SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
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ORANGE AND ROCKLAND UTILITIES, INC.,

Petitioner,

SOUTHERN ENERGY BOWLINE, LLC.,
MIRANT NEW YORK, INC.,
MIRANT BOWLINE, LLC,

Intervenor-Petitioners,

-Against-

THE ASSESSOR OF THE TOWN OF HAVERSTRAW
THE BOARD OF REVIEW OF THE TOWN OF
HAVERSTRAW and THE TOWN OF HAVERSTRAW

Respondents,

COUNTY OF ROCKLAND and NORTH ROCKLAND
CENTRAL SCHOOL DISTRICT,

Intervenors-Respondents.

For a Review of Tax Assessments Under Article 7
of the Real Property Tax Law.

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FILED AND ENTERED ON DATE November 24, 2004 ROCKLAND COUNTY CLERK

DECISION & ORDER
Index Nos: 4133-95
0346-96
4424-97
4639-98
4238-99
3258-00
4694-01
5120-02
5278-03

DICKERSON, J.

DISCOVERY REMEDIES, ADDITIONS & SUBSTITUTIONS OF PARTIES

The Discovery Remedies

On the first day of trial, July 6, 2004, the Respondents asserted that Petitioners had untimely produced documents, just two weeks earlier, which they needed to adequately prepare for trial. As a consequence, Respondents made an oral application for the following relief, to amend or supplement their appraisal, to recall witnesses and to move to have portions of Petitioner's appraisal stricken. Petitioners consented to allow Respondents to amend or supplement their appraisal and/or recall witnesses, if necessary.

The Addition And Substitution Of Mirant Bowline, LLC

On July 11, 2004, Petitioners responded in writing to Respondents' Discovery Application by cross moving pursuant to C.P.L.R. § 2001 for permission to substitute or add Mirant Bowline, LLC [of which Mirant New York, Inc. is the sole member], as a Petitioner in the 2001 and 2002 tax assessment review proceedings presently before this Court[1]. In their reply dated July 29, 2004, Respondents opposed Petitioner's application to add and/or substitute Mirant Bowline, LLC as a Petitioner and reasserted their statements made on the first day of trial regarding the Petitioners' alleged untimely production of documents, and requesting anew an opportunity, if necessary, to amend or supplement their appraisal, recall witnesses, and move to have portions of

Petitioner's appraisal stricken. Additional submissions were made by the parties addressing the aforementioned issues[2].

Is Mirant New York, Inc. An Aggrieved Party?

The relevant tax assessment review petitions were brought in the names of Southern Energy Lovett, LCC [2000 Petition], and Mirant New York, Inc. [2001-2003 Petitions]. In their pre-trial memorandum, Respondents argued that representations made by these parties before the United States Bankruptcy Court for the Northern District of Texas [" the Texas Bankruptcy Court "] raise the question whether Mirant New York, Inc. is an " aggrieved party " within the meaning of RPTL §704(1) which authorizes the review of a real property assessment only if brought by an " aggrieved " party. Respondents cite Waldbaum Inc. v. Finance Administrator, 74 N.Y. 2d 128, 544 N.Y.S. 2d 561 (1989) for the proposition that the party seeking review of the assessment must be wholly responsible for the entire tax levy, either as the property owner, or in his stead, or have a contractual entitlement to bring the proceeding in the name of the aggrieved person.

Admissions Before The Texas Bankruptcy Court

Evidently, while before the Texas Bankruptcy Court the Petitioners opposed a motion brought by the Respondent County of Rockland, to compel

Mirant Bowline, LLC, Mirant NY-Gen, LLC and Mirant New York, Inc. to pay the unpaid real property taxes with respect to the Bowline Electric Generating Plant. Respondents contend that in response to that motion, Petitioners argued that only Mirant Bowline, LLC and Mirant NY-Gen, LLC " arguably owe any taxes in New York ". Respondents claim that Mirant New York, Inc. is the named petitioner in the instant proceedings for the years 2001, 2002 and 2003, yet it represented that it had no obligation " to pay the taxes it now disputes ". Therefore, Respondents argue, Petitioners should be required to prove Mirant New York, Inc.'s standing as an " aggrieved party ". Although Respondents never made a formal motion to dismiss, they have asserted that if Petitioners are unable to prove that Mirant New York, Inc. has standing as an aggrieved party, the instant tax assessment review proceedings for the years 2001, 2002 and 2003 must be dismissed.

Aggrievement And Pecuniary Interest

In response, Petitioners contend, that the statement they made in the Texas Bankruptcy Court was based on Mirant New York, Inc.'s position as a Debtor, and thereby, the statement was based on United States Bankruptcy Law. Petitioners also argue that real property tax invoices were sent to Mirant New York, Inc. for the 2003 Town and County real property taxes and that these taxes were paid. Respondents issued tax bills to Southern Energy New York, Inc. [the predecessor to Mirant New

York, Inc.], and subsequently, to Mirant New York, Inc., which was subject to personal liability for said tax bills.

In Waldbaum v. City of New York, 74 N.Y. 2d 128, 133, 544 N.Y.S. 2d 561 (1989), the Court of Appeals held that " Aggrievement was recognized where an assessment adversely affected a challenger's pecuniary interests causing the loss of something from his own property or means." It is clear that the potential imposition of personal liability against Mirant New York, Inc. by the issuance of the real property tax invoices to it constituted a pecuniary interest.

The Parent Corporation

Petitioners also argue that for the 2003 tax assessment review proceeding, they timely amended the petition to name Mirant Bowline, LLC as Petitioner. On December 31, 2002 Mirant Bowline and Mirant Lovett became single member limited liability companies owned 100% by Mirant New York, Inc. Therefore according to Petitioners, Mirant New York, Inc. is the sole member of Mirant Bowline, LLC and thereby its parent corporation.

DISCUSSION

Under most circumstances tax certiorari proceedings should not be discontinued because of mere technical defects [see e.g., Waldbaums,

supra, at 74 N.Y. 2d 133; Matter of Great Eastern Mall, Inc. v Condon, 36 N.Y. 2d 544, 369 N.Y.S. 2d 672 (1975) ("' [the] Tax Law relating to review of assessments is remedial in character and should be liberally construed to the end that the taxpayer's right to have his assessment reviewed should not be defeated by a technicality "' citing People ex rel. New York City Omnibus Corp. v. Miller, 282 NY 5, 9 ")].

In addition parties may be substituted in real property tax proceedings [see e.g., Matter of Rotblit v. Board of Assessors[3], 121 A.D. 2d 727, 504 N.Y.S. 2d 61) (2nd Dept. 1986)(" Like an omitted authorization by the petitioner, a defect with respect to the name of the petitioner, where there is proper authorization by the appropriate individual, is a " technical defect which should not operate to bar the proceedings "[case citation omitted]. The appellant "received 'adequate notice of the commencement of the proceeding' and *** [no] substantial right of the [appellant] would *** 'be prejudiced by disregarding the defect'" and the misnomer may thus be properly cured by amendment of the petitions [case citations omitted]")].

Mirant New York, Inc. Had The Authority

In Rotblit, supra, the entity having the authority to commence the action executed the authorization. In the instant matter the entity having such authority was Mirant New York, Inc. Mirant New York, Inc. was the

operating manager and tax member for each year in question[4]. To commence the 2001, 2002 and 2003 tax assessment review proceedings, it was necessary for either Mirant New York, Inc. or its authorized representative to execute an authorization to file the respective petitions. Respondents, in their papers, conceded that the operating agreements gave Mirant New York, Inc. the authority to commence the proceedings on behalf of Mirant Bowline, LLC. Respondents also do not contest the fact that Mirant New York, Inc. executed the authorization to file both the administrative complaint and the petitions. In addition, Respondents repeatedly issued tax bills to Mirant New York, Inc.

Regarded As Interchangeable

In so doing, they appeared to regard the parties, Mirant New York, Inc. and Mirant Bowline, LLC as essentially interchangeable [see e.g., Matter of Arlen Realty and Development Corp. v. Board of Assessors of the Town of Smithtown et al, 74 A.D. 2d 905, 425 N.Y.S. 2d 855 (2nd Dept. 1980) ("Both Petitioner and its attorney had authority to act as agent for petitioner's wholly owned and controlled subsidiary, which, as a lessee, is clearly an 'aggrieved party' (see Matter of Burke,62 NY 224; Real Property Tax Law, §704, subd 1). Therefore, Special Term erred in not granting leave to petitioner to amend its caption pursuant to CPLR 3025 (subd[b]) (see People ex rel Durham Realty Corp. v. Cantos. 234 NY 507)]."

In Matter of Arlen Realty, supra, the Second Department held that the parent corporation, which would be Mirant New York, Inc. in the instant matter, had the authority to commence the proceeding for its wholly owned subsidiary, which here would be Mirant Bowline, LLC. The Court also found that the parent corporation could request that the petition's caption be amended to correct a misnomer by having its wholly owned subsidiary named as a petitioner. The Second Department ruled it was error not to apply the liberal amendment prescriptions of C.P.L.R. § 3025, and reversed the trial court for not permitting the amendment of the caption.

Mirant New York, Inc. Is An Aggrieved Party

It is the decision of this Court after reviewing the arguments of the parties and the applicable law, that Mirant New York, Inc. is an aggrieved party.

The Proceedings Will Not Be Dismissed

The tax assessment review proceedings for the years 2001, 2002 and 2003 will not be dismissed since Mirant New York, Inc. is an aggrieved party, and because this Court will not dismiss those proceedings based on a technical defect. This Court also notes that pursuant to C.P.L.R. § 2001 omissions and mistakes can be corrected by the Court.

Substitution of Mirant Bowline, LLC

In addition, pursuant to C.P.L.R. § 3025 and § 2001, and in an effort to avoid any future confusion on the matter, the Court grants Petitioners' motion to add Mirant Bowline, LLC as a Petitioner in the 2001 and 2002 tax assessment review proceedings, as well as allowing substitution of Mirant Bowline, LLC for Southern Energy Bowline, LLC.

Timeliness of Document Production

Regarding the issue of the production of certain documents to Respondents by Petitioners, specifically bid and pre-sale documents, the Respondents seek relief from what they allege to be Petitioners' failure to produce the requested documents until June 21, 2004, which was after the parties' appraisals were completed and exchanged.

As Petitioners remind the Court[5], when the issue was first raised by Respondents on July 6, 2004, Petitioners stated that they were not seeking to limit Respondents in their ability to adequately prepare their case for trial. Petitioners stated that they did not object to the Court's suggestion of permitting Respondents to recall witnesses or supplement their appraisal.

Accordingly, the Court grants Respondents' motion on consent of Petitioners to the extent that Respondents will be given an opportunity to

amend or supplement its appraisal, and to recall witness if deemed necessary.

This Constitutes the Decision and Order of this Court.

Dated: White Plains, NY
November 24, 2004

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HON. THOMAS A. DICKERSON
Supreme Court Justice

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ENDNOTES

1. The Petitioner's cross motion responded to the claim Respondents made earlier in their pre-trial memorandum wherein they argued that Mirant New York, Inc. is not an aggrieved party.

2. The following additional papers were submitted by the parties. Respondents filed a "Memorandum of Law In Opposition to Cross Motion to Substitute Party," dated September 10, 2004, regarding Petitioners' cross motion for an order substituting Mirant Bowline, LLC as the Petitioner in the 2001 and 2002 proceedings. Petitioners filed a "Reply Affirmation of Mark D. Lansing" dated September 17, 2004 in opposition to Respondents' application regarding certain documents produced to them on June 21, 2004. Petitioners' filed an "Affidavit of Josh Tolchin" on September 13, 2004, an "Affidavit of Michael Hobbs" on September 13, 2004, and an "Affidavit of Derek Keddy" on October 6, 2004. Respondents submitted an "Affidavit of Margaret Gillis" dated October 13, 2004 in response to the September 17, 2004 Affirmation of Mark Lansing. Respondents submitted a "Reply Memorandum of Law in Opposition to Cross Motion to Substitute Party" dated October 12, 2004. Finally, Petitioners submitted a "Sur-Reply Memorandum of Law in Support of Cross Motion for Summary Judgement," along with a "Sur-Reply Affirmation of Mark D. Lansing" dated October 27, 2004.

3. In Matter of Rotblit v. Board of Assessors, 121 A.D. 2d 727, 504 N.Y.S. 2d 61 (2d Dept. 1986), the proceedings brought to review the tax assessments on the subject property were commenced in the name of Max Rotblit although that individual no longer owned the subject property. However, one of the record owners executed the authorizations for those petitions. Under those circumstances, the Second Department held "the Special Term appropriately deemed the defect in those petitions 'technical' rather that 'jurisdictional', and permitted the names of the record owners to be substituted for that of Max Rotblit."

4. See Affidavit of Derek Keddy sworn to October 6, 2004.

5. See Reply Affirmation of Mark D. Lansing dated September 17, 2004.