Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D30371
H/prt

_____AD3d_____ Argued - January 21, 2011

DANIEL D. ANGIOLILLO, J.P.
ARIEL E. BELEN
CHERYL E. CHAMBERS
SHERI S. ROMAN, JJ.

2009-07489 DECISION & ORDER
2010-00121

In the Matter of Shore Development Partners,
appellant, v Board of Assessors, et al., respondents.

(Index Nos. 410881/07, 413368/08, 411931/08)

Schroder & Strom, LLP, Mineola, N.Y. (Robert N. Goldstein of counsel), for appellant.

John Ciampoli, County Attorney, Mineola, N.Y. (Gerald R. Podlesak of counsel), for respondents.

In related proceedings pursuant to RPTL article 7 to review the tax assessments of the petitioner's real property for the tax years 2007/2008 and 2008/2009, the petitioner appeals (1) from an order of the Supreme Court, Nassau County (Bucaria, J.), entered July 8, 2009, which denied those branches of its motion which were for summary judgment on so much of the petitions as sought to reclassify the subject property from Class Four commercial to Class One residential for the tax years 2007/2008 and 2008/2009, to reduce the assessments for those tax years based on the reclassification, and for corresponding tax refunds, including statutory interest, for both tax years, in effect, denied that branch of its motion which was for summary judgment on so much of the petitions as sought to reduce the final assessment of the property for the 2008/2009 tax year to the level of the 2008/2009 tentative assessment, and, in effect, searched the record and awarded summary judgment to the respondents dismissing the petitions, and (2), as limited by its brief, from so much of an order of the same court entered November 20, 2009, as, upon reargument, adhered to the original determination.

ORDERED that the appeal from the order entered July 8, 2009, is dismissed, as that

order was superseded by the order entered November 20, 2009, made upon reargument; and it is further,

ORDERED that the order entered November 20, 2009, is modified, on the law, (1) by deleting the provision thereof, upon reargument, adhering to so much of the determination in the order entered July 8, 2009, as, in effect, searched the record and awarded summary judgment to the respondents dismissing the petitions and substituting therefor a provision, upon reargument, vacating that portion of the determination in the order entered July 8, 2009, (2) by deleting the provision thereof, upon reargument, adhering to so much of the determination in the order entered July 8, 2009, as denied those branches of the petitioner's motion which were for summary judgment on so much of the petitions as sought to reclassify the subject property from Class Four commercial to Class One residential for the tax years 2007/2008 and 2008/2009, to reduce the assessments for those tax years based on the reclassification, and for corresponding tax refunds, including statutory interest, for both tax years, and substituting therefor a provision, upon reargument, vacating so much of the determination in the order entered July 8, 2009, as denied those branches of the petitioner's motion, and thereupon granting those branches of the petitioner's motion; as so modified, the order entered November 20, 2009, is affirmed insofar as appealed from, and the matter is remitted to the Supreme Court, Nassau County, for further proceedings in accordance herewith; and it is further,

ORDERED that one bill of costs is awarded to the petitioner.

The petitioner sought, inter alia, to reclassify its real property under RPTL article 18 from Class Four commercial to Class One residential for the tax years 2007/2008 and 2008/2009, and requested a corresponding reduction in the assessments for those tax years based on the reclassification. The petitions alleged that the subject property had been misclassified, and that the assessments were excessive, unequal, and unlawful. Subsequently, the petitioner moved, inter alia, for summary judgment on so much of the petitions as alleged that the property was misclassified, and that the assessments were unlawful and excessive.

In an order entered July 8, 2009, the Supreme Court denied the petitioner's motion, and, in effect, searched the record and awarded summary judgment to the respondents dismissing the petitions. Thereafter, the petitioner moved for leave to reargue. In an order entered November 20, 2009, the Supreme Court granted leave to reargue but, upon reargument, adhered to its original determination. This appeal by the petitioner ensued, and we modify.

"While the Supreme Court has the power to award summary judgment to a nonmoving party, predicated upon a motion for that relief by another party, it may not search the record and award summary judgment on a cause of action if no party has moved for it" (*Lima v NAB Constr. Corp.,* 59 AD3d 395, 397 [citation omitted]; *see Rimany v Town of Dover,* 72 AD3d 924, 925). Here, the petitioner moved, inter alia, for summary judgment on so much of the petitions as alleged that the subject property was misclassified, and that the assessments were unlawful and excessive. Therefore, procedurally, the Supreme Court should not have searched the record and awarded the respondents summary judgment dismissing so much of the petitions as alleged that the assessments were unequal (*see Dunham v Hilco Constr. Co.,* 89 NY2d 425, 429-430; *Lima v NAB Constr. Corp.,* 59 AD3d at 397).

On the merits, as relevant here, Tax Class One includes real property constituting vacant land outside Manhattan "provided that any such vacant land which is *not zoned residential* must be situated immediately adjacent to property improved with a residential structure [and] owned by the same owner as such immediately adjacent residential property" (RPTL 1802[1][d] [emphasis added]; *see Matter of Richmond County Country Club v Tax Commn. of City of N.Y.,* 53 AD3d 661). Although the statute makes no explicit provision for the tax classification of vacant parcels which, like the subject property, are zoned for mixed residential and commercial use, we agree with the petitioner that the subject property should have been classified as Class One residential. To the extent that there is any ambiguity in the statutory phrase "not zoned residential" (RPTL 1802[1][d]), "it must be construed most strongly in favor of the taxpayer and against the taxing authority" (*Matter of Astoria Gas Turbine Power, LLC v Tax Commn. of City of N.Y.,* 14 AD3d 553, 558, *affd* 7 NY3d 451; *see Matter of Manhattan Cable TV Servs., Div. of Sterling Info. Servs. v Freyberg,* 49 NY2d 868, 869; *Matter of Orange & Rockland Utils. v City of Middletown Assessor,* 269 AD2d 451, 452; compare *Matter of Caplan v Commissioner of Fin. of City of N.Y.,* 220 AD2d 324, 325, citing *Matter of Grace v New York State Tax Commn.,* 37 NY2d 193, 196).

Accordingly, upon reargument, the Supreme Court should have granted those branches of the petitioner's motion which were for summary judgment on so much of the petitions as sought to reclassify the subject property from Class Four commercial to Class One residential for the tax years 2007/2008 and 2008/2009, to reduce the assessments for those tax years based on the reclassification, and for corresponding tax refunds, including statutory interest, for both tax years.

The petitioner contends that the respondents improperly consolidated the various tax lots comprising the subject property, added additional property to the consolidated lot, and increased the assessments of the consolidated lot during the period between the issuance of the tentative and final tax rolls for the 2008/2009 tax year. As a result, the petitioner contends that it is entitled to a reduction in the final assessment of the property for the 2008/2009 tax year to the level of the 2008/2009 tentative assessment. However, the petitioner failed to establish, prima facie, that the subject parcels were improperly consolidated into a "superblock" and reassessed during the 2008/2009 tax year. Accordingly, upon reargument, the Supreme Court properly adhered to so much of the order entered July 8, 2009, as, in effect, denied that branch of the petitioner's motion which was for summary judgment on so much of the petitions as sought to reduce the final assessment of the property for the 2008/2009 tax year to the level of the 2008/2009 tentative assessment. However, the Supreme Court erred by, in effect, searching the record and awarding summary judgment to the respondents dismissing those portions of the petitions.

ANGIOLILLO, J.P., BELEN, CHAMBERS and ROMAN, JJ., concur.

ENTER:

Matthew G. Kiernan
Clerk of the Court