

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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JOSEPH MANDEL, DAVID WEISZ and RACHELLE WEISZ, PEARL SCHLESINGER, JOEL REICH, ABRAHAM SCHWARTZ and ISSAC BISTRITZKY,

DECISION/ORDER

Petitioners,

Index No:
6169/06

-against -

BOARD OF ASSESSORS FOR THE TOWN OF WOODBURY, AND THE TOWN OF WOODBURY,

Motion Date:
8/9/07

Respondents.

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In the Matter of the Application of JOEL & BRENDA ABRAMSON, et al.,

DECISION/ORDER

Petitioners,

Index No:
8877/06

-against -

THE TOWN OF WOODBURY, a Municipal Corporation, ROLAND TIFFANY, SOLE ASSESSOR FOR THE TOWN OF WOODBURY, THE COUNTY OF ORANGE, THE MONROE-WOODBURY SCHOOL DISTRICT, and THE CORNWALL SCHOOL DISTRICT,

Motion Date:
8/9/07

Respondents.

-----X

LaCAVA, J.

The following papers numbered 1 to 17 were considered in connection with this motion by respondents to dismiss petitioners Joseph Mandel, David Weisz and Rachel Weisz, Pearl Schlesinger, Joel Reich, Abraham Schwartz, and Isaac Bistritzky (Mandel)'s claims, and the respective petitions of Mandel and Joel and Brenda Abramson, et al. (Abramson) insofar as they seek a declaratory judgment against Respondent Town of Woodbury (Town) for equal protection violations of the New York State and U.S. Constitutions:

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION	1
NOTICE OF PETITION/PETITION/AFFIRMATIONS/EXHIBITS	2
ATTORNEY AFFIRMATION/AFFIDAVIT/EXHIBITS	3
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Two separate cases currently pending before us involve the same municipality and the same basic facts. In Mandel, petitioners assert selective reassessment in the preparation by the Town of the 2006 tax rolls relating to their properties. Petitioners' properties are concededly in a single area of the town (five of the properties are in Section 13, and one in adjacent Section 14); and all of the properties were purchased by petitioners within five years of the properties' reassessment, and five of those six were purchased within 18 months thereof. Only one of the properties was the subject of improvements by the owner (the Weisz parcel). The assessments on the properties were raised substantially, ranging from a low of 22% (with an increase in the land value of 85%) to a high of 280%. Notably, it was mainly the land portions of these assessments which were increased. In addition, the increase to the

Weisz parcel's assessment, after the improvements, allegedly exceeded the cost of the improvements to the property. Finally, they assert, the Town reassessed only these six out of 192 neighboring, similarly-situated properties.

As counsel in the Mandel matter notes, and the Town does not contradict, the final assessment roll for the Town of Woodbury was filed with the Office of the Town Clerk on Friday, June 30, 2006. The first official notice of the filing of the final roll appeared the following day, Saturday July 1, 2006, a day upon which no inspection of the roll was possible since Town Hall was closed. The first inspection of the roll was possible the following Monday, July 3, 2006. The Mandel petition, all parties concede, was filed on August 1, 2006.

In Abramson, petitioners likewise assert selective reassessment in the preparation of the tax rolls related to their properties. They are the owners of 170 town houses, all located in a single development in the town. These petitioners saw increases in their assessments of 40 to 60%, in virtually all of the instances (167 out of 170) without any improvements. In those latter 3 increases, the raise also allegedly exceeded the cost of improvements to those parcels. Finally, they argue that less than 25% of the town housing stock was reassessed, and that petitioners' parcels represented approximately 24% of these reassessments.

The assessor asserts that he conducted a town-wide reassessment pursuant to a comprehensive plan. However, the plan consisted of an initial examination of the properties in the locality based on a comparison of sales; from the analysis of the frequency of sale by style of home, he concluded that certain of the types or locations of properties in the town were "unfashionable"; these properties, due to their unpopularity, should thus, he concluded, be valued proportionally lower than the "popular" or "fashionable" styles of housing or areas in the municipality.

More particularly, the assessor noted that certain styles of residential housing, including small cape cod-style, ranch, and split-level houses, had experienced "essentially no sales in the last approximately three years." In contrast, the assessor noted from his review of the housing stock that both single family homes located in certain geographical areas of the municipality, and townhouses generally, experienced a considerable growth and/or turnover. The assessor concluded that this growth and/or turnover

served as a proxy for demand, and, after examining comparable sales of similar housing stock elsewhere in the locale, he increased the assessments for these two discrete groups of residential premises (the Mandel houses, and the Abramson townhouses), to be reflective, he asserted, of the current demand of that type or location of housing stock.

Notably, the municipality concedes that much of the home revaluation made pursuant to this analysis was limited to three, adjacent developments, while nearly all of the town-homes reassessed were in the same neighborhood; that not every property was reassessed (indeed, barely 20% of the residential properties were), much less examined; and that, in several instances, only the land portion of the assessment was increased. In addition, they recognize, as asserted above, that a significant number, albeit not all, of the parcels were purchased recently--within five years of the reassessment, by the current owners. Finally, the assessor also concedes that the assessment of similar properties in other areas of the municipality were not raised, nor had comparisons for the above-described analysis been made with similar properties outside of the municipality.

The Town now moves to dismiss the Mandel petition, alleging that the Article 7 portion of the petition is untimely, while the Article 78 portion of the petition is duplicative of the untimely-sought Article 7 relief¹. Mandel opposes the motion, asserting that there is clear evidence of selective reassessment in the Town's treatment of their parcels.

Timeliness of the Mandel Article 7 Petition

RPTL 516 provides

§ 516. Filing of final assessment roll; notice of completion

1. On or before the first day of July, the assessor or assessors shall complete the final assessment roll, deliver the original to the clerk of the county legislative body, and prepare and file a certified copy in the office of the city or town clerk.

¹While no motion is or has been pending in the Abramson matter, due to the similarity of issues the Court consolidated the two cases for the purpose of oral argument.

Further, pursuant to RPTL §702, which sets forth the venue and timing of an Article 7 petition,

§ 702. Place where and time within which proceeding to be brought

2. Such a proceeding shall be commenced within thirty days after the final completion and filing of the assessment roll containing such assessment. For the purposes of this section an assessment roll shall not be considered finally completed and filed until the last day set by law for the filing of such assessment roll or until notice thereof has been given as required by law, whichever is later.

Here, then, the 30-day period for the Mandel petitioners to commence any Article 7 special proceeding challenging the rolls commenced on July 1, 2006.

General Construction Law §25-a sets forth the manner in which time periods run, where such periods conclude on weekend days or public holidays. That statute provides

§ 25-a. Public holiday, Saturday or Sunday in statutes; extension of time where performance of act is due on Saturday, Sunday or public holiday

1. When any period of time, computed from a certain day, within which or after which or before which an act is authorized or required to be done, ends on a Saturday, Sunday or a public holiday, such act may be done on the next succeeding business day and if the period ends at a specified hour, such act may be done at or before the same hour of such next succeeding business day, except that where a period of time specified by contract ends on a Saturday, Sunday or a public holiday, the extension of such period is governed by section twenty-five of this chapter.

However, Mandel asserts that this section requires that the date **from which** the calculation of the 30-day period is be adjusted--

i.e. by **commencement** of the time period on the following Monday, because the date **from which** the calculation is to be made--the closing of the rolls--fell on a weekend day. To the contrary, the statute clearly sets forth an adjustment for the **conclusion**, not commencement, of periods, since they are adjusted solely when the "period of time...ends on a Saturday, Sunday, or a public holiday." (GCL §25-a, emphasis added.)

To be sure, Mandel is correct that the counting of the period (as opposed to its commencement) does start on the day following the date upon which it starts to run. GCL § 20 provides

§ 20. Day, computation

A number of days specified as a period from a certain day within which or after or before which an act is authorized or required to be done means such number of calendar days exclusive of the calendar day from which the reckoning is made. If such period is a period of two days, Saturday, Sunday or a public holiday must be excluded from the reckoning if it is [fig 1] an intervening day between the day from which the reckoning is made and the last day of the period. In computing any specified period of time from a specified event, the day upon which the event happens is deemed the day from which the reckoning is made. The day from which any specified period of time is reckoned shall be excluded in making the reckoning.

Mandel thus properly argues that the calculation of the 30-day period commences with the first date as the day after the period commences. However, since the 30-day period runs from July 1, 2006, it is counted by taking July 2 as the first day, and so on until 30 days are counted, leaving the 30th and last day of the period as July 31, 2006. As set forth previously, it is uncontested that the filing of the Article 7 petition occurred on August 1, 2006. Consequently, the Town correctly argues that the filing was on the 31st day after the closing of the rolls, and was thus untimely.

Article 78 Petition Duplicative of the Untimely Article 7 Petition

The Town also moves to dismiss the Petition pursuant to C.P.L.R. §7804 (f) on the grounds that Petitioners' proper remedy, if any, is under R.P.T.L. Article 7 and not C.P.L.R. Article 78. To be sure, as the Second Department stated in *Kaufman 42nd Street Co. v. Board of Assessors of Atlantic Beach*, 273 A.D. 2d 239, 240 (2d Dept. 2000), "Ordinarily, challenges to assessments on the grounds that they are illegal, irregular, excessive or unequal are to be made in a certiorari proceeding under RPTL Article 7." (See also *Rubin v. Board of Assessors of Town of Shandaken*, 175 A.D. 2d 494 (3d Dept. 1991). The Town, in particular, cites to *Krugman v. Board of Assessors of the Village of Atlantic Beach*, 141 A.D. 2d 175, 179-180 (2d Dept. 1988), where the Court indeed noted "Generally, a taxpayer who challenges his property assessment is relegated to a tax certiorari proceeding brought under the provisions of RPTL Article 7 for review of his assessment." And the Town accurately describes the Mandel Petition to the extent that Mandel alleges, in general terms only, that their equal protection constitutional rights were violated, e.g., that the assessments were the product of an invalid method of assessment, done without jurisdiction, and were unconstitutional and illegal.

As *Kaufman, supra*, quoting *Matter of Board of Mgrs. of Greens of N. Hills Condominium v. Board of Assessors of the County of Nassau*, 202 A.D. 2d 417, 419(2nd Dept. 1994), notes, however,

Ordinarily, challenges to assessments on the grounds that they are illegal, irregular, excessive or unequal are to be made in a certiorari proceeding under RPTL Article 7... However, where the challenge is based upon the method employed in the assessment of several properties rather than the overvaluation or undervaluation of specific properties, a taxpayer may forgo the statutory certiorari procedure and mount a collateral attack on the taxing authority's action through either a declaratory judgement action or a proceeding pursuant to CPLR Article 78... In reviewing a taxpayer's claim to determine whether this exception to the statutory procedure based upon the taxing authority's methodology has been demonstrated, mere allegations, unsupported by evidentiary matter, that the attack is on the methods employed rather than individual evaluations, are not enough to

relieve plaintiffs of the obligation to pursue their relief via the provisions of Article 7 of the Real Property Tax Law."

See also *Krugman, supra*, where the Court stated

However, certain exceptions to the exclusive jurisdiction of RPTL Article 7 exist. It is well recognized that where the jurisdiction of the taxing authority is challenged or the tax itself is claimed to be unconstitutional, one is not required to pursue a remedy under RPTL article 7...the taxpayer may properly forego the statutory certiorari procedure and mount a collateral attack on the taxing authority's action if the challenge is to the method employed in the assessment involving several properties rather than the overvaluation or undervaluation of specific properties. It is clear that C.P.L.R. Article 78 is available to the Petitioners if they can offer sufficient proof to demonstrate that their challenge to the assessment of the subject real properties in Paradise is based upon the Assessor's reassessment methodology.

Mandel (and, indeed, Abramson as well) contends that the Town Assessor's determination to increase their assessments was based upon a policy of "selective reassessment" since the "assessment of the property of petitioners has been made at a higher proportionate valuation than the assessments of other property within said tax district...."

The policy of selective reassessment has, of course, consistently been found by New York Courts to be a violation of the equal protection clause of both the United States Constitution and the New York State Constitution. (See, e.g., *Krugman*, 141 A.D. 2d, 184 supra

The respondents' practice of selective reassessment of only those properties in the village which were sold during the prior year contravenes statutory and constitutional mandates. In order to achieve uniformity and ensure that each property owner is paying an

equitable share of the total tax burden the assessors, at a minimum, were required to review all property on the tax rolls in order to assess the properties at a uniform percentage of their market value.

See also Feigert v. Assessor of the Town of Bedford, 204 A.D. 2d 543, 544 (2d Dept. 1994--"The petitioners herein have offered substantial proof that the 1991 assessment of their property is based directly upon the resale of the property in 1983...Accordingly, the Supreme Court properly determined that the 1991 assessment of the petitioners' property was invalid "); *Teja v. The Assessor of the Town of Greenburgh*, Supreme Court, Westchester County, Rosato, J., May 27, 2004--"Petitioners' argument, briefly stated, is that the only allowable increase in valuation above the assessment of June 1, 2001 could be one based solely on the addition of the kitchen appliances, which cost \$14,513.28. Anything more than this they contend is a 'welcome stranger' increase based on the purchase price of \$1,175,000.00 paid in April 2002. There was no town-wide reassessment of all similarly situated properties. This valuation technique is unconstitutional because it is a selective reassessment which denies equal protection guarantees.")

Here, the Mandel petitioners allege that the Assessor's policy regarding the Petitioners' assessments could be described as a policy of "selective reassessment", since reassessment of these properties--and apparently these properties alone--was based upon the rising market values of such properties in comparison to other, similarly situated properties in the Town. The properties' assessment increases also allegedly followed, as set forth above, recent sales, and in one case was based on improvements, the amount of increase allegedly exceeding the cost of the work done.

This Court has consistently held that "[W]hensoever an assessor changes the assessments of individual properties or of a particular type of property in a year when the entire roll is not revalued or updated, the assessor must be prepared to explain and justify the changes..."; "the assessor should be prepared to offer proof of his assessment methodology in general so as to successfully withstand any...challenge." (10 ORPS Opinions of Counsel SBRPS 60; see *MGD Holdings Hav v. Assessor of Town of Haverstraw*, 8 Misc3d 1013 (a) [Supreme Court, Rockland County, Dickerson, J., 2005].)

The Town in fact concedes that its valuation method involved

solely an analysis of the current "fashionability" of said properties vis-a-vis others in the town, and the use of such a determination as a measure of the value of said properties. In addition, this method was concededly not the result of a town-wide reassessment, and clearly resulted in reassessment of only a handful of recently-purchased properties in a single area of the town.

Petitioners have therefore properly pled an exception to the preference for tax certiorari challenges pursuant to RPTL Article 7, namely that the assessment increases were the product of equal protection violations by the Town, and offered substantial proof thereof. Consequently, the Town's motion to dismiss, based on its assertion that Petitioners have failed to offer sufficient proof to demonstrate that their challenge to the assessment of the subject properties was based upon an allegation that the Assessor's method of reassessing property values was erroneous, illegal, and unconstitutional, and, thus, could be challenged by way of a collateral proceeding pursuant to CPLR Article 78, must be denied.

In addition the Abramson petitioners have sought leave of Court for discovery pursuant to CPLR § 408, in particular depositions and documentary discovery relating to their claims. Petitioners having, as set forth above, provided substantial proof of the unconstitutionality of the assessment increases at issue here, the Court finds that the discovery sought by petitioners is appropriate, so long as petitioners notice said discovery demands pursuant to CPLR § 3120, and for documents relevant to the assessor's assessment methodology as alleged herein, and said the deposition of said assessor pursuant to CPLR § 3107, within 90 and 120 days, respectively, of the instant Order.

Finally, to the extent the Abramson and/or Mandel petitioners seek a declaratory judgment pursuant to CPLR Article 78 of the unconstitutionality of the assessor's assessment, said issues are not currently before the Court as not properly raised by a motion for summary judgment by those petitioners on those issues, or, in any event, on the current state of the record issues of fact remain with respect to those issues.

Based on the foregoing, it is hereby

ORDERED, that the Respondent's motion to dismiss petitioners Joseph Mandel, David Weisz and Rachel Weisz, Pearl Schlesinger, Joel Reich, Abraham Schwartz, and Isaac Bistritzky (Mandel)'s RPTL

Article 7 claims as untimely, is granted, to the extent that said RPTL Article 7 claims, and solely such claims, are hereby dismissed as untimely pled; and it is further

ORDERED, that the Respondent's motion to dismiss petitioners Joseph Mandel, David Weisz and Rachel Weisz, Pearl Schlesinger, Joel Reich, Abraham Schwartz, and Isaac Bistritzky (Mandel)'s CPLR Article 78 claims as duplicative of the aforementioned untimely RPTL Article 7 claims, is denied; and it is further

ORDERED, that the insofar as petitioner Mandel et al., seeks leave of Court pursuant to CPLR § 408 to demand documentary discovery pursuant to CPLR § 3120, and depositions pursuant to CPLR § 3107, said relief is granted, solely to the extent that petitioner Mandel is granted leave to serve discovery demands pursuant to CPLR § 3120, for documents relevant to the assessor's assessment methodology as alleged herein, and notice a deposition of said assessor pursuant to CPLR § 3107, within 90 and 120 days, respectively, of the instant Order, and is in all other respects denied.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: White Plains, New York
September ,2007

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