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DISTRICT II

October 28, 2020

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You are hereby notified that the Court has entered the following opinion and order:

2019AP1688

Historic Berlin School Apartments, LLC v. City of Berlin
(L.C. #2018CV27)

Before Reilly, P.J., Gundrum and Davis, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Historic Berlin School Apartments, LLC (Historic Berlin) appeals from a judgment dismissing its claims against the City of Berlin (the City). Historic Berlin asks this court to reverse and remand this case to the circuit court so that it may proceed with an unlawful tax claim on its 2017 tax assessment under WIS. STAT. § 74.35 (2017-18).¹ Based upon our review

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

Historic Berlin owns real property in the City, which it renovated from a former school building into a 40-unit apartment development. The property is a low-income housing development subject to federal tax credits under 26 U.S.C. § 42 (I.R.C. § 42). In 2017, the first full assessment year after the renovation, the City assessed the property at \$4,243,600 using the cost-approach method.² In 2018, the City reduced the assessment to \$886,500.

Historic Berlin filed suit seeking a partial refund of its property taxes for 2017 pursuant to an excessive assessment claim under WIS. STAT. § 74.37 and an unlawful tax claim under WIS. STAT. § 74.35. The parties filed cross-motions for summary judgment. The circuit court dismissed Historic Berlin’s excessive assessment claim, as Historic Berlin failed to attend a

² As Historic Berlin argues, our supreme court cautions against using the cost-approach method for subsidized housing because it requires including the impact of tax credits the owner receives, and WIS. STAT. § 70.32(1g) “prohibits assessors from considering the effect of [I.R.C. § 42] tax credits when valuing property.” *Regency W. Apartments LLC v. City of Racine*, 2016 WI 99, ¶30 n.12, 372 Wis. 2d 282, 888 N.W.2d 611. The circuit court determined that it was “undisputed” that the City’s assessor did not know of the I.R.C. § 42 tax credits when he assessed the property as “he had requested information from [Historic Berlin] but had not received it.” The court explained that the assessor “had to estimate the value of the property based on the information available to him *at the time*.” On appeal, Historic Berlin now argues that the “[t]he City’s assessor ... knew that the property was a low income subsidized property subject to tax credits.” The City, in response, argues that no evidence exists that the assessor was aware that the property was subject to tax credits, claiming that the assessor knew only that it was low-income subsidized housing, and his prior experience was with 42 U.S.C. § 1437f (HUD § 8) housing, which is “vastly different” from I.R.C. § 42. *See Regency West*, 372 Wis. 2d 282, ¶67.

prerequisite board of review hearing despite sufficient notice of the change in assessment.³ *See* § 74.37(4)(a). The circuit court also granted the City’s motion for summary judgment on the unlawful tax claim. Though Historic Berlin argued that the tax was “unlawful” because it included “exempt” property, the court found that “exempt” property for purposes of a § 74.35 unlawful tax claim is limited to the exemptions contained in WIS. STAT. § 70.11. As the value of I.R.C. § 42 tax credits is not found in § 70.11, the tax assessment, though an incorrect amount, was not an “illegal” tax. Instead, it had to be appealed as an excessive tax, not an unlawful tax. On reconsideration, Historic Berlin argued that an unlawful tax includes property exempt under WIS. STAT. § 70.112. According to Historic Berlin, § 70.112 specifically exempts “all intangible personal property,” which includes the value of I.R.C. § 42 tax credits, making it an unlawful tax. The circuit court refused to reconsider its decision on summary judgment. Historic Berlin appeals.

“Whether the circuit court properly granted summary judgment is a question of law that this court reviews de novo.” *Racine County v. Oracular Milwaukee, Inc.*, 2010 WI 25, ¶24, 323 Wis. 2d 682, 781 N.W.2d 88 (citation omitted). This case involves an issue of statutory interpretation, which we also review de novo. *DOR v. Menasha Corp.*, 2008 WI 88, ¶44, 311 Wis. 2d 579, 754 N.W.2d 95. A motion for reconsideration is reviewed for an erroneous

³ On appeal, Historic Berlin admits that it did not attend the board of review hearing, claiming it did not attend as it did not receive notice of the change in assessment. The parties litigated the issue of whether Historic Berlin received proper notice of the change in assessment before the circuit court, with Historic Berlin arguing that the City did not “wholly comply” with the notice requirement, as the notice was sent to Historic Berlin’s former address. The circuit court disagreed, concluding that Historic Berlin had received legally sufficient notice. Historic Berlin “does not seek review of that decision and limits its appeal solely to its unlawful tax claim.” Accordingly, we deem this issue abandoned.

exercise of discretion. *See Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶6, 275 Wis. 2d 397, 685 N.W.2d 853.

Historic Berlin brings its unlawful tax claim under WIS. STAT. § 74.35, which provides that “‘unlawful tax’ means a general property tax with respect to which one or more errors specified in [WIS. STAT. §] 74.33(1)(a) to (f) were made. ‘Unlawful tax’ does not include a tax in respect to which the alleged defect is solely that the assessor placed a valuation on the property that is excessive.” Sec. 74.35(1). As pertinent to this appeal, one of the errors listed under § 74.33(1) is that “[t]he property is exempt by law from taxation,” except where “the alleged error is solely that the assessor placed a valuation on the property that is excessive.” Sec. 74.33(1)(c), (2). Property that is exempt from taxation is listed in WIS. STAT. § 70.11.

We conclude that the circuit court properly granted the City’s motion for summary judgment, dismissing Historic Berlin’s claims in this case, and properly refused Historic Berlin’s motion for reconsideration. Historic Berlin’s argument is not that the property (the apartment development) being taxed is exempt. The property is not exempt from taxation because Historic Berlin does not challenge that this property was assessed in 2018 and thus concedes that the property is subject to assessment. Historic Berlin’s argument is that the assessor included amounts he should not have in the assessment—the I.R.C. § 42 tax credits—thereby making the assessment excessive. WISCONSIN STAT. § 74.33(1)(c) and (2) are clear that an unlawful tax claim is appropriate where the property being assessed is tax exempt, not when the assessed value of the property is allegedly excessive. *See also* WIS. STAT. § 74.35(1). Historic Berlin’s argument pursuant to WIS. STAT. § 70.112 would result in any property with some exempt component falling within § 74.35. Regardless, as the circuit court concluded, there is no evidence in the record that the City’s assessor included the I.R.C. § 42 tax credits in the

2017 assessment. This was an excessive tax claim that must be brought under WIS. STAT. § 74.37, which Historic Berlin admits it cannot challenge as it did not attend the board of review hearing.

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals