

**Matter of Midtown N. Hills, LLC v Board of  
Assessors of the County of Nassau**

2009 NY Slip Op 31373(U)

June 10, 2009

Supreme Court, Nassau County

Docket Number: 409267/08

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

TRIAL/IAS, PART 3  
NASSAU COUNTY

\_\_\_\_\_  
In the Matter of the Application of:  
MIDTOWN NORTH HILLS, LLC,

Petitioner,

INDEX No. 409267/08

MOTION DATE: March 5, 2009  
Motion Sequence # 001

-against-

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 Affidavit .....	XX
Supplemental Affirmation.....	X

This motion, by the attorneys for the petitioner, for an order pursuant to RPTL Article 7 and CPLR 3212 for summary judgment directing the respondents to reclassify the subject property from a Class Four commercial property to a Class One residential property is **granted** for the tax years 2007/08 and 2008/09.

On December 19, 2005, petitioner purchased two parcels known as Section 8, Block A, Lots 51 and 502 on the Nassau County Tax Map. On May 25, 2006, petitioner

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purchased three parcels known as Section 8, Block A, Lots 302, 702A and 702B on the Nassau County Tax Map. The above mentioned parcels were formerly exempt from property taxes for religious use purposes. For the 2007/08 tax year petitioner asserts that Section 8 Block A Lots 702A and 702B were misclassified as Class Four properties, resulting in an overpayment of \$77,723.28 for taxes for the year 2007/08. Respondent argues that the Petitioner is not entitled to relief for the miscalculation of Lots 702A and 702B since it failed to file any complaint at all for the 2007/08 tax year. For the 2008/09 tax year Nassau County reassigned the lot arrangements, 51, 502, 302, 702A and 702B) to create eight new lots 889, 894, 893, 892, 895, 896, 897A and 897B (hereinafter referred to as the subject property). Petitioner purchased the subject parcels in order to assemble a large parcel of land to construct a condominium complex. The subject property has remained vacant since its acquisition. Nassau County has classified the subject property as Class 4 - "Vacant Land Located in Commercial Areas." The 2008/09 Nassau County tax bills on Lots 889 and 897A restored the taxes for prior years 2007 and 2008 due to the removal of the real property exemption. Petitioner argues that the respondent incorrectly classified the subject property as Class Four property when under RPTL § 1802(1)(e) vacant land zoned residential must be classified as Class One.

On January 5, 2009, Petitioner was advised by Nassau County that a Correction of Error for the 2009/10 and 2010/11 tax years would be submitted to change the tax rate for the subject property to Class One. Petitioner contends that the County has failed to rectify its misclassification error for the 2007/08 and 2008/09 tax years, although requested to do so in a timely manner.

Petitioner seeks a court direction that the respondents reclassify the subject property from a Class Four commercial property to a Class One residential property for the tax years 2007/08 and 2008/09. Petitioner commenced an Article 7 proceeding for tax years 2008/09 to correct this misclassification. Respondent does not deny that the subject property was misclassified for the tax years 2007/08 and 2008/09, but that the petitioner did not raise this issue in a timely manner before the Assessment Review Commission (ARC). The alleged overpayment for the subject property is approximately \$699,174.67.

Further, respondent argues the petitioner failed to file a complaint for the tax year 2007/08. Petitioner alleges that after Section 8 Block A Lots 302, 702A, 882 and 702B became "non exempt" and the 2007/08 tentative tax roll was published, the petitioner

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filed a Notice of Petition and Petition for Tax Year 2007/08 on April 14, 2007 for section 8 Block A Lots 51, 302, 502, 702A, 702B, 785 and 882. Respondent argues that since the notice of motion and supporting affidavit did not include a copy of the RPTL Article 7 petition for the 2007/08 tax year the motion should be denied with respect to tax year 2007/08. Petitioner submitted a copy of the Article 7 petition for the 2007/08 tax year with the reply affidavit. Where material is introduced for the first time on reply, consideration of material is proper where opponent avails itself of the opportunity to file a sur-reply as was done by the respondent. (See Hayden v County of Nassau, 16 AD3d 415; Ioelle v Wal-mart Stores, Inc., 290 AD2d 614; Teplitskaya v 3096 Owners Corp., 289 AD2d 477).

Petitioner also contends that the failure to provide notice of the correction under RPTL § 553(2)(b) precipitates a “*mandamus*” situation since it deprives a property owner of a fundamental right of notice and due process. (Matter of City of N.Y. v Village of Valley Stream, 114 Misc2d 739 (Special Term Nassau County 1982)). A RPTL Article 7 proceeding may be converted into a CPLR Article 78 proceeding so that the within action may be reviewed by way of a collateral proceeding pursuant to CPLR 103(c). (Kaufman v Bd of Assessors, 141 AD2d 175). Petitioner’s purchase of Section 8 Block A Lots 302, 702A, 882 and 702B on May 25, 2006, resulted in the change of the property status to “non-exempt” on the tax rolls. See RPTL § 520. Upon a formerly exempt property being added to a final assessment roll, RPTL § 553(1)(c) mandates that an assessor shall execute and transmit a petition to the board of assessment review for correction of “an omission from the assessment roll for the preceding year of the assessed valuation of taxable real property.” RPTL § 553(1)(c). The assessor must notify the owner, by certified mail, return receipt requested, at least 10 (ten) days prior to the date designated for the review of the new assessment. RPTL § 553(2)(b). Such notice shall include a copy of the petition of the assessor and a statement of the time and place of the meeting of the appropriate board of assessment review. RPTL § 553(2)(b). When the exempt status was removed from Lots 302, 702A, 882 and 702B and the assessment was increased, the fact that the petitioner did not receive notification in accordance with RPTL § 553(2)(b) has not been refuted by the respondents.

On January 10, 2008, attorney for petitioner was advised by the Assessment Review Commission that they would be

“ . . . adjourning the examinations and conferences for cases that are scheduled for 2/13/08 and 2/14/08 . . . ”

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ARC will review these cases however, we will not be sending determinations out on any cases where information is missing.” (email from Mary Marissael dated January 10, 2008 attached as Exhibit “F” to Reply Affidavit).

On March 13, 2008, attorney for petitioner received notice from the Assessment Review Commission stating that:

“due to ARC’s commitment to finalizing the Assessment Roll, examinations conferences are being postponed until further notice.” (email from Mary Marissael dated March 13, 2008 attached as Exhibit “G” to Reply Affidavit).

Petitioner did not *waive* its right to a conference, but, rather the Assessment Review Commission cancelled both the conference and examination schedule. On or about March 28, 2008, the Assessment Review Commission issued a Final Determination specifically denying the Applications of the Petitioner. The Nassau County Administrative Code states, “an application that is denied means that a complete application was considered, but no reduction was indicated.” Nassau County Administrative Code § 6-40(i). The Notice provided by the Assessment Review commission was a “final notice” that petitioner had exhausted its administrative remedies. (See Nassau County Administrative code, § 6-40.4(e)(f) & (g); see also Nassau County Assessment Review Commission Rules of Procedure, § 19.7; see generally *Fifth Ave. Office Ctr. Co. v City of Mount Vernon*, 89 NY2d 735, 741; *Young Men’s Christian Assoc. v Rochester Pure Waters District*, 37 NY2d 371.

On April 9, 2008, petitioner filed a Notice of Petition and Petition Tax year 2008/09 for Lots 889, 892, 893, 894, 895, 896, 897A and 897B. The 2008/09 Petition states, “the Petitioner’s real property has been misclassified.” (Exhibit “J”, section #20). Petitioner’s attorney asserts that, on seeing the Redesignation and Misclassification of the subject property on April 1, 2008, she contacted the Department of Assessment in an attempt to resolve the misclassification issue through a Correction of Errors prior to the tax bills being issued. She asserts having several telephone conversations with the Department of Assessment and provided information in an attempt to resolve the Misclassification issue through a Correction of Errors. She was advised by the Department of Assessment that “it would be more appropriate for ARC to handle issues

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like this relating to the 2008/09 and 2009/10 tax years.” (Email from Carl Laske dated November 5, 2008, attached as Exhibit “K”). On October 15, 2008, petitioner’s attorney appeared before the Assessment Review Commission, and advised the Commission that the subject parcels were incorrectly classified as Class Four properties. On November 21, 2008, the Assessment Review Commission advised petitioner that this was a “matter that DOA [Dept. of Assessment] should handle.” (Email from Ouida Chambers dated November 21, 2008 attached herein as Exhibit “L”).

On December 18, 2008 petitioner was advised by the Department of Assessment that it would be submitting a Correction of Errors for the 2009/10 and 2010/11 years to change it to Class One property. Despite the correction of the 2009/10 and 2010/11 tax years, both the Department of Assessment and the Assessment Review Commission have refused to correct the misclassification error for the 2007/08 and 2008/09 years, resulting in the subject motion. Respondent also opposes the within motion on the ground that on the ARC form the petitioner checked the wrong box. The first box refers to objections “to the assessed value of the property.” This is the box the petitioner checked. Respondent contends the petitioner should have checked the second box “other objections including misclassification or denial of exemption.”

“Mere technical defects in pleadings should not defeat other meritorious claims, and that substance should be preferred over form.” (*Great Eastern Mall v Condon*, 36 NY2d 544, 548). “The Tax Law relating to review of assessments is remedial in character and should be liberally construed to the end that the taxpayer’s right to have his assessment reviewed should not be defeated by a technicality.” (*Great Eastern Mall v Condon, supra*, at 348; see also *People ex rel. New York City Omnibus Corp. v Miller*, 282 NY 5, 9 and CPLR § 2001 and CPLR 3026). Moreover, respondents’ attempts to raise an issue of fact by referring to Exhibit C to the motion as “particularly troubling in that it contains the handwritten unsworn testimony of an unidentified individual” falls short. (Liese Affidavit, pg. 5). Exhibit C is nothing more than a copy of the Village of North Hills Zoning Map and it does not raise an issue of fact.

In opposition to the application the respondents allege that the petitioner refused to attend a conference with ARC and remained silent during the 15 month period the county had to correct the mistake. There is nothing in the record before the Court to support the respondents’ assertion that “had petitioner presented its specific grievance to ARC within 15 months of the promulgation of the tentative roll, at a time when ARC could do

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something about it, it would have saved a \$700,000.00 cash outlay and the County taxpayers a \$700,000.00 refund.” (Memorandum of Law in Opposition, pg. 4). Petitioner sought relief from ARC—which cancelled the conference and referred the Petition to the Department of Assessment. ARC failed to act as an efficacious, user-friendly administrative agency charged with the goal of correcting real estate tax assessments in a timely fashion. On the contrary, respondents concede there was a misclassification in the 2007/08 tax year on Lot 702A and 702B. Respondents also acknowledge that for the 2008/09 tax year all the lots were redesignated and misclassified. In its Memorandum of Law in opposition respondent states that “the town bill for 2007/08 would have been sent on or about January 1, 2008. Thus petitioner’s deadline to request administrative review for the 2007/08 tax year was March 1, 2008, a deadline it failed to meet.” However, the Article 7 petition filed on April 14, 2007, apparently before respondent’s claimed deadline of March 1, 2008. Respondents’ assertion that petitioner did not file a 2007/08 application is contradicted by the Notice of Petition and Petition for 2007/08 filed on April 17, 2007. In the Supplemental Affirmation respondent’s counsel asserts that former Lots 702A and 702B “were in class 4 both before and after the redesignation, and therefore their classification could have and should have been challenged on the 2008/09 tentative roll which was made public on January 1, 2007.” (Clines Supplemental Affirmation ¶ 3).

The contradictory dates and time frames set forth in the Memorandum of Law and Supplemental Affirmation in opposition only obscure the respondents’ failure to give petitioner proper notice thereby putting the petitioner in legal limbo. (See *Matter of the Sisters of the Resurrection New York v Assessor of Town of North Elba*, 129 Misc2d 879, 884 (Sup. Ct. Essex Co. 1985)) (also cited by respondents in their Memorandum of Law). The issues raised by the respondents are feigned. Rather than raising issues of fact, the opposition papers only highlight the failure of the respondents to give petitioner proper statutory notice of the change of classification as specifically required by RPTL § 553(2)(b).

The assessment and collection of a tax without adequate notice to the owner is taking property without due process of law (Cooley, Taxation [3d ed], pp. 625-626). “The general theory under our laws for taxation of property is that the citizen to be affected must have some sort of notice of the proceeding to be had against his property, and that, in some form, he may be heard, if wrong apprehended, before any portion of his estate is seized for the support of government” (*Overing v Foote*, 65 NY 263, 269). Taxpayers have an absolute right to be heard before some officer or tribunal authorized to correct

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errors, and unless this right is afforded, any attempt at taxation is neither binding upon him personally nor a charge against his property (Matter of Douglas v Board of Supervisors of County of Westchester, 172 NY 309; see also TRC Industrial Park v Town of Islip, 104 Misc2d 585 (Suff County Sup. Ct. March 19, 1980)).

Since the mandates of Real Property Tax Law § 520 and 553(2)(b) and due process requirements were not adhered to, and no issues of fact raised by the respondent regarding the value of the property that is the subject of these proceedings, the assessments in question are a nullity, and summary judgment is granted.

The respondents are ordered to reclassify Section 8 Block A Lots 889, 892, 893, 894, 895, 896, 897A and 897B from Class Four commercial properties to Class One residential properties for the 2007/08 and 2008/09 tax years in accordance with RPTL § 1802(1)(e); reissue the corrected 2007/08 and 2008/09 General Tax Bills on Section 8 Block A Lots 889, 892, 893, 894, 895, 896, 897A and 897B; waive all penalties and interest; and refund petitioner's overpayment of said illegal taxes on the 2007/08 and 2008/09 tax bills with interest, forthwith.

Dated JUN 10 2009

  
J.S.C.

**ENTERED**  
JUN 16 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE