

**7 Vestry LLC v Department of Finance City of New York**

2003 NY Slip Op 30074(U)

October 3, 2003

Supreme Court, New York County

Docket Number: 0012178/2002

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOUIS B. YORK  
Justice

PART 2

7 Vestry LLC

- v -  
Department of Finance

INDEX NO. 121786/02  
MOTION DATE 01  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

**SCANNED**

PAPERS NUMBERED  
OCT 15 2003

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*with accompanying memorandum decided.*

*with accompanying memorandum decided.*

*motion is decided in accordance with accompanying memorandum decided.*

MOTION/ORDER IS RESOLUTELY REFERRED TO JUSTICE

Dated: 10/3/03

Luy  
LOUIS B. YORK  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 2

..... X  
7 VESTRY LLC, MARGARET MARY MC MAHON,  
WILLIAM M. MC MAHON, WILLIAM M. MC MAHON,  
LAWRENCE BUCK, ROY J. ZELUCK, CLAIRE BALDWIN,  
CHRISTOPHER M. SMITH, ROBERT A. MORRIS, CAROL  
MORRIS, DONNA WEINHEIM, JAN MARKS, IRENE  
VERNADAKIS, GEORGE VERNADAKIS, SUSAN G.  
ANDERSON, NIGEL THOMAS PERRY, MELANIE SAGS  
DUNEA, NAZAN AYSE EKE, LEWIS SEGAL, AVRA JAIN,  
GIOVANNI C. RUSSO, FLORENCE SICARD RUSSO,  
CHRISTOPHER ROBERT STURDY, SUNIL G. HIRANI,  
BLANCA L. HIRANI, JDC PROPERTIES II, LLC, LESLIE  
BULLOCH, DAVID BULLOCH, DARREN HERTSBERG,  
JESSICA HERZBERG, STEPHEN MC GRATH, JANINE  
SHELFFO, JOHN P. MC EVOY, ALPINE CAPITAL, LLC.,  
MICHAEL THOMAS TOMAINO, JR. KITELLEN MILO,  
PETER SCHWALBE, CORNELIA K. CONNERS, MICHAEL  
D. FLEISHER, ALEXANDRIA WHEELER, MICHAEL B.  
EATON, THE CAROLINE DE LUCA REVOCABLE TRUST,  
JOANNE CORIZINE, SHANE MC MAHON, MARRISSA  
MC MAHON, COBBLESTONE LOFTS CONDOMINIUM  
BOARD OF MANAGERS,

Index No.  
**121786102**

Plaintiffs,

-against-

**DEPARTMENT OF FINANCE CITY OF NEW YORK,  
MARTHA E. STARK, THE COMMISSIONER OF  
FINANCE OF THE CITY OF NEW YORK, NEW YORK  
CITY,**

Defendants.

-----X  
**LOUIS B. YORK, J.:**

Preliminary Statement

This is an action by condominium owners and the condominium sponsor to set aside tax liens filed by the New York City Department of Finance on the ground that the plaintiffs

did not receive adequate prior notice of these liens before they acquired the property. The first cause of action alleges that the liens are void “and must be discharged or [sic] record.” Plaintiffs construe this as an action for a declaratory judgment while defendants claim that the nature of this cause of action requires that it converted into an Article 78 proceeding. The second cause of action is for slander of title.

Plaintiffs move for summary judgment. Defendants oppose, arguing that the attack on the tax liens is barred by the applicable Statute of Limitations, and asks the Court to dismiss both causes of action as the complaint fails to set forth all necessary elements of the cause of action for slander of title. Defendants also claim that counsel should be disqualified from representing the condominium owners because their interests are adverse to the sponsor’s interests.

### **Statement of Facts**

On June 10, 1998, plaintiff 7 Vestry, LLC purchased the premises at 5, 7 and 9 Vestry Street. Thereafter, it converted the buildings into a large number of condo units.

It appears that the non-party seller participated in a program called the Industrial Commercial Incentive Program (“ICIP”) of the City’s Department of Finance. This program defers taxes on property in which the owner agrees to rehabilitate, construct or otherwise improve eligible industrial and commercial properties. The Finance Department’s procedure embodied in its regulations, is to issue a temporary certificate of eligibility followed by a permanent certificate of eligibility at the successful conclusion of the project. While the

project is ongoing, the building owner receives partial tax deferrals over a period of seven years. It is only when the project is successfully completed that the Department files a tax lien and a certificate of eligibility. In the eighth and ninth years full taxes are reinstated. In the ensuing tenth through twentieth years the deferred taxes are repaid. Apparently, the prior owners never completed the project so that when the building was purchased, assert the plaintiffs, they had no notice or knowledge of the tax liens. Thus, they now challenge the City's enforcement of the tax lien against them.

### **Contentions**

The defendants contend that this is actually an Article 78 proceeding and since the first tax bill which was sent on July 1, 2000 or letters dated February 15, 1999 seeking some of the deferred taxes were sent more than 120 days before the initiation of this action, the proceeding is time-barred.

Plaintiffs contend that neither of these notices effectively give notice of the balance of the deferred taxes. They only give notice of the particular years they refer to. A Certificate of Eligibility was never filed because the project was never completed and defendants do not contend that a lien was posted with the Clerk of the County prior to the initiation of the lawsuit.

### **Discussion**

Real Property Tax Law §49-eeee requires that the Certificate of Eligibility must be filed in the same way as a mortgage. Defendants concede that the Certificate of Eligibility

was never filed because the seller never completed the project. Thus, the obvious purpose of the statute, which is to give future purchasers notice of such a lien before they agree to purchase the property was defeated. It is not only future purchasers that the statute seeks to protect. Other secured creditors need to be aware that a lien exists, which will have priority over their lien. It is also noted that the acceleration of the deferred taxes was not filed as a lien with the County Clerk at the time this lawsuit was initiated. Thus, plaintiff never had the notice contemplated by the statutes at the time this lawsuit was instituted. Even if the four-month Statute of Limitations is invoked, this would seem to end the Statute of Limitations problem. Defendants argue, however, that plaintiffs were put on notice that all the deferred taxes were due by the bill sent to plaintiffs and annexed to defendants' opposition papers as Exhibit 1. But letters only referred to a sum of \$6,046.50 and did not inform plaintiffs that the entire \$400,000 of deferred taxes was due. It is, however, notice of that particular deferred amount as of July 1, 2000 which is barred by the Article 78 four-month statute. The same is true for the letters from the Department of Finance, both dated February 5, 1999, and annexed to defendants' affirmations as Exhibits A&B, which together inform plaintiff that the tax exemptions for the 1999/2000 and 2000/2001 tax years have been revoked. The four-month Statute of Limitations does bar a challenge to these two tax deferred years. But the challenge to the balance of the accelerated taxes survive the statute of limitations.

The Court concludes that the balance of the accelerated tax cannot be collected by the

defendants. The procedure set forth by the statutory scheme of the ICIP program creates a super lien that has priority over all other liens. Thus, the statutory requirements must be construed very strictly (*Rosenbaum v City of New York*, 96 NY2d 468, 730 NYS2d 774 [2001]). What is required is that the Certificate of Eligibility be filed with the City Register when the project is approved. It is to be filed in the same manner as the recording of a mortgage RPTL §489-eee(4); Admin Code § 11-260(e). Instead of doing this, the City issued a Temporary Certificate of Eligibility and did not file it in accordance with the statutory mandates. Its practice is to only file the Certificate of Eligibility in the manner prescribed by statute only when the project is finished. In this case, the project was never finished, so that the Certificate of Eligibility was never filed. The result was that the notice feature of the statute was never satisfied. The Court thus concludes that the portion of the deferred taxes that survived the Statute of Limitations cannot be collected. The two tax years which do not survive the Statute of Limitations can be recovered by defendants because it was too late to challenge them when this lawsuit was instituted. The letters that inform the plaintiffs of these two tax years are dated February 5, 1999. Interest shall be calculated from that date. Plaintiffs have not brought a cross-motion to dismiss. Thus, the arguments contained in its Memorandum of Law to the effect that plaintiff has failed to plead all of the elements for Slander of Title cannot be considered.


The Court denies defendants' demand that the conflicting interests of plaintiffs and defendants require that plaintiffs' law firm be disqualified from representing the individual

condominium owners is denied. First of all, defendants have not cross-moved for this relief. Secondly, the Court believes that the plaintiff-sponsor and the individual plaintiffs are united in interest in defeating the imposition of the deferred taxes. The Court does conclude that it is the sponsor who is liable for those taxes that were not eliminated by the acceleration of the taxes. It was plaintiff-sponsor who received those February 5 letters. Thus, the sponsor, not the condominium owners, who was notified about those taxes, is the one who must pay them. As to the balance of the taxes, the Court has determined that none of the plaintiffs should pay them, thereby eliminating any potential conflict among the plaintiffs.

The Court has not considered defendants' sur-reply as it was submitted without the Court's authorization.

Settle Order.

Dated: October 3, 2003

  
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Louis B. York, J.S.C.