

**Matter of Green 485 Owners LLC v Tax Commn. of  
the City of N.Y.**

2009 NY Slip Op 32517(U)

October 26, 2009

Supreme Court, New York County

Docket Number: 115913/2008

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN  
*Justice*

PART 12

Green 485 Owner LLC  
- v -  
TAX Commission

INDEX NO. 115913/2008  
MOTION DATE 7/8/09  
MOTION SEQ. NO. 001  
MOTION CAL. NO. 5

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for Article 78

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

*all attached*

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**PETITION IS DECIDED IN ACCORDANCE WITH  
THE ANNEXED DECISION, ORDER AND JUDGMENT.**

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 10/26/09

*[Signature]*

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X  
In the Matter of the Application of  
GREEN 485 OWNERS LLC, 485 EAT OWNER LLC,  
GREEN 485 TIC LLC, SLG 1185 SIXTH A LLC,  
SLG 100 Park LLC,

Index Number 115913/2008  
Mot. Seq. Nos. 001 & 002

Petitioners,

**DECISION, ORDER &  
JUDGMENT**

- against -

THE TAX COMMISSION OF THE CITY OF NEW  
YORK,

Respondent.

-----X  
Appearances: For the Petitioner:  
Nixon, Peabody LLP  
By: Frank Penski, Esq.  
437 Madison Avenue  
New York, NY 10022  
(212) 940-3000

**UNFILED JUDGMENT**  
**This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry of counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1419).**  
By: Vincent D'Orazio, Esq.  
Frances Henn, Esq.  
Brooke Zacker, Esq.  
100 Church Street, Room 5-224  
New York, NY 10007  
(212) 788-1299

Papers considered in review of this petition to annul, cross-motion to dismiss, and motion for leave to reargue or appeal:

Papers	Numbered
<b>Motion Seq. 001:</b> Notice of Petition and Annexed Exhibits	1
Petitioners' Memo of Law	2
Notice of Cross-motion	3
Respondent's Memo of Law	4
Petitioners' Memo of Law in Further Support and Opp.	5
Tener Affidavit; Penski Affirmation	6
Respondent's Reply Affirmation	7
Respondent's Reply Memo of Law	8
Verified Answer	9
<b>Motion Seq. 002:</b> Notice of Motion	1
Respondent's Memo of Law	2
Petitioners' Memo of Law in Opposition and Affirmation	3
Respondent's Affirmation in Further Support	4

**PAUL G. FEINMAN, J.:**

Petitioners commenced this CPLR Article 78 proceeding to annul respondent's

determination regarding the status of petitioners' Industrial and Commercial Incentive Program ("ICIP") tax exemption (*see* RPTL § 489-bbbb *et seq.*) (Mot. Seq. 001). Respondent then cross-moved, pre-answer, to dismiss the proceeding. By interim order dated March 5, 2009 and entered March 10, 2009, this court converted the cross-motion to one for summary judgment, pursuant to CPLR 3211 (c), and gave the parties notice and time to submit additional materials (Not. of Mot. Seq. 002, Ex. A). Respondent then moved for leave to reargue, or, in the alternative, leave to appeal (Mot. Seq. 002). For the reasons set forth below, respondent's cross-motion to dismiss, which was converted to a cross-motion for summary judgment, is granted and the petition is dismissed; the motion for leave to reargue or to appeal, which bears sequence number 002 is denied as academic.

### ***Background***

Petitioners own various properties in New York County (Ver. Pet. ¶¶ 5-7). On July 31, 2008, each of the petitioners filed petitions pursuant to RPTL Article 7 to challenge their ICIP tax exemption status determinations for the 2008-2009 tax-year (Mot. [Mot. Seq. 002], Ex. B); those petitions are still pending (Mot. [Mot. Seq. 002] ¶ 11).<sup>1</sup> Over four months later, on December 5, 2008, petitioners also commenced this proceeding pursuant to CPLR Article 78, alleging that respondent's determination was arbitrary and capricious because the properties were "denied the ICIP exemption that they were entitled to receive" (Ver. Pet. ¶¶ 46-47). In sum, petitioners allege that the property situated at 485 Lexington Avenue is entitled to an ICIP exemption in the amount of \$28,546,000.00; that the property situated at 1185 6<sup>th</sup> Avenue is

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<sup>1</sup> Petitioners had also filed challenges to the determinations made for the 2007-2008 tax-year, which petitions were either settled or discontinued (Mot. Seq. 002, Ex. C).

entitled to an exemption in the amount of \$26,085,000.00; and that the property situated at 100 Park Avenue is entitled to an exemption in the amount of \$26,740,000.00 (Ver. Pet., at 14).

Respondent cross-moved to dismiss alleging, among other things, that petitioners' exclusive remedy to address the perceived grievance was a proceeding pursuant to RPTL § 700 and that, accordingly, this court lacked subject matter jurisdiction (Resp.'s Memo of Law [Mot. Seq. 001]). This court then issued an interim order, on March 5, 2009, converting respondent's cross-motion to dismiss to a motion for summary judgment, allowing "submission of such additional materials as the parties deem appropriate, including an answer, if so advised, raising the issues raised on the cross-motion" (Mot. Seq. 002, Ex. A). Respondent did answer (Ver. Ans.) and subsequently moved for leave to reargue or, in the alternative, for leave to appeal, arguing, for several reasons, that this court's order, dated March 5, 2009, erroneously converted respondent's cross-motion to dismiss into a cross-motion for summary judgment (Resp.'s Memo of Law [Mot. Seq. 002], at 9-10). Petitioners oppose the motions (Pets.' Memo of Law [Mot. Seq. 002]).

### *Analysis*

Generally, administrative determinations are challenged via CPLR Article 78 proceedings (*see* CPLR 7801 [1]; 7803 [3]), which this court disposes of in the same manner as it would a motion for summary judgment (*see* CPLR 409 [b]). However, the proper procedure for challenging a tax assessment is to commence a tax certiorari proceeding pursuant to RPTL Article 7, not CPLR Article 78 (*see Kahal Bnei Emunim & Talmud Torah Bnei Simon Israel v Town of Fallsburg*, 78 NY2d 194, 204 [1991] ["Such a proceeding is the taxpayers' exclusive remedy by which instances of illegality, overvaluation or inequality as to assessments may be

asserted’’). At issue here, is an example of one such tax assessment—the real estate exemption benefits under the ICIP, which was enacted “[t]o encourage the development, expansion and preservation of commercial and industrial real estate in the City of New York” (*Matter of CDL W. 45th St. v City of N.Y. Dept. of Fin.*, 308 AD2d 210, 214 [1st Dept 2003], *lv denied* 100 NY2d 514 [2003]; *see* RPTL 489-aaaa *et seq.*). In the context of tax assessment determinations, there are only two exceptions for which an Article 78 proceeding is appropriate instead of an RPTL Article 7 proceeding: (1) when the taxing authority’s methodology for determining the assessment is challenged; or (2) when the taxing authority has exceeded its authority (*see Niagara Mohawk Power Corp. v City School Dist. of City of Troy*, 59 NY2d 262, 268 [1983]; *Matter of Dudley v Kerwick*, 52 NY2d 542, 550-551 [1981], *rearg denied* 54 NY2d 626 [1981]; *Matter of Adams v Schoenstadt*, 57 AD3d 1073, 1074 [3d Dept 2008], *lv dismissed* 12 NY3d 769 [2009]).

This court may dismiss an action when “there is another action pending between the same parties for the same cause of action in a court of any state or the United States” (CPLR 3211 [a] [4]). Here, there is no dispute as to the “substantial identity of the parties” (*see Bradford v Brooklyn Trust Co.*, 269 AD 549, 550 [1st Dept 1945], *lv dismissed* 295 NY 660 [1945]), and, for the reasons set forth below, this court finds that however they are “couched” (*Matter of Averbach v Board of Assessors of Town of Delhi*, 176 AD2d 1151, 1152 [3d Dept 1991]), petitioners’ arguments are ultimately seeking the same relief here as they are in the prior-commenced RPTL Article 7 proceeding—nullification of respondent’s determinations (*see generally* Siegel, NY Prac § 262, at 442-444 [4th ed]). Petitioners’ actions are, at best, duplicative and, at worst, an attempt to forum shop (*see L-3 Communications Corp. v SafeNet*,

*Inc.*, 45 AD3d 1, 8-9 [1st Dept 2007]).

“Petitioner[s]’ claim that [purports to challenge] respondent’s assessment methods” (*Matter of Kraebel v New York City Dept. of Fin.*, 217 AD2d 416, 426 [1st Dept 1995], *app dismissed* 86 NY2d 835 [1995], *cert denied sub nom. Kraebel v New York City Dept. of Finance*, 516 US 1146 [1996]) is actually a “challenge . . . merely couched in illegality” or methodology, and does not “clearly attack[] the method employed in taxing” (*Matter of Averbach v Board of Assessors of Town of Delhi*, 176 AD2d at 1152). At best, petitioners’ challenge is “not really a challenge to respondent’s use of the particular methodology,” but amounts to “an attack on respondent’s failure to follow its own rules and precedent regarding” the application of that methodology, and such a “claim falls within the scope of a RPTL article 7 proceeding” (*Matter of Brooklyn Union Gas Co. v State Bd. of Real Prop. Servs.*, 246 AD2d 898, 899 [3d Dept 1998]). This is evidenced by the fact that petitioners made no mention of a challenge to methodology until after respondent’s motion to dismiss for lack of subject matter pointed out this fatal flaw (*compare* Pets.’ Memo of Law [Mot. Seq. 001] *with* Pets.’ Memo of Law [Mot. Seq. 002]). Any contention to the contrary is disingenuous inasmuch as the very first paragraph of petitioners’ own verified petition states, “Petitioners bring this Article 78 proceeding to review determinations of The Tax Commission which denied [p]etitioners mandatory tax exemptions for the current tax-year pursuant to the Industrial and Commercial Incentive program” (Ver. Pet. ¶ 1).

Petitioners’ “[m]ere allegations, unsupported by evidentiary matter, that the attack is on the methods employed rather than individual evaluations, are not enough to relieve [petitioners] of the obligation to pursue their relief via the provisions of Article 7 of the Real Property Tax Law” (*Matter of Board of Mgrs. of Greens of N. Hills Condominium v Board of Assessors of County of Nassau*, 202 AD2d 417, 419-420 [2d Dept 1994], *lv denied* 83 NY2d 757 [1994],

quoting *Matter of Krugman v Board of Assessors of Vil. of Atl. Beach*, 141 AD2d 175, 180 [2d Dept 1988], *app withdrawn* 73 NY2d 872 [1989]; *accord Samuels v Town of Clarkson*, 91 AD2d 837, 837 [4th Dept 1982]). Even a cursory “examination of petitioner[s’] article 78 challenge[] to the purportedly invalid methodology employed by respondent[]” (*Matter of Brimberg v Commissioner of Fin. of City of N.Y.*, 45 AD3d 506, 507 [1st Dept 2007]) reveals the true “crux of [petitioners’] claim” (*Matter of Cassos v King*, 15 AD3d 758, 759 [3d Dept 2005]), and petitioners’ thinly veiled attempt to categorize their challenge as one to methodology is belied by their very pleadings, which, on their face, “seek a review of individual assessments, rather than the formula used” (*Matter of Board of Mgrs. of Greens of N. Hills Condominium v Board of Assessors of County of Nassau*, 202 AD2d at 420) (Ver. Pet. ¶ 1).

This court was within its discretion in converting respondent’s pre-answer motion to dismiss to a motion for summary judgment because at that stage of the litigation, the very characterization of the proceeding was at issue: whether it was properly commenced as a CPLR Article 78 proceeding or whether it should have been the subject of a RPTL Article 7 proceeding (*see* CPLR 103 [c]; *Aymes v City of New York*, 27 AD3d 394, 396 [1st Dept 2006]). The court’s March 5, 2009 order specifically preserved respondent’s right to assert all defenses and arguments it had raised in the pre-answer motion to dismiss. In so converting the motion to one for summary judgment, the court preserved scarce judicial resources by avoiding the possibility of repeated dispositive motions and ensuring that a complete record is generated. Moreover, nothing in the court’s approach prejudices the respondent.

However, now, upon summary judgment, it is clear that “at the time the instant proceeding was commenced, a tax certiorari proceeding” was already pending (*Matter of Laurel Hill Farms Inc., v Board of Assessors of Nassau County*, 51 AD3d 794, 794 [2d Dept 2008]) (Mot. [Mot. Seq. 002], Ex. B). Thus, the petition is dismissed (*see generally* 193 Siegel’s

Practice Review, *Other-Action- Pending Dispute*, at 2 [Jan. 2008]).

In light of the foregoing, respondent's motion for leave to reargue or in the alternative to appeal (Mot. Seq. 002) is rendered academic and therefore denied.

Accordingly, it is

ORDERED that respondent's cross-motion to dismiss, which this court converted into a cross-motion for summary judgment, is granted, and it is further

ORDERED and ADJUDGED that the petition is dismissed in its entirety; and it is further

ORDERED that the motion for leave to reargue this court's March 5, 2009 decision and order and/or for leave to appeal it is denied as academic.

This constitutes the decision, order, and judgment of this court.

ENTER:  


Dated: October 26, 2009  
New York, New York

\_\_\_\_\_  
J.S.C.

**HON. PAUL G. FEINMAN**

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1412)