

New York Tel Co. v Nassau County

2007 NY Slip Op 33601(U)

November 1, 2007

Supreme Court, Nassau County

Docket Number: 2986-97/

Judge: Edward G. McCabe

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MEMORANDUM

Present: HON. EDWARD G. MCCABE

Justice

STATE OF NEW YORK
SUPREME COURT, NASSAU COUNTY

NEW YORK TELEPHONE COMPANY,
Plaintiff,

INDEX NO.: 97-12986
INDEX NO.: 98-12182

MOTION SEQUENCE
NOS.: 2 & 3

-against-

NASSAU COUNTY, THE NASSAU COUNTY
DEPARTMENT OF ASSESSMENT, THE
NASSAU COUNTY BOARD OF ASSESSORS,
ABE SELDIN - CHAIRMAN OF THE BOARD OF
ASSESSORS, NASSAU COUNTY BOARD OF
SUPERVISORS AND THE NASSAU COUNTY
LEGISLATURE,

Defendants.

NEW YORK WATER SERVICE CORPORATION,

X

INDEX NO.: 97-12762

Petitioner,

-against-

NASSAU COUNTY, THE NASSAU COUNTY
DEPARTMENT OF ASSESSMENT, THE
NASSAU COUNTY BOARD OF ASSESSORS,
ABE SELDIN - CHAIRMAN OF THE BOARD OF
ASSESSORS, NASSAU COUNTY BOARD OF
SUPERVISORS AND THE NASSAU COUNTY
LEGISLATURE,

Respondents.

X

_____ X
LONG ISLAND WATER CORPORATION, INDEX NO.: 97-012856

Petitioners,

-against-

NASSAU COUNTY, THE NASSAU COUNTY
DEPARTMENT OF ASSESSMENT, THE
NASSAU COUNTY BOARD OF ASSESSORS,
ABE SELDIN - CHAIRMAN OF THE BOARD OF
ASSESSORS, NASSAU COUNTY BOARD OF
SUPERVISORS AND THE NASSAU COUNTY
LEGISLATURE,

Respondents.

_____ X

The following papers were read on this application:

- Notice of Motion (N.Y. Tel. Co. & L.I. W.C.).....1
- Notice of Motion (N.Y. Water Service Corp.).....2
- Affirmation in Opposition to Motions for
 Leave to Amend the Petition.....3
- Petitioner LIWC's Memorandum of Law.....4
- Affidavit (LIWC).....5
- Affirmation in Opposition to Motions for Leave
 To Amend Petitions.....6

The Petitioners, Long Island Water Corporation and New York Water
Service Corporation, submit applications for leave to amend their petitions to
reflect more clearly that the cause of action asserted and the relief sought
encompasses the illegally levied real property taxes on all of LIWC and NYWSC's

Class Three properties located in non-countywide special districts, including both special franchise property and public utility property. The Petitioners state the proposed amendment is simply a clarification of the scope of relief sought, after discovering during settlement negotiations that the County intended to take the position that the petitions filed by the Water Service utilities only sought relief for special franchise property, thereby excluding their public utility property from any settlement discussions. The parties do not dispute the fact that the declaratory judgment action filed by N.Y. Telephone Company (which was joined with these proceedings on 3/12/99) included both special franchise property and public utility property. Thus, they do not join in this application.

The Petitioners disagree with the Respondent County's position that the Petitioner's public utility property is not included and state they believe their petitions were drafted broad enough to include all of their Class Three properties. Petitioners state they decided to submit the subject application to avoid any potential confusion at trial. The County opposes the motion claiming substantial delay and prejudice.

This Article 78 proceeding was commenced in 1997 to recover refunds for tax overpayments resulting from Nassau County's unlawful method of taxation for

Class Three special franchise property in non-countywide special districts and the Court's determination that the increased equalization rates established by the Respondent County for special franchise property when utilized by Special Taxing Districts, were erroneous, excessive and unconstitutional.

In terms of factual support for its' application, the Petitioners explain there is no good reason why the water companies would have complained about one species of Class Three property and not the other because they involve the same type of property. Both LIWC and NYWSC Class Three properties consist of public utility property and special franchise property. Petitioners explain public utility property consists of property located upon, above and below privately owned property and is located at specific sites. They also state public utility property includes land upon which its' equipment and facilities are located such as treatment plants, wells and pumping equipment. The Petitioners describe special franchise property as property located upon, above and under public property and public rights of way such as easements in public streets. The County cites RPTL §102 (17) for the following description: "special franchise property is property upon which one has the right to construct, maintain and/or operate, inter alia,

water mains and pipes upon, above, in, under or through any public street, highway or right-of-way for conducting water, steam, light, power, electricity, gas or other substance.” Special franchise property traverses many parcels and generally includes transmission and distribution property through which (as relates to this case) water services are provided to public and private consumers.

It is the Petitioners’ position that the County’s practice of utilizing one tax rate for all classes of property in non-countywide special districts such as fire districts, sewer districts, park districts and their local taxing districts, unlike countywide taxing districts where the tax rates established vary by property classification, imposes an excessive share of the property tax burden upon owners of Class Three or utility real property. They ask the Court to direct tax refunds be issued to Class Three real property owners for all such taxes overpaid, with interest from the dates of overpayment or by adjusting the tax levy for the ensuing fiscal years in a manner that provides the Class Three property owners with the same economic benefit as a tax refund with interest.

The CPLR§3025 (b) provides that leave to amend a pleading “should be freely given upon such terms as may be just, including the granting of costs and continuances.” The Petitioners cite Melendez vs. Bernstein, 29 A.D. 3d 872, 815

N.Y.S. 2d 702, 703 (Second Dept. 2006), which granted Plaintiff's motion for leave to serve an amended complaint and found "leave to amend a pleading should be freely granted unless the proposed amendment is palpably improper as a matter of law or prejudices or surprises the opposing party. They also rely upon Edenwald Contracting Co. vs. City of New York, 60 N.Y. 2d 957, 959; 471 N.Y.S. 2d 55, 56; (1983), wherein the Court found the decision to permit or deny amendment is entrusted to the sound discretion of the trial court, "mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine." The Court in Edenwald granted the Defendant leave to amend its' answer to plead an affirmative defense six and one-half years after the action had begun. Petitioners state this principle was recently affirmed by the Second Department in Abrahamian vs. Tak Chan, 33 A.D. 3d 947, 824 N.Y.S. 2d 117 (Second Dept. 2006). The Appellate Division affirmed the Supreme Court's order granting the Plaintiffs' motion for leave to amend their complaint, despite the fact that the delay in moving for the amendment was "substantial and largely unexplained." 3 A.D. 3d at p. 949, 824 N.Y.S. 2d at 119. "Permission to amend should be freely given.... (Defendants) failed to demonstrate any prejudice as a result of the

amendment. Moreover, the evidence in the record does not indicate that the amendment is palpably insufficient or patently devoid of merit. Accordingly, there is no basis for disturbing the Supreme Court's exercise of its' broad discretion in granting the motion." Abrahamian, supra at 119. Such prejudice does not exist where the motion simply amends the ad damnum clause and this results in greater exposure to liability. See, Loomis vs. Civetta Corinno Construction Corp., 54 N.Y. 2d 18, 444 N.Y.S. 2d 571 (1981). The Loomis Court found there had to have been some indication that a defendant was hindered in the in the preparation of his case or was prevented from taking some measure in support of his position.

The County argues there is no ambiguity that the Article 78 proceedings are specifically limited to special franchise property. It further contends the Court should consider the length of time the Petitioners were aware of the facts upon which the motion was predicated and whether a reasonable excuse for the delay was offered. In Boyd vs. Trent, 297 A.D. 2d 301, 304 746 N.Y.S. 2d 191 (Second Dept. 2002) leave to serve an amended complaint was denied where plaintiffs offered no excuse for their inordinate ten year delay and failed to explain why the amendment could not have been made at an earlier time. The Respondents do not

mention in the Boyd case the Court found the proposed amendment to be meritless. The County also cites Mohammed vs. City of New York, 242 A.D. 2d 321, 661 N.Y.S. 2d 249 (Second Dept. 1997) in which the defendant moved to amend his answer almost eight years after the initial answer was interposed and failed to offer a reasonable excuse for the delay. The Court denied the application finding the facts upon which the defendant based his motion must have been known to him since the inception of the action and that allowing him to amend his answer at such a late date would prejudice the other parties.

The instant proceeding can be distinguished from Mohammed, supra, as the Court finds the language in the subject petition to be ambiguous to the extent the term special franchise property was used interchangeably with the term Class Three properties. The term Class Three property includes both special franchise property and public utility property. This was seen in paragraph 21(a) which asks the Court to determine the increased equalization rates...for special franchise property utilized by Special Taxing Units to be erroneous, excessive and unconstitutional and paragraph 21(b) which asks the Court to determine the Special Taxing Units tax rates, established on the basis of such erroneous values for Class Three property owners, to be excessive and unconstitutional. In

paragraph 21(c), the Petitioners ask the Respondents to immediately correct the assessed valuations and class shares for special franchise property and paragraph 21(d) asks the Court to order the Respondents to issue refunds to the Petitioner, with interest, to account for the improper allocation of taxes to Petitioner caused by the County. Paragraphs 21(b), 21(d), 21(e), and 21(f) do not limit the relief requested to special franchise property. It appears to the Court that despite the fact that there are distinctions between special franchise property and public utility property, the term special franchise property and the term Class Three property were used interchangeably by the Petitioners. Even the Respondent County's answer states, in paragraph 13 on page 4, "This Article 78 proceeding challenges the uniform percentage of value or class ratio at which Petitioners' real property, including special franchise property, is assessed." It is noted the County throughout its' papers regularly refers to "Petitioners' property" without excluding public utility property, other paragraphs such as 23 and 24 (on page 7 of the County's answer) refer only to special franchise property. Paragraph 49 of the County's answer mentions all Class Three properties, including special franchise property. Though the Respondents argue the Petitioners do not offer an explanation for the delay in seeking this amendment, the explanation is obvious,

the Petitioners thought their request for relief already included public utility property.

The Court rejects the Respondents arguments with respect to any professed surprise that the Petitioners intended to include public utility properties, as well as special franchise properties, and finds there would be no prejudice to the County by granting the requested relief other than the increased refund amounts.

This case is still in the discovery phase, depositions have not been completed and no trial date has been set. The Court has wide discretion in granting leave to amend pleadings, particularly where it is needed to clarify an ambiguity and/or oversight in the drafting of the petition. Clearly, there would be no rational basis for excluding the Petitioners' public utility property from the scope of relief requested, while including Plaintiff N.Y. Telephone Company's public utility property.

Accordingly, based upon the foregoing, it is hereby

ORDERED, that the Petitioners' applications for leave to amend their Article 78 petitions, is granted; and it is further

ORDERED, that the Petitioners shall serve their amended petitions within twenty (20) business days of the date of this order and file proof of such service with the Court.

This constitutes the decision and order of this Court.

ENTER:

Dated: November 1, 2007
Mineola, NY



HON. EDWARD G. McCABE
J.S.C.

ENTERED
NOV 07 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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