To commence the 30 day statutory time period for appeals as of right (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 PUTNAM

----------X

In the Matter of the Application of
MICHAEL H. BARNETT,

Petitioner,

-against -

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

Respondent.

----------X

DECISION/ORDER

Index No:
1612/2006
1718/2007
2081/2008

Motion Date:
11/17/09

LaCAVA, J.

The following papers numbered 1 to 5 were considered in connection with this motion by petitioner Michael H. Barnett (Barnett) for an Order granting summary judgment against respondent Town of Carmel (Town):

PAPERS	NUMBERED
NOTICE OF MOTION/AFFIRMATION/AFFIDAVITS/EXHIBITS	1
AFFIDAVIT IN OPPOSITION	2
REPLY/EXHIBIT	3
SUR-REPLY	4
REPLY AFFIRMATION TO SUR-REPLY/EXHIBIT	5

This is an action, pursuant to RPTL Article 7, seeking to challenge the assessment by the Town for a parcel owned by Barnett. Petitioner alleges that the Town, rather than pursuing a town-wide revaluation, has selectively-reassessed the subject property by raising the assessment from $150,000.000 to $240,000.00. The parcel is a residential parcel improved with a house and, since 2002, a garage, known on the tax map of the Town as Section 64.19, Block 1, Lot 49, and is also known as and located at 201 West Lake Boulevard, Town of Carmel. Barnett now moves for summary judgment,

asserting that there are no questions of fact regarding the reassessment of the parcel. The Town opposes the motion, asserting that there are questions of fact regarding whether the Town has selectively reassessed the property.

Facts

Petitioner herein purchased the subject premises in 1986. In 2001, he contracted with a builder to construct a garage with storage on the premises. The garage, which was completed in 2002, contains space for three cars, has second-floor storage, and electricity and heat, but no other utilities, and no bath or kitchen. Petitioner asserts that no improvements have been made to the garage space since the completion of the work in 2002. Between 1996 and 2002, the assessment on the premises was $105,000.00; upon completion of the improvements, the assessment was increased to $150,000.00.

Respondent assessor claims that, in 2006, one of his employees, Glen Droese, while passing the subject premises, observed either a satellite dish or an air conditioner on the second floor of the garage[1]. Without any further steps to identify any specific improvements to the premises since the increase in assessment in 2002, Droese determined that the assessment was evidence of residential improvement to the garage; he changed the property classification of the structure, and increased the assessment to $180,000.00 on the property card for 2006[2]. The respondent assessor, again without determining the specific nature of the improvements or when they had occurred, then altered Droese's notation on the property card to increase the assessment

[1] Respondent assessor initially affirmed that his staff observed the item and conducted an inspection; in reply papers, he concedes that in actuality no inspection was conducted by anyone in 2006, but that an inspection of the garage actually occurred in 2008.

[2] Respondent assessor originally affirmed that his staff (and not the affiant personally) had inspected the garage upon its completion in 2002 and found the second floor to consist of unfinished storage space; this inspection prompted the 2002 assessment increase. The property card, however, reflects only that the second floor was "storage" upon completion in 2002; neither was any other document, nor someone with personal knowledge of the condition, offered by respondent as proof of the actual condition in that year in its responsive papers. In reply, however, the assessor now suggests in one place that he personally conducted the 2002 inspection, while elsewhere asserting that it was done by his "office." He also purports to rely on the Building Permit and Certificate of Occupancy for the condition of the premises in 2002.

for 2006 again to $240,000.00. Subsequently, in 2008, the assessor asked for, and received permission from petitioner to inspect the garage. Petitioner continues to assert, however, that the condition of the building as noted in the 2008 inspection, was the same as when it was completed in 2002.

Selective Reassessment

As this Court noted in *Bock v. Town/Village of Scarsdale*, 11 Misc.3d 1052(A), 814 N.Y.S.2d 889 (Table) (Supreme Court, Westchester County, Dickerson, J., February 14, 2006), where a petitioner alleges a change in assessment in a tax year in which there is no municipal-wide re-assessment, the assessor is required to provide an explanation of both the change in assessment on petitioner's parcel, and his assessment methodology in general. The Court stated in *Bock*:

> Respondents have provided a facially reasonable explanation which appears to be fair and comprehensive, "applied even-handedly to all similarly situated property", for the 2002 change in assessment on the subject property which meets the threshold recommended in *10 ORPS Opinions of Counsel SBRPS 60* ("Instead, whenever an assessor changes the assessments of individual properties or of a particular type of property in a year when the entire roll is not revalued or updated, the assessor must be prepared to explain and justify the changes ... the assessor should be prepared to offer proof of his assessment methodology in general so as to successfully withstand any ... challenge".)

In *Bock*, a developer had purchased a parcel for $1,400,000, and then gutted and renovated it before reselling it to the petitioner for $2,995,000. Affidavits attested to the costs in improving the property of approximately $744,000.00, which affidavits differed greatly from affidavits filed with the Town Building Department stating that the cost of the improvements was only $ 210,000.00. The Town Assessor in the Town/Village of Scarsdale had re-assessed the property upon completion of the aforementioned construction, pursuant to a plan by which she reassessed property in the Town based upon improvements. The plan was described as the Town's "review and reassessment process and procedures", and included her conducting a thorough investigation of all building permits issued in the Town. After eliminating properties and building permits that did not warrant a change in

assessment, for reasons including that work under a building permit had not commenced; work under a building permit was modified, canceled, delayed or not yet assessable; or the work involved individual items that are generally not assessed (i.e, fences, walls, roofs, windows, siding), permits where the approved work may result in a change in assessment were then subject to further review and investigation, including, where possible, a site/building inspection of the subject property taken. Any changes in assessments were then based on the equalized fair market cost of the new construction.

This Court, in *Bock*, found:

> The Assessor developed and implemented a reasonable and comprehensive plan for the non-discriminatory reassessment of real property based upon the market cost of improvements determined by referring to all filed building permits and conducting an extensive investigation featuring a review of building permit applications, building plans, blue prints, specifications filed with the building department, cost estimates submitted, cost manuals and other documents evidencing cost, rent rolls and income and expense statements, sale and property record card data and, where applicable, a site/building inspection was performed and photographs taken.

In so finding, the Court upheld the assessment, as based on a comprehensive plan for reassessing parcels in the Town upon their improvement.

Similarly, in *Joan Dale Young v. Assessor of the Town of Bedford,* 9 Misc.3d 1107(A) (Supreme Court, Westchester County, Dickerson, J., September 14, 2005), aff'd. 37 A.D.3d 729 (2nd Dept. 2007), the assessor had made use of standard tables and an appraisal manual (which had been relied upon by previous assessors in the Town since 1974) as part of a comprehensive plan for assessing vacant land and newly built homes. The Court found no selective reassessment, since the Town had a comprehensive plan to reassess newly-created properties such as the subject therein. And in *MGD Holdings Hav, LLC v. Assessor of the Town of Haverstraw,* 8 Misc.3d 1013(A) (Supreme Court, Rockland County, Dickerson, J., July 13, 2005) the petitioner challenged the assessor's raising the assessment from approximately $720,000 in one tax year to over $1.3 million in the following tax year. In opposition to petitioner's

motion for summary judgment, respondent assessor described how he had reduced the assessment to the $720,000 figure in an earlier tax year, to account for a high vacancy rate in this commercial premises, and then had merely returned the assessment to the higher amount in a subsequent year when vacancies had decreased. The Court noted there that the "Respondents have provided an explanation for the increase in assessment ... (which) is facially reasonable").

Markim v. Assessor of the Town of Orangetown, 9 Misc.3d 1115(A) (Rockland Sup. 2005) also involved a selective reassessment challenge to a change by an assessor. The Petitioners there were owners of town-house style houses in Paradise Landing, a development located in the Town of Orangetown, Rockland County. The builder completed the subject properties in late 1996 or early 1997, and the subject properties were sold between 1996 and 1998, with some being re-sold soon thereafter. The sale prices of the town houses ranged from $300,000 to $700,000, and some Petitioners made post-purchase improvements ranging in value from $5,000 to $20,000. The tax year 1997-1998 assessments imposed by the Town Assessor were in the range of $257,900 to $335,000, and the 1999 assessments were in the range of $346,600 to $420,900.

Petitioners in *Markim* challenged the tax year 1999 (and subsequent) assessments, alleging that the assessments were selective since no town-wide revaluation had occurred. The Town moved to dismiss, and in the supporting papers the assessor provided an explanation of both the changes in the individual properties' assessments, and his assessment methodology in general. After denial of the motion, the Court held oral argument during which the assessor's general methodology and valuation of these premises was explored. In essence, the Court found, the assessor was unable to satisfactorily explain either the 1999 assessments on the subject parcels, or his assessment methodology, the Court stating " The Assessor has failed to explain ... his methodology ... failed to provide a coherent (numerically based) explanation of his ... assessments of the subject properties", and the Court deemed the increases in 1999 selective reassessment.

This Court has also frequently examined municipal re-valuations and found that the assessors' explanations of the changes were either lacking or non existent. In *Carter v. City of Mount Vernon,* Supreme Court, Westchester County, Rosato, J., November 26, 2003, which involved reassessment based on improvements to the property, the Court stated "the respondents do not so much as even identify or enumerate just what specific renovations or improvements they are referring to", in finding selective reassessment by the City. Similarly, in *Villamena v. The*

City of Mount Vernon, 7 Misc.3d 1020(A) (Supreme Court, Westchester County, Dickerson, J., May 9, 2005), the Assessor's explanation was that the reassessment of the subject property was based upon a multiple listing, which the Court found to be not only likely to be inaccurate, but a form of selective reassessment similar to reassessment on sale; the Court ordered a new inspection of the premises (to evaluate any improvements) and a reassessment. Finally, the Second Department found selective reassessment, where the Assessor did not submit an affidavit disputing the petitioner's claim that he had relied on the purchase price of a property in arriving at its assessed value, in *DeLeonardis v. Assessor of the City of Mount Vernon,* 226 A.D.2d 530, 532 (2d Dept 1996).

Recently, in *Leone Properties v. Town of Cornwall*, 24 Misc.3d 1218(A) (Supreme Court, Orange County, 2009) this Court found selective reassessment in the absence of a comprehensive written plan such as that at issue in *Bock* and *Young*, *supra*. This Court noted:

> In response, the Town has failed to come forward with any facts to demonstrate a triable issue of fact as to the reason for the increase in the assessment on the subject parcel, and whether or not the Town is following an equitable, comprehensive, written plan directed to the revaluation of all of the properties in the Town. Notably, the Town has failed to even mention the increase in petitioner's assessment, much less explain the basis for it, other than to characterize it in a report as an "equalization" change. Further, while the assessor has provided two memos (dated 2003 and 2006, and directed to town officials) describing his general methodology, the said memos describe the plan in only minimal detail. In addition, the detail which is provided in the plan mainly involves only a regular and intensive review of sales inventory (recall that reassessment upon sale alone has been found numerous times to constitute selective reassessment) and new construction; any review of remaining inventory, however, involves only observation from the roadway, not physical inspection of the premises. Surely, limiting a substantial portion of the properties in the town to review by observation of only some portion of the exterior, from a distance, will not

> guarantee equitable treatment for all properties in the Town. It is also noteworthy that the 2006 memo by Fiorentino seems to be at odds with the 2003 description of the plan, as it describes the emphasis of the review as on building or construction permits.

Fundamentally, as well, the plan is consistently described as an effort to update inventory records in the Town; no where does the assessor state that any or all of this information, in any, some, or all cases, is used for reassessment purposes, as opposed to simple record updating. (*C.f. Nash v. Assessor of Town of Southampton,* 168 A.D.2d 102, [2nd Dept. 1991], where the comprehensive plan addressed on its face more properties than the plan at issue here [indeed, it was conceded that it would reach all of the properties in the municipality], but also specified that in each of four circumstances of review listed, the properties **would be** reassessed, while the plan at issue here makes no indication when, if ever, such reassessments would occur).

Motion for Summary Judgment

Upon a summary judgment motion, the movant bears the initial burden of presenting evidence, in competent form, establishing entitlement to judgment as a matter of law, and tendering sufficient evidence to eliminate any material issues of fact from the case" (*Way v. George Grantling Chemung Contracting Corp.*, 289 A.D.2d 790, 793 [3rd Dept., 2001]). Unless and until that initial burden is met, there is no need for the non-movant to come forward with "evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*id.; see also Rodriguez v Goldstein*, 182 A.D.2d 396, 397 [1st Dept., 1992]).

In *Celardo v. Bell* (222 A.D.2d 547 [2d Dept., 1995]), the Court stated:

> It is axiomatic that summary judgment is a drastic remedy which should only be granted if it is clear that no material issues of fact have been presented. Issue finding, rather than issue determination, is the court's function (*Sillman v Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957). If there is any doubt about the existence of a triable issue of fact or if a material issue of fact is arguable, summary judgment should be denied

(*Museums at Stony Brook v Village of Pachogue Fire Dept.*, 146 A.D.2d 572 (1989) …

The Court finds, regarding petitioner's motion, that, at the outset, petitioner has met the initial burden, by showing entitlement to judgment as a matter of law. As correctly argued by petitioner, he has demonstrated entitlement to judgment as a matter of law, in this tax certiorari matter relating to alleged selective reassessment, by showing that the Town, in the tax years at issue, increased the assessment on only petitioner's property, after having done so at the completion of improvements to the premises in 2002, and failed both to proffer an explanation for the increased assessment, or a description of its own general assessment methodology for that tax year; and further that the increase was based on the false premise that additional improvements (the finishing of the garage) occurred after the reassessment in 2002.

In opposition, respondent has failed to raise material issues of fact with respect to the change made to petitioner's tax year 2006 assessment, and to the methodology adopted by the Town to review its property inventory. In sum, the respondent assessor has offered varying explanations of who (generally, not he personally) observed what improvements to the premises and when. He asserts specifics about the condition of the building in 2002 (*i.e.* that it was not finished), without support from the property card or any other documents, or, it appears, his own first-hand knowledge, but instead supported by illegible and inexact records of other municipal departments, and the recollections of other persons in his employ. He has offered the explanation that the 2006 reassessment reflects a re-appraisal of the interior condition of the garage, but concedes that it was based **solely** on an observation of some movable appliance attached to or visible from the exterior of the premises, the exact nature of which he does not now recall, and said observation was not made personally but by an inspector in his office. He has asserted that the 2006 reassessment was based on this observation, although he concedes that an inspection of the garage to determine the actual interior condition did not take place for another two years. He asserts that, even though he did not personally observe the exterior condition at all in 2006, he nevertheless increased the assessment over and above that dictated by the inspector who did observe the condition, to an amount that was 60% greater than the 2002 assessment; and he does so without the least explanation of his methodology, or that of his inspector, in determining the amount of the increase to the assessment in 2006. Most of the aforementioned "explanations" (*see Bock*, *supra*), are simply not in admissible form, and, in the face of a properly-admissible affidavit from the petitioner that the garage was

completed as storage in 2002, and was not improved thereafter, respondent's explanations fail to raise an issue of fact as to why the 2006 reassessment occurred and his general assessment methodology.

Based upon the foregoing, it is hereby

ORDERED, that the motion by petitioner seeking summary judgment against respondent is granted; and it is further

ORDERED, that the Petitions, with costs (R.P.T.L. §722[1]), are sustained to the extent indicated above, the assessment rolls are to be corrected accordingly, and any overpayments of taxes are to be refunded with interest.

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

Dated: White Plains, New York
December 22, 2009

_____
HON. JOHN R. LaCAVA, J.S.C.

Joseph F. Albert, Esq.
Attorney for Petitioner
100 White Plains Road
Tarrytown, New York 10591

Richard Blancato, Esq.
Attorney for Respondents
65 South Broadway, Suite 101
Tarrytown, New York 10591