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 ORANGE

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LEONE PROPERTIES, LLC,

Petitioner,

-against -

BOARD OF ASSESSORS FOR THE TOWN OF CORNWALL and TOWN OF CORNWALL,

Respondent.

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DECISION/ORDER

Index No:
5312/2006
6319/2007

Motion Date:
4/20/09

LaCAVA, J.

The following papers numbered 1 to 6 were considered in connection with this joint motion by petitioner Leone Properties LLC, (Leone) to permit reconsideration its motion for an Order granting summary judgment against respondent Town of Cornwall (Town), and by the Town for the same relief[1]:

PAPERS	NUMBERED
NOTICE OF MOTION/AFFIDAVITS/AFFIRMATION	1
AFFIDAVIT/EXHIBITS	2
PETITIONER'S MEMORANDUM OF LAW	3
EXHIBITS A-G	4
CROSS MOTION/AFFIRMATION/AFFIDAVIT/EXHIBITS	5
STIPULATION OF FACTS	6

This is an action, pursuant to RPTL Article 7, seeking to challenge the assessment by the Town for a parcel owned by Leone. Leone alleges that the Town, rather than pursuing a town-wide revaluation, has selectively-reassessed the subject property. Leone previously moved for summary judgment, asserting that there

[1]The Court acknowledges the assistance of Andrew L. Smith, summer intern and first year student at Pace University School of Law, in the preparation of this Decision and Order.

are no questions of fact regarding that issue.

The Town opposed the motion, and cross-moved for the same relief, asserting that there is no question of fact that the Town has not selectively reassessed the property.

In a Decision and Order dated June 6, 2008, the Court stated

> The Court finds, regarding petitioner's motion, that, at the outset, petitioner has not met the initial burden, by failing to show entitlement to judgment as a matter of law. As correctly argued by respondent Town, petitioner has failed to demonstrate entitlement to judgment as a matter of law, in this tax certiorari matter relating to alleged selective reassessment, by failing to show that the Town is not engaged in a town-wide plan of reassessment, and has instead selected petitioner wrongfully for reassessment of the subject property.
>
> In any event, had petitioner met its initial burden, the Town has come forward with ample facts to demonstrate a triable issue of fact as to whether or not the Town is following an equitable, comprehensive, written plan directed to the revaluation of all of the properties in the Town.
>
> The Court also finds, regarding respondent's motion, that, at the outset, respondent has likewise not met the initial burden, by failing to show entitlement to judgment as a matter of law. As correctly argued by petitioner, the Town has failed to demonstrate the absence of material facts showing that the Town has actually engaged in a reassessment of the subject parcel which is either arbitrary, capricious, fraudulent, or intentionally discriminatory...

(*Nash v. Assessor of Southampton*, 168 A.D.2d 102. 105-106 [2nd Dept. 1991].)

> In any event here too, had respondent met its initial burden, Leone has come forward with

> triable issues of fact, including, *inter alia*, whether the plan allegedly pursued by the town is arbitrary or capricious, the nature and extent of the existing inequities in the tax rolls, the extent to which such existing inequities are rectified by the plan, and the amount and duration of temporary disparities under the plan. (Nash, supra.)

Subsequent to the Court's denial of the motion by petitioner and cross-motion by respondent, the parties elected to re-submit the matter for the Court's consideration, on Stipulated Facts, seeking reconsideration (while actually submitting no additional facts and affirming the absence of facts not disclosed by the parties on the prior motion.)

Facts

Respondent Ronald Fiorentino is the Sole Assessor for the Town of Cornwall; his regular duties include inspecting and measuring town properties, preparing scale drawings and property records cards, initiating valuation analyses of properties for assessment purposes, and being available to the public to answer any property-related questions. Fiorentino maintains a very small office, generally staffed by one assessor (himself) and two full-time assessor clerks to assist him in daily operations; he is the only qualified member of the office to review the assessment tax roll.

Fiorentino's predecessor as assessor, Roland Tiffany, had previously undertaken a town revaluation in 2000. However, upon his taking office in early 2002, Fiorentino concluded that there were substantial factual, inventory, logical and valuation errors in the revalued assessment roll, including mistakes in market value assessments, improvements on property not being properly reflected on the record cards, and the absence of photographs of the properties in the tax roll. In fact, these problems had already been noted by the New York State Office of Real Property Services (ORPS) during the revaluation.

Consequently, Fiorentino prepared a plan--which plan he hoped would take 5-6 years to implement--to re-document and review every property in the Town. The assessor had, by 2006, reviewed approximately 59.2% of the roll, and by July 2007, 69.9% of all improved properties had been examined. However, 691 unimproved parcels still remain to be reviewed and assessed, and Fiorentino has indicated that he needs additional time to complete the review.

The plan, as disclosed by the assessor's affidavit, in particular his May 6, 2003 letter to the Respondent Town Board, consists simply of the following:

1. A review of all new construction.

2. A review of all sales with photographs.

3. A review of all other inventory, solely from the Right of Way.

His July 20, 2006 letter to the respondent Board, however, described the main focus of the plan as field reviews by [building] permits, plus "random reviews in the same areas" until all properties have been visited. He also asserts in this same letter that the Town contains 4,843 parcels, but also that he has visited 2,426 out of 4,099 parcels in the previous three years, with completion of the plan in an additional two years (i.e in 2008.) His affidavit in support of the instant motion by respondent also recorded that in the year from July 2006 to July 2007 he had reviewed an additional 500 properties, with completion of the review plan projected to be in late 2009 or early 2010, rather than 2008.

Fiorentino's affidavit also noted that, in the Assessor's Reports for the years 2004 through and including 2007 (annexed by petitioner to their moving papers), assessment changes were noted as either "quantity", meaning construction, either new or previously undisclosed; and "equalization", meaning "actual changes in value for different reasons, including correction of previous mis-valuation of properties." Petitioners have alleged that the assessment on the subject parcel was increased for tax year 2006 by respondent from $625,200 to $965,250, without any explanation by respondent assessor. Notably, Fiorentino's affidavit does not even mention the increase in petitioner's assessment, much less offer an explanation for it, and no explanation of the increase appears anywhere else in respondent's papers. Neither does he give any additional details of the methodology of the reassessment plan.

Petitioner, in sum, alleges simply that respondent Town raised the assessment for the subject parcel from $625,200 to $965,250, an increase in excess of 54 %, for stated "equalization purposes", with no other explanation, and without changing assessments on properties throughout the Town, or in any comprehensible way. Respondent essentially asserts in response that the assessor is reviewing all of the properties in the Town, as part of a review

plan. Thus, as petitioner has properly argued, there are in essence two actions by the assessor here which require scrutiny by the Court--first, did the assessor increase the assessment of the subject property for the tax year 2006 without providing an explanation for the increase; and second, was any increase in assessment part of a comprehensive plan to review all of the properties in the Town?

Selective Reassessment

Significantly, 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 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.

In fact, this Court has 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.)

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, Leone 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, raised only a select few properties, including petitioner's own, and failed both to proffer an explanation for the increased assessment, or a description of its own general assessment methodology for that tax year.

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.)

Thus, given the passage of over six years from the inception of the plan already, during which it has not yet been completed, the Court has grave reservations as to whether the plan is comprehensive, since it may in fact not be adequately designed to re-assess all of the properties in the Town, or, even if all properties in Town may in fact eventually be reviewed, that the review of all properties will be thorough and thus equitable, or that the review will be completed within any reasonable period of time. And, as previously stated, it is entirely unclear when and under what circumstances, following the property reviews set forth in the plan, the Assessor would actually reassess the properties reviewed.

Respondent having 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, petitioner has properly demonstrated entitlement to summary judgment in its behalf.

Given the above, the Court does not see any reason to disturb its prior determination denying respondent's prior cross-motion for summary judgment in its behalf.

Based upon the foregoing, it is hereby

ORDERED, that the motion by petitioner seeking reconsideration of its previously decided motion for summary judgment, is granted as unopposed, solely to the extent that the Court agrees to reconsider the prior motion, and upon such reconsideration it is hereby

ORDERED, that upon reconsideration, the motion by petitioner for 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; and it is further

ORDERED, that the motion by respondent likewise seeking reconsideration of its previously decided motion for summary judgment, is granted as unopposed, solely to the extent that the Court agrees to reconsider the prior motion, and upon such

reconsideration, it is hereby

ORDERED, that upon reconsideration, the cross-motion by respondent for summary judgment is denied in all respects.

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

Dated: White Plains, New York
July 13, 2009

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

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