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(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 WESTCHESTER

-----X

In the Matter of

The Application for a Review under Article
7 of the Real Property Tax Law Assessment
and for a Judgment Pursuant to CPLR Article
78 by

STEVEN L. GREENBERG,

Petitioner,

-against -

THE ASSESSOR OF THE TOWN OF SCARSDALE,
THE BOARD OF ASSESSMENT REVIEW OF THE
TOWN OF SCARSDALE and the TOWN OF
SCARSDALE,

Respondents.

-----X

STEVEN L. GREENBERG,

Petitioner,

-against-

THE TOWN OF SCARSDALE, THE VILLAGE OF
SCARSDALE, NANETTE J. ALBANESE, DAVID
B. JACKSON, WESTCHESTER COUNTY, and the
SCARSDALE UNION FREE SCHOOL DISTRICT,

Respondents.

-----X

STEVEN L. GREENBERG,

Petitioner,

-against-

THE TOWN OF SCARSDALE, THE VILLAGE OF

DECISION/ORDER

Index No:
23003/08

Motion Date:
07-11-12

Action No. 1

Index No.
11854/09

Action No. 2

Index No.
30011/09

SCARSDALE, NANETTE J. ALBANESE, DAVID
B. JACKSON, WESTCHESTER COUNTY, and the
SCARSDALE UNION FREE SCHOOL DISTRICT,

Respondents.

-----X

In the Matter of

The Application for a Review under Article
7 of the Real Property Tax Law Assessment
and for a Judgment Pursuant to CPLR Article
78 by

STEVEN L. GREENBERG,

Petitioner,

-against -

Index Nos:
22506/09
25721/10

THE TOWN OF SCARSDALE, THE VILLAGE OF
SCARSDALE, NANETTE J. ALBANESE, THE
BOARD OF ASSESSMENT REVIEW OF THE
TOWN OF SCARSDALE and THE BOARD OF
ASSESSMENT REVIEW OF THE VILLAGE OF
SCARSDALE,

Respondents.

-----X

LaCAVA, J.

The following papers were considered in connection with these
motions:

1. respondent Village of Scarsdale (Village), under Index
#23003/2008, for dismissal of petitioner's petition, for failure of
petitioner to seek leave of court to amend his petition, and
petitioner cross-moves to strike the aforementioned motion to
dismiss;

| <u>PAPERS</u> | <u>NUMBERED</u> |
|--|-----------------|
| RESPONDENTS' NOTICE OF MOTION/AFFIRMATION/EXHIBITS | 1 |
| PETITIONER'S NOTICE OF MOTION | 2 |
| PETITIONER'S AFFIDAVIT IN OPPOSITION/EXHIBITS | 3 |
| PETITIONER'S MEMORANDUM OF LAW | 4 |
| PETITIONER'S AFFIDAVIT IN SUPPORT/EXHIBITS | 5 |
| PETITIONER'S MEMORANDUM OF LAW IN SUPPORT | 6 |
| RESPONDENTS' MEMORANDUM OF LAW IN SUPPORT | 7 |
| PETITIONER'S REPLY AFFIDAVIT | 8 |

2. respondent County of Westchester (County), under Index #11854/2009, for dismissal of petitioner's petition, for improperly commencing the action against the County since they are not the tax-levying body, and for Statute of Limitations; for dismissal by the Scarsdale Union Free School District (District), for improperly commencing the action against the District after conceding that the said District had not taken any action which could be complained of by petitioner; and by the Village of Scarsdale (Village), for commencing an action duplicative of #23003/08, for Statute of Limitations, and for improperly joining an Article 78 action with an action seeking relief for, *inter alia*, 1983 violations; and petitioner cross-moves to strike the aforementioned motion to dismiss;

| <u>PAPERS</u> | <u>NUMBERED</u> |
|--|-----------------|
| RESPONDENTS' NOTICE OF MOTION/AFFIRMATION/EXHIBITS | 1 |
| RESPONDENTS' NOTICE OF MOTION/AFFIRMATION/EXHIBITS | 2 |
| RESPONDENTS' MEMORANDUM OF LAW | 3 |
| PETITIONER'S NOTICE OF MOTION/AFFIDAVIT/EXHIBITS | 4 |
| PETITIONER'S MEMORANDUM OF LAW | 5 |
| PETITIONER'S MEMORANDUM OF LAW | 6 |
| PETITIONER'S AFFIDAVIT IN OPPOSITION/EXHIBITS | 7 |
| PETITIONER'S AFFIDAVIT IN OPPOSITION/EXHIBITS | 8 |
| RESPONDENTS' REPLY AFFIRMATION IN SUPPORT | 9 |
| RESPONDENTS' NOTICE OF MOTION/AFFIRMATION/EXHIBITS | 10 |
| RESPONDENTS' NOTICE OF MOTION/AFFIRMATION/EXHIBITS | 11 |
| RESPONDENTS' MEMORANDUM OF LAW | 12 |
| RESPONDENTS' NOTICE OF MOTION/AFFIRMATION/EXHIBITS | 13 |
| RESPONDENTS' REPLY | 14 |
| RESPONDENTS' MEMORANDUM OF LAW | 15 |

3. respondent Village, under Index #22506/2009, for dismissal of the pre-2009 claims as time-barred; for dismissal as a whole as duplicative of the claims under Index #11854/2009; and for dismissal for improper joinder of non-RPTL Article 7 claims with claims under said RPTL Article;

| <u>PAPERS</u> | <u>NUMBERED</u> |
|--|-----------------|
| RESPONDENTS' NOTICE OF MOTION/AFFIRMATION/EXHIBITS | 1 |
| RESPONDENTS' MEMORANDUM OF LAW | 2 |
| PETITIONER'S AFFIDAVIT IN SUPPORT/EXHIBITS | 3 |
| PETITIONER'S AFFIDAVIT IN OPPOSITION/EXHIBITS | 4 |
| PETITIONER'S MEMORANDUM OF LAW | 5 |
| RESPONDENTS' AFFIDAVITS/EXHIBITS | 6 |
| RESPONDENTS' REPLY MEMORANDUM OF LAW | 7 |

4. Respondents, under Index #30011/2009, for dismissal as duplicative of the claims in Index #11854/2009, and for dismissal

for improper joinder of non-RPTL Article 7 claims with claims under said RPTL Article;

| <u>PAPERS</u> | <u>NUMBERED</u> |
|--|-----------------|
| RESPONDENTS' NOTICE OF MOTION/AFFIRMATION/EXHIBITS | 1 |
| PETITIONER'S AFFIDAVIT IN OPPOSITION/EXHIBITS | 2 |

5. respondents, under Index #25721/2010, for dismissal of the pre-2010 claims as time-barred, for dismissal as duplicative of the claims in Index #11854/2009, and for dismissal for improper joinder of non-RPTL Article 7 claims with claims under said RPTL Article;

| <u>PAPERS</u> | <u>NUMBERED</u> |
|--|-----------------|
| RESPONDENTS' NOTICE OF MOTION/AFFIRMATION/EXHIBITS | 1 |
| RESPONDENTS' MEMORANDUM OF LAW | 2 |
| PETITIONER'S AFFIDAVIT IN OPPOSITION/EXHIBITS | 3 |
| PETITIONER'S MEMORANDUM OF LAW | 4 |
| RESPONDENTS' AFFIDAVIT | 5 |
| RESPONDENTS' AFFIDAVIT | 6 |

In the instant RPTL Article 7 Actions, petitioner (Greenberg) complains of, *inter alia*, violations, including constitutional violations, by the respondents in connection with real property tax assessments by the Village of petitioner's property, and for the County's and Village's handling of several RPTL Article 5 Correction of Error petitions relating to the two parcels owned by petitioner. The parcels are designated on the Tax Map of the Town/Village of Scarsdale as Section 04, Block 01, Lots 957 and 993.

Facts

Petitioner and his wife purchased the subject property, two adjacent lots, Lot 04.01.957 (the 957 parcel) and Lot 04.01.993 (the 993 parcel), in May 2006. Subsequently, petitioner researched the assessments on the two parcels in the Village, and, after numerous instances of such research, petitioner alleges that, in September 2007, he discovered inconsistencies in the tax treatment of the two parcels during the 2007 tax year. He was, he asserts, then contacted by the assessor, at which time she allegedly told him that, during the 2005, 2006, and 2007 tax years, he had inadvertently been paying the assessment on the 993 lot twice, since that assessment amount had already been added to the 957 parcel's assessment. Although it was too late to correct the 2007 tax year, she corrected the 2008 tax year assessment for the two parcels, but did subsequently recommend that petitioner file a Correction of Errors application pursuant to RPTL §556 for the earlier tax years with the Westchester County Real Property Tax

Commission (the Commission). Pursuant to this advice, petitioner then filed a Correction of Errors application with the Commission. He also discussed the application with Commissioner David Jackson (respondent Jackson or Commissioner), and whether an allocation of tax assessments between the parcels might be appropriate,

In June 2008, petitioner filed a tax grievance for the 957 lot only, since, according to his calculation, the 993 lot was already under-assessed. This grievance was subsequently denied. In October 2008, petitioner filed an RPTL Article 7 action challenging the assessment (the 2008 action). In March 2009, petitioner filed an RPTL §556 Correction of Errors application, alleging errors relating to the 957 parcel during tax years 2006, 2007, and 2008, and also commenced an action in US District Court for the Southern District of New York against the Town and Village. In June 2009 he filed an amended application for the 957 parcel and an application for the 993 parcel for tax year 2009. Petitioner also grieved the 2009 assessments for both parcels. On or about May 5, 2009, the Commissioner issued a recommendation to the Village that the initial 957 application be denied for a lack of clerical error; on or about June 25, 2009 he issued a recommendation to the Village that the initial 993 application likewise be denied for a lack of clerical error; and, finally, on or about August 13, 2009, Commissioner Jackson issued a recommendation to the Village that the amended 957 application also be denied for the same reason¹. The Village's Mayor adopted those conclusions, formally confirming Commissioner Jackson's recommendations soon thereafter. Petitioner has subsequently brought petitions for tax years 2009 and 2010.

1. The Claims Under Index #23003/2008

In this 2008 RPTL Article 7 Action, petitioner Greenberg complains of, *inter alia*, an unequal, excessive, and illegal assessment by Scarsdale for the promises Designated on the Tax Map of the Town/Village of Scarsdale as Section 04, Block 01, Lot 957. A petition setting forth that claim was filed on October 14, 2008. Subsequently, and without leave of Court, petitioner filed an amended petition under the same Index #, dated September 9, 2009, asserting, in addition, acts of the municipal respondents relating to tax years (2005, 2006, and 2007) prior to tax year 2008; an alleged violation of 42 U.S.C. 1983; and other claims. Respondent

¹ Here, the assessor admitted that she duplicated the assessment on the 957 parcel by adding that assessment **also** to the 993 parcel. While not crucial at this stage to the Court's decision, the record in this case, contrary to the commissioner's recommendations, appears to disclose a "duplicate entry" clerical error as defined in RPTL §550(2)(a).

moves to dismiss the amended petition, asserting that (a) it was filed without leave of Court; (b) that, by alleging acts related to tax years prior to 2008, it violates the RPTL Article 7 Statute of Limitations; (c) that it improperly joins non-Article 7 claims (e.g. the 1983 claims); and other alleged defects.

a. Statute of Limitations

RPTL §702 provides:

§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.

3. If it appears upon the answer that the petition or petition and notice, when such notice is required by section seven hundred four of this chapter, were not filed or served and filed where required pursuant to section seven hundred forty of this chapter, within the time limited therefor, such failure to file or serve and file the petition or petition and notice within such time shall constitute a complete defense to the petition and the petition must be dismissed.

Petitioner asserts that, based on the actions by Scarsdale in 2005, 2006, and 2007, the rolls were never finalized, and consequently an action may be commenced relating to those assessments may be commenced thereafter (i.e. in 2008.) RPTL §702 (2) is plain on its face, however: the rolls are finalized 30 days after the later of the "last day set by law for the filing of such assessment roll or until notice thereof has been given as required by law." That date was in 2005, 2006, and 2007, respectively. And, as RPTL §703 makes equally clear, failure to "file or serve and file the petition...within such time shall constitute a

complete defense to the petition and the petition **must be dismissed**" (emphasis added). Thus, the Court has no choice but to dismiss the 2008 petition insofar as it alleges acts prior to 2008 tax year.

b. Improper Joinder

As respondent also properly points out, petitioner's amended petition seeks to assert numerous claims beyond those normally maintained in an RPTL Article 7 Action, challenging a real property tax assessment. Indeed, while Article 78 Actions are on occasion considered properly joinable with RPTL Article 7 Petitions, only such actions as assert selective reassessment of the same premises are so joinable. Here there are no common question of law or fact justifying the joinder of the Article 7 claims pled in the original petition, and the other claims contained in the subsequent petition. For example, in Article 7 and Article 78 matters challenging improper or illegal tax assessments, this Court sits as the sole trier of fact and such matters are tried non-jury, while petitioner would have the right to a trial by jury in some of the other matters pled in the amended petition. Thus, the Court would be compelled to direct severance for claims in the petition other than those brought pursuant to RPTL Article 7, or Article 78 allegations of selective reassessment.

c. Amendment without Leave of Court

Respondent also argues that the amended petition must be dismissed in its entirety in any event, since the September 9, 2009 petition was filed without leave of Court.

CPLR §3025 provides:

Rule 3025. Amended and supplemental pleadings.

(a) Amendments without leave. A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.

(b) Amendments and supplemental pleadings by leave. A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any

time by leave of court or by stipulation of all parties.

Respondent argues, and petitioner does not controvert, that the September 9, 2009 petition was not filed with leave of Court. In fact, petitioner did not submit opposition to the motion at all; rather, he simply cross-moved to dismiss the Village's motion to dismiss (see below). In *Halmar Distributors, Inc. v. Approved Manufacturing Corp.*, 49 A.D. 2d 841 (1st Dept. 1975), plaintiff lender commenced an action for monies advanced and sought injunction relief. After the Court granted the injunction, plaintiff amended their complaint without leave of court, deleting their request for an injunction. The borrower sought reconsideration of the grant of the injunction, which was denied by the trial court. The First Department reversed, citing to *Branower & Son v. Waldes*, 173 A.D. 676 (1st Dept. 1916), and holding that, upon service of the amended complaint, the initial complaint was superseded, leaving only the amended complaint as the existing pleading in the case. See also *Porquoi M.P.S. v. Worldstar International*, 64 A.D.3d 551 (2nd Dept. 2010) - pleadings that have been superseded by new pleadings are no longer viable; *Penniman v. Fuller & Warren Company*, 133 N.Y. 442 (1892) - amended answer becomes the answer in an action, and supersedes all pleadings.

Thus, the Court is compelled to strike the amended petition as filed without leave of Court in violation of CPLR 3025 (a) and (b). Having done so, and there being no petition pending in the instant matter, the Court is also compelled to dismiss the matter in its entirety.

d. Motion to Strike the Motion to Dismiss

Petitioner did not submit any opposition to respondent's motion. Rather, he has cross-moved to strike the motion to dismiss filed by respondents. While there is authority to move to strike documents such as answers, defenses, or even notes of issue, there is no authority in the CPLR permitting a party to move (or cross-move) to strike another party's motion. Consequently, absent any authority for petitioner's cross-motion to strike respondents' motion, petitioner's cross-motion must be denied.

2. The Claims Under Index #11854/2009

A petition setting forth claims, essentially 18 USC 1983 allegations raising constitutional claims to the handling of petitioner's RPTL §556 Correction of Errors application, was subsequently filed on September 8, 2009. In particular, it alleges, *inter alia*,

1. Selective Reassessment
2. Due Process violations relating to the 2008 assessment
3. A Declaratory Judgment that the pre-2008 assessments were not lawful;
4. Various violations of the RPTL relating to taxation and assessment;
5. A taking from the aforementioned illegal assessments;
6. 1983 and 1985 violations;
7. Wrongful denial of the correction of errors petitions

Respondent County moves for dismissal, arguing that the County was improperly the subject of the instant petition since such an action for relief from the above actions can only be brought against the tax-levying body, which the County is not; and also arguing that petitioner violated the Statute of Limitations by commencing the Article 78 portion of the action in excess of 120 days after the County's recommendation to the Village. The Scarsdale School District (District) also moves for dismissal, arguing that petitioner likewise improperly commenced the action against the District, despite conceding that the said District did not take any action which respect to petitioner which caused the above-alleged violations. Finally, the Village also moves for dismissal, asserting that the instant action is duplicative of the aforementioned #23003/08; that the action violates the Statute of Limitations; and for improper joinder, for improperly joining an Article 78 action with an action seeking relief for Equal Protection, Due Process, 1983 and 1985 violations, and other claims. Petitioner cross-moves here as well to strike the aforementioned motions to dismiss.

In the first instance, however, the court is compelled to dismiss the claims under Index #11854/2009 against all respondents for an error by the Village with respect to the RPTL §556 application.

RPTL §556 provides:

§556. Refunds and credits of taxes

1. (a) Pursuant to the provisions of this section, an appropriate tax levying body may refund to any person the amount of any tax paid by him or her, or portion thereof, as the case may be, or may provide a credit against an outstanding tax (I) where such tax was attributable to a clerical error or an unlawful entry and application for refund or credit is made within three years from the

annexation of the warrant for such tax, or (ii) where such tax was attributable to an error in essential fact, other than an error in essential fact as defined in paragraph (d) of subdivision three of section five hundred fifty of this title, and such application for refund or credit is made within three years from the annexation of the warrant for such tax.

2. (a) Whenever it appears to a person who has paid a tax that such tax, or a portion thereof, was attributable to an unlawful entry, a clerical error, or an error in essential fact, as described in subdivision one of this section, such person may file an application in duplicate, including any available proof of the error, with the appropriate county director of real property tax services for a refund of such tax, or portion thereof, as the case may be.

(c) For an error in essential fact, the application for correction shall include a copy of the property record card, field book, or other final work product upon which the incorrect assessment was based and a copy of any existing municipal record which substantiates the occurrence of the error. For an unlawful entry as defined in paragraph (a) of subdivision seven of section five hundred fifty of this title, the application for correction shall include a statement by the assessor or by a majority of a board of assessors substantiating that the assessor or assessors have obtained proof that the parcel which is the subject of the application should have been granted tax exempt status; the failure to include such statement shall render the application null and void and shall bar the tax levying body from directing a refund or credit of taxes pursuant to this section.

3. The application for a refund or credit pursuant to this section shall be on a form

and shall contain such information as prescribed by the state board and shall be available in the offices of all collecting officers and in the office of the county director.

4. (a) The county director, within ten days of the receipt of an application filed pursuant to this section, shall investigate the circumstances of the claimed unlawful entry, clerical error or error in essential fact to determine whether the error exists, and on such investigation he may require and shall receive from any officer, employee, department, board, bureau, office or other instrumentality of the appropriate municipal corporation such facilities, assistance and data as will enable him to properly consummate his studies and investigations hereunder.

(b) Upon completion of such investigation the county director shall immediately transmit a written report of such investigation and his or her recommendation for action thereon, together with both copies of the application, to the tax levying body. If the same alleged error also appears on a current assessment roll, the county director shall also file a copy of such report and recommendation with appropriate assessor and board of assessment review who shall consider the same to be the equivalent of a petition for correction filed with such board pursuant to section five hundred fifty-three of this title.

5. The tax levying body, at a regular or special meeting, upon the presentation of an application filed pursuant to this section and the written report described in subdivision four of this section, shall:

(a) examine the application and report to determine whether the claimed unlawful entry, clerical error or error in essential fact exists;

(b) reject an application where it is determined that the claimed unlawful entry, clerical error or error in essential fact does

not exist by making a notation on the application and the duplicate copy thereof that the application is rejected and the reasons for the rejection;

(c) approve an application where it is determined that the claimed unlawful entry, clerical error or error in essential fact does exist by making a notation on the application and the duplicate copy thereof that the application is approved and by entering thereon the amount of the refund to be paid or outstanding tax to be credited;

(d) mail an application that has been rejected to the applicant;

(e) mail an application that has been approved to the applicant.

8. (a) A tax levying body may, by resolution, delegate to an official who is empowered to authorize payment of bills without prior audit by such body or, in the event there is no official so empowered, to an official responsible for the payment of bills upon audit of the appropriate municipal corporation so designated by it, the authority to perform the duties of such tax levying body, as provided in this section. Such resolution shall only be in effect during the calendar year in which it is adopted and shall designate that such delegation of authority is applicable only where the recommended refund or credit is twenty-five hundred dollars or less, or such other sum not to exceed twenty-five hundred dollars.

(b) Where such resolution is adopted and the recommended refund or credit does not exceed the amount specified in the designating resolution, the county director shall transmit the written report of the investigation and recommendation, together with both copies of the application, to the official designated by the tax levying body. Upon receipt of the

written report, the designated official shall follow the procedure which the tax levying body would follow in making refunds, provided, however, where the designated official denies the refund or credit, in whole or in part, such official shall transmit to the tax levying body for its review and disposition pursuant to subdivision five of this section the written report of the investigation and recommendation of the county director, together with both copies of the application and the reasons that the designated official denied the refund or credit. Where the recommendation of the county director is to deny the application or the refund or credit requested is in an amount in excess of the amount authorized in the enabling resolution, the county director shall transmit the written report of the investigation and recommendation, together with both copies of the application, to the tax levying body.

Furthermore, RPTL §550, which provides definitions for some of the terms in §556, provides:

§550. Definitions:

When used in this title:

3. "Error in essential fact" means:

(a) an incorrect entry on the taxable portion of the assessment roll, or the tax roll, or both, of the assessed valuation of an improvement to real property which was destroyed or removed prior to taxable status date for such assessment roll; or

(b) an incorrect entry on the taxable portion of the assessment roll, or the tax roll, or both, of the assessed valuation of an improvement to real property which was not in existence or which was present on a different parcel; or

(c) an incorrect entry of acreage on the taxable portion of the assessment roll, or the

tax roll, or both, which acreage was considered by the assessor in the valuation of the parcel and which resulted in an incorrect assessed valuation, where such acreage is shown to be incorrect on a survey submitted by the applicant; or

(d) the omission of the value of an improvement present on real property prior to taxable status date; or

(e) an incorrect entry of a partial exemption on an assessment roll for a parcel which is not eligible for such partial exemption; or

(f) an entry pursuant to article nineteen of this chapter on an assessment or tax roll which is incorrect by reason of a misclassification of property which is exclusively used for either residential or non-residential purposes.

In *Affordable Housing v. Town of Monroe*, 25 Misc.3d 1124 (Supreme Court, Orange County, 2009), this Court addressed the issue of whether a County Real Property Tax commission, and the county (there the tax levying body) properly handled an RPTL §556 Correction of Errors Application, when the Commission made the determination on the Application rather than the tax-levying body. As set forth above, §556 requires that "[t]he county director, within ten days of the receipt of an application filed pursuant to this section, shall investigate the circumstances of the claimed unlawful entry, clerical error or error in essential fact to determine whether the error exists...." RPTL §556-b, this Court held in *Affordable Housing*, is rather unclear on the procedure following the investigation of the application by the Agency, except that the report of the inquiry is to be referred to the "tax-levying body" for a determination on the report. RPTL §556, however, is much clearer - the agency's report is to be conveyed to the tax levying body (RPTL §556 [4]b), and a determination on the application by the tax-levying body is directed to take place "at a regular or special meeting" **of that body** (RPTL §556[5]). Clearly, then, the Commissioner's report is only a recommendation which in this case should have been referred to the tax-levying body for **its** determination on the application, and not the Mayor's office.

The New York State Office of Real Property Services (ORPS) dealt with this very issue in 11 Op. Counsel SBRPS No. 122 (April

7, 2008). ORPS had been asked to give its opinion on the need, or advisability, of municipal governing board resolutions with respect to judicial or administrative tax assessment reviews, including for the administrative correction of errors. Regarding the latter, ORPS is of the opinion that an investigation conducted into alleged assessment errors by a county director of real property tax services under RPTL §§556 and 556-b, is embodied in a report which constitutes his recommendation for the resolution of the disputed assessment. That report, that recommendation, is provided then to the tax levying body for a decision on the refund petition. While, ORPS agrees, the statute does not specify how that decision is made by the body, it is their opinion that, in those municipalities (such as Scarsdale Village) where a legislative body is the tax levying body, the decision on such applications should be by resolution adopted by the legislative body².

That the ORPS opinion is correct, that a legislative determination on the application is the proper procedure for determining a petitioner's request for a correction of error, prior to issuance of a refund under RPTL §556 and §556-b, is implicit in *Battlefields, Inc., v. County of Rockland, et al.*, 86 Misc.2d 181 (Supreme Court, Rockland County, 1976), *aff'd.* 56 A.D.2d 586 (2nd Dept. 1977). In *Battlefields*, petitioner challenged a determination by the Rockland County Legislature on his petition pursuant to RPTL §556 for a refund of taxes, bases on an "error in essential fact." The court upheld the referral of the application to the Legislature, but held that their determination, embodied in a resolution denying the application, was in error as arbitrary and capricious, for their apparent failure to consider whether there was an error in essential fact in the assessment rolls, and the matter was remanded to the Legislature for a proper determination on the refund application (see also, *Community Health Plan v. Burckard. et al.*, 3 A.D. 724 [3rd Dept. 2004], where the Sullivan County Agency's role under RPTL §556 is described as providing a **recommendation** on the disposition of the application, rather than a **determination** on it). Implicit in *Battlefields* is that the legislature, the tax-levying body, takes the referred report and makes the determination.

Here, the Scarsdale Village Board is the tax levying body for the Village, yet there is no record that this application, and the Agency's report thereon, was ever referred to that body for a

² ORPS also recognized that RPTL 556 (8) provides for the decision-making power being lodged, by "resolution", in a county agency, but only relating to refunds of under \$2,500.00, and that this section was added to obviate the need for regular resolutions by the **legislative body** relating to small refunds.

determination on the application pursuant to RPTL §556(4)(b). Neither is there any record that the Village Board considered the application pursuant to RPTL §556(5)(a); or that they embodied that determination in a resolution, which was then sent to petitioner, pursuant to RPTL §556(5)(b)-(e). Instead, the Commission simply made a recommendation on the petitioner's application, and communicated that recommendation to the Village Mayor. Rather than refer the application to the Board for a determination, however, the Mayor made the determination himself. This was in error.

The instant petition seeks, *inter alia*, a determination that the Commission review and approve petitioner's refund application. As set forth above, clearly pursuant to either RPTL §556 or §556-b, the determination denying the application herein should not have been made here by the Mayor; rather, while it is the Commission's duty to review said application and produce a report thereon, it is the duty of the tax-levying body, the Village Board, **alone** to review the report and determine the application. Thus, no proper determination on the petitioner's application has yet been made; since there has been no proper determination, no challenge to a determination is yet ripe.

Consequently, on the Court's own motion, Index #11854/2009 is dismissed, as untimely brought due to the failure of the tax levying body in the Village, the Village Board, to properly act on the petitioner's application seeking a review of an alleged clerical error in his assessment. This matter will therefore be remanded to the Scarsdale Village Board, which is directed to consider the merit, if any, of petitioner's application for refund of the alleged overpayments made, pursuant to §556 of the Real Property Tax Law, at the next meeting of said body following the entry of the judgment to be made herein. *C.f. Battlefields, supra*, 188. All motions with respect to Index #11854/2009 will be denied, with leave to renew upon a new claim, if any, challenging any determination made by the Scarsdale Village Board of the petitioner's application.

3. The Claims Under Index #22506/2009

Index #22506/2009 contains RPTL Article 7 claims with respect to petitioner's 2009 real property tax assessments, but in addition makes claims with respect to tax assessments for prior years; and makes claims with respect to the Correction of Errors application which is also the subject of the claims in Index #11854/2009.

As set forth in greater detail above, RPTL §702 provides that an RPTL Article 7 proceeding must be commenced within thirty days after the final completion and filing of the assessment roll

containing such assessment. The assessment roll is considered finally completed and filed upon the later of the last day set by law for the filing of such roll, or when notice thereof has been given as required by law. Here too, petitioner's argument respecting an alleged "toll" of the running of the 30 days, since the roll was somehow not complete, is simply not correct. The failure to file the petition within that time period is a complete defense to the petition, and the petition must be dismissed upon such failure. Thus, any claims in Index #22506/2009 as relate to years prior to 2009 must be dismissed.

As set forth in greater detail above with respect to the claims in Index #11854/2009 relating to petitioner's Correction of Errors application, it was the executive body of the Village, the Mayor, and not its legislative body, the Village Board, which made the challenged determination on the application. Since said determination was thereby improper, and since the matter must be remanded to the Village Board for its determination of the application to comply with RPTL §556, any challenge to the Village's determination is premature. Consequently, the Court must likewise dismiss the claims in Index #22506/2009 which challenge said determination.

Finally, petitioner joins in his RPTL Article 7 claim, extraneous claims including to compel final tax rolls for years prior to 2009; for enforcement of his civil rights; and to compel other actions by the Village. As set forth in greater detail above, such claims, whatever their merit, have no place being joined in a petition seeking redress for alleged over-assessment pursuant to RPTL Article 7. The petition has hundreds of paragraphs within and among which said non-joinable claims are interspersed with those appropriately joined under the RPTL, and it is not the place of this Court to re-draft the petition until it properly conforms to the RPTL. Thus, the Court must dismiss the instant petition under Index #22506/2009 in its entirety, for all of the above reasons, with leave for petitioner, if he be so advised, to recommence an RPTL Article 7 and/or Article 78 (solely relating to any claim of selective reassessment) claim, by a petition containing only those claim(s) for tax year 2009; and with leave for petitioner, again if he be so advised, to recommence a separate action or actions seeking redress of any non-RPTL Article 7 claims, said action or actions to be brought in an appropriate Part of this Court other than the Tax Certiorari and Condemnation Part.

4. The Claims Under Index # 30011/2009

Like the claims asserted by petitioner under Index

#22506/2009, the claims under Index #30011/2009 relate to the Correction of Errors application which is also the subject of the claims in Index #11854/2009, and to constitutional claims. As set forth in greater detail above, claims relating to the Correction of Errors Application are premature. Furthermore, the asserted constitutional claims are improperly joined before this Court, which sits as the trier of fact in Article 7 and Article 78 matters, while petitioner would have the right to a trial by jury on his other claims. In addition, Article 7 and Article 78 matters have a preference in this part over any other matters pending before it. Thus, the Court would be compelled to direct severance for claims in the petition other those pursuant to RPTL Article 7, or Article 78 allegations of selective reassessment. However, here too, the claims to be dismissed as premature are interspersed within and among numerous counts and hundreds of paragraphs asserting other claims, and the Court is not inclined to re-draft petitioner's petition to conform to a severance order. Consequently, the Court will dismiss the instant petition under Index #30011/2009, as containing claims which are premature, and as improperly joined, with leave for petitioner, if he be so advised, to recommence a separate action seeking redress only of any non-RPTL Article 7 claims, said action to again not be brought before the Tax Certiorari and Condemnation Part of this Court.

5. The Claims Under Index #25721/2010

Index #25721/2010 contains RPTL Article 7 claims with respect to petitioner's 2010 real property tax assessments, but in addition makes claims with respect to tax assessments for prior years; and makes claims with respect to the Correction of Errors application which is also the subject of the claims in Index #11854/2009.

As set forth in greater detail above, RPTL §702 provides that an RPTL Article 7 proceeding must be commenced within thirty days after the final completion and filing of the assessment roll containing such assessment. The assessment roll is considered finally completed and filed upon the later of the last day set by law for the filing of such roll, or when notice thereof has been given as required by law. Here too, petitioner's argument respecting an alleged "toll" of the running of the 30 days, since the roll was somehow not complete, is simply not correct. The failure to file the petition within that time period is a complete defense to the petition, and the petition must be dismissed upon such failure. Thus, any claims in Index #25721/2010 as relate to years prior to 2010 must be dismissed.

As also set forth in greater detail above with respect to the claims in Index #s 11854/2009, 22506/2009, and 30011/2009, relating

to petitioner's Correction of Errors application, it was the executive body of the Village, the Mayor, and not its legislative body, the Village Board, which made the challenged determination on the application. Since said determination was thereby improper, and since the matter must be remanded to the Village Board for its determination of the application to comply with RPTL §556, any challenge to the Village's determination is premature. Consequently, the Court must likewise dismiss the claims in Index #25721/2010 which challenge said determination.

Finally, petitioner again joins in his RPTL Article 7 claim, extraneous claims including for enforcement of his civil rights; and to compel other actions by the Village. As set forth in greater detail above, such claims, whatever their merit, have no place being joined in a petition seeking redress for alleged over-assessment pursuant to RPTL Article 7. The petition has hundreds of paragraphs within and among which said non-joinable claims are interspersed with those appropriately joined under the RPTL, and it is not the place of this Court to re-draft the petition until it properly conforms to the RPTL. Thus, the Court must dismiss the instant petition under Index #25721/2010 in its entirety, for all of the above reasons, with leave for petitioner, if he be so advised, to recommence solely an RPTL Article 7 claim, by a petition containing only that claim for tax year 2010; and with leave for petitioner, again if he be so advised, to recommence a separate action or actions seeking redress of any non-RPTL Article 7 claims, said action or actions to not be brought before the Tax Certiorari and Condemnation Part of this Court.

Based upon the foregoing, as relates to these several motions, it is hereby

ORDERED, that respondent's motion to dismiss Index #23003/2008, for filing an amended petition without leave of court, pursuant to CPLR §3025, and for improper joinder, is granted, and it is further

ORDERED, that on the Court's own motion, Index #11854/2009 is dismissed, as prematurely brought due to the failure of the tax levying body in the Village of Scarsdale to properly act on the petitioner's Correction of Errors Application, and the matter is remanded to the said Village Board, which is directed to consider the merit, if any, of petitioner's application, pursuant to section 556 of the Real Property Tax Law, at the next meeting of said body following the entry of the judgment to be made herein; and all other motions with respect to Index #11854/2009 will be denied, with leave to renew upon a new claim, if any, challenging any determination made by the Scarsdale Village Board of the

petitioner's application; and it is further

ORDERED, that on the Court's own motion, and on respondent's motion to dismiss, Index #22506/2009 is likewise dismissed, as prematurely brought in the same manner as Index #11854/2009; as commenced (relating to tax years prior to 2009) in violation of the Statute of Limitations; and for improper joinder of non-RPTL Article 7 claims with RPTL claims, with leave for petitioner, if he be so advised, to recommence solely an RPTL Article 7 and/or Article 78 (as limited above)claim(s), by a petition containing only such claim(s) for tax year 2009; and likewise with leave for petitioner, again if he be so advised, to recommence a separate action or actions seeking redress of any non-RPTL Article 7 claims, said action or actions to not be brought before the Tax Certiorari and Condemnation Part of this Court; and all other motions with respect to this Index Number are denied; and it is further

ORDERED, that on the Court's own motion, and on respondent's motion to dismiss, Index #30011/2009 is likewise dismissed, as prematurely brought in the same manner as Index #s 11854/2009 and 22506/2009; and for improper joinder of non-RPTL claims with non-RPTL claims, with leave for petitioner, if he be so advised, to recommence a separate action or actions seeking redress of any non-RPTL Article 7 claims, said action or actions to not be brought before the Tax Certiorari and Condemnation Part of this Court; and all other motions with respect to this Index Number are denied; and it is further

ORDERED, that on the Court's own motion, and on respondent's motion to dismiss, Index #25721/2010 is likewise dismissed, as prematurely brought in the same manner as Index #s 11854/2009, 22506/2009, and 30011/2009; as commenced (relating to tax years prior to 2010) in violation of the Statute of Limitations; and for improper joinder of non-RPTL Article 7 claims with RPTL claims, with leave for petitioner, if he be so advised, to recommence solely an RPTL Article 7 claim, by a petition containing only that claim for tax year 2010; and likewise with leave for petitioner, again if he be so advised, to recommence a separate action or actions seeking redress of any non-RPTL Article 7 claims, said action or actions to not be brought before the Tax Certiorari and Condemnation Part of this Court; and all other motions with respect to this Index Number are denied.

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

Dated: White Plains, New York
July 25, 2012

HON. JOHN R. LA CAVA, J.S.C.

Steven L. Greenberg
Petitioner, Pro Se
271 Fox Meadow Road
Scarsdale, New York 10583
Fax #472-9589

Rice & Amon
By: Terry Rice, Esq.
Attorneys for Respondents Town of Scarsdale,
Village of Scarsdale and Nanette J. Albanese
Four Executive Boulevard, Suite 100
Suffern, New York 10901
Fax #845-357-0765

Caroline Lineen, Esq.
Rutherford & Christie, LLP
Attorneys for Respondent Scarsdale Union Free School District
369 Lexington Avenue, 8th Floor
New York, New York 10017
Fax #212-599-5162

Robert F. Meehan
Westchester County Attorney
By: Melissa-Jean Rotini, Esq.
148 Martine Avenue
White Plains, New York 10601
Fax #995-3132