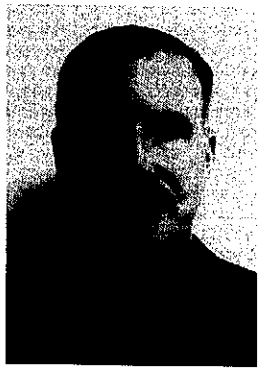

Tax *Certiorari*, Eminent Domain and Real Property Exemptions in 2016

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2015 WAS ANOTHER BUSY YEAR in the field of tax *certiorari*, eminent domain and real property tax exemptions. Reported cases from the Appellate Divisions and Trial Courts covered a variety of topics including Real Property Tax Law (RPTL) §727, valuation methodology, abandonment, procedural issues, discovery, tax exemptions and eminent domain issues.

RPTL §727

Central to these two appeals is the language, purpose and legislative intent of RPTL §727 which states, in relevant part, that "where an assessment being reviewed pursuant to this article is found to be unlawful, unequal, excessive or misclassified by final court order or judgment, the assessed valuation so determined shall not be changed for such property for the next three succeeding assessment rolls prepared on the basis of the three taxable status dates next occurring on or after the taxable status date of the most recent assessment under review in the proceeding subject to such final order or judgment."[1]

In *ELT Harriman, LLC v. Assessor of Town of Woodbury*,[2] in a prior related proceeding, Rutherford Chemicals, LLC ("Rutherford"), the owner of

several parcels of vacant land, filed challenges to assessments on the parcels for tax years 2006 and 2007, seeking a reduction due to environmental contamination. In 2007, Rutherford sold the property to Petitioner in a negative value transaction, in which Rutherford agreed to pay $5,614,061 for expenses related to the remediation of the environmental contamination.[3] The purchase agreement also acknowledged the existence of tax *certiorari* proceedings relating to the parcels, and that any reductions would not affect the agreement.[4] Petitioner subsequently filed petitions challenging assessments for tax years 2008 through 2010.[5] At that time, Petitioner did not seek to intervene in the 2006/07 petitions, or seek to consolidate them with the later petitions. Respondents subsequently entered into a consent judgment with Rutherford reducing the assessments for tax years 2006 and 2007, whereupon Petitioner sought to intervene, arguing that the settlement, binding as the three year moratorium would be on the tax years following 2007 pursuant to RPTL §727, affected Petitioner's 2008 through 2010 petitions, particularly in light of a preliminary appraisal showing a substantially lower value; however, the motion to intervene was denied.[6]

Respondents, following the settlement, moved to dismiss the 2008 through 2010 petitions pursuant to RPTL §727, which motion the trial court granted.[7] The Court affirmed, holding that the language of RPTL §727(1) clearly applied the three year moratorium on assessment increases to the years following the last year settled, namely to tax years 2008 through 2010, barring Petitioner's challenge. While RPTL §727(2) contains certain exceptions to the application of the moratorium, none of those pertain to a change in ownership.[8] As to Petitioner's argument that *Susquehanna Development, LLC v. Assessor of City of Birmingham*, 185 Misc.2d 267, 712 N.Y.S.2d 817 (Supreme Court, Tompkins County, 2000) bars as unconstitutional the application of RPTL §727 to subsequent *bona fide* purchasers for value, the Court distinguished *Susquehanna*, finding that here Petitioner could have participated in the 2006/2007 proceedings, and that there is no uncontroverted evidence that the assessment exceeded the fair market value of the property in the tax years at issue.[9]

In *Matter of Torok Trust v. Town Board of Town of Alexandria*,[10] Petitioner filed a RPTL Article 7 petition challenging the assessment of its tax parcel for tax year 2007. The related School District was properly served but did not intervene. In 2009, Petitioner and Respondent stipulated to a settlement of the challenge, including refunds for any overpayments, and that the RPTL §727 moratorium would apply to the settlement. The District subsequently issued a refund for tax year 2007, but refused a refund for the 2008 year,

and Petitioner moved to compel the refund. The District opposed, arguing that Petitioner had failed to commence an Article 7 proceeding for 2008.[11] The trial court granted the order to compel, and the Court affirmed, declining to follow *Scellen v. Assessor for City of Glens Falls*, 300 A.D.2d 979, 753 N.Y.S.2d 536 (3d Dep't 2002). The Court found that the language, as well as the legislative history of RPTL §727(1), make clear that the statute applied a moratorium to the three tax years following the last (and only) challenged tax year, 2007, and that the statute further mandated refunds during those three years where overpayments had already been made in those years due to the former (reduced) assessments. In effect, according to the Court, due to the settlement, RPTL §727 automatically reduced the assessments for 2008 through 2010, without Petitioner having to challenge those assessments.[12]

Property Valuation

Residential

In *Carroll v. Assessor of City of Rye,*[13] Petitioner challenged reassessments made by the city assessor in several years due to improvements made to the house during some of those years, based on the assessor's estimate of the percentage of completion of the residence. The trial court determined that the reassessments were unconstitutional as selective reassessment, and reduced the assessments.[14] The Court reversed, holding that the assessor merely estimated market value, considered comparable sales, and construction costs, in determining assessed value, while Petitioner had failed to show that newly-constructed property was assessed at a higher percentage of value than existing property, and therefore failed to establish selective reassesment.[15]

Agricultural

In *Peaceful Valley Land Stewardship, LLC v. Johnson,*[16] Petitioner, owner of an agricultural property, secured Town Planning Board permission to subdivide the property into nine tax parcels. Immediately after the subdivision, Petitioner donated a conservation easement encumbering eight of the nine parcels, prohibiting or limiting residential development on nearly all of the parcels. Petitioner also owned an adjoining parcel which he also donated a conservation easement on the property.[17] In 2009, the assessor reassessed the adjoining parcel, which Petitioner challenged. In 2011, following a town-wide revaluation, all the parcels were reassessed; Petitioner subsequently challenged the assessments on five of the parcels (including the separate parcel). After a trial, the petitions were dismissed

and Petitioner appealed.[18] The Court held that, while Petitioner had raised a valid and credible dispute regarding valuation of the parcels, it failed to show that Respondent had overvalued the properties.[19] The Court found that valuation by their current, agricultural use, was appropriate, contrary to Petitioner's appraiser, who had incorrectly valued them at their highest and best use, and had therefore chosen comparable properties which did not have an agricultural use like the subject properties. Respondent also, the Court held, properly declined to reduce the value for the conservation easement since the easement did not impair Petitioner's agricultural use of the property during the tax years at issue.[20] For the adjoining parcel, which was vacant land put to no particular use, Petitioner failed to establish that Respondent overvalued the parcel.[21]

Hotel

In *Village Square of Penna, Inc. v. Board of Assessment Review of Town of Colonie*,[22] petitioner hotel operator filed RPTL Article 7 challenges to the assessment of a parcel improved by a hotel, for tax years 2010 and 2011. At trial, Petitioner's appraiser employed the income capitalization method, and primarily using the property's actual finances arrived at full market valuations of $13,300,000.00 and $12,109,000.00 respectively. Respondents' appraiser also employed an income capitalization methodology, but generally used market figures and arrived at fair market valuations of $26,200,000.00 and $26,000,000.00. The trial court credited Petitioner's appraiser's testimony, and adopted his valuations.[23] Post-judgment, Respondents moved to modify, contending that the award erred in going below the value Petitioner had sought before the Board of Assessment Review, and in the Article 7 petitions. Petitioner cross-moved to amend the pleadings to conform to the proof at trial; the trial court granted the cross-motion.[24] While affirming as to the trial court's crediting of Petitioner's testimony, including well-settled law that actual income is the best indicator of value,[25] the Court reversed insofar as to the trial court's valuations, it being equally well-settled law that RPTL §720(1)(b) prohibits reductions in assessments below the valuation sought in the Article 7 petitions.[26]

Big Box Retail

In *Home Depot USA Inc. v. Assessor of Town of Queensbury*,[27] petitioner home-improvement store commenced a RPTL Article 7 action to challenge its assessment for two tax years. At trial, both appraisers employed comparable sales and income capitalization methodologies (Respondent's appraiser also used reproduction cost).[28] Petitioner's appraiser's comparable

sales analysis used seven "big-box" properties based on the fee simple value of the property, unencumbered by ground leases, which were located outside the general area of the subject. Respondent's appraiser, on the other hand, utilized two big-box stores with long term leases. For his income capitalization analysis, Petitioner's appraiser used second-generation lease properties (those formerly occupied by other big-box retailers), and rejected "build-to-suit" leases as above market value, while Respondent's appraiser utilized the latter. The Court found that it was not an abuse of discretion for the trial court to have accepted Petitioner's appraiser's methodology, as his choice of comparables, including those outside the area of the subject, was adequately supported and explained.[29]

Commercial Office Space

In *Techniplex III v. Town and Village of East Rochester*,[30] Petitioners, related companies, brought RPTL Article 7 proceedings to challenge the tax assessment of three commercial properties for tax years 2009 through 2011. The Court granted the petitions after trial, and Respondents appealed. The Court found that Petitioners had, as an initial matter, presented substantial evidence of overvaluation of the parcels, and that they ultimately established, by a fair preponderance of the evidence, that the challenged assessments were excessive.[31] The Court also held that there was no evidence that the actual rents were arbitrary or collusive, and therefore Petitioners properly relied on actual, rather than market rents, in their income capitalization analysis.[32] In addition, the Court found that it was proper for the trial court to rely on the 30 year net ground lease as best reflective of the future value of the parcel, and to decline to assign a market value to space rented free of charge in a distressed rental market.[33]

Retail Pharmacy

In *Rite Aid Corp. v. Huseby*,[34] Petitioner, a retail pharmacy operator, challenged assessments relating to tax years 2008/2009 through 2012/2013. The pharmacy is operated under a 20-year triple net lease, at a rent of $358,634 per year, and was constructed in 2002 under a build-to-suit arrangement with the prior owner. A 2005 sale of the premises was for $4,903,634.00. At trial, the court rejected the recent sale and actual rent as not of probative value and awarded a reduction of the assessment to Petitioner.[35] On appeal, the Court found that, while all of Petitioner's appraiser's comparable properties in his sales analysis were local, he erroneously declined to employ those with national pharmacy chains or those subject to build-to-suit leases, or to put much weight on

recent sales of retail drug stores in his valuation.[36] Respondent's appraiser, on the other hand, identified and employed a national survey to identify proper comparable properties, including those constructed by build-to-suit arrangements, and gave the recent sale great weight in determining value.[37] Petitioner's appraiser's income methodology also improperly rejected the actual contract rent, as well as the rents of other net lease national drugstore properties, and relied on non-pharmacy properties to derive market rent. Respondent's appraiser, to the contrary, used eleven rental comparables, nine of which were national chain pharmacies.[38] Thus, the Court concluded, the trial court improperly relied on Petitioner's appraisal in concluding value, was against the weight of the evidence, and the determination should be reversed and the petitions dismissed.[39]

Abandonment

In *Traditional Links, LLC v. Board of Assessors of Town of Riverhead,*[40] Petitioner golf course operator filed RPTL Article 7 proceedings seeking review of tax assessments for tax years 2004/05 through 2007/08. In 2008, Petitioner filed and served Notes of Issue regarding tax years 2005/06 and 2006/07, and soon thereafter the parties commenced an audit of Petitioner's books and records pursuant to 22 NYCRR 202.59(c), Respondent stating at that time that it considered tax year 2004/05 abandoned for failure to file a Note of Issue within four years of commencement. In 2012, Petitioner filed and served Notes of Issue for tax years 2004/05 and 2007/08; thereafter, Respondent moved to dismiss those tax years pursuant to RPTL §718 for Petitioner's failure to file Notes of Issue within four years of commencement of those actions.[41] Petitioner opposed, asserting that it had filed timely Notes of Issue in the other tax years, that discovery (the audit) was proceeding with regard to all of the tax years, and that the parties had also participated in court conference regarding all of the tax years.[42] The trial court denied the motion to dismiss tax years 2004/05 and 2007/08, and the Court modified to grant dismissal of those years, finding that, while Notes of Issue were timely filed regarding tax years 2005/06 and 2006/07, no Notes of Issue were filed within four years of the commencement of the tax year 2004/05 and 2007/08 petitions.[43] Absent filing of a timely note of issue, or a stipulation or court order extending the time within which to file, it was error for the trial court to fail to dismiss the tax year 2004/05 and 2007/08 petitions.[44]

Procedural Issues

Article 7 vs Article 78 Action

In *Highbridge Broadway, LLC v. Assessor of City of Schenectady,*[45] Petitioner commercial property owner, although eligible for a business investment property tax exemption after 2005 on the property, did not apply for the exemption until 2008. In 2008, Petitioner commenced a RPTL Article 7 action, contesting the valuation placed on the exemption. Although only filing the challenge for that tax year, Petitioner subsequently sought summary judgment for tax years through 2014. Supreme Court granted judgment.[46] The Court reversed, holding that RPTL Article 7 requires yearly challenges to tax assessments, or relief for overassessments, including those relating to exemptions, is waived.[47]

In *Karl v. Martin,*[48] Petitioners commenced RPTL Article 7 proceedings seeking to reduce the assessments on a number of tax parcels. Petitioners each served their respective petitions *via* certified mail rather than personal service pursuant to RPTL §708(1). Respondents returned each of the petitions as nullities, and moved to dismiss for lack of personal jurisdiction pursuant to CPLR § 3211(a)(8). Petitioners cross-moved for extensions of time to re-serve; the trial court denied Respondent's motion on the ground that the defect in service could be disregarded, and denied the cross-motion as moot.[49] The Court reversed, holding that RPTL §708(1) permits only personal service of the petition; failure to so serve is defective service and requires dismissal.[50]

Discovery

In *Aylward v. Assessor, City of Buffalo,*[51] Petitioners, challenging tax assessments for their residences, appealed from an order of the trial court granting discovery, including mandated interior inspections of their homes or preclusion for failure to consent to the inspection. The Court reversed, finding that the assessors had failed to show that interior inspections of the taxpayers' homes were reasonable and necessary to prepare their defense against the challenge. Submission of expert's affidavit, which stated that there was no adequate substitute for interior inspection in preparing a self-contained appraisal report, nevertheless also stated that such inspections were not always required under uniform standards for appraisal, nor required by statute or court rule.[52] Respondents also failed to demonstrate that their interest in conducting such expenses outweighed Petitioners' Fourth Amendment privacy rights.[53]

Real Property Tax Exemptions

In *Greater Jamaica Development Corporation v. NYC Tax Commission*[54] respondent City of New York revoked the tax exemption enjoyed by the owner's property, a public parking lot. The owner challenged the determination in a CPLR Article 78 action, which was dismissed on motion. The Second Department reversed, holding that Respondent failed to meet its burden (due to its having revoked the exemption) to demonstrate that the use of the property for public parking was not a tax–exempt use by the owner of the parcel.[55] A property owner which is an entity whose not-for-profit status has been recognized by the Internal Revenue Service, and whose property is used solely for charitable purposes, has made a presumptive showing of entitlement to the exemption.[56] The Court of Appeals reversed and reinstated the dismissal of the petition, holding that an organization's Internal Revenue Code charitable status does not create a presumption that the organization is entitled to a charitable tax exemption.[57] The Court also held that, where the economic benefit of below-market rate parking inures to the benefit of private enterprise, and the garage operation was not reasonably incident to the charitable purpose of promoting commerce and business growth in a city, such parking is not a charitable use entitled to a property tax exemption.[58]

In *United Health Services Hospitals, Inc. v. Assessor of Town of Vestal,*[59] Petitioner, a not-for-profit corporation and operator of hospitals and other health care services, signed a ground lease designating it as the owner of certain property owned by another corporation. Petitioner then improved the property with a premises designated for hospital use, and applied for an exemption for the entire parcel. After the application was denied, it commenced RPTL Article 7 and CPLR Article 78 actions to challenge the denial. Upon a concession that 3.95% of the building was not entitled to an exemption, the trial court entered judgment for a partial (96.05%) exemption.[60] On appeal, the Court found that the lease vested title to all improvements, and other incidents of ownership, in Petitioner, such that Petitioner is the owner for RPTL §420-a exemption purposes.[61]

EMINENT DOMAIN

In *Metropolitan Transportation Authority v. Longridge Associates, LP,*[62] Claimant owner of vacant land filed claim for taking by Condemnor in eminent domain.[63] At trial, the court rejected Condemnor's appraisal since the evidence showed the highest and best use of the property was retail, as asserted by Claimant, and not vacant land, as asserted by Condemnor's

appraiser. The trial court thus accepted the Claimant's appraisal with minor modifications.[64] The Court affirmed, finding that the determination as to highest and best use (retail) was proper, and also that the trial court's modifications to Claimant's appraisal were adequately explained and within the range of expert testimony.[65]

In *Rocky Point Realty, LLC v. Town of Brookhaven,*[66] Claimant owned a parcel of real property zoned commercial improved with a vacant Burger King restaurant, upon which it sought to develop an automobile parts dealer. After entering into a lease consistent with that use, Claimant obtained site plan approval for such development. Thereafter Condemnor commenced a proceeding to take the parcel in eminent domain. Upon the taking, Claimant filed the instant claim for damages.[67] At trial, both appraisers determined commercial development to be the highest and best use, and both used the sales method for valuation. Claimant's appraisal, focused on high-end retail, valued the premises at $1,387,500.00 while Condemnor's appraiser's value was $910,000.00. While the trial court rejected the Claimant's appraiser's use of high-end retail comparable sales, it found the Condemnor's appraisal below market value, and determined value at $1,120,125.00.[68] The Court affirmed, finding the commercial highest and best use (arrived at by both appraisers) appropriate. The Court also noted that the trial court had accorded more weight to the Condemnor's comparable sales, and its award was adequately explained and within the range of expert testimony.[69]

ENDNOTES

1 N.Y. Real Prop. Tax Law §727(1) (McKinney's 2016).

2 *ELT Harriman, LLC v. Assessor of Town of Woodbury,* 128 A.D.3d 201, 203, 7 N.Y.S.3d 423 (2d Dep't 2015), *lv. to appeal denied,* 26 N.Y.3d 918 (2016).

3 *Id.* at 203-4, 7 N.Y.S.3d at 423.

4 *Id.* at 204, 7 N.Y.S.3d at 423-24.

5 *Id.* at 204, 7 N.Y.S.3d at 424.

6 *Id.* at 204-5, 7 N.Y.S.3d at 424.

7 *Id.* at 205-6, 7 N.Y.S.3d at 424-5.

8 *Id.* at 207-9, 7 N.Y.S.3d at 426-27.

9 *Id.* at 209-11, 7 N.Y.S.3d at 427-29.

10 *Torok Trust v. Town Bd. of Town of Alexandria,* 128 A.D.3d 97, 98, 7 N.Y.S.3d 748, 749 (4th Dep't), *lv. to dismissed by* 25 N.Y.3d 1098, *rearg. denied by* 26 N.Y.3d 959 (2015).

11 *Id.*

12 *Id.* at 98-100, 7 N.Y.S.3d at 749-51.

13 *Carroll v. Assessor of City of Rye*, 123 A.D.3d 924, 999 N.Y.S.2d 155, 156 (2d Dep't 2014).

14 *Id.* at 925, 999 N.Y.S.2d at 156.

15 *Id.* at 925-26, 999 N.Y.S.2d at 157.

16 *Peaceful Valley Land Stewardship, LLC v. Johnson*, 132 A.D.3d 999, 18 N.Y.S.3d 184 (2d Dep't 2015).

17 *Id.* at 999-1000, 18 N.Y.S.3d at 185.

18 *Id.* at 1000, 18 N.Y.S.3d at 185.

19 *Id.* at 1001, 18 N.Y.S.3d at 186.

20 *Id.*

21 *Id.* at 1001-2, 18 N.Y.S.3d at 186.

22 *Village Square of Penna, Inc. v. Board of Assessment Review of Town of Colonie*, 123 A.D.3d 1402, 999 N.Y.S.2d 610 (3d Dep't 2014), *lv. to appeal denied*, 25 N.Y.S3d 903 (2015).

23 *Id.* at 1403, 999 N.Y.S.2d at 611.

24 *Id.* at 1404, 999 N.Y.S.2d at 611-12.

25 *Id.* at 1404-5, 999 N.Y.S.2d at 612-13.

26 *Id.* at 1405-6, 999 N.Y.S.2d at 613.

27 *Home Depot USA Inc. v. Assessor of Town of Queensbury*, 129 A.D.3d 1427, 12 N.Y.S.3d 364, 365 (3d Dep't 2015), *lv. to appeal denied*, 26 N.Y.S.3d 915 (2016).

28 *Id.* at 1428, 12 N.Y.S.3d at 365-66.

29 *Id.* at 1429-30, 12 N.Y.S.3d at 367.

30 *Techniplex III v. Town and Village of East Rochester*, 125 A.D.3d 1412, 3 N.Y.S.3d at 521, 523 (4th Dep't 2015).

31 *Id.* at 1412-13, 3 N.Y.S.3d at 523.

32 *Id.* at 1413-14, 3 N.Y.S.3d at 523-24.

33 *Id.* at 1415, 3 N.Y.S.3d at 525.

34 *Rite Aid Corp. v. Huseby*, 130 A.D.3d 1518, 1519, 13 N.Y.S.3d 753, 754 (4th Dep't 2015), *lv. to appeal denied*, 132 A.D.3d 1329, 17 N.Y.S.3d 374 (4th Dep't 2015), *lv. to appeal denied*, 26 N.Y.S.3d 916 (2016).

35 *Id.*

36 *Id.* at 1520-21, 13 N.Y.S.3d at 755-56.

37 *Id.* at 1521, 13 N.Y.S.3d at 756.

38 *Id.* at 1521-23, 13 N.Y.S.3d at 756-57.

39 *Id.* at 1523, 13 N.Y.S.3d at 757.

40 *Traditional Links, LLC v. Board of Assessors of Town of Riverhead*, 128 A.D.3d 978, 10 N.Y.S.3d 273 (2d Dep't 2015), *lv. to appeal denied*, ___ N.Y.3d ___ (N.Y. March 31, 2016).

41 *Id.* at 979, 10 N.Y.S.3d at 275.

42 *Id.*

43 *Id.* at 979-80, 10 N.Y.S.3d at 275-76.

44 *Id.* at 980, 10 N.Y.S.3d at 275-76.

45 *Highbridge Broadway, LLC v. Assessor of City of Schenectady,* 124 A.D.3d 1193, 2 N.Y.S.3d 679, 680 (3d Dep't), *lv. to appeal granted in part, dismissed in part by* 25 N.Y.3d 1097 (2015).

46 *Id.* at 1193-94, 2 N.Y.S. 3d at 680.

47 *Id.* at 1195, 2 N.Y.S. 3d at 681-2.

48 *Karl v. Martin,* 127 A.D.3d 1294, 6 N.Y.S.3d 746,747 (3d Dep't 2015).

49 *Id.* at 1294-95, 6 N.Y.S.3d at 747.

50 *Id.* at 1295, 6 N.Y.S.3d at 747-48.

51 *Aylward v. Assessor, City of Buffalo,* 125 A.D.3d 1344, 1345, 3 N.Y.S.3d 818, 819 (4th Dep't), *appeal dismissed by* 25 N.Y.3d 1056 (2015).

52 *Id.* at 1345-46, 3 N.Y.S.3d at 820.

53 *Id.* at 1346, 3 N.Y.S.3d at 820.

54 *Greater Jamaica Dev. Corp. v. NYC Tax Comm'n,* 25 N.Y.3d 614, 621, 15 N.Y.S.3d 738, 740 (2015).

55 *Id.* at 621-22, 15 N.Y.S.3d at 741.

56 *Id.* at 622, 15 N.Y.S.3d at 741.

57 *Id.* at 623, 627, 15 N.Y.S.3d at 742, 744-45.

58 *Id.* at 629-31, 15 N.Y.S.3d at 746-48.

59 *United Health Servs. Hosps., Inc., v Assessor of Town of Vestal,* 122 A.D.3d 1177, 1178, 997 N.Y.S.2d 786, 787(3d Dep't 2014), *lv. to appeal denied by* 25 N.Y.3d 909 (2015).

60 *Id.*

61 *Id.* at 1179, 997 N.Y.S.2d at 787-88.

62 *Metropolitan Transp. Auth. v. Longridge Assocs., LP,* 122 A.D.3d 856, 997 N.Y.S.2d 461 (2d Dep't 2014).

63 *In re Metropolitan Transp. Auth.*, 37 Misc.3d 1227(A), 961 N.Y.S.2d 359 (Table), 2012 N.Y. Slip Op. 5202(U) *1 (N.Y. Sup. Ct., Putnam Cty., 2012), *aff'd by Metropolitan Transp. Auth. v. Longridge Assocs., LP,* 122 A.D.3d 856, 997 N.Y.S.2d 461 (2d Dep't 2014).

64 *Metropolitan Transp. Auth.*, 122 A.D.3d at 857-58, 997 N.Y.S.2d at 463-64.

65 *Id.*

66 *Rocky Point Realty, LLC v. Town of Brookhaven,* 126 A.D.3d 706, 707, 7 N.Y.S.3d 139, 140 (2d Dep't 2015).

67 *Id.*

68 *Id.* at 707, 7 N.Y.S.3d at 140-41.

69 *Id.* at 707-08, 7 N.Y.S.3d at 141-42.

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