

FILED AND
ENTERED ON
DATE
August 18, 2005
WESTCHESTER
COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X

In the Matter of the Application of

MRE REALTY CORP.,

Index No: 9535/05

Petitioner,

DECISION, ORDER &
JUDGMENT

-against-

THE ASSESSOR OF THE TOWN OF GREENBURGH,
THE TOWN OF GREENBURGH, THE ELMSFORD
SCHOOL DISTRICT, WESTCHESTER COUNTY,
THE BOARD OF ASSESSMENT REVIEW OF THE
TOWN OF GREENBURGH, AND THE VILLAGE
OF ELMSFORD,

Respondents.

-----X

DICKERSON, J.

The R.P.T.L. § 727(1) MORATORIUM: FAILURE TO TIMELY FILE

Real Property Tax Law [" R.P.T.L. "] § 727(1) prohibits changes to real property tax assessments within three years of a Court ordered reassessment with certain exceptions, two of which we previously addressed in Matter of 2 Perlman Drive v. The Board of Assessors of the Village of Spring Valley, ___ Misc. 3d ___, 2005 WL 1668394 (West. Sup.

2005). In this variation upon a theme we address the impact of a failure to file a timely R.P.T.L. Article 7 Petition and when the Moratorium's three year freeze would have begun had the Petitioner timely filed.

The Article 78 Petition

The Petitioner brought the instant C.P.L.R. Article 78 Petition seeking an order and judgement pursuant to R.P.T.L. § 727 revising the 2000 and 2001 tax assessment rolls from an assessed value of \$42,590.00 to \$31,200.00, and the 2004 tax assessment roll from an assessed value of \$42,590.00 to \$25,000.00, of certain real property owned by Petitioner located at 135 Saw Mill River Road and designated as parcel EL/01/802/6 of the Official Assessment map of the Town of Greenburgh [" the subject property "]. The Respondents Town of Greenburgh and the Elmsford Union Free School District each submitted a Verified Answer and the Respondents Westchester County and the Village of Elmsford each submitted a Motion to Dismiss Petitioner's Article 78 Petition.

Factual Background

The Petitioner commenced a R.P.T.L. Article 7 tax certiorari proceeding contesting the tax assessment fixed upon the subject property by the Town of Greenburgh for assessment years 1999, 2002 and 2003.

The Consent Judgment

By Consent Judgement signed on February 8, 2005 and entered on February 16, 2005, it was Ordered that " the assessment Parcel EL/01/802/6 be and the same are hereby reduced, corrected and fixed " for the assessment years 1999, 2002, and 2003 as follows¹:

Assessed Value Reduced

Assessment Year	<u>From</u>	<u>To</u>
1999	\$42,590	\$31,200
2002	\$42,590	\$25,300
2003	\$42,590	\$25,000

The Petitioner's Contentions

The Petitioner contends that pursuant to R.P.T.L § 727, " the assessment for assessment years 2000 and 2001 are to be reduced accordingly to \$31,200.00 and Petitioner is entitled to a refund for over payment " and " the assessment for assessment year 2004 is to be

reduced accordingly to \$25,000.00 and Petitioner is entitled to a refund for over payment "2.

R.P.T.L § 727(1)

Subdivision 1 of RPTL §727, entitled " Prohibition against change in assessment following litigation ", states as follows: " Except as hereinafter provided, and except as to any parcel of real property located within a special assessing unit as defined in article eighteen of this chapter where an assessment being reviewed pursuant to this article is found to be unlawful, unequal, excessive or misclassified by final court order or judgement, the assessed valuation so determined shall not be changed for such property for the next three succeeding assessment rolls prepared on the basis of the three taxable status dates next occurring on or after the taxable status date of the most recent assessment under review in the proceeding subject to such final order or judgement. Where the assessor or other local official having custody and control of the assessment roll receives notice of the order or judgement subsequent to the filing of the next assessment roll, he or she is authorized and directed to correct the entry of assessed valuation on the assessment roll to conform to the provisions of this section ".

Matter of Scellen

Both Petitioner and Respondents discuss Matter of Scellen v. Assessor for the City of Glens Falls, 300 A.D.2d 979, 980, 753 N.Y.S.2d 536 (3d Dept. 2002). The issue before the Appellate Division, Third Department in Scellen, supra, was " whether petitioner was required to commence tax certiorari proceedings while her 1998 challenge was pending in order for the December 2000 reduction of her 1998 assessments to be binding for the intervening tax years " pursuant to R.P.T.L. § 727. The court agreed with respondents that " petitioner was required to challenge the assessed valuations of her properties for the 1999 and 2000 tax years while her 1998 challenge was pending and, having failed to do so, is not entitled to relief for those years. " [Scellen, supra, at 300 A.D. 2d 980]. The court went on to say that in their view, " the statutory scheme underlying RPTL article 7 evinces a clear legislative intent that a separate proceeding be timely commenced to challenge each tax assessment for which relief is sought (see RPTL 702, 704, 706; see also 22 NYCRR 202.59[d][2]), and the legislative history of RPTL 727 gives no indication that the Legislature intended to relieve petitioner of this requirement in the case of assessment rolls established during the pendency of a prior RPTL article 7 proceeding

(see Governor's Mem., Bill Jacket, L. 1995, ch. 693)." [Scellen, supra, at 300 A.D. 2d 980-981]. The court therefore found that petitioner, having failed to challenge the 1999 and 2000 assessments of her properties, was not entitled to R.P.T.L. §727 relief for those tax years.

Petitioner's Challenge: Scellen Not Fair

It is Petitioner's view that Scellen, supra, is not binding on this court because it emanates from the Appellate Division, Third Department and because it is factually dissimilar to the matter before this court. The Petitioner criticizes the Scellen court's interpretation of the operation of R.P.T.L. § 727 as " determined not on the words of the statute or issues of fundamental fairness, but rather on the intent of the legislature and what benefit can be supplied to the municipality that has been over taxing the tax payer...The Court in Scellen engaged in finding an ambiguity in a statute when there is none by substituting its own view of the intent of the legislature rather than the intent of the legislature itself as demonstrated by the words of the statute itself " ³.

Respondents' Position: Scellen Is Very Fair, Indeed

The Respondents contend that Scellen, *supra*, does, indeed, apply to the instant matter since the " case has not been challenged or overturned, or distinguished for that matter, by any other Court in this State."⁴. According to Respondent Town of Greenburgh, " the Consent Judgement plainly indicates at the first decretal paragraph on the last page of the judgement, RPTL §727 did and does apply to this case after 2003 - that is, Petitioner has received the benefit of a fixed assessment, pursuant to RPTL §727, for 2004, 2005 and 2006 "⁵. Since the Petitioner did not file R.P.T.L. Article 7 Petitions for 2000 and 2001, Respondents allege that " Petitioner here is seeking to be rewarded with an additional two year freeze on assessment years for which she did not file "⁶.

DISCUSSION

The decision of the Appellate Division, Third Department in Scellen, *supra*, is well reasoned, properly decided and on point with the instant matter. Hence, it will be followed by this court. Since the Petitioner did not file an R.P.T.L. Article 7 petition for either 2000 or 2001, R.P.T.L. § 727 does not apply to those years.

When Would The Freeze Have Begun?

In addition, the language of the statute is clear when it states that " the assessed valuation so determined shall not be changed for such property for the next three succeeding assessment rolls prepared on the basis of the three taxable status dates next occurring *on or after the taxable status date of the most recent assessment under review in the proceeding subject to such final order or judgement* " [emphasis added]. In the instant matter, the most recent assessment under review subject to the parties' Consent Judgement was 2003. Therefore, pursuant to R.P.T.L. § 727, the next three succeeding assessment rolls for which the assessed valuation " shall not be changed " would be 2004, 2005 and 2006. Hence, the statutory freeze on assessed valuation would not apply to 2000 and 2001, in any event.

Accordingly, for all the aforesaid reasons, Petitioner's C.P.L.R. Article 78 Petition is denied in its entirety. The Motions to Dismiss of both Respondents Westchester County and the Village of Elmsford are denied as moot.

This constitutes the decision, order and judgement of this court.

Dated: White Plains, N.Y.
August 18, 2005

HON. THOMAS A. DICKERSON
SUPREME COURT JUSTICE

TO: William Yuris, Esq.
Attorney for Petitioner
25 Broadway, Suite 105
Pleasantville, N.Y. 10570

Giacchino J. Russo, Esq.
Attorney for Elmsford Union Free School District
50 Main Street, Suite 1000
White Plains, N.Y. 10606

Ira S. Levy, Esq.
Attorney for Village of Elmsford
20 North Broadway, Suite H-338

White Plains, N.Y. 10601

Charlene M. Indelicato, Esq.
Carol F. Arcuri, Esq.
Attorneys for Westchester County
148 Martine Avenue, Room 600
White Plains, N.Y. 10601

Timothy W. Lewis, Esq.
Attorney for Town of Greenburgh
177 Hillside Avenue
Greenburgh, N.Y. 10607

ENDNOTES

1. See Petition dated June 14, 2005 [" the Petition "] at Ex. D [Consent Judgment].
2. Petition at paras. 7 & 8.
3. Petition at paras. 14-15.
4. Affirmation In Opposition of Peter Carparelli dated July 20, 2005 [" Carparelli Aff. "] at para. 3.
5. Caparelli Aff. at para. 5.
6. Caparelli Aff. at para. 6.