SHORT FORM ORDER
SUPREME COURT, STATE OF NEW YORK
COUNTY OF NASSAU

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BELLMORE-MERRICK E.M.S., INC.,
Plaintiff

Trial/IAS Part 19
Index No. 07-12559
Sequence No. 01
Submit Date 5/23/08

against

BOARD OF ASSESSORS OF THE COUNTY OF NASSAU,
Defendant

- -

The following papers read on this motion:

Notice of Motion/Order to Show Cause..... X
Answering Affidavits..... X
Replying Affidavits..... X

PRESENT: HON. JOSEPH P. SPINOLA

PRELIMINARY STATEMENT

The Plaintiff moves for Judgment by Default declaring that the property known as 2108 Bellmore Avenue, Bellmore, New York (the property) is 100% exempt from all real estate taxes, and refunding all real property taxes paid by the Plaintiff from 2005 to date. The Defendant opposes the motion, claiming that they are not in default in responding to the Petition pursuant to Article 78 because the Plaintiff did not include an Index Number on the documents served and did not file and serve a Request for Judicial Intervention. The Plaintiff replies that they did obtain, and annex a copy of the receipt for an Index Number and Request for Judicial Intervention. After granting the Defendant two adjournments to respond, no response was forthcoming. The Plaintiff further claims that the Defendant's effort to file an Answer in response to the Motion is ineffective in the absence of a showing of a justifiable excuse and meritorious defense.

BACKGROUND

The procedural issues are raised in the context of an interesting matter concerning the imposition of real estate taxes on an otherwise tax-exempt parcel of improved land. The property is a former Sun Oil Company service station, the use of which was severely affected by the widening of Bellmore Avenue. After the use as a service station ended, the property was leased to the Plaintiff, then known as Bellmore Merrick Volunteer Ambulance Company, Inc., and, since 1996, known as Bellmore-Merrick E.M.S., Inc. (BMEMS). By deed dated April 20, 1997, BMEMS, under its former name, acquired title to the premises from Sun Oil Company of Pennsylvania.

BMEMS uses the property for its office and the storage of its emergency vehicles. It has 501(c)(3) status from the Internal Revenue Service, and until the 2006/2007 tax year, with a tax valuation date of 1/1/05, was fully exempt from real estate taxes by Nassau County. As part of Exh. "A" to the Motion, the Plaintiff annexes a School Tax Bill for the property in the amount of $6,036.29, and a General Tax Bill for 2007 in the amount of $3,501.10. Each of these bills reflect a full value for tax purposes of $383,800, and an assessment, at the 1% equalization rate, of $3,838. Also annexed is a Notice of Tentative Assessed Value for 2008/09, reflecting a fair market value of $460,500, with a transitional assessment of $3,890, in accordance with the requirements of Real Property Tax Law § 1805 (3).

In or about 1981, the Plaintiff installed a 100' antenna, which replaced an existing 75' one. The antenna permitted communication from the base station to emergency vehicles equipped with the appropriate two-way radio equipment. In 1996 Bell Atlantic and BMEMS executed a lease agreement permitting Bell to replace the antenna with a more substantial tower of the same height, and to affix cellular radio antennas. The new tower continued to serve as the platform for the BMEMS antenna and equipment. For some 9 years after the construction of the new tower, BMEMS continued to enjoy its exemption from real estate taxes.

The termination of the tax exemption by the Defendant appears to have been triggered by the decision in *Nextel of New York, Inc. v. Assessor for Vil. of Spring Val.*, 4 Misc.3d 233 (Sup. Ct. Rockland 2004, Dickinson, J.). The underlying issue is whether the lease agreement with Bell Atlantic, calling for the construction of a new tower and the affixing to it of cellular telephone equipment, vitiates the exemption from real estate taxes on the property, and, if so, to what extent. The initial inquiry is whether or not the Plaintiff is entitled to a default Judgment in light of the failure of the Defendant to interpose a timely defense, and whether or not the failure to do so is excusable.

DISCUSSION

This is a special proceeding under Article 78 of the Civil Practice Law and Rules, in which the parties are properly denominated Petitioners and Respondents. Civil Practice Law and Rules § 401. The receipt for filing, Exh. "A" to the Reply Affirmation, indicates that the fees for the Index Number and Request For Judicial Intervention were purchased on July 19, 2007, the same date the Petition was filed with the Nassau County Clerk. Exh. "A" to Motion. The County Attorney's Office acknowledged receipt of the Petition, copies of which acknowledgments are annexed as Exh. "B" to the Reply, and the Petitioner annexes affidavits of personal service at Exh. "C" to the same document. By letter dated August 16, 2007, the Respondent's correspondence to the Petitioner (Exh. "B" to Reply Affirmation) confirms that the Petition was adjourned from August 17 to September 17, 2007. The matter was further adjourned at the Respondent's request until October 17, 2007.

Civil Practice Law and Rules § 7804 requires the service of an answer with supporting affidavits, if any, to served not later than 5 days before the return date, and replies at least 1 day before such time. The time for the service of an answer expired on October 12, 2007. In order to obtain relief from a default in answering, the Respondents are obligated to provide a reasonable excuse and demonstrate the existence of a meritorious defense. In the most recent holding of the Second Department on the subject, *Papandrea v. Acevedo,* 2008 WL 4355398 (2d Dept. 2008), the defaulting Defendant submitted an extensive affirmation as to the preparation of the answer and its mailing, albeit to the wrong address. This was accepted as a valid excuse of law office failure. In addition, the Defendant demonstrated a potentially meritorious defense based upon the issue of whether the plaintiff sustained a serious injury within the ambit of the Insurance Law. Under these circumstances the default was excused, and the service of an answer permitted.

The Respondents have neither offered a reasonable excuse for failure to answer, nor have they produced evidence of a meritorious defense. By a document entitled "Reply Affirmation in Opposition", which the Court treats as an Answering Affirmation in accordance with Civil Practice Law and Rules § 2214 (b), the Respondent offers as an excuse that the Petition was served without the Petitioner having acquired an Index Number. There is no plausible basis for this claim, since the Notice of Petition, Exh. "A" to the motion, contains the handwritten index number. The receipt for filing, Exh. "A" to the Reply affirmation, reflects the purchase of both an Index Number and a Request for Judicial Intervention. The Respondent's claim to the contrary is pure surmise.

The Affirmation further states that the Respondent is not in default because they

never intended to abandon the action. This is neither a statement of meritorious defense nor of justifiable excuse. To Exh. "A" , the proffered Answer, is an Affirmation in Opposition. Civil Practice Law and Rules § 7804 (c)authorizes "an answer and supporting affidavits, if any", and presumably Exh. "A" to the Answer is intended to be one.

The Affirmation is not by a person with personal knowledge of the basis for the change in status, but is essentially a memorandum of law, which raises interesting points. The essence of the affirmation is that the Petitioner has lost its tax exemption by utilizing the tower for the placement of a cellular antenna, which is not being used exclusively for the tax exempt purpose. In support of their position Respondents cite Real Property Tax Law § 420-a (2), *People ex rel. Young Men's Assn. V. Sayles,* 32 A.D. 197 (3d Dept. 1898), *Ellis Hospital v. Assessor of Schenectady,* 288 A.D.2d 581 (3d Dept. 2001), and *Nextel of New York v. Assessor for Vil. of Spring Val.,* 4 Misc.3d 233 (Sup. Ct. Rockland, 2004, Dickinson, J.).

In *Young Men's Assn.* the Court concluded that only a small portion of the real estate was used for the beneficial purposes for which the organization was intended, while the vast majority of the structure was used for public meetings, exhibits and entertainment, which were not in furtherance of the benevolent and charitable purposes of the organization. Those portions of the building so used were determined to be subject to real estate taxation. *Ellis Hospital* leased a portion of its parking area to an adjoining medical building. That portion of the property was determined to not be exempt from real estate taxes.

In *Nextel of New York* the Court conducted an extensive inquiry into the language of Real Property Tax Law § 102 and its impact on the tax status of communications equipment on property owned by other than a telephone company. United Water of New York had a licensing agreement with Nextel, authorizing the latter to place telecommunications equipment on its existing water tower. The Court there determined that Nextel's equipment was taxable real estate for two reasons. "*First*, its antennae are 'poles', its coaxial cable is 'lines' or 'wires' and its 40,000-pound communications shed is an 'inclosure' all used 'in connection with the transmission or switching of electromagnetic voice, video and data signals between different entities separated by 'air' as these terms are defined in RPTL 102 (12) (1) (*Voicestream, supra).*" and "*Second,* an explanation of how cell phones work today reveals that Nextel's Spring Valley communications equipment is a cell tower base station which is a '*telecommunications outside plant of entities other than a local telephone companies*' and functions like 'lines, wires, poles, supports and inclosures' in connecting cell phone users (CPE anologue) to a

central office (COE)[1] which makes connections to other base stations and other cell phone users (CPE)[2]". *Id.* at 241. Parenthetically, the Court dismissed the Petition because the Petitioner failed to submit an appraisal as required, thus reducing the extensive analysis as to the application of § 102 (12) (1) to dicta.

In the present case, the Respondent does not correlate the Bell Atlantic equipment to that of Nextel so as to even warrant a comparison of the cases. In fact, the Affirmation annexed to the Answer, while acknowledging that only the portion of the premises not being used for the exempt purpose may be subject to real property tax, does not offer any insight as to what specific equipment they refer. In reality, based on the current estimated market value of $460,500, the Respondent is taking the position that the placement of a cellular antenna on the tower renders the tower taxable because it is not used exclusively for the exempt purpose, and because the tower is not exclusively used for the exempt purpose, the building to which it is attached is also subject to taxation.

This would defeat the entire exemption by virtue of a single antenna affixed to a tower which is otherwise essential to the operation of the exempt organization. There is, in the Court's opinion, no merit to this claim, and the Respondent has failed to adequately demonstrate the existence of a meritorious defense to the action. A refined technical analysis of the equipment sought to be taxed, and its value, may be meaningful, but the Respondent has not offered one.

Most pointedly, however, is the fact that the Respondent failed to answer and offers no rational excuse for failing to do so. It would be inappropriate for Court to surmise any one of a variety of reasons which could constitute excusable law office failure. None is offered, and therefore none is adopted.

CONCLUSION

The Petitioner's motion for the entry of default judgment is granted. The Respondent's Answer, with supporting affidavits, if any, was due not later than October 12, 2007, approximately one year ago. The affirmation in opposition to the motion does not offer evidence of excusable neglect, nor does it include evidence of a justifiable defense so as to justify the termination of the Petitioner's tax exemption. While there may be some rational basis for taxing the fixtures which are not reasonably incidental to the Petitioner's purpose, there is no such basis for taxing the tower, which is incidental to their essential radio communications, or the land and building itself, which are not only

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[1] Central Office Equipment.

[2] Customer Premises Equipment.

incidental, but essential to their purpose.

The Respondents are directed to refund all real estate taxes which have been collected from the Petitioner from the inception of such payments to the present time, together with interest and statutory costs.

This constitutes the decision and order of the Court.

ENTER:

Joseph P. Spinola, Justice
Supreme Court, Nassau County

Dated: October 16, 2008