

**Matter of Al-Ber, Inc. v New York City Dept. of Fin.**

2009 NY Slip Op 32612(U)

November 4, 2009

Supreme Court, Queens County

Docket Number: 1186/2009

Judge: Peter J. Kelly

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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE PETER J. KELLY**  
Justice

IAS PART 16

In the Matter of the Application of  
AL-BER, INC. d/b/a EL-BER ISLAMIC  
SCHOOL,  
  
Petitioner,

INDEX NO. 1186/2009  
  
MOTION  
DATE June 23, 2009

For a Judgment Pursuant to CPLR  
Article 78, Vacating, Annulling and  
Setting Aside Determinations Made  
Concerning Real Property Tax  
Assessments Upon the 2006 to 2008  
Assessment Rolls for the Real  
Property Described Herein,

MOTION  
CAL.NO. 3  
  
MOT. SEQ.  
NUMBER 2

- against -

NEW YORK CITY DEPARTMENT OF FINANCE,  
TAX COMMISSION OF THE CITY OF NEW  
YORK and THE CITY OF NEW YORK,

Respondents.

The following papers numbered 1 to 16 read on this motion to restore the above captioned special proceeding to the court's motion calendar and on this notice of petition pursuant to Article 78 of the CPLR for this court to review certain determinations made by the respondents. The respondents cross-move pursuant to CPLR §3211[a][7] and §7804[f] to dismiss the petition for failure to state a claim.

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Based upon the foregoing papers the motions and cross-motion are determined as follows:

The motion by the petitioner to restore its notice of petition,

petition and supporting documentation constituting its pleadings to the court's motion calendar is granted on consent. Accordingly, the special proceeding is restored to the calendar forthwith and the court finds as follows.

In this special proceeding, commenced pursuant to Article 78 of the Civil Practice Law and Rules, the petitioner seeks court review and reversal of a determination made by the respondents that petitioner does not qualify for a real estate tax exemption under Real Property Tax Law §420-a. In opposition, the respondents raise an objection in point of law (See, CPLR §7804[f]) that the petition fails to state a cause of action (See, CPLR §3211[a][7]) and cross-move to dismiss the petition on that basis.

The petitioner, Al-Ber, Inc., is a New York State not-for-profit corporation which is exempt from federal income taxation. The petitioner operates an Islamic school, the El-Ber Islamic School, at a premises located at 25-42 49<sup>th</sup> Street, Astoria, New York, which is the primary subject of this litigation.

It is undisputed that the petitioner is not the record owner of the premises. Presently, and at all times relevant to this proceeding, the record owner of the premises is Clio Realty. The petitioner occupies the premises pursuant to a lease executed on November 26, 2001 with a term of 99 years. Executed simultaneously with the lease was an option to purchase the property whereby the petitioner, in return for paying Clio Realty \$330,000.00, was granted the exclusive option to purchase the premises until April 1, 2016.

Pursuant to the terms of the lease, the petitioner obligated itself to pay all real estate taxes that accrued on the premises during the term of the lease. The lease also afforded the petitioner the right to contest any tax assessments made on the property in its own name or on behalf of Clio Realty.

On or about July 6, 2005, the petitioner submitted an application to the New York City Department of Finance ("D.O.F.") for a real estate tax exemption on the property at issue based upon its use of the property as a not-for-profit religious school. In a letter dated May 29, 2008, the D.O.F. denied the petitioner's application on the basis that legal title to the parcel of real property for which the exemption was sought was not in the petitioner's name.

In an application dated September 8, 2008, the petitioner appealed the decision of the D.O.F. to the Tax Commission of the City of New York ("Tax Commission"). In a letter dated September 17, 2008, the Tax Commission denied the petitioner's application as untimely.

When called upon to review the determination of an administrative

agency under Article 78 of the Civil Practice Law and Rules, the court's inquiry is limited to only assessing whether the disputed action was "arbitrary and capricious" (See, CPLR §7803[3]; Matter of Pell v Board of Educ., 34 NY2d 222, 231). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (Matter of Pell v Board of Educ., supra).

Procedurally, the court must treat the application as it would a motion for summary judgment (See, CPLR §409[b]; Moore's Lane Dev. Corp. v Suffolk County Water Auth., 267 AD2d 460). If the submitted affidavits, affirmations and documentary evidence permits, the court shall make a determination as a matter of law. If, however, a resolution can not be reached because of disputed fact issues, a trial must be held to determine the salient facts (See, CPLR §7804[h]; Church of Scientology v Tax Com. of New York, 120 AD2d 376; Green v Commissioner of Environmental Conservation, 94 AD2d 872).

At dispute in this special proceeding is the meaning and application of section 420-a of the Real Property Tax Law. In pertinent part that statute provides that:

Real property owned by a corporation or association organized or conducted exclusively for religious, charitable, hospital, educational, or moral or mental improvement of men, women or children purposes, or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes either by the owning corporation or association or by another such corporation or association as hereinafter provided shall be exempt from taxation as provided in this section (RPTL §420-a[1][a]).

The petitioner asserts that its lease and option to purchase the premises qualifies it as an owner of the property at issue such that it satisfies the statutory requirement for a real property tax exemption. The respondents argue that since the wording of RPTL §420-a[1][a] is plain and the petitioner is not the titled owner of the property, the D.O.F. was correct in denying it a tax exemption.

Obviously, the analysis of any legislative edict must begin with the words themselves. "Where the wording of a statute is not clear, it may be necessary for a court to interpret, so as to determine what the Legislature intended. Courts should not, however, add restrictions or limitations where none exist, nor should they interpret what has no need of interpretation. When words have a definite and precise meaning, courts should not go elsewhere in search of conjecture so as to restrict or extend that meaning" (Erie County Agricultural Soc. v Cluchey, 40 NY2d 194, 200). With respect to taxing statutes in particular, these enactments are "'to be construed most strongly against the government and in favor of the citizen. The government takes nothing except what is given by the clear import of the words used, and a well-founded doubt

as to the meaning of the act defeats the tax'" (Grace v New York State Tax Com., 37 NY2d 193, 196, quoting People ex rel. Mutual Trust Co. v Miller, 177 NY 51, 57). However, exemption statutes, such as the one at issue in the case at the bar, "must be construed against the taxpayer" (Matter of Moran Towing & Transp. Co. v New York State Tax Commn., 72 NY2d 166, 172-173). Additionally, the party seeking the exemption "must show 'that its interpretation of the statute is . . . the only reasonable construction'" (Fed Deposit Ins v Tax Commr, 83 NY2d 44, 49, quoting, Matter of Moran Towing & Transp. Co., supra).

Here, the legislature limited the tax exemption available under RPTL §420-a to real property actually "owned" by certain organizations (See, Matter of Charter Dev. Co., L.L.C. v. City of Buffalo, 6 NY3d 578, 583). Contrary to the petitioner's assertion, it definitively does not own the real property at issue. Paragraph 33 of the lease executed by the petitioner expressly states the agreement creates "a leasehold estate in land". "Under a long line of New York decisions, the interest of a tenant of realty under a real estate lease is not realty but is a chattel real which is personal property" (Ft. Hamilton Manor, Inc. v Boyland, 4 NY2d 192, 197-198). Moreover, the option to purchase the property also does not bring the petitioner within the ambit of the statute since it is just an option. It does not vest the petitioner with legal ownership of the property, rather it simply creates a "contingent, equitable interest in the land" (Symphony Space v Pergola Props., 88 NY2d 466, 477).

The petitioner's assertion that its beneficial ownership interest in the premises falls within the meaning of the statute is incorrect. Had the legislature intended a broader definition of ownership to be included in the statute it could have included any number of descriptions to the statute including beneficially, equitably or contingently. They did not do so. The absence of these additional descriptive terms can not be remedied by appeal to the court, but must be corrected through the "legislative process of democratic government'" (Treyball v Clark, 65 NY2d 589, 591, quoting, Maresce v Cuomo, 64 NY2d 242, 249).

Petitioner also argues that the respondents' application of the ownership requirement of RPTL §420-a to it violates the Free Exercise clauses of the New York State and United States Constitutions.

Federal Free Exercise Clause claims are narrower than claims under the New York State Constitution. The United States Supreme Court has held that "where a prohibition on the exercise of religion 'is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended'" (Catholic Charities of Diocese of Albany v Serio, 7 NY3d 510, 522, quoting Employment Div., Dept. of Human Resources of Ore. v Smith, 494 US 872, 878). A "neutral law of general applicability", does not "target religious beliefs as such" nor is its "object . . . to infringe upon or restrict practices because of their religious motivation" (Church of Lukumi Babalu Aye v City of Hialeah, 508 US 520, 533).

Here, the real estate tax exemption contained in RPTL §240-a is applicable to both religious and secular not-for-profit organizations. Indeed, the ownership requirement necessary to qualify for the exemption under RPTL §420-a is similarly applicable to the real property tax exemptions available to numerous other types of organizations and peoples.<sup>1</sup> Plainly, then, the requirement that an entity seeking a real estate exemption must actually own the property subject to the exemption was not targeted at religious entities in general nor the petitioner's faith in particular. In addition, the object of RPTL §420-a was not to interfere with anyone's religious beliefs. Rather, its object was to afford a tax benefit to not-for-profit organizations who own real property. Accordingly, since the statute at issue is "neutral law of general applicability", the petitioner's claim under the federal Free Exercise Clause must fail (See, Catholic Charities of Diocese of Albany v Serio, supra).

Under the New York State Constitution, the Court of Appeals has held that "when the State imposes 'an incidental burden on the right to free exercise of religion' [a court] must consider the interest advanced by the legislation that imposes the burden, and that '[t]he respective interests must be balanced to determine whether the incidental burdening is justified'" (Charities of Diocese of Albany v Serio, supra at 525, quoting La Rocca v Lane, 37 NY2d 575, 583). In examining the circumstances, "substantial deference is due the Legislature" and the petitioner "bears the burden of showing that the challenged legislation, as applied to that party, is an unreasonable interference with religious freedom" (Charities of Diocese of Albany v Serio, supra).

In the present case, it does not appear the respondents acted unreasonably in requiring actual ownership as a prerequisite to receiving a real estate tax exemption under the circumstances. The ownership requisite appears to be purely a logical necessity since a real estate tax assessment is against the land itself (See, RPTL §304[1]) and liability therefor does not accrue personally to anyone other than the titled owner (See, RPTL §926[1]). It is also worth noting that the New York State Constitution itself recognizes the ownership requirement in this context wherein it makes tax exemptions for real and personal property "owned" by religious, educational or charitable entities (NY Const, art XVI, §1) unrepealable.

Respondent's refusal to grant an exception to the above ownership

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<sup>1</sup> See, RPTL §400, et seq. [public property], §422 [Not-for-profit housing companies], §426 [Opera houses], §427 [Performing arts buildings], §428 [Fraternal organizations], §430 [Interdenominational centers], §432 [Theatrical corporations created by acts of congress], §434 [Academies of music], §440 [Infant homes], §442 [Soldiers monument corporations], §444 [Historical societies], §450 [Agricultural societies], §452 [Veterans organizations], §454 [Indians], §460 [Clergy], §464 [Volunteer firefighters and fire companies in villages].

requirement to the petitioner, in application of the statute, has neither placed an onerous obligation on petitioner nor compel the petitioner to violate its religious beliefs. Petitioner can not be heard to complain that the respondents acted in a discriminatory manner when it was the petitioner's voluntary act to assume the real estate tax obligation at issue and there is no proof that religious dogma expressly required the assumption of such tax burden. Indeed, petitioner only argues that since Islamic religious doctrine prohibits paying or charging interest, an outright purchase of the property was not fiscally possible. Likewise, the respondents' determination neither prohibits the petitioner from operating a religious school at the location in question or anywhere else even if it may be more expensive and difficult to accomplish.

Weighing against the petitioner's claim is the very compelling issue of the difficulty created by narrowing the municipal tax base and the resultant shifting of the tax burden to other non-exempt taxpayers. The legislature cited this problem when it significantly narrowed the application of RPTL §240-a in 1971 stating "that the continuous removal from the tax rolls of taxable real property, is a particular hardship on the local governments of this state and upon the citizens of this state, who are increasingly burdened by additional taxes, whenever such tax exemptions reduce the tax base, as a means of raising revenue for the conduct of government" (Legislative Findings and Intent, McKinney's Session Laws of NY, ch 414, at 597). In light of the present economic realities and the budget constraints facing the City and State of New York, the court can not say the above rationale is any less true some 38 years later, and therefore finds the determination by the respondents was justified.

Accordingly, the petitioner's application pursuant to CPLR §7803[3] is denied, the respondents' cross-motion pursuant §3211[a][7] and §7804[f] is granted and this special proceeding is dismissed.

Dated: November 4, 2009

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**Peter J. Kelly, J.S.C.**