SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS
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REDHEAD PROPERTIES, L.L.C.,
By Huff Wilkes, L.L.P., Agent,

Petitioner,

-against-

THE TOWN OF WAPPINGER, its ASSESSOR
and THE BOARD OF ASSESSMENT REVIEW,

Respondents,

For a Judgment Under Article 78 of the
CPLR and Other Relief
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Index No. 05-19569

(Westchester County Clerk)

DECISION & ORDER

DICKERSON, J.

RPTL § 727(1) MORATORIUM: CONSENT JUDGMENT ENFORCED

In this matter the Petitioner, Redhead Properties, L.L.C., owners of the subject seventy-six (76) tax lots, seeks to enforce pursuant to CPLR Article 78 and RPTL § 727(1) a Consent Judgment[1] [" the Consent Judgment "] entered into between Sherwood Development I, LLC and Sherwood Development II, LLC ["Sherwood"], the former owners of the subject tax lots, and the Respondents, The Town of Wappinger, its Assessor and Board of Assessment Review

[“ BAR “], on March 16, 2004[2].

The Consent Judgment expressly provided “ that the provisions of Section 727 of Real Property Tax Law shall apply to the assessments appearing in Exhibit A for at least the three assessment rolls succeeding the 2003 assessment roll “[3]. However, fourteen months after agreeing to the Consent Judgment the Respondents proposed to [and eventually did] more than double the assessments on all of the subject 76 tax lots for the tax year 2005[4]. In response the Petitioner challenged the 2005 assessments before the BAR, filed an R.P.T.L. Article 7 Petition for Review of Tax Assessment[5] and commenced the instant Article 78 proceeding. The Respondents later explained their actions [within the context of this proceeding] as being justified by a misrepresentation made by Petitioner’s “ transactional attorney “[6] which Respondents relied upon in entering into the Consent Judgment and two exceptions in RPTL § 727(2)(i.e., § 727(2)(a) (“ There is a revaluation or update of all real property on the assessment roll “)[7] and § 727(2)(I) (“ The use or classification of the property has changed “)[8].

Stated, simply, and after a careful review of the Petition and papers submitted in support of and in opposition thereto[9] and the excellent presentations of counsel made during oral argument, most especially, the forthright admissions of Respondents’ attorney[10], held on May 5, 2006, this Court grants the relief sought, to the

extent of " directing and compelling Respondents to correct the final assessment roll for the 2005 assessment year by adjusting the assessments in accordance with the terms of the Consent Judgment... directing that refunds for the overpayment of any (2005) real property taxes levied and paid...shall be made together with statutory interest " and awarding an " additional allowance " of $100.00 for each of the subject 76 tax lots.

FACTUAL BACKGROUND

The Consent Judgment

The Consent Judgment which forms the basis of this Article 78 proceeding was entered into on March 16, 2004 by Sherwood and the Respondents to resolve a dispute over the 2003 assessments imposed on the subject tax lots. The dispute lead to the entry of a Default Judgment issued by Justice Rosato of this Court[11]. Evidently, as a face saving measure the Respondents agreed to the Consent Judgment[12]. " The Consent Judgment resulted in the reduction of the aggregate assessments for 2002 and 2003 assessment years from $3,055,100 to $1,680,00 which was to remain fixed, pursuant to RPTL § 727, for the 2004, 2005 and 2006 assessment rolls "[13].

The Purchase

The Petitioner, Redhead Properties LLC, purchased the subject tax lots from Sherwood on March 14, 2005[14].

The Notice Of Change Of Assessment

On May 6, 2005 the Respondent Assessor mailed to Petitioner a " Notice of Change of Assessment "[15] for each of the subject tax lots the effect of which " was to reset each assessment for each of the lots to the pre-Consent Judgment values "[16]. This Notice was challenged before the BAR and resulted in the filing of an RPTL Article 7 petition[17].

Article 78 Petition To Enforce A Consent Judgment

The Petitioner timely[18] filed the instant Article 78 Petition seeking to enforce the Consent Judgment and vacate the 2005 assessment pursuant to RPTL § 727(1). Petitioner may seek to enforce the Consent Judgment by way of a CPLR Article 78 Petition [See e.g., EMP of Cadillac, LLP v. Assessor of Village of Spring Valley, 15 A.D. 3d 336, 789 N.Y.S. 2d 522 (2d Dept. 2005)(" The Supreme Court should have determined that the plaintiff should have commenced a proceeding pursuant to CPLR Article 78 in the nature of

mandamus, since the defendant refused to comply with the terms of the consent judgment...We remedy such procedural infirmity by converting this action...to a proceeding pursuant to CPLR article 78...to compel the defendant to comply with the consent judgment ")] or an RPTL Article 7 Petition [See e.g., Washington Commons Associates v. Board of Assessors of the City of Albany, 4 Misc. 3d 1027, 798 N.Y.S. 2d 349 (Albany Sup. 2004)(RPTL Article 7; summary judgment granted to petitioner); Matter of 2 Perlman Drive LLC v. Board of Assessors of Village of Sporing Valley, 9 Misc. 3d 382, 800 N.Y.S. 2d 816 (Rockland Sup. 2005)(RPTL Article 7)].

No Selective Reassessment

Notwithstanding Petitioner's assertions[19] to the contrary the issues raised herein do not involve the prohibited policy of selective reassessment[20] [See e.g., Matter of Charles Krugman v. Board of Assessors of the Village of Atlantic Beach, 141 A.D. 2d 175, 184, 533 N.Y.S. 2d 495 (2d Dept. 1988)(" The respondents' practice of selective reassessment of only those properties in the village which were sold during the prior year contravenes statutory and constitutional mandates. In order to achieve uniformity and ensure that each property owner is paying an equitable share of the total tax burden the assessors, at a minimum, were required to

review all property on the tax rolls in order to assess the properties at a uniform percentage of their market value. The respondents' disparate treatment of new property owners on the one hand and long term property owners on the other has the effect of permitting property owners who have been longstanding recipients of public amenities to bear the least amount of their cost... This approach lacks any rational basis in law and results in invidious discrimination between owners of similarly situated property ")].

The RPTL § 727(2) Exceptions

The assessments agreed to in the Consent Judgment may be changed within the three year prohibition of RPTL § 727(1) if Respondents can demonstrate the application of one or more of the exceptions set forth in RPTL § 727(2) [See e.g., Matter of Malta Town Centre v. Town of Malta Board of Assessment Review, 3 N.Y. 3d 563, 822 N.Y.S. 2d 331, 789 N.Y.S. 2d 80 (2004)(RPTL § 727(2) (a)(revaluation)); Matter of Akey v. Town of Plattsburgh, 300 A.D. 2d 871, 754 N.Y.S. 2d 378 (3d Dept. 2002)(RPTL § 727(2)(a) (revaluation)); Matter of Viacom Corp. v. Board of Assessors of the Town of Horseheads, 295 A.D. 2d 791, 744 N.Y.S. 2d 539 (3d Dept. 2002)(RPTL § 727(2)(a)(revaluation)); Owens Corning v. Board of Assessors of Town of Bethlehem, 279 A.D. 2d 118, 718 N.Y.S. 2d 715 (3d Dept. 2001)(RPTL § 727(2)(a)(revaluation));

Washington Commons Associates v. Board of Assessors of the City of Albany, supra (RPTL § 727(2)(g)(change in occupancy rate of 25% or greater)); Matter of 2 Perlman Drive LLC v. Board of Assessors of Village of Spring Valley, supra (RPTL § 727(2)(g)(change in occupancy rate),(I)(change in use or classification)].

The Respondents' Position

The Respondents assert in the unsworn affidavit of their attorney that there are three reasons[21] which justify their violation of the Consent Judgment's prohibition against increasing the assessments on the subject tax lots for the tax year 2005.

The Misrepresentation

Respondents assert that they entered into the Consent Judgment with Sherwood, the former owner of the subject tax lots and not a party to this proceeding, because of a misrepresentation to the effect " that should the units be sold individually in the future, such would constitute a change warranting an increase in assessment[22]". Respondents claim that three sales were made in August and October of 2005[23], long after the taxable status date of March 1, 2005, after the subject tax lots were sold to the Petitioner on March 14, 2005 and after the Petitioner received the

Notice of Change of Assessment on May 6, 2005. As admitted by counsel at oral argument[24] these sales have nothing to do with the 2005 assessment challenged herein. In any event, no affidavit of any of the Respondents has been submitted setting forth the alleged misrepresentation and their reliance thereon in entering into the Consent Judgment. All that is presented on this issue is the statement of counsel in an unsworn affidavit having no probative value[25]. Furthermore, if in fact there was such a misrepresentation [disputed by Petitioner's counsel[26]] and Respondents were serious about their claims of being deceived then they should have moved against the prior owner[27], Sherwood, to vacate the Consent Judgment on the grounds of fraud which they have not done. It is clear that there is not a scintilla of merit in the Respondents' counsel's unsworn claim that Respondents were deceived into entering into the Consent Judgment and, therefore, are justified in violating the Consent Judgment by raising the assessments on the subject tax lots in 2005.

RPTL § 727(2)(a): Revaluation

Respondents assert that the " Town of Wappinger has undertaken a town wide revaluation. The cover page of the contract for such endeavor is attached "[28]. Not only does Petitioner dispute that such a revaluation took place in 2005, if at all[29], but at oral argument

Respondents' counsel admitted that no revaluation took place during the 2005 tax year and that RPTL § 727(2)(a) does not apply herein. In addition, the assertion of a revaluation was not set forth in any affidavit by Respondents but only in the unsworn affidavit of their attorney[30].

RPTL § 727(a)(I): Change In Use

Respondents assert that " assessment may be changed where the ' use or classification of the property has changed '. Such change or classification has irrefutably taken place "[31]. Respondents claim that the sale of three lots in August and October of 2005 are indicative of a change of use from " rental units " to lots for sale. Respondents cite no authority to support their position that such a " change " is covered by RPTL § 727(a)(I). As with other factual assertions discussed above these statements regarding a change in use have no probative value, are not applicable to the 2005 assessment challenged herein as discussed by Petitioner[32] and admitted to at oral argument by Respondents' counsel[33].

DISCUSSION

The Petitioner has met its burden of demonstrating the existence of an enforceable Consent Judgment regarding the subject

tax lots which expressly states " that the provisions of Section 727 of the Real Property Tax Law shall apply to the assessments appearing in Exhibit A for at least the three assessment rolls succeeding the 2003 assessment roll " and that Respondents violated the Consent Judgment and RPTL § 727(1) by more than doubling the 2005 tax assessments on all 76 of the subject tax lots [See e.g., Washington Commons Associates v. Board of Assessors of the City of Albany, supra (" In sum, the Court finds that WCA made a prima facie case entitling it to summary judgment for demonstrating that the 2002 reassessment was prohibited by the August 11, 2000 Order and RPTL § 727(1) ")].

The burden of proof then shifted to the Respondents to " show that the (2005) reassessment was authorized by an exception provided in RPTL § 727(2) " [Washington Commons Associates v. Board of Assessors of the City of Albany, supra]. The Respondents have failed to meet their burden by demonstrating that the 2005 reassessments of the subject tax lots were, in any way, justified by RPTL § 727(2)(a)(revaluation) or RPTL § 727(2)(I) (change in use). Further, Respondents' counsel's unsworn assertion that Respondents were deceived in entering into the Consent Judgment with a party not before this Court is irresponsible, at best. It is clear that Respondents are not serious about this charge of misrepresentation since they have not moved to vacate the Consent Judgment on the grounds of fraud.

RPTL § 722(2): An Additional Allowance

The Petitioner seeks the award of " an additional allowance " of " $500.00 for each of the 76 tax lots illegally assessed " pursuant to RPTL § 722(2)(" Where the court finds as a fact that (a) the assessment of the property was increased without adequate cause after a final order...the court shall award to the petitioner an additional allowance, not exceeding the amounts hereinafter specified...one year, five hundred dollars "). Such an award is appropriate when an assessment has been increased " without adequate cause " [See e.g., Matter of W.T. Grant Company v. Srogi, 52 N.Y. 2d 496, 438 N.Y.S. 2d 761, 420 N.E. 2d 953 (1981) (" Similarly, the record supports the findings that the assessments were ' increased without adequate cause ' subsequent to court orders of reduction "); Matter of McCrory v. Srogi, 101 A.D. 2d 696, 476 N.Y.S. 2d 37 (4th Dept. 1984)(" No credible evidence was offered to dispute petitioner's allegations and proof that the assessment was increased ' without adequate cause ' "); Rice v. Srogi, 70 A.D. 2d 764, 417 N.Y.S. 2d 537 (4th Dept. 1979)(" we do not disturb the trial court's award of an additional allowance ")]. In addition, it is appropriate to consider awarding " an additional allowance " for each of the subject 76 tax lots [See e.g., Michael J. Adrian Corp. v. Sexton, 251 A.D. 181, 295 N.Y.S. 542 (1st Dept. 1937)(it is proper to consider " the assessments

on thirty-seven separate and distinct parcels of property " within the context of a single petition)].

It is clear that Respondents violated the Consent Judgment and RPTL § 727(1) in reassessing the subject 76 tax lots in 2005 and that they did so " without adequate cause "[34]. The Court awards an " additional allowance " of $100.00 for each of the 76 overassesed tax lots.

Conclusion

Based upon the foregoing the relief sought by the Petitioner is granted to the extent of (1) directing Respondents to correct the final assessment roll for the 2005 assessment year by rolling back the assessments in accordance with the terms of the Consent Judgment dated March 16, 2004, (2) directing that refunds for the overpayment of any real property taxes levied and paid for the 2005 assessment in excess of those set forth in the Consent Judgment shall be made together with statutory interest and (3) awarding an additional allowance of $100.00 for each of the subject 76 tax lots pursuant to RPTL § 722(2).

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, N.Y.
May 10, 2006

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HON. THOMAS A. DICKERSON
JUSTICE SUPREME COURT

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ENDNOTES

1. Verified Petition dated October 31, 2005 [" Pet. "] at Ex. B.

2. Pet. at Exs. A, B.

3. Pet. at Ex. B, p. 3.

4. Pet. at Ex. D.

5. Pet. at Ex. E.

6. Affidavit in Opposition of Emanuel F. Saris [unsworn] [" Saris Unsworn Aff. "] at para. 6 and Ex. A.

7. Saris Unsworn Aff. at para. 8.

8. Saris Unsworn Aff. at para. 9 and Ex. C.

9. The only papers submitted by Respondents in opposition to the relief sought by Petitioner is the unsworn affidavit of their attorney, Emanuel F. Saris.

10. At oral argument Respondents' attorney, Mr. Saris, graciously admitted that Respondents have no credible basis for opposing the relief sought by the Petitioners [Transcript of Oral Argument [" Trans. "] at pp. 8-15].

First, the exception in RPTL § 727(2)(I) does not apply:

> The Court: What relevance are these sales to the 2005 assessment?
> Mr. Saris: For these particular units, I would have to say none.
> The Court: Thank you. So there is no exception under (727)(2)(I), is there?
> Mr. Saris: With respect to the year at issue as represented by counsel, the Court is absolutely correct.
> The Court: That's what we're here for, 2005.
> Mr. Saris. That's correct, your Honor. The Court is absolutely correct.
> The Court: So (2)(I) is out; is that correct?
> Mr. Saris: I believe so, your Honor.

Second, the exception in RPTL § 727(2)(a) does not apply:

> " The Court: (2)(a), do you have any proof of any reval?

Mr. Saris: That we're in the midst of a reval?
The Court: Yes, for 2005. That's the year.
...
The Court: What proof do you have that the reval exception applies in this case dealing with 2005?
Mr. Saris: Other than the process of a reval or that was it completed for 2005; is that what the Court is asking.
The Court: Yes.
Mr. Saris: It wasn't complete. It won't be completed until next year.
The Court: So it doesn't apply, is that correct?
Mr. Saris: Yes, that's correct.
The Court: So you have two exceptions and just admitted that neither one apply.

Third, the representation set forth in para. 6 of the Saris Unsworn Aff. (" it was agreed and understood that should the units be sold individually in the future, such would constitute a change warranting an increase in assessment "), even if true (and no probative evidence in affidavit form has been submitted by a Town official attesting to the making of and reliance upon such a representation in entering into the Consent Judgment), is irrelevant to the 2005 assessment.

" Mr. Saris: Well, I'm going to have to rely on my understanding...I had not had the opportunity to specifically discuss the case with him...The representation was made...to Mr. Logan by Mr. Wilke...
...
The Court: Does that appear in the consent judgment?
Mr. Saris: It does not, your Honor. But the point is that everybody knew that.
The Court: Everybody?
...
The Court: Is there anything is writing?
Mr. Saris: No, your Honor. That's right. There isn't.
...
The Court: So tell me why we should not grant the request of the Petitioner?
Mr. Saris: For the initial argument that I made which was the Town relied upon the representations made to enter into that consent judgment, and there's documentary evidence supporting that representation made to the prior assessor...Tom Logan.
The Court: Again, the sales took place after the relevant dates which you've just admitted, so of what relevance

would such a representation even if it were true be, as far as 2005 is concerned? Maybe 2006, but that's not in front of us.

Mr. Saris: I concede that point to the Court, your Honor.

The Court: So what is your argument why we shouldn't grant the relief requested by the Petitioner?

Mr. Saris: Other than what I've just made on behalf of the Town, I have none...I concede that to the Court.

The Court: Okay. I appreciate that.

11. Affirmation in Reply of David C. Wilkes dated January 17, 2006 [" Wilkes Reply Aff. "] at paras. 8-11; Trans. at pp. 15-19.

12. Trans. at pp. 17-18 (" Essentially, nothing was submitted, we did ask Judge Rosato to enter the default judgment, that was entered...our client was agreeable to entering a consent judgment that essentially masks the fact that there was a default judgment. Had the Town not entered into the consent judgment, they would simply be bound by the default judgment which was never appealed. So that's the reason why the consent judgment was entered ").

13. Pet. at para. 5.

14. Pet. at para. 4 and Ex. C.

15. Pet. at Ex. D.

16. Pet. at para. 7.

17. Pet. at Ex. E.

18. Pet. at para. 10 (" This proceeding is timely commenced because four months did not elapse since the filing of the Town of Wappinger's certified copy of the completed and verified final 2005 assessment roll on July 1, 2005 ").

19. Pet. at paras. 8-9; Wilkes Reply Aff. at paras. 14-15.

20. This Court has previously examined the policy of selective reassessment in McCready v. Assessor of Town of Ossining, 11 Misc. 3d 1086 (West. Sup. 2006); Bock v. Town/Village of Scarsdale, 11 Misc. 3d 1052 (West. Sup. 2006); Markim v. Assessor of the Town of Orangetown, 6 Misc. 3d 1042(Rockland Sup. 2005), 9 Misc. 3d 1115 (Rockland Sup. 2005), mod'd 11 Misc. 3d 1063 (Rockland Sup. 2006); MGD Holdings Hav, LLC v. Assessor of the Town of Haverstraw, 8 Misc. 3d 1013 (Rockland Sup. 2005), reargument granted 11 Misc. 3d 1054 (Rockland Sup.

2006); Dale Joan Young v. The Town of Bedford, 9 Misc. 3d 1107 (West. Sup. 2005); Villamena v. The City of Mount Vernon, 7 Misc. 3d 1020(A)(West. Sup. 2005). See also Dickerson, Real Property Selective Reassessment: Annual Method Best?, New York Law Journal, January 5, 2006, p. 7 and Siegel, Reassessment on Sale, New York Law Journal, August 2, 2005, p. 16.

21. Saris Unsworn Aff. at paras. 4-9.

22. **Saris Unsworn Aff. at para. 6.**

23. **Saris Unsworn Aff. at para. 7, Ex. B.**

24. **See N. 10, supra.**

25. Saris Unsworn Aff. at paras. 5-7.

26. Wilkes Reply Aff. at para. 10 (" There was never any agreement or understanding in writing or otherwise that supports the Respondents' claim that if the property were sold it would warrant a change in assessment ").

27. **Trans. at pp. 15-16 (" The Court: You're claiming he made a misrepresentation. Mr. Saris: I did not, your Honor. I'm claiming that the prior owner made a representation upon which the Town of Wappinger relied which his client should be bound by ").**

28. **Saris Unsworn Aff. at para. 9, Ex. C.**

29. Wilkes Reply Aff. at paras. 13-14, 17.

30. Compare to the quality of evidence presented by the respondents in Matter of Akey v. Town of Plattsburgh, 300 A.D. 2d 871, 754 N.Y.S. 2d 378 (3d Dept. 2002)(RPTL § 727(2)(a); " Respondents met this burden by presenting evidence... Specifically, in affidavits opposing the petition, *the Town Supervisor avers that...and the Town Assessor avers that* [emphasis added] ...Thus, the record contradicts Supreme Court's finding that respondents failed to offer evidence...")].

31. **Saris Unsworn Aff. at para. 8.**

32. **Wilkes Reply Aff. at para. 12 (" It is important to note that, notwithstanding the fact that sales are not a valid basis for reassessment these sales took place some six to eight months after the taxable status date of March 1, 2005 and well after the**

assessor had already raised all 76 assessments of the subject property ").

33. See N. 10, supra.

34. Such a finding does not require evidence of malice or recklessness. See Trans. at pp. 23-25 (Mr. Saris:...If he was wrong on the timing, that's not something that the Town should be penalized for. It was not done maliciously, it was not done purposely, recklessly, or any other fashion...").