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COURT OF APPEALS

STATE OF NEW YORK

EASTBROOKE CONDOMINIUM, et al.,

Appellants,

-against-

No. 15

ELAINE AINSWORTH, et al.,

Respondents.

20 Eagle Street
Albany, New York
February 13, 2019

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: Good afternoon, everyone.
2 The first appeal on this afternoon's calendar is appeal
3 number 15, Matter of Eastbrooke Condominium v. Ainsworth.
4 Counsel?

5 MR. JACOBSON: Good afternoon, Your Honors.
6 Robert Jacobson for the appellant. I'd like to reserve two
7 minutes of rebuttal time.

8 CHIEF JUDGE DIFIORE: You may, sir.

9 MR. JACOBSON: This is a case involving a
10 condominium tax assessment challenge, and it deals with
11 several different parts of the Real Property Tax Law and
12 the Real Property Law.

13 CHIEF JUDGE DIFIORE: Can we get straight away to
14 339-y(4)? Isn't the statutory language clear there that
15 we're talking about an individual assessment?

16 MR. JACOBSON: What the language basically says
17 is that the board of managers can represent unit owners who
18 want to be represented, and it doesn't say you have to do
19 it over and over again every year; it just says if you want
20 to be appointed then you should be appointed, and - - - and
21 there's no end to it, and - - -

22 CHIEF JUDGE DIFIORE: I was referring to "an
23 assessment", the reference to "an assessment"; can that be
24 interpreted to be a single discrete assessment?

25



1 MR. JACOBSON: I think that would be nit-picking.

2 JUDGE FAHEY: But that's what we're here for.

3 MR. JACOBSON: Well, I know, we're here for - - -

4 JUDGE FAHEY: And it may be the only reason we
5 exist.

6 MR. JACOBSON: An - - - an assessment, I think it
7 can be - - - I don't think it's that narrow. If they
8 wanted to make it discrete for every single year, they
9 might have said that, and they don't have any deadline in
10 there for doing it. In fact, I think it could be done - -
11 -

12 JUDGE FAHEY: Has that issue been brought up
13 before, the distinction between - - - the "an assessment"
14 distinction?

15 MR. JACOBSON: The word "an"?

16 JUDGE FAHEY: Has it been discussed in the lower
17 courts?

18 MR. JACOBSON: I don't think anyone talked about
19 just the word "an"; they looked at the general language - -
20 -

21 JUDGE FAHEY: But - - -

22 MR. JACOBSON: - - - in the statute and the
23 argument was once - - - once someone's appointed the board
24 of managers to be their agent, now we're into the agency
25



1 rules and laws. And you know, you have to look at this
2 339-y. It's part of the Condominium Act and the Real
3 Property Tax Law. It's a condominium-friendly provision.
4 It's intended to let them have special valuation rules.
5 It's intended to let them ban together in one single
6 action. It was a remedial statute. It was something to
7 benefit them, to - - - to say - - -

8 JUDGE RIVERA: But by having a unit owner each
9 year, or for each assessment, fill out an authorization,
10 doesn't that make crystal clear that the unit owner wishes
11 to be part of the action or the challenge?

12 MR. JACOBSON: I think that's just good lawyering
13 because I knew my opponent wasn't going to let me, you
14 know, rest on that. Having it filled out every year is
15 good practice, but the plain language of the authorization
16 itself said it was good for past, present, and future
17 years. So it could go retroactive; it could go to the
18 future. And by retroactive - - -

19 JUDGE RIVERA: True. But are you suggesting that
20 counsel and a client could define the parameters of the
21 statute if the statute means otherwise?

22 MR. JACOBSON: Well, the statute just says you
23 need to appoint a board of managers to be your agent. Now,
24 once they're your agent - - -

25



1 JUDGE RIVERA: Through a written authorization?

2 MR. JACOBSON: Right, and the written
3 authorization says that's good until revoked.

4 JUDGE STEIN: That may be, but it doesn't say
5 it's good for the past.

6 MR. JACOBSON: The authorization says it's good
7 for the past. But here's the thing: if you appoint the
8 board of managers to be your agent, now we get into the
9 concept of agency provisions and the fact that, okay, I
10 missed the first year or the second year, or maybe I missed
11 a year in between; can I ratify the agency? The thing is
12 this: 339 - - -

13 JUDGE STEIN: But the statute, to me, is clear
14 about one thing, okay, and it's clear that you have to have
15 a written authorization.

16 MR. JACOBSON: Right.

17 JUDGE STEIN: And to me, it seems like there are
18 multiple purposes of that, but one may be to make it clear
19 to the assessors what is being grieved or challenged. And
20 so if you - - - you know, you - - - I don't see how you can
21 have the - - - the board of assessment review having to
22 figure out, you know, if it doesn't say that it's for the
23 future or if it doesn't say it's for, you know, whatever
24 period of time, how are they going to figure out?

25



1 That's one problem. And the other problem is is
2 that the board of managers doesn't have any authority at
3 all unless there is a written authorization.

4 MR. JACOBSON: Well, they have authority to bring
5 the action if they have one unit owner.

6 JUDGE STEIN: If they have one; that's right.

7 MR. JACOBSON: It doesn't mean that they're only
8 acting on behalf of that one. If someone signs up late,
9 can they get in with a ratification of the agency? And I
10 don't see anything wrong with that. This is a
11 taxpayer-friend provision.

12 JUDGE STEIN: So a taxpayer can decide, after
13 they know what the outcome is, to go back and say, okay,
14 now I want in, now I'll share the expenses?

15 MR. JACOBSON: Well, I guess they could. First
16 of all, there were no expenses in this case. The board
17 paid them, which they had a right to do.

18 JUDGE STEIN: But we're looking at this for
19 everybody.

20 MR. JACOBSON: But okay, looking at the big
21 picture for everybody; I understand that.

22 If they don't - - - if they decide to get in
23 later, can they get in backwards and forwards? I guess the
24 question is do you read 33-y - - - 339-y as a - - - as a
25

1 provision for the town board, a jurisdictional provision?
2 It's not. It's a separate provision. If you take a look
3 even what the Appellate Division said, they go - - -

4 JUDGE STEIN: But it's referred to in Article 5.

5 MR. JACOBSON: It's referred to, but here's the
6 thing. There's - - - you look at the Real Property Tax
7 Law, which has a lot of strict provisions for who can file
8 a tax case. By the way, if I filed a tax case this year,
9 and I didn't fill out my authorization form, the case law
10 would let me in; the case would let me in late.

11 In other words, if a petition was filed, and in
12 this case our petition said it was on behalf of all
13 Eastbrooke unit owners - - - there's even some of the
14 Appellate cases that say if even you didn't have an oral
15 permission to file, as long as you got it later on it was
16 okay. The cases that were cited in our brief. And on - -
17 - and on top of that, if you - - - even if you - - - so
18 they - - - they allow late authorizations under the Real
19 Property Tax Law.

20 JUDGE RIVERA: But up until when? How far does
21 that extend?

22 MR. JACOBSON: Well, part of it has to do with
23 when the town raises an objection. And in this case there
24 was no objection until the day of trial or until right
25



1 before trial. After a year - - -

2 JUDGE FAHEY: Let's stay with the cases that you
3 have an authorization for, and you have an initial
4 authorization, then you have subsequent years, because
5 we're going from what, 2008 to 2011?

6 MR. JACOBSON: Okay. I think - - -

7 JUDGE FAHEY: All right. So that doesn't cover -
8 - - there's 401 that could - - - people - - - or owners
9 that it could potentially - -- condo owners that it could
10 apply to. But let's assume it doesn't apply to all of
11 them. Would it still apply, though, to those people that
12 you actually had the authorizations for, once you have
13 them, those authorizations going forward?

14 MR. JACOBSON: I think it should because I'll
15 tell you why.

16 JUDGE FAHEY: Okay.

17 MR. JACOBSON: The tax law is flexible. They
18 allow late authorizations especially when the municipality
19 doesn't object. And Real Property Law - - -

20 JUDGE FAHEY: I'm not talking about late
21 authorizations.

22 MR. JACOBSON: Well, that's - - -

23 JUDGE FAHEY: No, no; stay with me.

24 MR. JACOBSON: Okay.

25



1 JUDGE FAHEY: I'm not talking about late
2 authorizations. What I'm talking about - - - there are
3 some cases you've got - - - some of the 401 you've got
4 authorizations for and some you don't. Let's assume the
5 ones you don't, they're out.

6 MR. JACOBSON: Okay.

7 JUDGE FAHEY: All right? So the question is is
8 that in 2008, if I signed the authorization, is it good for
9 all those four years, or is it only good for 2008? Do you
10 have to sign one in 2008, 2009, 2010? Do you see what I'm
11 saying?

12 MR. JACOBSON: It should be good for all the
13 years because - - -

14 JUDGE FAHEY: All right. Why?

15 MR. JACOBSON: - - - that's what it says; it's
16 good for - - - it's good for future years until revoked,
17 and nobody revoked the authorizations.

18 JUDGE FAHEY: So in other words, your argument is
19 that on that issue, not on whether it applies to everybody
20 else - - -

21 MR. JACOBSON: Right.

22 JUDGE FAHEY: - - - but on that issue what
23 matters is the authorization, and this authorization
24 complies with 339-y.

25



1 MR. JACOBSON: And 33 - - -

2 JUDGE RIVERA: But if the statute said an
3 authorization in each year, you couldn't - - - you're not
4 arguing that the - - -

5 MR. JACOBSON: If it's not - - -

6 JUDGE RIVERA: Excuse me - - - that the lawyer
7 and the client, nevertheless, could cite an authorization
8 that they wanted to apply to future years as one document.

9 MR. JACOBSON: Perhaps, unless the case law under
10 the Real Property Tax Law gave a waiver because the town
11 never objected. But if they gave leniency, which the law
12 regularly does - - -

13 JUDGE RIVERA: No, no, just if the statute read -
14 - -

15 MR. JACOBSON: If it specifically - - -

16 JUDGE RIVERA: - - - that you need one in every
17 year.

18 MR. JACOBSON: I guess that might be
19 questionable, but that's the big issue. In a tax case,
20 when you have a - - -

21 JUDGE RIVERA: No, no, no; it's a yes or no.

22 MR. JACOBSON: Well, if it said that, I think
23 there still might be leniency - - -

24 JUDGE FAHEY: Well, but - - -

25



1 MR. JACOBSON: - - - because that's what the Real
2 Property Tax Law does.

3 JUDGE FAHEY: Does the statute say that?

4 MR. JACOBSON: No, it doesn't say it.

5 JUDGE FAHEY: Okay.

6 JUDGE RIVERA: If the legislature's saying you
7 need this - - -

8 MR. JACOBSON: The legislature - - -

9 JUDGE RIVERA: - - - you need - - - just take my
10 hypothetical. The legislature expressly says you have to
11 have an authorization for each assessment each tax year?

12 MR. JACOBSON: I guess it would also have to say
13 and it can't be waived.

14 JUDGE GARCIA: May I ask you a que - - -

15 MR. JACOBSON: Like the statute of limitations,
16 it can't be waived.

17 JUDGE RIVERA: All right.

18 MR. JACOBSON: And these cases are remedial. And
19 ambiguities in tax assessment cases are supposed to be
20 construed to the benefit of the taxpayer.

21 JUDGE RIVERA: But what's the ambiguity in the
22 use of the singular - - -

23 MR. JACOBSON: Well - - -

24 JUDGE RIVERA: - - - which is what the chief
25



1 judge asked you before.

2 MR. JACOBSON: I guess you say an - - - "an
3 assessment". I mean, you can have an assessment every
4 year. I guess if I sign up for one year I'm - - - I'm in
5 for all years unless I revoke it. I - - - I just don't
6 think it's clear that the word "an" should be construed so
7 narrowly.

8 JUDGE RIVERA: You mean, if it's the same
9 assessment every year, once I've said I'm challenging that
10 assessment, I shouldn't have to keep - - -

11 MR. JACOBSON: No.

12 JUDGE RIVERA: - - - or I'm authorizing, excuse
13 me, the board to challenge that assessment on my behalf; is
14 that what you mean?

15 MR. JACOBSON: I say to the board: challenge the
16 case. I know it takes - - - these cases take years. Here,
17 challenge the case. If I do it in year one, I should be
18 allowed to just sit there and wait. I shouldn't have to do
19 it every year.

20 CHIEF JUDGE DIFIORE: Counsel, once last question
21 from Judge Garcia.

22 JUDGE GARCIA: One last question. Just to step
23 back for a second. As I understand it, as a very basic
24 understanding, you challenge the overall assessment of the
25



1 building, right?

2 MR. JACOBSON: Correct.

3 JUDGE GARCIA: And here, whatever, approximately
4 three million is knocked off the value, then they
5 reallocate that to the condominium.

6 MR. JACOBSON: Correct.

7 JUDGE GARCIA: So in signing on to a challenge,
8 the condominium owners are challenging that overall
9 assessment, right?

10 MR. JACOBSON: Correct.

11 JUDGE GARCIA: What if they're challenging the
12 allocation underneath? How do you do that?

13 MR. JACOBSON: That's what we do at trial. We do
14 that at trial. We - - -

15 JUDGE GARCIA: Isn't there essentially conflict
16 in some way there? So let's say you knock off three
17 million dollars from the overall value, and now you're
18 going to allocate that new nineteen-million-dollar value,
19 how - - - how do you do that? I mean, if somebody come in
20 and says my condominium is worth X but no, the person - - -
21 isn't it a zero-sum game at that point?

22 MR. JACOBSON: If you remember, it's not about
23 what my condominium's worth. Its worth - - - it's what the
24 entire project is worth as if it were an apartment project.

25



1 Then it gets allocated in a logical way, both parties
2 present appraisal testimony. It might be based on square
3 footage or whatever. It might be based on unit type and
4 unit style. It's something that has to be litigated in the
5 case and - - - and that's what - - - that's what is
6 determined.

7 JUDGE GARCIA: Then do all the people that have
8 signed up with you have to agree on the way you're
9 allocating it, your proposal?

10 MR. JACOBSON: They give the board of managers
11 discretion to handle the case, and the board of managers
12 has me handle the case, and the experts determine that.

13 JUDGE GARCIA: And just forgive me this basic
14 question again, but if you have condominium owners then who
15 are not in your class, let's call it, just for now - - -

16 MR. JACOBSON: Okay.

17 JUDGE GARCIA: - - - in your group, what happens
18 to those apartments, the assessments on them?

19 MR. JACOBSON: In this case they don't get paid
20 anything. They won't get refunds at all. They won't save
21 - - - they won't save any of the money.

22 JUDGE STEIN: Yeah, but what if they filed
23 individually?

24 MR. JACOBSON: You're not allowed to.
25



1 JUDGE STEIN: Oh, they're not allowed to.

2 MR. JACOBSON: They're not allowed to under the
3 statute.

4 JUDGE GARCIA: So the plan gets approved, and
5 let's say that apartment, it would have been reduced a
6 thousand dollars, the tax, they don't get that thousand
7 dollar - - -

8 MR. JACOBSON: They won't get their money.

9 JUDGE GARCIA: But it doesn't affect then - - -
10 the fact that they're not in doesn't affect what anyone
11 else who's in gets?

12 MR. JACOBSON: No, because the court case
13 determines the value. We got a four-million-dollar
14 reduction. It was allocated equitably among all the units,
15 and that's where we - - -

16 CHIEF JUDGE DIFIORE: Thank you, counsel.
17 Counsel?

18 MR. FINK: May it please the court. Thomas Fink,
19 representing the town of Brighton.

20 JUDGE STEIN: Sir, aside from some possible
21 ambiguity in the word "an assessment", is there anywhere
22 else in the statute, in the whole statutory scheme that
23 refers to the form of the authorization, what it must
24 contain, or whether it can be one year or multiple years?

25



1 MR. FINK: The authorization that a condominium
2 owner has to sign authorizing the board is exactly the same
3 type of authorization that a townhouse owner has to sign
4 authorizing his attorney to file a grievance. It's the
5 same authorization that a business owner has to sign
6 authorizing his attorney to sign - - -

7 JUDGE STEIN: But where does it say that it's
8 limited to one year at a time? I mean, the way I
9 understand these work is that they take a while. And so
10 they file for year one, and then when year two comes along
11 and the case is still pending they - - - they supplement
12 that with a petition for year two or whatever the case may
13 be. Where does it say anywhere that you have to file a
14 separate authorization for each one of those tax years?

15 MR. FINK: In your case, 1938, Hilton v.
16 Fahrenkopf, where the question came up when there was a
17 decision on some property, and the next year - - - this was
18 before there was a freezing of cases under 727 - - - the
19 case was tried, and there was a higher value. And the
20 petitioner came and said, well, you can't do that; it's res
21 - - - the first year is res judicata to the second year.
22 It's the same property and it's the same owner. This court
23 said no, each tax year is a separate tax year, and it's - -
24 -

25



1 JUDGE STEIN: Well, there's no question about
2 that, but here we have an authorization that says I
3 authorize you to - - - to do this for me in this tax year
4 and the next one and the next one until I revoke that
5 authorization. That's - - - that's a different question.

6 MR. FINK: There is no authorization for that
7 type of language to be effective because each tax year is a
8 - - -

9 JUDGE FAHEY: You're arguing - - - it seems to me
10 that you're fundamentally mis - - - you're equating the
11 requirement to file an assessment, which the board of
12 managers have, with - - - with the agency's - - - the right
13 of agency to direct someone else to bring that challenge to
14 an assessment to me. And - - - and they aren't the same
15 thing.

16 And Judge - - - Judge Stein's characterization of
17 the authorization is - - - is exactly right. I mean, what
18 it says is: "This authorization shall apply to all pending
19 and future proceedings for tax assessment review." There's
20 no limit on them. They're all the same.

21 MR. FINK: It would be the same if a townhouse
22 owner said I authorize - - -

23 JUDGE FAHEY: Well, but the legislative intent
24 here quite clearly was to allow - - - when they enacted
25



1 this law, was to allow condominium owners to be able to let
2 the board of managers go ahead and do these things.

3 MR. FINK: But it doesn't say that the
4 condominium owner doesn't have to do the same thing that
5 every other - - -

6 JUDGE FAHEY: The Property Act doesn't need to
7 say what the agency requirements need to be. It seems to
8 me that they have to address the assessment of the
9 property. But it seems to me that we're - - - we're
10 confused here about what applies. That's - - - that's what
11 I'm struggling with.

12 MR. FINK: In 2013, in the record 285, the
13 petitioner's attorney said to the 402 owners, each year you
14 have to sign a separate authorization. It was
15 acknowledged. And when we went to trial - - -

16 JUDGE GARCIA: What would be the point of that,
17 though? What would be the reason you would have to do
18 that? What value does that add to anything, other than you
19 don't have to make payments to certain units that haven't
20 signed up?

21 MR. FINK: The legislature could certainly have
22 done something like that, but that was not what was - - -

23 JUDGE GARCIA: But if it's ambiguous, and we're
24 looking at, okay, it has this language "an assessment",
25



1 what would be the policy driving an assessment of a
2 condominium where you're challenging the overall value, and
3 the town or the village knows that's what you're
4 challenging? And really what this goes to is payments
5 because all the proof and all the plans are going to be the
6 same. So what's the difference?

7 MR. FINK: Every year is a separate assessment.
8 This is what this court said. Every year value changes.
9 So - - -

10 JUDGE GARCIA: Right, and every year there'll be
11 a challenge, and every year you'll have to go through this
12 process. But what's the difference to the government
13 entity, the municipality, whether or not you have an
14 authorization that says 2009 for the next five years, or
15 you get one each year, 2009, '10, et cetera?

16 MR. FINK: The question is who is a participant
17 in each year. And the participant in each year is those -
18 - -

19 JUDGE FAHEY: That's not the question for the
20 board of managers, though. The board of managers is
21 bringing the challenge that why would the government care
22 who the participants are, one way or the other? What - - -
23 all they care about is - - - is the challenge that's being
24 brought. The board of managers, you're right, has to bring
25



1 that every year. I understand that point. I don't
2 understand how the board of managers relates, as a
3 representative body, back to their condo owners, why that -
4 - - why you would even care about that.

5 MR. FINK: Think of the owners of the
6 condominium. Each year they got a notice and said if you
7 want to participate in this year you have to sign the
8 authorization. Every year - - -

9 JUDGE WILSON: Well, but are you saying that if
10 they got a notice that instead said, if you sign once it'll
11 be good until you revoke it, that would be okay?

12 MR. FINK: I don't think that's consistent in the
13 law.

14 JUDGE WILSON: Okay.

15 MR. FINK: But in this - - -

16 JUDGE WILSON: So it doesn't really turn on what
17 they were told; it turns on something else.

18 So instead of contrasting it to a townhouse, let
19 me ask you this: can we contrast it to a cooperative, to a
20 residential co-op, right? My understanding is in a
21 residential co-op, the co-op board can file without getting
22 permission from any of the owners, right?

23 MR. FINK: Judge Wilson, frankly, there are no
24 co-ops in Upstate New York, so I am not familiar with - - -

25



1 JUDGE WILSON: But do you have any - - -

2 JUDGE GARCIA: Is Westchester now part of
3 Upstate?

4 MR. FINK: It's hard enough for me to understand
5 what a co-op - - - what a condominium is, let alone a
6 cooperative. The property owners have a right to decide if
7 they want to continue. They may decide this litigation is
8 going nowhere, I don't want to participate, I don't want to
9 be responsible for the costs, because that's what the
10 section says.

11 JUDGE WILSON: So if we take, hypothetically,
12 let's say, the proposition that co-op owners, who live in
13 apartments that look very much like condominiums, don't
14 have to file anything, and the board, every year, on behalf
15 of all of them, files a protest, what is - - - is there a
16 public policy reason to differentiate the condo from a
17 co-op, or because you're unfamiliar with co-ops you can't
18 answer that?

19 MR. FINK: Actually in condominiums, according to
20 Section 5 in 330, in New York City you don't have to have -
21 - - the board has the authorization, if they get a
22 resolution, to file without any authorizations in New York
23 City. But in the rest of the state you need an
24 authorization, and the property owner has a right to decide
25



1 each year whether he wants to continue. He may not want to
2 take the responsibility for the expenses.

3 JUDGE RIVERA: Can I just - - - I'm trying to
4 understand your interpretation of the provision that - - -
5 that requires the written authorization. So it says the
6 written - - - "the owner's written authorization to seek
7 administrative and judicial review of an assessment made in
8 accordance with" et cetera, et cetera. So you read that to
9 mean the owner has provided a written authorization for one
10 specific assessment.

11 MR. FINK: Correct.

12 JUDGE RIVERA: And each year there is a different
13 assessment even if it's the exact same amount. Is that
14 your position?

15 MR. FINK: That's exactly correct, Your Honor.

16 JUDGE RIVERA: Okay.

17 MR. FINK: Because every year - - -

18 JUDGE RIVERA: So then I'm not understanding your
19 point, or maybe it was his point, about the multiple years,
20 because it's an authorization to challenge that assessment.
21 It may take years to resolve that, but that's the
22 assessment you're trying to challenge, correct?

23 MR. FINK: If the authorization is for year 2008,
24 that authorization is good for 2008, no matter how many
25



1 years it takes to try 2008 - - -

2 JUDGE RIVERA: Well, it's the authorization for
3 the assessment. So you mean the assessment that's issued
4 in 2008? Is that what you meant, or did I misunderstand
5 you?

6 MR. FINK: The authorization is - - - could very
7 well change in 2009.

8 JUDGE RIVERA: Yes.

9 MR. FINK: Could very well change in 2010. And
10 there - - -

11 JUDGE RIVERA: Or it might stay the same. But
12 your position is the provision in the statute is talking
13 about an authorization that is tied to only one year's
14 assessment.

15 MR. FINK: That's exactly correct. Just the same
16 - - - and again, maybe you don't like this, it's the same
17 for the townhouse owner, it's the same for a business
18 owner. Every year is a separate year, and you have said
19 that in - - - in Hilton v. Fahrenkopf, and you explained
20 why, because every year the assessor has to look at the
21 fair market value of all the property in the town - - -

22 JUDGE GARCIA: But that gets back to this problem
23 with condominiums, to me, because in some cases we have
24 school boards who come in here and there are pitches. You

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1 have to grieve every year because we set aside reserves and
2 we need to know specifically that year's been challenged.
3 But here they're challenging the overall assessment of the
4 condominium. And you know that, and you know that every
5 year they're doing that. And you know that it's going to
6 be the same; it's going to be four million dollars here,
7 whether or not who's in that pool or not's in that pool.
8 Are you saying that you look beyond that and each year you
9 look at how many condo owners are in the pool and that
10 somehow affects your financials?

11 MR. FINK: The condominium owner gets a break
12 because their condominium is not a value - - - fair-market
13 value. In these cases they were worth 100,000 dollars,
14 their assessment was 50,000 dollars, and they were trying
15 to get it down to 35,000 dollars. SO - - -

16 JUDGE GARCIA: Yeah, but I'm asking, though, what
17 would be the point for you of having these filed each year
18 rather than, as some of the - - - my colleagues have been
19 asking, something that covers five years. What's the
20 difference to the municipality whether they do that or not?
21 How does it harm you that there isn't an authorization for
22 each year? And again, given the example of the school
23 board where they don't have notice if you don't file every
24 year in some of these cases and you think it's riding over,

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1 they need notice to set aside reserves. What difference
2 does it make, where they're challenging the overall
3 assessment of the building, and that challenge is the same,
4 what difference does it make to the municipality whether or
5 not they have a hundred percent or whether or not they
6 have, you know, authorizations that say one year or five
7 years?

8 MR. FINK: It doesn't make any difference to the
9 municipality.

10 JUDGE GARCIA: Right.

11 MR. FINK: It's not the municipality that's at
12 issue here; it's the law that says a property owner has to
13 file an authorization before that case can be tried.

14 JUDGE GARCIA: But if the law is somewhat
15 ambiguous and we're looking for a reason that would be,
16 what would the reason that would - - - what is the reason
17 for it?

18 MR. FINK: The board determined that their
19 assessment for the - - - for each - - - the entire list of
20 condominiums was correct, and they denied the application.
21 The question is who is a participant in the case? And the
22 law says a participant in the case in each year is the
23 person who signs an authorization.

24 JUDGE STEIN: Do you pay any more or less money,
25



1 in the overall refund, depending on the number of people
2 who - - -

3 MR. FINK: Yes, and that's why it was important
4 for us to find out who were the participants and in fact -
5 - -

6 JUDGE STEIN: So it's not a pot of money that
7 then gets divided up if there's two people or three people
8 or 200 people?

9 MR. FINK: And that's why - - -

10 JUDGE STEIN: So that's - - -

11 MR. FINK: That's why counsel - - -

12 JUDGE STEIN: That's why you're challenging this?

13 MR. FINK: That's why counsel put into the record
14 the authorizations in 2008, as an Exhibit, the
15 authorizations in 2009, the authorizations in 2010, and the
16 authorizations in 2011. He put in - - -

17 JUDGE STEIN: Why can't he put in an
18 authorization that says, here's Mr. Jones, okay, Mr. Jones
19 says in - - - let's say Mr. Jones didn't come on in 2009?
20 Mr. Jones didn't come in till 2010. And Mr. Jones says,
21 okay, from 2010, until I revoke this authorization, you may
22 represent me, and I'm - - - I'm on board, I authorize you
23 as my agent for every single individual tax year until I
24 revoke it; what is the problem with the municipality
25



1 looking at Mr. Jones' authorization and saying okay, well,
2 then he's authorized for this year?

3 MR. FINK: The same reason why the townhouse
4 owner can't do it, because every year is a different year
5 and the property owner has to make a decision in every year
6 whether he wants to participate.

7 JUDGE STEIN: But what a townhouse owner's doing
8 is filing a petition in every year. And that's exactly
9 what the board of managers is doing. So - - - so that's
10 where that analogy comes in. It doesn't have - - - the
11 townhouse person doesn't have to file an opposition.

12 MR. FINK: That's correct.

13 JUDGE RIVERA: Well, I thought your point is
14 that, potentially, there's a different assessment in every
15 year.

16 MR. FINK: That's correct. Every year there's a
17 different assessment - - -

18 JUDGE RIVERA: And the owner has to agree for the
19 board to represent them with respect to that - - -

20 MR. FINK: That's exactly correct, Your Honor.

21 JUDGE RIVERA: - - - assessment.

22 MR. FINK: That's exactly correct. That's our
23 position. We think it's correct. The Appellate Division
24 thought it was correct, and the trial court thought it
25



1 correct. And all I can hope is that you think it is
2 correct as well, and I thank you very much.

3 CHIEF JUDGE DIFIORE: Thank you, sir.

4 Counsel?

5 Counsel, the board of managers, they have to
6 authorize counsel to represent them each year, year after
7 year? They have to renew that authorization, correct?

8 MR. JACOBSON: Yes, and they did.

9 CHIEF JUDGE DIFIORE: So how does that impact our
10 analysis as to the condo owner? So - - -

11 MR. JACOBSON: The condo authorization is
12 completely different than the tax assessment petition
13 authorization. The Real Property Law says - - - is what
14 creates the condo authorization. It also gives the special
15 tax break for condos.

16 If you look in the Real Property Tax Law, there's
17 a provision in the tax law that talks about the special way
18 of calculating the value for condos, but it doesn't say
19 anything about authorization. That's because it was
20 intended, from the beginning, that the authorization to
21 appoint a board as an agent is completely different than
22 the appointment of the board of managers as the agent to
23 challenge assessments to file the petition every year.
24 They're completely different authorizations.

25



1 JUDGE GARCIA: So is it the board, then, that's
2 making that decision every year whether or not to challenge
3 the assessment?

4 MR. JACOBSON: The board makes the decision.

5 JUDGE GARCIA: They're authorizing, essentially -
6 - -

7 MR. JACOBSON: Right.

8 JUDGE GARCIA: - - - the board to make that
9 decision in the future.

10 MR. JACOBSON: Right. Now, the New York City
11 provision that was referred to by counsel, the subdivision
12 number 5, that has nothing to do with condo authorizations.
13 That has to do with an election that the statute says can
14 be made by the board of managers to take a tax abatement,
15 an exemption. If a condominium is still going to file a
16 petition, they still have to rely on subdivision 4 and get
17 an authorization or - - - or whatever, but that's not what
18 5 stands for. That was - - - that has to do with your
19 question about co-ops.

20 The other thing is I never told anybody that they
21 must file an authorization every year. I recommended it.
22 It's just good lawyering. I knew that Mr. Fink would bring
23 me to the Court of Appeals; I didn't want to mess around.
24 I said, look, I advise you to do it every year, if I were
25



1 you, but I think one is enough. And that's why the actual
2 document says it's good for past, present, and future
3 years.

4 On the idea of waiver, Mr. Fink and the town,
5 they do - - -

6 JUDGE RIVERA: I guess, alternatively, you just
7 could have given them an authorization every year, right?

8 MR. JACOBSON: Well, I could have, but then - - -
9 then it's extra work. And you know what? These people are
10 in Florida, these people end up in nursing homes. I mean,
11 this is a low-income - - - this is a low-cost property.

12 CHIEF JUDGE DIFIORE: What about that person who
13 ends up in a nursing home and maybe isn't aware that you're
14 filing year after year, and then year 5 the assessment
15 comes and they have to share the costs of a lawyer or an
16 expert or someone.

17 MR. JACOBSON: They gave me authority until it
18 was revoked. If they lose capacity, maybe they could make
19 that argument. But as long as they sign up and they say
20 you're my attorney until it's revoked, I don't see any
21 reason to change that.

22 JUDGE RIVERA: Well, the question is whether or
23 not the statute permits that. That - - -

24 MR. JACOBSON: Right.

25



1 JUDGE RIVERA: Even if - - -

2 MR. JACOBSON: Now, the other thing - - -

3 JUDGE RIVERA: Even if - - -

4 MR. JACOBSON: Okay.

5 JUDGE RIVERA: - - - for purposes of this appeal

6 - - -

7 MR. JACOBSON: Right.

8 JUDGE RIVERA: - - - one were to say that that is
9 how we could read these authorizations, there's no doubt
10 that's clearly the intent - - -

11 MR. JACOBSON: Right.

12 JUDGE RIVERA: - - - that's what - - - what you
13 and the owners agreed to, the question is whether or not
14 that's permissible under the statute.

15 So I'm asking you what I asked him: do you read
16 that language, "written authorization to seek
17 administrative and judicial review and assessment made in
18 accordance" to mean the assessment that holds fast until it
19 changes or an assessment that may potentially change every
20 year?

21 MR. JACOBSON: The assessment was the same every
22 year. It didn't change.

23 JUDGE RIVERA: Are you saying so there's no work
24 - - -

25



1 MR. JACOBSON: But an assessment - - -

2 JUDGE RIVERA: - - - that the assessor did every
3 year - - -

4 MR. JACOBSON: You know what?

5 JUDGE RIVERA: - - - to confirm the assessment is
6 the same?

7 MR. JACOBSON: Properties have an assessment, and
8 it's their - - - they always have "an assessment".

9 JUDGE RIVERA: Correct.

10 MR. JACOBSON: It can change, but it still - - -

11 JUDGE RIVERA: My tax bill reminds me.

12 MR. JACOBSON: It's still an assessment.

13 JUDGE RIVERA: No, no, I understand that. My - -
14 -

15 MR. JACOBSON: I read it to say - - -

16 JUDGE RIVERA: I'm sorry; I'm not being clear.

17 My question is whether or not the statute is not expressly
18 saying that written authorization to seek administrative
19 and judicial review of an assessment, given that an
20 assessment happens every year, even if the number, the
21 amount, doesn't change - - - that's his position; maybe you
22 want to argue something else - - - doesn't that then
23 resolve this for us that this means one assessment in one
24 year?

25



1 MR. JACOBSON: I'd say you have an assessment
2 when your house is built and you always have an assessment.
3 So you could interpret the word "an" as being the
4 assessment. The assessment, that's what you can challenge.
5 I don't - - - I think, at worst, it's ambiguous, in which -
6 - -

7 JUDGE RIVERA: You think that's the ambiguity?

8 MR. JACOBSON: No, I don't think it's ambiguous;
9 I never actually thought of it that way. But if it was
10 ambiguous - - -

11 JUDGE RIVERA: Okay.

12 MR. JACOBSON: - - - it should be construed in
13 favor of the taxpayer.

14 One last point on waiver. They waited five years
15 to raise the issue. They knew from the beginning that my
16 authorization said it's good for all years, but they sat on
17 it and they waited five years till trial, which is the
18 Skuse case and the Extrom case. If the town waited, we
19 shouldn't get sandbagged, after spending 15,000 dollars for
20 an appraisal, only to find out on the courthouse steps that
21 we're out of luck.

22 So even if you interpret the law the way you say
23 that it could be interpreted, that "an" means a new one
24 every year, there's a clear waiver here. And the waiver
25



1 rules for tax cases are very liberal. And they're all
2 mentioned in the brief. So I think that, even if you want
3 a strict interpretation, you should consider waiver in this
4 case. That's what the record shows. They didn't do
5 anything for five years.

6 CHIEF JUDGE DIFIORE: Thank you, counsel.

7 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Eastbrooke Condominium, et al., v. Elaine Ainsworth, et al., No. 15, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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