

**Matter of Brookdale Physicians' Dialysis Assoc., Inc. v
Department of Fin. of the City of N.Y.**

2014 NY Slip Op 34073(U)

February 10, 2014

Supreme Court, New York County

Docket Number: Index No. 101244/2013

Judge: Margaret A. Chan

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Margaret A. Chan
Justice

PART 52
INDEX 101244/2013
DECISION AND ORDER

IN RE OF THE MATTER OF THE APPLICATION
OF BROOKDALE PHYSICIANS' DIALYSIS
ASSCO, ET AL., ,

Petitioners,

- vs. -

THE DEPARTMENT OF FINANCE OF THE
CITY OF NEW YORK,

Respondent.

FILED

FEB 13 2014

NEW YORK
COUNTY CLERK'S OFFICE

Petitioners Brookdale Physicians' Dialysis Associates, Inc. (Brookdale Dialysis) and Samuel and Bertha Schulman Institute for Nursing and Rehabilitation Fund, Inc. (Schulman Inst.) claim that respondent Department of Finance acted arbitrarily and capriciously in revoking the tax exempt status of their building retroactively to 2001. Schulman Inst. brought this Article 78 proceeding to annul the DOF's determination and to obtain a declaratory judgment that the building is wholly tax exempt from 2001 to present. The Department of Finance of the City of New York (DOF) opposed the petition and cross-moved to dismiss it.

FACTS

Brookdale Dialysis is a domestic for profit corporation that occupies the first floor and basement in a building located at 9701 Church Avenue, Brooklyn, New York, which has been owned by Schulman Inst. since sometime in 1996. Schulman Inst. is an not-for-profit corporation that provides funds in support of charitable healthcare purposes through The Schulman and Schachne Institute for Nursing and Rehabilitation (Nursing Institute) and The Brookdale Hospital Medical Center (Brookdale Hospital). Both Nursing Institute and Brookdale Hospital are located at One Brookdale Plaza, Brooklyn, New York - one block from the subject building - and are affiliated with each other under the Brookdale Health System.

Petitioners claim that Brookdale Dialysis services 80% of the patients from Brookdale Hospital; its physicians work at Brookdale Hospital and the Nursing Institute, and its nurses, technicians and staff are Brookdale Hospital staff. Brookdale Hospital relies on Brookdale Dialysis' machines and they are used in providing over 8,000 in-patient treatments a year, about 22,000 treatments are done for out-patients in the subject building. The building had been granted an exemption pursuant to Section 420a of the Real Property Tax Law. A letter dated March 22, 2013, from the DOF stated that it learned that a commercial entity occupied the property as of September 1996, and therefore, the property was no longer eligible for the exemption.

DISCUSSION

Initially, the DOF argues that this court does not have jurisdiction over this matter as it should have been brought under Article 7 of the Real Property Tax Law. However, as petitioners seek to restore an exemption which were previously granted, petitioners may seek relief by way of an Article 78 proceeding (*see Hewlett Associates v City of New York*, 57 NY2d 356 [1982]).

Secondly, as the DOF is revoking a previously granted tax exemption, it has the burden of proof that the property is no longer eligible for the exemption (*see Congregation Rabbinical Coll. Of Tartikov, Inc. v Town of Ramapo*, 17 NY3d 763, 764 [2011]). The DOF does not include any evidence to support its cross-motion. It relies on the fact that Brookdale Dialysis is a for profit corporation, and as such, it is not used for exempt purposes. However, the Court of Appeals have stated that the exclusive use language in RPTL 420-a is not to be read literally (*see Matter of Adult Home at Erie Sta., Inc. v Assessor & Bd. Of Assessment Review of City of Middletown*, 10 NY3d 205, 214 [2008] *citing Matter of Symphony Space v Tishelman*, 60 NY2d 33, 38 [1983]). In that Brookdale Dialysis performs a great deal to further the charitable activities of Brookdale Hospital and the Nursing Institute, and is apparently quite enmeshed with them in terms of staffing, whether its service is reasonably incidental to or in furtherance of the exempt purpose must be considered (*see Hapletah v Assessor of Town of Fallsburg*, 79 NY2d 244 [1992]). No such consideration was presented here.

The DOF argues that the petition is insufficient to establish its eligibility for the exemption. Petitioners submit two affidavits, but they are conclusory and insufficient. For example, there is no information as to the use of the remainder of the building.

Accordingly, the petition is granted only to the extent that the determination revoking the exemption is annulled and the cross-motion is denied in its entirety.

This constitutes the decision and order of the court.

Dated: February 10, 2014


Margaret A. Chan, J.S.C.

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