

6 W. 37th St. Realty, LLC v State of New York

2011 NY Slip Op 32036(U)

July 22, 2011

Supreme Court, New York County

Docket Number: 107806/11

Judge: Peter H. Moulton

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

PRESENT: HON. PETER H. MOULTON
SUPREME COURT JUSTICE
Justice

PART 40B

6 W 37th ST. REALTY LLC
ET AL.

INDEX NO. 107806/11

MOTION DATE _____

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

- v -

STATE OF NY, ET AL.

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*is decided in accordance
with the personal decision
of this date*

FILED

JUL 22 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/22/11

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK : PART 40-B
- - - - -X

6 West 37th Street Realty, LLC, and Tribeca
Realty, LLC :

Petitioners, : Index No.:
107806/11

For a Judgment Pursuant to Article 78 of
the CPLR in the Nature of Certiori to
Review :

against :

The State of New York, New York State
Department of Taxation and Finance,
New York State Department of Taxation and
Finance Commissioner, :

FILED
JUL 22 2011

Respondents. : NEW YORK
COUNTY CLERK'S OFFICE

- - - - -X
Moulton, Justice

Petitioners bring this Article 78 proceeding to vacate a tax warrant filed by the New York State Department of Taxation and Finance ("the Tax Department") against petitioner 6 West 37th Realty LLC ("Realty LLC").¹

Petitioners seek a judgment declaring that the Tax Department's assessment of a real estate transfer tax, plus penalties, on two real property conveyances, were invalid. The

¹In rendering this decision the court considered the following documents: 1) Petitioner's Order to Show Cause and Petition and attached documents; 2) the Cross-Motion to Dismiss of defendants and supporting exhibits and memorandum of law, and 3) The Affirmation of Lawrence Omansky in support of the order to show cause and in opposition to the cross-motion, and supporting exhibits.

property involved in both conveyances is the condominium unit 5-6 West at 49-51 Warren Street. The unit is currently owned by Realty LLC. It was previously owned by petitioner Tribeca Realty, LLC ("Tribeca"). Tribeca appears to be inactive and it is unclear why it is a named petitioner herein.

Petitioner alleges that Tribeca went into contract in 2005 to sell unit 5-6 West to Peter Wen and Skye Drynan. Under this contract Tribeca was obligated to complete certain renovation work in the unit. A dispute arose concerning whether Tribeca completed the renovation work and a lawsuit between Wen and Tribeca commenced in 2005. This lawsuit was resolved by a settlement in which the court issued an order dated November 20, 2007, directing the rescission of Wen and Drynan's contract.

In March 2008 Tribeca's rights under the contract with Wen and Drynan were allegedly conveyed to Realty LLC. Subsequently, on or about March 18, 2008, ownership of the condominium unit was conveyed from Wen and Drynan to Realty, LLC. Realty LLC's principal, Lawrence Omansky, who is also serving as petitioner's counsel herein, avers that not all of Tribeca's members wished to participate in the litigation, so Realty LLC - composed of some but not all of Tribeca's members -- was formed to take possession of the unit.

On or about April 8, 2008, Realty LLC filed a Bargain and Sale Deed in the New York County Clerk's Office. The deed

reflected the transfer of unit 5-6 West from Wen and Drynan to Realty LLC. Realty LLC also filed a combined Real Estate Transfer Tax Return in the County Clerk's office on the same date. On the Real Estate Transfer Tax Return Realty LLC claimed an exemption from transfer tax stating that the deed was a "rescission pursuant to court order."

The Tax Department avers in its motion to dismiss, via counsel's affirmation, that it conducted an audit and determined there was no basis for an exemption. On December 11, 2008, the Tax Department mailed a Statement of Proposed Audit Changes to Realty LLC at the address listed on the Real Estate Transfer Tax Return submitted by Realty LLC. That address is "49 51 Warren Street, New York, NY 10007. The statement explained that a real estate transfer tax was due in the amount of \$37,100 plus interest and penalty. The total balance demanded was \$48,762.44. The payment due date was January 1, 2009. The statement stated that if Realty LLC disagreed with the amount due it should submit a written explanation of the disagreement. It went on to say that a Notice of Determination would be issued if a response was not received by January 10, 2009.

On or about February 5, 2009, the Tax Department mailed a Notice of Determination. The Notice of Determination informed Realty LLC of its avenue of appeal if it disagreed with the assessment. If it wished to appeal the determination, Realty LLC

could file, within 90 days, either a request for a conciliation conference or a petition for a Tax Appeals Hearing. The Notice of Determination expressly stated that if a response was not received by May 6, 2009, "this notice will become finally and irrevocably fixed and subject to collection action."

The Tax Department attaches a copy of its mail log reflecting the mailing of this notice on February 5, 2009.

Realty LLC did not respond to the Notice of Determination.

ON June 1, 2009, the Tax Department avers that it mailed a Notice and Demand for Payment of Tax Due to Realty LLC. The Notice stated that an amount was due for real estate transfer tax, and warned of legal action if the payment was not received by June 22, 2009.

On September 29, 2009, the Tax Department docketed warrant # E-031174471W001-3 ("the Warrant") against Realty LLC in the New York County Clerk's Office in the aggregate amount of \$54,542.77. A copy of the warrant was also filed with the New York State Department of State on September 30, 2009. The Tax Department attaches a copy of its mail log indicating that it mailed a copy of the warrant to Realty LLC at 49-51 Warren Street, New York, NY 10007. The warrant to Realty LLC was accompanied by a Notice to Judgment Debtor informing Realty LLC, inter alia, that the warrant is a lien on the property.

In its reply papers, petitioners state in a conclusory manner that in "2009" it filed a request for the return of the "initial transfer taxes" paid at the sale in 2005. Petitioners' papers are unclear regarding when this was done. Petitioners appear to concede that they received the December 11, 2008, Statement of Proposed Audit from the Tax Department, because they aver that they protested this document to the Tax Department. (See Affirmation in Reply of Lawrence Omansky ¶ 6.) Again, petitioners provide no record of this protest. Although the subsequent statements sent by the Tax Department bear the same address as the December 11 Statement, Omansky states in his reply affirmation that he did not receive any of the subsequent notices from the Tax Department. This anomaly is unexplained by petitioners. Moreover, petitioners do not explain what follow-up they conducted after allegedly protesting the transfer tax in 2009.

In its initial motion papers, petitioner states that "respondents" acknowledged the "nullification of the initial sale," ie the 2005 sale, by returning the transfer tax. This statement is incorrect. The attached check is from the City, not the State. This check states on its face that it is "subject to audit for 2008 Real Property Transfer Tax." Accordingly, this check is not an admission from respondents. Its is also not clear that this check demonstrates that the City would treat the 2008 transaction differently than the way the State is treating it. It concerns

only the 2005 transfer tax.

DISCUSSION

Respondents move to dismiss the petition on the ground that respondents did not exhaust their administrative remedies. It also seeks to dismiss on statute of limitations grounds. Both grounds have merit.

It is undisputed that petitioners have failed to demonstrate that they saw the administrative appeals process through. New York State Tax Law §§ 1411(a); 1412(a) provide avenues for grieving a transfer tax assessment. These options have not been pursued by petitioners. The failure to exhaust administrative remedies is a sufficient reason to dismiss the petition. (E.g. Ryan v New York State Dep't of Taxation and Finance, 63 AD3d 850.)

The exclusive means to challenge the Tax Department's final determination is by an Article 78 proceeding, which must be brought within four months of the agency's final determination. (CPLR 217.) The Tax Department docketed the warrant on September 29, 2009, and it mailed a copy of the warrant to Realty LLC on or about that date. This lawsuit was not brought until July 2011. Accordingly the four month limitations period has run. The petition also seeks the return of the transfer tax paid in 2005. This claim is a fortiori time-barred.

Petitioner's conclusory claims of non-receipt of most, but not all, of the Tax Department's mailing, are insufficient to defeat the presumption of mailing. (Moore v Commissioner of Taxation and Finance, 4 AD3d 682, lv denied 3 NY3d 603.) Petitioners also seek relief from the limitations period by invoking CPLR 2004. However, that provision states that extensions of time may be given "except where otherwise prescribed by law." (CPLR 2004.) Limitations periods provide such prescription. (CPLR 201.) It is remarkable that petitioners quote from the McKinney's commentary regarding CPLR 2004, but omit adjacent commentary that explicitly states that the provision does not apply to statutes of limitations.

CONCLUSION

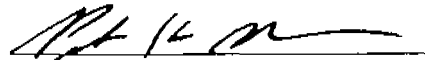
For the reasons stated, respondents' motion is granted and the petition is dismissed. This constitutes the decision and order of the court.

FILED

JUL 22 2011

NEW YORK
COUNTY CLERK'S OFFICE

DATE: July 22, 2011



Peter Moulton, J.S.C.

HON. PETER H. MOULTON
SUPREME COURT JUSTICE