Lund v. U.S.

85 AFTR 2d 2000-1083

OPINION

The United States District Court for the District of Utah Central Division.

Memorandum Decision

Judge: SAM, District Judge:

I. Introduction

Before the court are cross motions for summary judgment. The material facts are generally undisputed. Plaintiffs' vacation home at Sundance, Utah was damaged a second time by an avalanche in 1993. (An avalanche in 1986 is alleged to have caused damage to the home of approximately $90,000.) Pursuant to Section 165(c)(2) of the Internal Revenue Code of 1986, plaintiffs claimed a casualty loss on their 1993 federal income tax return in the amount of $221,759.51. The cost to repair the actual physical damage caused by the second avalanche was approximately $9,000.00. The Internal Revenue Service ("IRS") denied the claimed deduction. Plaintiffs appealed to the IRS Appeals Office which also denied the deduction.

II. Summary Judgment Standard

Under Fed. R. Civ. P. 56, summary judgment is proper only when the pleadings, affidavits, depositions or admissions establish there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. The burden of establishing the nonexistence of a genuine issue of material fact is on the moving party. 1 E.g., Celotex Corp. v. Catrett, 477 U.S. 317 (1986). This burden has two distinct components: an initial burden of production on the moving party, which burden when satisfied shifts to the nonmoving party, and an ultimate burden of persuasion, which always remains on the moving party. See 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure section 2727 (2d ed. 1983).

When summary judgment is sought, the movant bears the initial responsibility of informing the court of the basis for his motion and identifying those portions of the record and affidavits, if any, he believes demonstrate the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. In a case where a party moves for summary judgment on an issue on which he would not bear the burden of persuasion at trial, his initial burden of production may be satisfied by showing the court there is an absence of evidence in the record to support the nonmovant's [pg. 2000-1084] case. 2 Id., 477 U.S. at 323. "[T]here can be no issue as to any material fact...[when] a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id.

Once the moving party has met this initial burden of production, the burden shifts to the nonmoving party to designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324.

If the defendant in a run-of-the-mill civil case moves for summary judgment...based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other, but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict...

Liberty Lobby, 477 U.S. at 252. The central inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. If the nonmoving party cannot muster sufficient evidence to make out a triable issue of fact on his claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law. Id., 477 U.S. 242.

III. Discussion

Defendant contends "a casualty loss is limited to the decline in a home's fair market value resulting from a natural disaster...that is directly linked to actual physical damage to the subject property or to its use and may not include any diminution in fair market value attributable to buyer resistance." Defendants' Memo in Support at 4. On the other hand, plaintiffs assert that, because their home is in an avalanche zone, the use of the home is permanently restricted during winter months and the drop in the appraisal value of their home is not due to mere temporary buyer resistance.

Section 165 of the Internal Revenue Code allows a tax deduction for "any loss sustained during the taxable year and not compensated for by insurance or otherwise." 26 U.S.C. section 165(a). For individuals a loss under section 165(a) is limited to "losses of property not connected with a trade or business or a transaction entered into for profit, if such losses arise from fire, storm, shipwreck, or other casualty, or from theft." Id. at section 165(c). The value of the loss is to be determined as follows:

In determining the amount of loss deductible under this section, the fair market value of the property immediately before and immediately after the casualty shall generally be ascertained by competent appraisal. This appraisal must recognize the effects of any general market decline affecting undamaged as well as damaged property which may occur simultaneously with the casualty, in order that any deduction under this section shall be limited to the actual loss resulting from damage to the property.

(ii) The cost of repairs to the property damaged is acceptable as evidence of the loss of value if the taxpayer shows that (a) the repairs are necessary to restore the property to its condition immediately before the casualty, (b) the [pg. 2000-1085] amount spent for such repairs is not excessive, (c) the repairs do not care for more than the damage suffered, and (d) the value of the property after the repairs does not as a result of the repairs exceed the value of the property immediately before the casualty.

Treas. Reg. section 1.165-7(a)(2).

The parties have not cited, nor is the court aware of any Tenth Circuit authority squarely addressing the matter presented here. Section 165 has been interpreted by case authority as not being intended to cover loss in market value not due to physical damage directly caused by the casualty. For example, in Kamanski v. Commissioner, 477 F.2d 452 [31 AFTR 2d 73- 1157],

(9th Cir. 1973), it was found that a drop in the market value of the taxpayers' residence was due to buyer resistance rather than damage directly caused by the casualty, in that case a landslide. The court held as follows,

The loss claimed by the taxpayers was not attributable to the slide itself, but to the existence of soil conditions that the occurrence of the slide served to demonstrate. The loss in market value was not due to damage caused by the casualty, but to buyer predictions that future casualties would cause further damage. This may well be an accurate prediction but the claim of loss must await the event. Loss of value based upon such a prediction is not deductible as casualty loss under section 165(c)(3).

Id. 477 R.2d 452-453. See also Citizen's Bank of Weston v. Commissioner, 252 F.2d 425 [1 AFTR 2d 951] (4th Cir. 1958)(upholding IRS denial of taxpayer bank's casualty loss for a flood to its basement based on fear of future loss, rather than costs of repairs). The United States Tax Court has consistently held that a claimed casualty loss due to fluctuation in market value or temporary buyer resistance is not deductible.

Where alleged losses result from a mere fluctuation in [market] value, there is no deductible loss. Thornton v. Commissioner, 47 T.C. 1 (1966); Peterson v. Commissioner, 30 T.C. 660 (1958). See also Pulvers v. Commissioner, 407 F.2d 838 [23 AFTR 2d 69-678] (9th Cir. 1969), affg. 48 T.C. 245 (1967). (No deduction allowed where landslide destroyed neighboring homes, but there was no actual physical damage to taxpayer's property; casualty loss depends upon actual physical damage, not, hypothetical loss, mere fluctuation in value, or temporary buyer resistance.)

Radding v. Commissioner, 55 T.C.M. (CCH) 1029, 1034 [¶88,250 PH Memo TC] (1988). However, in Finkbohner v. United States, 788 F.2d 723 [57 AFTR 2d 86-1400] (11th Cir. 1986) a distinction was drawn between temporary buyer resistance causing a temporary decline in property in value after a natural disaster and loss of property value due to a permanent change in the land or surrounding land.

We conclude...that evidence showing willing buyers temporarily pay less for property only recently subjected to flooding, will not by itself justify retaining in an award determined by loss in market value, the portion ascertainably or inferentially due to such a factor. This is to allow the property owner to deduct the consequences of future disasters as well as his own. We know the volatile market will decline sharply on occurrence of a natural disaster, yet will rebound when it is no longer fresh in people's minds. New and more costly houses will then replace those the flood damaged. It is different when the impact of the flood on the market value shows itself not wholly but chiefly in the expectation that additional floods will in future occur, but more directly in changes in the neighborhood, or acts of public officials, that will outlast the fresh recollection of disaster.

Id. at 788 F.2d at 727.

[1] Here the basis of plaintiffs' deduction is the restricted use of their home in winter months due to avalanche risk and a lower appraisal value attributed to anticipated buyer resistance because of avalanche risk. In support it its position plaintiffs state that the Utah County Sheriff on occasion has closed access to their home, and at times discouraged them from visiting their home in winter months. Plaintiffs also state that their home cannot be completely protected from avalanche danger and that several homes in the area have [pg. 2000-1086] been destroyed and may not be rebuilt. The court is of the opinion that those conditions are not the permanent changes contemplated by Finkbohner entitling the taxpayer to a casualty loss deduction.

The Eleventh Circuit held that due to the permanent nature of the change caused by the flood (i.e., the destruction of the seven houses and the governmental mandate that the lots remain as open space), the owners of the remaining homes were entitled to a section 165 deduction...In doing so the court recognized that it was not the fear and apprehension of would-be buyers that another flood would damage the area that allowed the section 165 deduction...Rather, it was the permanent change that the flood had caused to the surrounding area (the seven permanently empty lots).

Philmon v. United States, No. 98-246- C.V.T. 246(A), 1999 WL 793683, at *2, [84 AFTR 2d 99-6037] (M.D. Fla. Aug. 25, 1999) (charactering Finkbohner). Because plaintiffs have not established a loss in value due to permanent change, the court concludes they are not entitled to the casualty loss deduction in question for the 1993 tax year.

IV. Conclusion

For the foregoing reasons, plantiffs' motion for summary judgment is Denied and defendant's motion for summary judgment is Granted.

Dated this 20th day of January, 2000.

1 Whether a fact is material is determined by looking to relevant substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

2 In his dissent in Celotex, Justice Brennan discussed the mechanics for discharging the initial burden of production when the moving party seeks summary Judgment on the ground the nonmoving party - who will bear the burden of persuasion at trial - has no evidence:
Plainly, a conclusory assertion that the nonmoving party has no evidence is insufficient. Such a `burden' of production is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment. Rather, as the Court confirms, a party who moves for summary judgment on the ground that the nonmoving party has no evidence must affirmatively show the absence of evidence in the record. This may require the moving party to depose the nonmoving party's witnesses or to establish the inadequacy of documentary evidence. If there is literally no evidence in the record, the moving party may demonstrate this by reviewing for the court the admissions, interrogatories and other exchanges between the parties that are in the record. Either way, however, the moving party must affirmatively demonstrate that there is no evidence in the record to support a judgment for the nonmoving party.
477 U.S. at 323 (citations omitted).