

Matter of Shapiro v Board of Assessors

2011 NY Slip Op 31337(U)

May 10, 2011

Supreme Court, Nassau County

Docket Number: 023080/10

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE

TRIAL/IAS PART 18

In the Matter of

JOSEPH AND LIBBY SHAPIRO

Petitioners,

Index No.: 023080/10
Motion Sequence...01
Motion Date...03/29/11
XXX

-against-

**THE BOARD OF ASSESSORS, THE BOARD
OF ASSESSMENT REVIEW AND THE
ASSESSMENT REVIEW COMMISSION OF
NASSAU COUNTY,**

Respondents.

Papers Submitted:
Notice of Petition.....X
Affirmation in Opposition.....X
Reply Affidavit.....X

The Petitioners, Joseph and Libby Shapiro, commenced the within Article 78 proceeding, seeking a judgment granting the following relief: (1) compelling the Assessor of Nassau County to correct the 2007/08, 2008/09 and 2009/10 assessments, in accordance with a previously filed correction of errors petition, so as to properly reflect the correct square footage of the home located at 145 Tall Oaks Crescent, Oyster Bay Cove, New York [hereinafter the subject premises]; (2) to refund any and all excess real property taxes paid

by Petitioners, together with statutory interest thereon; (3) vacating the decision of the Hearing Officer, with respect to the 2010/11 assessment and ordering a new hearing in connection thereto, and; (4) compelling the Assessor to correct the 2011/12 assessment for the final roll and to base same upon the corrected square footage.

The Petitioners herein are the owners of the subject premises (*see* Verified Petition at ¶ 4; *see also* Exhibit C). At some point, a discrepancy developed with respect to the correct square footage attendant to the home located thereon, where the records maintained by the Respondents indicated that the home consisted of 7,409 square feet, yet the actual building plans filed with Building Department of the Village of Oyster Bay Cove, indicated a square footage of 6,050 (*id.* at ¶ 5). As a result thereof, on June 11, 2010, counsel for the Petitioners sent a letter to the Nassau County Department of Assessment, setting forth the described discrepancy and simultaneously requesting that a correction be made in the assessed value of the property so as to reflect the proper square footage attendant to the home (*id.*; *see also* Exhibit A). Thereafter, and presumably in response to the Petitioners' attorney's letter, the Nassau County Department of Assessment conducted a field inspection, at which time it was purportedly determined that the square footage was lower than that of 7,409 (*id.* at ¶ 7; *see also* Exhibit B). Counsel for the Petitioners provides a copy of a Notice from a Rosemary Ferina of the Nassau County Department of Assessment, which was allegedly left on the Petitioners' front door and upon which the following notations appeared:

“took 900,000 off”; “No need to call”¹(*id.* at Exhibit B). On July 30, 2010, and following a lack of any further notification by the Nassau County Department of Assessment, counsel for the Petitioners filed several corrections of error applications, which encompassed the years 2007/08, 2008/09, 2009/10 (*id.* at ¶ 9; *see also* Exhibit C).

By letter dated August 16, 2010, the County Assessor issued a letter acknowledging the error as to the square footage but asserting that as the Petitioners “did not file an appeal for 2007/08, accepted an ARC reduction for 2008/09 and a SCAR reduction for 2009/2010”, these years could not be considered or changed further (*id.* at ¶ 10; *see also* Exhibit D). The County Assessor further stated that his office has “notified both ARC and SCAR about the discrepancy in the square footage so they can take this information into consideration for the 2010/2011 SCAR hearing and the 2011/2012 ARC protest (*id.* at Exhibit D).

On September 9, 2010, a SCAR hearing was held for the tax years 2010/11, at which time a reduction in assessment was denied (*id.* at ¶ 11). As a result of this denial, the within proceeding was thereafter commenced, which also demands that the Nassau County Department of Assessment “be compelled to * * * correct the record to set forth the proper square footage of 6,050, to reduce the values accordingly, and to refund all excess real property taxes paid by the Petitioners with statutory interest” (*id.* at ¶¶ 12, 19).

In support of the within application, counsel for the Petitioners contends that

¹ The Court notes that the Nassau County Department of Assessment denies that Ms. Ferina left any such notice at the Petitioners’ residence (*see* Verified Petition at Exhibit D).

the error in square footage is a mechanical error within the purview of RPTL § 554² and notwithstanding being provided with evidence thereof, the Nassau County Department of Assessment has thus far failed to correct same (*id.* at ¶¶ 15-17; *see also* Santemma Affidavit at ¶¶ 10, 16). Counsel asserts that given the failure to correct the error, the within proceeding brought pursuant to Article 78 of the CPLR, is the appropriate vehicle through which to compel said Respondents to execute the duty with which it is statutorily charged (*see* Verified Petition at ¶¶ 13, 14, 17, 18). Counsel posits given the Respondents' failure to correct the error as described herein, the Petitioners have consequently overpaid the taxes on their property (*id.* at ¶ 14). Counsel further asserts that as the Petitioners' property taxes were predicated upon "incorrect assessed values", they are entitled to both a refund in accordance with RPTL § 556, as well as a recalculation of the assessment relative to their home (*see* Santemma Affidavit at ¶¶ 14, 15, 16, 17).

In opposing the instant application, counsel for the Respondents challenges the within petition on both procedural and substantive grounds. With respect to tax year 2007/08, counsel contends that as the Petitioners have not filed either an application with the

² RPTL §554 (1) and (2) provides the following, in relevant part:

(1) The appropriate tax levying body may correct a clerical error, an unlawful entry, or an error in essential fact other an error in essential fact as defined in paragraph (d) of subdivision three of section five hundred fifty of this title in accordance with the provisions of this section.

(2) Whenever it appears to an owner of real property * * *, that a clerical error, * * * is present on the tax roll in regard to his real property, such owner * * * may, at any time prior to the expiration of the warrant, file an application * * * with the county director of real property tax services for the correction of such error."

Assessment Review Commission or commenced a proceeding under Article 7 of the Real Property Tax Law, this Court does not have jurisdiction over said tax year (*see* Lee Affirmation in Opposition at ¶ 5). As to tax year 2008/09, counsel contends that the Petitioners filed an application with ARC and thereafter accepted an offer reducing their assessment and that said acceptance deprives this Court of jurisdiction to entertain the challenge alleged herein (*id.* ¶ 6). As to tax years 2009/10 and 2010/11, counsel argues, *inter alia*, that the Petitioners elected to seek SCAR hearings and accordingly may not now seek redress herein (*id.* at ¶¶ 3, 7, 26). Finally, as to tax years 2011/12, counsel argues that said year is not yet ripe for review (*id.* at ¶ 10).

As to the substance of the underlying petition, counsel for the Respondents contends that the discrepancy in square footage does not constitute an error as contemplated by RPTL § 554, and rather same is a valuation error, which is subject only to administrative review (*id.* at ¶¶ 13, 17, 18, 20, 26; *see also* Exhibit 7).

In the instant matter, while the within petition demands relief in the form of an order compelling the Nassau County Department of Assessment to correct the error in square footage, the underlying substance thereof is a challenge by the Petitioners with respect to the overvaluation of their property and the excessiveness of the tax assessments levied thereon.

As a general proposition, a “taxpayers’ exclusive remedy by which instances of illegality, overvaluation or inequality as to assessments may be asserted” is a certiorari proceeding commenced in accordance with Article 7 of the Real Property Tax Law (*Kahal*

Bnei Emunium and Talmud Torah Bnei Simon Israel v. Town of Fallsburg, 78 N.Y.2d 194 [1991] at 204). Exceptions to this general rule exist where “the taxing authority acted without jurisdiction, that the tax itself is unconstitutional or that the method employed involving several properties is unconstitutional” (*Bassett Mountain Recreation Center Inc. v. Town of Jay Board of Assessors*, 232 A.D.2d 934 [3d Dept. 1996]; *Kahal Bnei Emunium and Talmud Torah Bnei Simon Israel v. Town of Fallsburg*, 78 N.Y.2d 194 [1991], *supra* at 204-205; *Hall v. Board of Assessors*, 60 A.D.3d 853 [2d Dept. 2009]). However, absent an applicable exception, a taxpayers “sole vehicle for review of an individual tax assessment is pursuant to RPTL article 7” (*Bassett Mountain Recreation Center Inc. v. Town of Jay Board of Assessors*, 232 A.D.2d 934 [3d Dept. 1996], *supra*; *Cathedral Fourth Development Corp. v. Board of Assessors and the Assessment Review Commission of County of Nassau*, 25 A.D.3d 693 [2d Dept. 2006]). Stated differently, a proceeding commenced under Article 78 of the CPLR “is not available to review a complaint of overvaluation” (*Cathedral Fourth Development Corp. v. Board of Assessors and the Assessment Review Commission of County of Nassau*, 25 A.D.3d 693 [2d Dept. 2006], *supra* at 694; *see also G. A. D Holding Company v. City of New York Department of Finance, Real Property Assessment Bureau*, 192 A.D.2d 441 [1st Dept. 1993] at 442). Here, given that the nature of relief sought by the Petitioners relates directly to the overvaluation and over assessment of their property, the within Article 78 proceeding is not the appropriate vehicle thorough which to request same (*id.*).

Accordingly, the Petitioner’s instant application, made pursuant to CPLR

Article 78, is hereby **DENIED** and the petition is **DISMISSED**.

This constitutes the Decision and Order of the Court.

All applications not specifically addressed are Denied.

DATED: Mineola, New York
May 10, 2011



Hon. Randy Sue Marber, J.S.C.
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ENTERED
MAY 12 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE