OF BEAVER DAM,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dodge County: ANDREW P. BISSONNETTE, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Dykman, Deininger and Lundsten, JJ.

¶1 PER CURIAM. The City of Beaver Dam appeals an order relating to a real estate tax assessment for property owner Mary Klovers. The main issues are whether the circuit court could set the 2000 assessment as part of a certiorari review of the 1999 assessment, and whether the court erred in ordering the City to

pay attorney's fees to Klovers. We reverse as to the assessment, but affirm on the attorney's fees.

¶2 This action was commenced by Klovers in certiorari, seeking review of a decision by the board of review regarding the 1999 assessment on two parcels she owned in Beaver Dam. In an order entered November 17, 2000, the circuit court held that the assessment on one of the parcels was not supported by the record, and it set the assessment at a figure it believed was proper. The court further stated that it was willing to consider an award of attorney's fees to Klovers because of certain actions by the City's attorney in the litigation, and it directed Klovers to submit a statement of attorney's fees.

¶3 That order was followed by an exchange of letters between the parties that initially concerned attorney's fees. However, as part of that exchange, in a letter received by the court on December 26, 2000, Klovers said she had received her tax bill for 2000, and the City was continuing to use the valuation it originally assessed for 1999, rather than the assessment that had been set for 1999 by the court's order in this action. She asked the court to issue an additional order setting the 2000 assessment. The City responded by arguing that each year is a separate assessment, that Klovers had not filed an objection to the 2000 assessment, and that the 2000 assessment was not before the court because Klovers had not exhausted her administrative remedies by proceeding through the board of review.

¶4 Klovers responded with a further letter stating that she had not received any notice of changed assessment for 2000, and that the assessment on the property should be as the court had set by order, until such time as the City again follows the proper procedure to change that assessment. The City again

replied that Klovers was required to renew her objection for the year 2000, and it noted that the board of review had met in 2000 before the court reduced the 1999 assessment. Finally, Klovers responded further by pointing out that the city attorney was aware of her continuing objection to the higher assessment because, in her briefs to the circuit court in the certiorari proceeding, she had asked the court to set the assessment at a certain amount for both 1999 and 2000.

¶5 The circuit court disposed of this issue and the attorney's fees issue in an order entered February 15, 2001. The court held that because the City had not sent a notice of changed assessment for 2000, and the court had reduced the assessment for 1999, the City had no authority to continue using the unmodified 1999 assessment for 2000. The court ordered the City to amend the tax bill on that parcel to conform to the value previously set by the court. In addition, the court ordered attorney's fees to Klovers in the amount of $1,050.

¶6 The City filed a notice of appeal from both of the above orders. However, we have previously determined, in orders dated April 6, April 18, and June 26, 2001, that the City's appeal from the first order is not timely, and our review is confined to the second order. The City's first two arguments on appeal are short and vague, but they appear to be directed at the 1999 assessment, which was decided in the circuit court's first order, and therefore is not before us in this appeal. We do not address them further.

¶7 The City's third and fourth arguments are, essentially, that the circuit court should not have taken jurisdiction over the 2000 assessment without Klovers having filed an appeal to the board of review for the year 2000, and also because the certiorari proceeding on the 1999 assessment was over at the time Klovers

asked the court to issue the order for 2000. We agree that the court erred in setting the assessment for the year 2000, for several reasons.

¶8 One concern with the court's order for 2000 is that the court set the assessment at a particular value. When reviewing an assessment on certiorari, the court does not itself set the value, but instead it remands to the board for further proceedings. ***Nankin v. Village of Shorewood***, 2001 WI 92, ¶21, 245 Wis. 2d 86, 630 N.W.2d 141. In addition, certiorari review is confined to the record made before the board. ***Id.*** at ¶20. In the present case, no record from the board of review was before the court as to the 2000 assessment. Indeed, the absence of a record makes plain the fundamental problem. The circuit court in this case was acting in certiorari, reviewing a board's decision on the 1999 assessment. This posture simply does not bring before the court any question on the 2000 assessment.

¶9 Klovers argues that the court could properly set her 2000 assessment pursuant to ***Duesterbeck v. Town of Koshkonong***, 2000 WI App 6, 232 Wis. 2d 16, 605 N.W.2d 904. She states that in ***Duesterbeck*** the property owner sought certiorari review of a 1993 assessment, the town did not send a notice of assessment to the property owner in 1994, and we then affirmed the circuit court's decision to set the assessment for both 1993 and 1994. Klovers has mischaracterized ***Duesterbeck***. First, the action in ***Duesterbeck*** was not a certiorari review. The property owners there pursued claims for unlawful taxes and excessive assessments under WIS. STAT. §§ 74.34 and .37. ***Id.*** at ¶1. Their claims were decided on summary judgment, after discovery, rather than by review of the administrative record. ***Id.*** at ¶8. Second, Klovers is incorrect in stating that the town did not send notices of assessment for 1994. The ***Duesterbeck*** opinion

expressly states that the record did not show whether such notices were sent. ***Id.*** at ¶23 n.13.

¶10 In ***Duesterbeck***, the town sought to restrict the claims of certain plaintiffs to only 1993, on the ground that those plaintiffs had not filed objections to their 1994 assessments with the board of review under WIS. STAT. § 70.47(7) (1999-2000).[1] ***Duesterbeck***, 2000 WI App 6 at ¶17. We held that because the plaintiffs had put the town on notice by filing an objection for 1993, they were not obligated to file another objection for 1994 in order to preserve their claim for that year, also. ***Id.*** at ¶23.

¶11 ***Duesterbeck*** has little applicability to the present case because of a significant difference between certiorari review and a claim that is litigated de novo in circuit court. *See generally,* ***Nankin***, 2001 WI 92 at ¶¶24-25 (differences between certiorari review and other assessment court actions discussed). In ***Duesterbeck***, as we said above, the facts were developed in discovery, and the case was decided on a summary judgment record. Therefore, in ***Duesterbeck*** the town had an opportunity to develop a factual record on the assessment for both 1993 and 1994, even though the property owners had not made objections to the board of review for 1994. However, in certiorari review, the court is confined to the record from the board of review. ***Id.*** at ¶25. If the certiorari court sets a 2000 assessment based only on its review of a 1999 record, when does either party have an opportunity to make a factual record on the assessment for 2000? The question is not merely academic, because in this case

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

the City is claiming that for 2000 the parcel in question changed in a material respect, and that the City could submit additional evidence supporting the assessment for 2000 that it did not submit to the board of review for 1999.

¶12 The circuit court's answer to this question appears to have been that when Klovers's certiorari review of 1999 was still pending at the time the assessment notices should have been issued for 2000, the City was obliged to send her such a notice, thereby giving her an opportunity to object to the board of review. From the City's perspective, however, such a notice under WIS. STAT. § 70.365 was *not* required, because that statute requires notice only when the assessment changes. It appears from the parties' letters to the court that the 2000 assessment did not change from the original 1999 assessment, which had not yet been reversed by the circuit court at the time the notices of assessment were issued. Rather than conclude that the City should somehow have foreseen the eventual reversal of its 1999 assessment, we think the answer instead lies in the fact that a property owner has another method to challenge an excessive assessment, in addition to certiorari review of a proceeding before the board of review. *See* ***Nankin***, 2001 WI 92 at ¶3.

¶13 One of the other methods is for the property owner to pay the tax and proceed under WIS. STAT. § 74.37 with a claim for an excessive assessment, as the property owners in ***Duesterbeck*** did. This statute makes it clear that the property owner can pursue this method even when the City has not sent a notice of change of assessment, and the property owner has not objected to the board of review. *See* WIS. STAT. § 74.37(4)(a). If the City disallows the claim, the property owner may then file an action in circuit court. In this type of action, unlike certiorari, the court's review is not confined to the record, and the court may take evidence and make its own determination. ***Nankin***, 2001 WI 92 at ¶25.

If Klovers had filed this type of claim for 2000, and the City had disallowed it, both parties could then have made a factual record in court, notwithstanding the fact that there was no proceeding before the board of review for that year.

¶14 Finally, we consider whether Klovers's letter asking the circuit court to set her assessment for 2000 can be construed as the commencement of the type of action we just described under WIS. STAT. § 74.37. We conclude it cannot. Before filing a court action, the property owner must submit the claim to the clerk of the taxation district or county in writing, and allow ninety days for the district or county to decide the claim. WIS. STAT. § 74.37(2)(b)5 and (3). Klovers's letter to the court describes telephone contact with the City, but there is no suggestion or evidence in the record that she submitted the claim in writing to the clerk and waited ninety days before requesting judicial relief. Furthermore, even if we construed her letter as an action under § 74.37, the court's decision for 2000 cannot be affirmed because the City's assessment is presumptively valid unless rebutted by evidence, ***Nankin***, 2001 WI 92 at ¶25, and this record contains no evidence of the proper valuation for 2000.

¶15 The City also argues that the court should not have awarded attorney's fees to Klovers as a sanction. This argument is made without citation to authority, and we conclude that the City has not identified a specific error made by the court in this decision.

¶16 Finally, Klovers asks us to award her attorney's fees for this appeal, presumably on the ground of frivolousness under WIS. STAT. RULE 809.25(3). While some of the City's argument in this appeal may be frivolous, not all of them are, and we have no authority to find individual arguments in a brief frivolous.

Nichols v. Bennett, 190 Wis. 2d 360, 365 n.2, 526 N.W.2d 831 (Ct. App. 1994), *aff'd on other grounds*, 199 Wis. 2d 268, 544 N.W.2d 428 (1996).

¶17 In summary, we reverse the circuit court order entered February 15, 2001, to the extent it makes any determination regarding the assessment for 2000. However, we affirm that order as it relates to attorney's fees. We deny Klovers's request that we find this appeal frivolous. In addition, because we affirm in part and reverse in part, we order no costs to either party for this appeal.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.