

L&Q Realty Corp. v The Assessor
2008 NY Slip Op 32038(U)
July 11, 2008
Supreme Court, Nassau County
Docket Number: 0329-97/
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

L&Q REALTY CORPORATION,

Petitioner,

TRIAL/IAS, PART 4
NASSAU COUNTY

INDEX No. 010329/97

MOTION DATE: June 5, 2008
Motion Sequence # 001

-against-

THE ASSESSOR, THE BOARD OF ASSESSORS
and THE ASSESSMENT REVIEW COMMISSION
OF THE COUNTY OF NASSAU,

Respondents.

The following papers read on this motion:

Notice of Motion..... X
Affirmation in Opposition..... X
Reply Affirmation X

PRELIMINARY STATEMENT

The Petitioner moves for an order restoring the proceedings to the ready trial calendar of the tax certiorari part of the Supreme Court. The Respondents oppose the application because the motion is made more than three years from the date on which the matter was removed from the ready trial calendar, and that there has been no evidence that the Petitioner has a meritorious cause of action.

BACKGROUND

Commencing in 1993, then- presiding Justice and Administrative Judge Leo F. McGinity sought to reduce the extraordinary backlog of tax certiorari matters on the active trial calendar. He established a 500-case monthly calendar, at which time the cases would receive an off-calendar marking, be transferred to a reserve calendar, and be recalled in six months, to determine the status of negotiations. Upon recall, they were marked either "settled" or "discontinued", irrespective of the reality that most were neither settled nor discontinued. The purpose was to enable the Respondents to obtain preliminary appraisals, adequate to serve as a basis for settlement negotiations, but not full trial appraisals complying with Uniform Rules for Trial Courts § 202.59. There are very many cases which have either never been negotiated, or were negotiated without success, and which Petitioners seek to restore to the ready trial calendar. This is one of them.

The Petitioner was represented by another law firm until September 11, 2006, when the moving law firm was substituted. They subsequently learned that this is one of the many matters stricken from the calendar under the agreement between the parties and with the concurrence of the Court. It appears that the matter was negotiated with the prior attorney on two occasions and no offers of reduction in the assessment were made. Counsel for the Respondent takes the position that the matter is without merit, and that the Petitioner has offered no evidence to the contrary.

In his Reply Affirmation, counsel indicates, inter alia, that the equalized assessment for 2000/01 was \$1,333,138; that it rose to \$1,437,343 for 2001/02, and to \$1,533,166 for 2002/03. Thereafter, based on the reassessment undertaken by the County, the property was valued at \$1,343,743 for the 2003/04 tax year, reflecting reductions of 7.2% and 13% respectively from the 2001/02 and 2002/03 assessments. Simply stated, the Respondents' own estimate indicates that the property was overassessed for the two preceding years. This resolves the issue of meritorious cause of action, at least for two of the years under review.

There is no evidence of an intent to abandon this action. As Respondent states, former counsel submitted adequate information to enable the County's appraiser to estimate the value of the property for the years under review. He did not find that reductions were warranted for any of the tax years considered. This includes the tax years commencing 1/1/03 and 1/1/04, when the actual equalized assessment was, according to

the Petitioner, \$1,343,743. The Respondent's appraiser estimated the value for those years to be \$1,620,000 and \$1,660,000 respectively.

The Respondents' appraiser may be right, or he may be wrong. The Petitioner is entitled to a judicial determination with respect to the claim of overassessment for some or all of the years under review.

DISCUSSION

Restoration of Cases for which a Note of Issue was filed.

Uniform Rules for Trial Courts § 202.59(d)(2) requires a Note of Issue for each property for each year under review. Real Property Tax Law § 718 sets time limits within which Notes of Issues for each subsequent year must be filed. For many years the County and Petitioners have executed a standardized stipulation which extends the time within which to file a Note of Issue until the time when the Petitioners are required to furnish a stipulation of consolidation of all open actions on the same property. Consequently, a Note of Issue is typically filed for the first year only, and the others are filed only in conjunction with trial preparation.

Only cases in which a Note of Issue has been filed require compliance with Civil Practice Law and Rules § 3404. In the Second Department, leave to restore is automatically granted if application is made within one year of the date of the marking. After one year, the matter is presumed abandoned, and is dismissed. But the presumption is rebuttable, and the Petitioner must make a four-pronged showing to justify reinstatement. (*Basetti v. Nour*, 287 A.D.2d 126, 133, 2nd Dept., 2001; See also, *McClure v. Schindler El. Corp.*, 297 A.D.2d 335, 2nd Dept., 2002).

The party seeking restoration must show that there is a meritorious cause of action, that there was not intentional abandonment, that there is a reasonable excuse for the delay, and that the delay has not caused prejudice to the opposing party. But where the parties have stipulated to remove the case from the calendar, and particularly where it is done to accommodate the Defendant or Respondent, cases have held that the requirements of § 3404 with respect the foregoing showings are inapplicable. (*Denver v. American Home Products Corp., et al.*, 138 A.D.2d 670, 671, 2nd Dept., 1988; *Nicolich v. Fitzgerald*, 259 A.D.2d 741, 2nd Dept., 1999).

But even applying the standards for restoration of § 3404, the Petitioner has established entitlement to restoration to the ready trial calendar. The submissions by counsel for the Petitioners are based on their actual knowledge of the circumstances under which the matter was stricken from the calendar, and the efforts to resolve it with the Respondents. Their actions belie any evidence of an intention to abandon the matter. The delay in seeking restoration was consistent with the very purpose for the removal, that is, to permit the Respondents to obtain appraisal reports upon which to negotiate with the Petitioner; and the reference to appraisals showing reductions evinces an adequate claim of a meritorious cause of action.

The motion to restore those matters for which a Note of Issue has been filed is **granted**.

Restoration of Pre-Note of Issue Matters.

In matters in which a Note of Issue has not been filed, and in which a party unreasonably neglects to proceed, or otherwise delays in the prosecution thereof, or who unreasonably fails to serve and file a Note of Issue, the Court may dismiss the party's pleadings. Unless specifically provided to the contrary, the dismissal is not on the merits. But no such dismissal can take place unless the party seeking relief shall have served a written demand by registered or certified mail, calling upon the party against whom relief is sought, to serve and file a Note of Issue within ninety days of receipt of the demand. (Civil Practice Law and Rules § 3216). "In the absence of a 90-day notice pursuant to CPLR 3216, restoring a case marked 'inactive' is automatic". (*Andre v. Bonetto Realty Corp., et al.*, 32 A.D.3d 973, 975, 2nd Dept., 2006). (Internal citations omitted).

CONCLUSION

The motion to restore all pending proceedings is **granted**. To the extent that the motion involves a filed Note of Issue, the Petitioner has satisfied the burden of establishing a meritorious cause of action, that there was no intentional abandonment, that the delay was occasioned by a justifiable excuse, and that the Respondents have not been prejudiced. But even if they did not, the matter having been removed by consent of the parties, and for the benefit of the Respondents, proof of compliance with the four-pronged standard of § 3404 is not required.

There is no evidence, in either Statutory law, Rules of Court, or Appellate case law, of a claimed "3-Year Rule". While this may have been the time frame in which it

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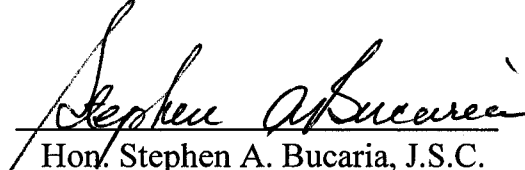
was hoped that the Respondents would be able to gather themselves sufficiently to negotiate cases, and during which a matter could be restored by letter, or a period beyond which the Respondents informally requested that the Petitioners seek restoration of unresolved matters, it certainly does not override Civil Practice Law and Rules § § 3404 and 3216, the Uniform Rules for Trial Courts, or the Decisional Law cited herein.

With respect to those proceedings for which a Note of Issue has not been filed, the motion is also **granted**. The Respondents have not shown any evidence of the service of a 90-day notice to the Petitioner calling upon them to file a note of issue, or that such notice has not been responded to by the Petitioners.

The parties are directed to exchange trial appraisal reports conforming to §202.59(g) of the Uniform Rules for Trial Courts, within sixty days of the receipt of a copy of this Order with Notice of Entry.

This constitutes the Decision and Order of the Court.

JUL 11 2008


Hon. Stephen A. Bucaria, J.S.C.

ENTERED

JUL 16 2008
**NASSAU COUNTY
COUNTY CLERK'S OFFICE**