

Geneva Exchange Fund XVII, LLC,  
Petitioner,

**ORDER DENYING  
MOTION TO STRIKE**

vs.

File Nos. 19-C6-07-8009  
19HA-CV-08-931

County of Dakota,

Dated: November 19, 2009

Respondent.

The Honorable Sheryl A. Ramstad, Judge of the Minnesota Tax Court, tried this matter, on April 20-21, 2009, at the Minnesota Tax Court, Judicial Center, St. Paul, Minnesota.

Thomas Wilhelmy and Jennifer Kitchak, Attorneys at Law, represented the Petitioner.

Suzanne W. Schrader, Assistant Dakota County Attorney, represented the Respondent.

At the end of trial, the Court set a post-trial briefing schedule. When Petitioner filed its Reply Brief, it raised for the first time the ability of Joel Miller to serve as Respondent's expert appraiser in the case. Petitioner subsequently brought this Motion to Strike the testimony of Joel Miller and exhibits related thereto. The Court set a briefing schedule on the timeliness of Petitioner's Motion, and the matter was submitted to the Court for decision on September 8, 2009.

The issue is whether Petitioner is timely in challenging the ability of Joel Miller of the Dakota County Assessor's Office to testify as an expert appraiser.

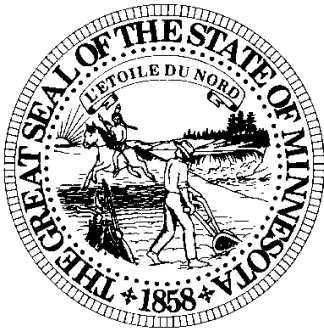
The Court upon all of the evidence adduced at the hearing, and upon the files, records and proceedings herein, now makes the following:

**ORDER**

Petitioner's Motion to Strike the testimony of Joel Miller, and exhibits related thereto, is hereby denied.

IT IS SO ORDERED.

BY THE COURT,



---

Sheryl A. Ramstad, Judge  
MINNESOTA TAX COURT

DATED: November 19, 2009

**Memorandum**

**Background**

At issue in this property tax appeal is the market value of a multi-tenant business center known as "Nicollet VI" ("Subject Property"). The trial took place on April 20 and 21, 2009. In post-trial briefing to this Court, Petitioner requested that the Court strike from evidence Respondent's appraisal report submitted at trial because its author does not hold a Minnesota appraiser's license. Subsequently, Petitioner brought this Motion to Strike, and on August 5,

2009, the Court ordered additional post-trial briefing with respect to: 1) the admissibility of the Appraiser's testimony and related exhibits; 2) the timeliness and manner of Petitioner raising the matter of admissibility; and 3) what impact exclusion of the evidence has on the outcome of the case. The matter was submitted for decision on September 8, 2009.

For the reasons below, we deny Petitioner's Motion to Strike the testimony of Joel Miller and the exhibits related to his testimony.

In Petitioner's post-trial reply brief, Petitioner for the first time raised an objection to the admissibility of the expert testimony of Joel Miller ("Mr. Miller"), of the Dakota County Assessor's Office, in the trial of this matter in April 2009. At trial, Mr. Miller's qualifications were addressed by both counsel, and Petitioner's attorney, after cross-examining Mr. Miller as to foundation, made no objection to Mr. Miller's testimony or to his appraisal being admitted into evidence. For the reasons discussed below, we find that Petitioner waived its objection to the admission of Mr. Miller's testimony and appraisal and deny the Motion to Strike.

The issue concerning the qualifications of assessors arose recently in the The Shoppes of Woodbury Village, LLC v. County of Washington<sup>1</sup> where the county assessor, who was not a licensed appraiser, prepared an appraisal report and was prepared to testify as an expert witness. Upon objection by petitioner's counsel, the Court excluded the report and refused to allow the assessor to testify as an expert witness. Petitioner relies upon that case to support its argument that a member of the Dakota County Assessor's Office

---

<sup>1</sup> File Nos. CX-07-2880, 82-CV-08-1506, 82-CV-08-5768.

should similarly be precluded from testifying in this case. Here, however, we need not address the underlying issue as to the ability of assessors to provide appraisal testimony at trial because Petitioner's objection to the admission of expert testimony of Joel Miller is untimely.

Minnesota Rule of Evidence 103 specifies that an error in admitting evidence at trial will be found only when a timely objection to the evidence is made, as follows:

**103. Rulings on Evidence**

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context....<sup>2</sup>

Here, Petitioner waived the right to challenge the admissibility of Mr. Miller's testimony and the exhibits related thereto by failing to object at the time of trial. It would be a serious departure from the Minnesota Rules of Evidence and standard trial practice to allow a party to sit silently throughout trial, raising its objections to evidence and witnesses testimony after the record is closed and post-trial briefs have been submitted. Under these circumstances, we find Petitioner waived its object to Mr. Miller's testimony and the exhibits offered through him.

Petitioner objected to Mr. Miller's testimony and exhibits related thereto for the first time in its Reply Brief. Minnesota Tax Court Rules of

---

<sup>2</sup> Minn. R. Evid. 103.

Procedure, Rule 8610.0070, pertaining to Tax Court motion practice, states in sections 5C and 6C that “the moving party may submit a reply memorandum, limited to new legal or factual matters raised by an opposing party’s response to a motion.” The Tax Court practice applies a similar rule to trial briefs where reply briefs are limited to new matters raised in the opposing party’s brief. In Dahl v. Commissioner of Revenue,<sup>3</sup> this procedural rule was the basis for the Court disregarding nonresponsive issues raised in a post-trial reply brief. Here, as in Dahl, no new issues were raised in Respondent’s initial post-trial brief regarding the subject matter addressed in Petitioner’s Reply Brief. Because Petitioner’s Reply Brief went beyond the scope of responding to Respondent’s arguments, Petitioner’s challenge to Mr. Miller’s testimony was improper and untimely.

In Lowertown Five L.P. v. County of Ramsey<sup>4</sup> we declined to consider petitioner’s unequal assessment claim when it did not address the claim at trial, but only in its post- trial brief, stating as follows:

Petitioner did not raise the issue of equal assessment at trial. No testimony or evidence was introduced on this claim...This Court is not required to take judicial notice of possible facts relating to claims that are not even raised at trial and only mentioned as an afterthought in the post trial brief.

In MacAloon v. Commissioner of Revenue<sup>5</sup> we determined that a legal issue raised for the first time in a post-trial brief was untimely. The appellant claimed in its post-trial brief that the statute in question was unconstitutional.

---

<sup>3</sup> Dkt. No. 4949 (Minn. Tax Ct. May 10, 1989).

<sup>4</sup> File No. C7-01-1964 (Minn. Tax Ct. June 26, 2002).

<sup>5</sup> Dkt. No. 5593 (Minn. Tax Ct. Sept. 24, 1991).

Although this issue was raised before the Tax Court issued its final decision in that case, it was raised after the facts were in evidence. Denying appellant's motion to transfer to district court, we held that raising the issue for the first time in trial briefs following submission of stipulated facts was untimely.

Petitioner argues that Minn. Stat. § 599.04 requires courts to take judicial notice of common law and statutes, citing the criminal case of State v. Stufflebean<sup>6</sup> as support for its position. In that case, a pro se defendant who was convicted of fourth-degree criminal sexual conduct and attempted third-degree criminal sexual conduct raised objections after trial to the prosecutor's closing argument. Although that decision clarifies the general rule that a party's failure to object constitutes a forfeiture of the right to have the issue considered on appeal, the court declined to strictly apply the rule because the defendant was not represented by counsel at trial. Here, however, Petitioner is represented by counsel, and this is not a criminal proceeding.

Petitioner's reliance upon Hubbard v. Montgomery Ward & Co.<sup>7</sup> is similarly misplaced. In that case, the issue of whether the defendant's objection was untimely was only summarily discussed, as the motion for a new trial was granted on other grounds.<sup>8</sup>

Based upon the foregoing, we deny Petitioner's Motion to Strike the testimony of Joel Miller and the exhibits related thereto.

S. A. R.

---

<sup>6</sup> 329 N.W.2d 314 (Minn. 1983).

<sup>7</sup> 21 N.W.2d 229 (Minn. 1945).

<sup>8</sup> Id. at 135.