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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

Present: **HON. EDWARD G. McCABE**
Justice

TRIAL/IAS PART 1
NASSAU COUNTY

NEW YORK TELEPHONE COMPANY,

Index No.: 97- 012986
Index No.: 98- 12182

Plaintiff,

Mot. Seq. Nos.: 11 & 12

- 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.

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LONG ISLAND WATER CORPORATION,

Petitioner,

For a judgment pursuant to Article 78 of the CPLR

Index No.: 97-12856

- against -

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

Respondents.

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NEW YORK WATER SERVICE CORPORATION,

Petitioner,

For a judgment pursuant to Article 78 of the CPLR

Index No.: 97-12762

- against -

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

Respondents.

_____X

The following papers were read on this application:

Notice of Motion (County).....1
Memorandum of Law in Support (County).....2
Affidavit.....3
Memorandum of Law in Opposition (Verizon).....4
Memorandum of Law in Opposition (NY Water Service).....5
Order to Show Cause.....6
Memorandum of Law (NY Tel and LI Water).....7
County's Reply Affidavit.....8
Affirmation in Opposition to Motion to Strike.....9
Affirmation in Opposition to Order to Show Cause.....10
Memorandum in Opposition to Motion to Strike (County)...11
Reply Memorandum of Law.....12
County's Corrected Reply Memorandum of Law.....13

PRELIMINARY STATEMENT

Two of the Nassau County Defendants, the Nassau County Department of

Assessment and the Chairman of the Board of Assessors, submit an application for an order dismissing the Amended Petitions of Respondents, New York Water Service Corporation and Long Island Water Corporation, pursuant to Civil Practice Law and Rules § 7804, and summary judgment against the Plaintiff, New York Telephone Company, in accordance with CPLR § 3212.

Counsel for Plaintiff, New York Telephone Company (now Verizon) and Petitioner, Long Island Water Corporation, submit an Affidavit in Opposition to the motion and, file an Order to Show Cause brought pursuant to CPLR §2101 (d) and Title 22 of the NY Code of Rules & Regulations §1-130-1.1-a and in accordance with the inherent power of the Court to regulate its' own calendar, they ask the Court to strike the Defendants'/ Respondents' motion and impose sanctions against all who joined in their motion.

New York Water Service Corporation's counsel submits a Memorandum of Law in Opposition to the motion to dismiss by the Nassau County Assessor.

BACKGROUND

This matter has had a tortuous path through the judicial process. The action on behalf of New York Telephone Company requested a judgment that Article 18 of the Real Property Tax Law respecting classes of property, does not apply to their non-county-wide special districts, and that the Defendants/Respondents were

required to comply with Real Property Tax Law § 305. As a first alternative, New York Telephone requested that if the Court found Article 18 to be applicable, that the Defendants/Respondents be required to determine annual base percentages (ABP's) as required by Article 18. A third requested alternative was that if Article 18 was found to be applicable and the Defendants/Respondents were not required to develop ABP's for the purpose of determining tax rates, that Article 18 be found to be unconstitutional as applied to real property in non-county-wide special districts. [1]

The Defendants/Respondents appeared by service of a Verified Answer and Amended Verified Answer. [2] For the purpose of this motion, the Tenth Affirmative Defense in the New York Telephone Answer and the Fourteenth Affirmative Defense in the Long Island Water Company proceedings are significant. They both read as follows:

> Nassau's liability for refunds, if any, to Plaintiff is set forth in Section 6-26.0(b)(3)(c) of the Administrative Code of Nassau County.
>
> Because the conditions set forth in this Section do not exist and will not arise from this proceeding, Nassau

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[1] Exh. "1" to motion by Assessor and Department of Assessment.

[2] Exhs.. "C" and "D" to New York Telephone's Order to Show Cause are answers in the New York Telephone and Long Island Water Company proceedings.

is not liable for the payment of any tax refund.

The actions on behalf of New York Telephone Company, New York Water Service Corp. and Long Island Water Corp. were consolidated for trial and both sides moved for summary judgment after issue was joined. This Court granted the motion for summary judgment by the Plaintiff in Action # 1 and the relief requested by the Petitioners in Proceedings # 1 and # 2 to the extent that the Defendants' and Respondents' assessment of real property in non-County-wide special districts was declared invalid, and the calculation of the extent of damages suffered by the Plaintiff and Petitioners was referred to trial.

The Defendants' and Respondents' cross-motions for summary judgment were denied. The cross-motion by the Defendants in Action # 1 for leave to serve a second amended answer was granted. [3]

The Defendants and Respondents appealed to the Appellate Division, Second Department, which issued an Order, dated September 16, 2002, affirming the Order of this Court, but modified it to delete the provision for a determination of damages. [4]

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[3] Exh. "G" to Order to Show Cause.

[4] Exh. "H" to Order to Show Cause.

The Court of Appeals granted the Plaintiff and Petitioners' leave to appeal, and by Order dated March 30, 2004, the Court of Appeals reversed the Order of the Appellate Division, insofar as it denied refunds, and remitted the matter for a hearing on the amount of refunds due and the financial hardship, if any, imposed upon the County by the payment of such refunds. [5]

In anticipation of the hearing, the Defendants and Respondents served a Witness Disclosure Statement. [6] Among the identified witnesses were three individuals who would testify as to the adverse financial impact on the special districts by the award of tax refunds. The Plaintiff and Petitioners moved to preclude such testimony, and their motion was granted by this Court by Order dated October 26, 2006, entered November 3, 2006. [7] The appeal from that Order was dismissed by the Appellate Division, since "no appeal lies from an order determining a motion in limine."[8]

The Defendant/Respondents' motion now before the Court seeks partial summary judgment on the grounds that the Nassau County Administrative Code

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[5] Exh. "I" to Order to Show Cause.

[6] Exh. "O" to Affidavit in Opposition to Motion to Dismiss Petitions and Partial Summary Judgment against Verizon.

[7] Exh. "J" to Order to Show Cause.

[8] Exh. "K" to Order to Show Cause.

imposes liability, not on the County, but on the non-County-wide special districts. The Office of the Nassau County Attorney, by its' counsel, Peter J. Clines, Esq., explicitly endorsed the pleadings, which were originally pro se, and submitted opposition to the Plaintiff/Petitioners' application for an Order to Show Cause.

As noted, in addition to opposing the motion for summary judgment and dismissal, the Plaintiff, New York Telephone, and the Petitioner, Long Island Water Corporation, obtained an Order to Show Cause why the motion by the Defendants and Respondents should not be stricken, for partial summary judgment and sanctions be imposed upon all Defendants and Respondents who have joined in the motion for partial summary judgment.

The Nassau County Attorney's Office interposed an Affirmation in Opposition on the grounds that, pursuant to CPLR § 2214, this is not a proper case for an Order to Show Cause. Instead, they requested that the Order to Show Cause be treated as opposition to their motion for partial summary judgment, stating they had no objection to the submission of additional papers by the Plaintiff and Petitioners.

DISCUSSION

The motion for dismissal of the Amended Petitions and for summary judgment against New York Telephone Company is introduced by an affirmation

of the Chairman of the Nassau County Board of Assessors, a Defendant in the action. Affirmations by an attorney who is a party to the action are not authorized. See CPLR § 2106. However, since it does no more than identify the attached exhibits and refer to a Memorandum of Law, the Court will consider it.

I. The County's Motion

The County's arguments are set forth in their Memorandum of Law dated December 10, 2007. Their positions can be summarized as follows:

A. The language of § 6-26.0(b)(3)(c) of the Nassau County Administrative Code must be interpreted in light of the legislative history. They argue that the lack of any reference to Article 7 of the Real Property Tax Law, in the face of references to other sections of the Code, can only be interpreted to mean that the obligation of the County applies to Administrative, as opposed to Judicial, determinations of an illegal assessment.

B. § 6-26.0(b)(3)(c) is a subsection of § 6-26.0, entitled "Action by the Board of Supervisors on the petition", and thus is applicable only to administrative, as opposed to judicially mandated refunds.

C. The legislative history of Chapter 851 of the Laws of New York for 1948 shows an intent to affect administrative refunds only. By reference to the bill jacket, the County concludes that the reference to "tax refunds made by the

County Board of Supervisors" deals only with the administrative correction of errors, and not judicially mandated refunds, since they are not mentioned.

D. The Plaintiff and Petitioners have failed to exhaust their administrative remedies in that they have never filed an administrative petition for the correction of errors, and that such application is a statutory predicate to the issuance of a refund.

E. NCAC § 6-24, having been replaced by Article 5 of the Real Property Tax Law, is no longer an operative provision of the Administrative Code. They cite *Atria Associates* v. *County of Nassau*, 181 A.D.2d 847, 851, (2d Dept. 1992) as support for this proposition. That case, dealing with County land leases at Mitchell Field, held that attempts by the County to grant tax exemptions, pending approval of zoning applications, were ineffective in that only the State is authorized to grant real property tax exemptions.

II. Applicable Legal Principles

A. The Law of the Case Doctrine.

The history of this matter is as earlier stated. The Remittitur by the Court of Appeals has the same clear directive that this Court noted in its' October 26, 2006 Order, which is to conduct a hearing on the amount of tax refunds and their financial impact on the County. Since the County's current position is that there

is no financial impact on the County, which is totally contrary to the position they argued in the brief they submitted to the NYS Court of Appeals they are free to stand mute on the hearing of this issue.

The impact upon special districts, evidence of which the moving parties seek to raise through the three identified witnesses, is not presently open to review. The law of the case is directly to the contrary. The County movants classify the October 26, 2006 Order as "advisory", and therefore not constituting the law of the case. In so doing, they claim reliance on the decision of the Appellate Division dismissing their appeal.[9] That decision does not classify the decision in any way; it states simply that there is no appeal from an order determining a motion in limine.

The language of *Cotgreave v. Public Adm'r. of Imperial County (Cal.)*, 91 A.D.2d 600, (2d Dept. 1982), cited by the Appellate Division, uses the term advisory, but only in the sense that during the course of the trial a Court would be free to change its' mind, and it is imprudent to appeal a determination which the trial court is free to change of its' own volition. In *People v. Evans*, 94 N.Y.2d 499 (2000), the Court held that the *Sandoval* ruling on the cross-examination of the defendant, regarding four of his prior convictions, was not binding, or the law

[9] Memorandum of Chairman and Department of Assessment at p. 3.

of the case for the second trial, after the first resulted in a mistrial. It does not mean that there is an unlimited number of times that the same Court can be asked to change its' opinion on an issue of law.

Evans, supra provides an in-depth discussion of the law of the case doctrine. It is "part of a larger family of kindred concepts, which includes res judicata (claim preclusion) and collateral estoppel (issue preclusion). Like them, the law of the case doctrine contemplates that the parties had a "full and fair" opportunity to litigate the initial determination. *Id.* at 502. The determination by the Court was that not every ruling in the course of a trial is binding upon a judge presiding over a retrial. *Sandoval* deals with evidentiary rulings, just as if they were made in response to an objection during the course of the trial, and not every evidentiary ruling constitutes the law of the case which must be strictly adhered to in subsequent proceedings in the same action.

But the determination by this Court, and the Court of Appeals, that the County is responsible for any refunds as a result of the improper assessing of non-County-wide special districts is hardly a discretionary evidentiary ruling. It is the essence of the matter.

As explicitly stated in the Order of October 26, 2006, " . . . this Court finds, as a matter of law, that NCAC § 6-26.0(b)(3)(c) applies, which provides the tax

refunds costs are a 'County charge' and thus, there is no need for the County to introduce evidence as to any alleged costs to the special districts." If this Court is in error in its' interpretation, it is for the appellate courts to determine at the appropriate juncture.

The Movants' argument that because the issue of the County's responsibility for the refund was not litigated in the Court of Appeals, it is not the law of the case, is unpersuasive. Both Appellants and Respondents took the same position on this issue, and it was for this reason that the Court directed a hearing on the amount of refunds and its' fiscal impact on the County. The position now espoused, that the Deputy County Attorney who briefed and argued the matter before the Court of Appeals was simply wrong, is not helpful at this stage of the proceedings.

B. Estoppel against Inconsistent Positions (Judicial Estoppel)

This doctrine establishes the rule that a party will not be allowed to maintain inconsistent positions in litigation. As opposed to most jurisdictions, the application of the doctrine in New York is dependent upon success in the original claim. NY Jur., Second Ed., Estoppel and Waiver § 54.

In its' September 2, 2002 decision, the Appellate Division concluded that the refund of improperly collected taxes "will have a significant financial impact

on many non-Countywide special districts, where taxes have been paid, tax liens matured, budgets adopted, and expenditures made, all in reliance on the ad valorem levies". [10] The failure of the Second Department to consider § 6-26.0(b)(3)(c) of the Nassau County Administrative Code was raised by the Plaintiffs and Petitioners in the Court of Appeals. [11]

Thereafter, the County took the position in the Court of Appeals that there would be no financial impact upon the special districts; rather, it would be borne by the County. [12] In both its' Respondents' Brief and in oral argument, they successfully argued that there would be a significant financial burden upon the County because it "must pay the refunds for every taxing jurisdiction that uses its' assessment roll, even though the County never receives their tax money. Nassau County Administrative Code § 6-26.0 (b) (3)(c)". As a consequence, the Court of Appeals remitted the matter to this Court for a hearing to determine the amount of the refund, and the fiscal impact on the County. To now state that the premise upon which the remittitur was granted is without merit, is impermissible. The effort

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[10] Exh. "H" to Order to Show Cause.

[11] Exh. "J" to Affidavit in Opposition to the Motion to Dismiss.

[12] Exhs. "L" — "M" to Affidavit in Opposition to the Motion to Dismiss.

to distinguish inconsistent factual, as opposed to legal, positions is also without merit. *F.D.I.C. v. J & D Einbinder Associates, Inc.*, 224 A.D.2d 655, 656 (2d Dept. 1996).

For these reasons, the motion by the Chairman of the Board of Assessors and the Department of Assessment, subsequently adopted by the County Attorney, is denied.

C. The Order to Show Cause

The Defendants and Respondents contend that an Order to Show Cause is an inappropriate response to their motion to dismiss the amended petition of Long Island Water Corporation and for partial summary judgment against Verizon New York, Inc. The CPLR § 2214(d) provides in pertinent part that "the court in a proper case may grant an order to show cause to be served in lieu of a notice of motion, at a time and in a manner specified therein". The County claims that this is not a "proper case" for the issuance of an Order to Show Cause.

An order to show cause is no more than a substitute for a notice of motion. Certainly, if it were labeled a cross-motion, as opposed to order to show cause, there would be no such argument. The determination of what is a "proper case" is purely discretionary with the Judge called upon to sign it. See, N.Y. Practice § 248 by Siegel (4th ed.). The Defendants and Respondents have suffered no prejudice by

virtue of the use of an order to show cause. There has been no ex parte grant of relief, and they have had full opportunity to submit opposition papers and memoranda in support of their position. The use of an order to show cause, as opposed to a notice of motion, was altogether appropriate. *See,* Rodriguez *v.* CRM Compensation Risk Managers, LLC, 11 Misc.3d 1077(A); Mallory *v.* Mallory, 113 Misc.2d 912, (Nass. Sup. 1982, Balletta, J.).

D. Frivolous Motion Consideration

Frivolous conduct is defined in Part 130 of the Rules of the Chief Administrator.

§ 130-1.1(c)provides that conduct is frivolous if:

> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false.

The pertinent issue before the Court is whether or not the motion, initially pro se, and subsequently endorsed by the Office of the Nassau County Attorney, "is completely without merit in law and cannot be supported by a reasonable argument

for an extension, modification or reversal of existing law". The movants have essentially called upon this Court to disregard the specific mandate of the Court of Appeals, and to determine instead the financial impact that a refund would have on the special districts. This is after this Court has twice determined, as a matter of law, that the County, not the special districts, is responsible for such refunds. It is, to say the least, difficult to discern the reasonableness of arguments for a complete reversal of course by the Court, and now consider the financial impact on the special districts who have twice been judicially determined not to be responsible for the subject tax refunds.

This Court finds the instant motion to dismiss the amended petitions of New York Water Service and Long Island Water Corporation, and the motion for summary judgment against New York Telephone Company to be frivolous, and are therefore dismissed.

E. Costs and Sanctions

The Department of Assessment, the Chairman of the Board of Assessors and the Nassau County Attorney's Office have engaged in frivolous conduct. Irrespective of the merits of their claim that the County guarantee of §6-26.0(b)(3)(c) does not apply to judicially mandated tax refunds, that issue is preempted by the Decisions of this Court and the Court of Appeals. The imposition of costs and

sanctions for such conduct is discretionary with the Court, and may include reimbursement for actual expenses reasonably incurred and reasonable attorney's fees. In addition, the Court is authorized to impose financial sanctions. See, § 130-1.1(a). While the Court has not yet concluded that reimbursement or an award of costs and sanctions is warranted, counsel for the Petitioners and Plaintiffs are directed, within thirty days of the receipt of this Decision and Order, to submit to the Court, with notice to all parties, an itemized statement of their time and disbursements incurred in response to the motion, together with a statement of their usual billing rate for these services.

This constitutes the decision and order of the Court.

ENTER:

Dated: August 11, 2008
Mineola, NY

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

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