

**Matter of Whitter Realty Corp./801 Broadway, LLC v
Board of Assessors of County of Nassau**

2011 NY Slip Op 32475(U)

September 13, 2011

Sup Ct, Nassau County

Docket Number: 6411/11

Judge: Ute W. Lally

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SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - PART 3

Present: HON. UTE WOLFF LALLY
Justice

MOD

In the Matter of the Application of
WHITTER REALTY CORPORATION/801
BROADWAY, LLC.,

Motion Sequence #2
Submitted July 14, 2011

Petitioner,

For a Judgment Pursuant to CPLR Article 78

-against-

INDEX NO: 6411/11

THE BOARD OF ASSESSORS and THE
ASSESSMENT REVIEW COMMISSION OF THE
COUNTY OF NASSAU and THE SCHOOL
DISTRICT OF BETHPAGE,

Respondents.

The following papers were read on this motion:

Notice of Motion and Affs.....	1-3
Affs in Opposition.....	4&5

This is a special proceeding brought by the petitioner for an order pursuant to CPLR Article 78 directing The Board of Assessors and the Assessment Review Commission of Nassau County ("County of Nassau") to comply with the provisions of Real Property Tax Law ("RPTL"), the Nassau County Administrative Code ("NCAC") and Assessment Review Commission ("ARC") Rules declaring void an AR 70 Stipulation of Settlement disposing of tax certiorari proceedings on the petitioner's property for the 2003/2004 through 2009/10

tax years. The respondent, County of Nassau moves for an order pursuant to CPLR 3211 dismissing the within CPLR Article 78 proceeding, and in the alternative should the Court decline to dismiss the petition, an order permitting respondents time to interpose an answer to the Petition.

Petitioner is the owner of real property known as Section 46, Block 503, Lot 11 ("the Subject Property"). On November 21, 1972 a lease was executed between Montauk Aero Corporation as landlord and Long Island Trust Company as tenant. The subject lease gave the landlord the primary right to grieve real property assessments. The tenant only had this right in the event that the landlord failed to do so. Fifteen years later, on or about January 5, 1987, Long Island Trust Company was acquired by Bank of New York and the subject lease was assigned to Bank of New York. On or about September 25, 1992 Paumanock Development Corp. (formerly known as Montauk Aero Corp.) sold the Subject Property to Whitter Realty Corp. After the sale of the Subject Property, the subject lease remained in effect between tenant, Bank of New York, and the new owner and landlord, Whitter Realty Corporation. On or about August 28, 1997 the first ten-year option in the subject lease was exercised by tenant, Bank of New York, which extended the lease term to August 19, 2008. On or about December 7, 2005 Whitter Realty Corporation sold the Subject Property to 801 Broadway LLC. After the sale of the Subject Property, the subject lease remained in effect between the tenant, Bank of New York, and the new owner and landlord, 801 Broadway, LLC. On or about April 2006 Bank of New York was acquired by J.P. Morgan Chase and the subject lease was assigned to J.P. Morgan Chase. By letter dated September 23, 2008, and in a prior telephone conversation, J.P. Morgan Chase's agent advised petitioner's attorney that the bank has not renewed its lease and would

vacate the premises on or before April 30, 2009. On or about April 30, 2009 tenant J.P. Morgan Chase did vacate the Subject Property.

Starting in the 2009/10 tax year, the petitioner, rather than the tenant, began paying all tax bills directly to Nassau County.

For the tax years 2003/04 through 2009/10, petitioners, as well as their respective tenants, Bank of New York and J.P. Morgan Chase, both filed tax certiorari proceedings on the Subject Property. On April 28, 2009, unbeknownst to petitioner, ARC entered into an AR 70 Stipulation of Settlement with petitioner's tenant, J.P. Morgan Chase covering the tax years 2003/04 through 2009/10. On April 30, 2009, two days after entering into said Stipulation, J.P. Morgan Chase vacated the Subject Property. The Stipulation of Settlement included the entire 2009/10 tax year despite the fact that J.P. Morgan Chase neither occupied the Subject Property nor paid the 2009/10 taxes. Petitioner was neither contacted nor notified by ARC of the Stipulation of Settlement. Petitioner never withdrew or discontinued any tax certiorari proceedings for any tax year covered by the Stipulation of Settlement.

On January 7, 2010, after learning of the AR 70 Stipulation between ARC and J.P. Morgan Chase, petitioner's counsel sent a letter to the Nassau County Attorney's Office advising that the proceeding had not been properly settled. Petitioner's attorneys allege that on March 16, 2011, an oral agreement was reached with the Nassau County Attorney's Office to reduce the assessments on petitioner's Subject Property for the 2008/09 through 2010/11 tax years. On March 28, 2011, respondent advised petitioner that it would not honor the agreement arrived at on March 16, 2011 due to the prior AR 70 Stipulation of Settlement between ARC and petitioner's tenant, J.P. Morgan Chase.

Respondent ARC is an agency "charged with the duty of reviewing and correcting all assessments of real property." Nassau County Administrative Code § 6-40.2. ARC was enacted by enabling statute RPTL § 523-b, and as such, is governed under RPTL § 523-b, the Nassau County Administrative Code and ARC's Rules of Procedures ("ARC Rules").

According to the express provisions of the subject lease, the tenant was only granted the right to grieve an assessment if the landlord failed to do so. Pursuant to the subject lease, petitioner commenced tax certiorari proceedings on the Subject Property against Nassau County for the 2003/04 tax year through the current year. As part of petitioner's tax certiorari proceeding for each tax year, petitioner provided ARC with a copy of the subject lease.

The petition alleges that ARC entered into the AR 70 Stipulation of Settlement with a party who neither had a contractual right to grieve nor the party that paid taxes for all of the years covered by the stipulation. Respondents have taken the position that since the AR 70 Stipulation of Settlement disposes of tax certiorari proceedings on petitioner's property for the 2003/04 through 2009/10 tax years, the petitioner may not now maintain a tax certiorari proceeding on its property for the 2008/09 through 2010/11 tax years.

RPTL § 523-b is ARC's enabling statute and provides in relevant part:

Such commission shall recommend to the local legislative body any necessary regulations of the commission, the rules of procedure of the commission and the rules for conduct of the commission not inconsistent with the provisions of this chapter. The local legislative body shall adopt any such rules and regulations as it deems necessary. RPTL § 523-b.

As mandated under RPTL § 523-b, ARC has adopted rules of procedure. ARC Rule 7.1 states:

The applicant shall be a person aggrieved by the assessment as such term is defined by law and precedent.

According to ARC's own rules as mandated under RPTL § 523-b, only an "aggrieved person" as that term is defined by law and precedent shall qualify as an applicant. The judicial test for whether a party qualifies as an "aggrieved person" in a tax certiorari proceeding is whether that party (1) has a contractual right to pursue a tax certiorari proceeding or (2) has an obligation to pay the taxes. (See RPTL § 704; *Waldbaums, Inc. v Finance Admin. of the City of N.Y.*, 74 NY2d 128; *Matter of Grant*, 85 NY 536; *Matter of Walter*, 75 NY 354; *Matter of Burke*, 62 NY 224; *Matter of Grant*, 85 NY 536).

Since J.P. Morgan, the tenant who signed the stipulation has vacated the premises, petitioner alleges the bank had no contractual right to maintain the tax grievance proceeding. Petitioner's lease with tenant J.P. Morgan Chase stated that:

"If Landlord shall fail or refuse, on demand of Tenant, to take any steps necessary to contest the validity or amount of any assessed valuation, or of any Imposition, Tenant, at its own cost and expense, may undertake by appropriate proceedings in the name of landlord and/or Tenant to review the validity or amount of the assessed valuation or of the Imposition."

In connection with tax certiorari proceedings commenced by petitioner, it is alleged that this lease was provided to ARC every year going back to the 2003/04 tax year.

On a motion to dismiss pursuant to CPLR 3211(a)7., the Court must accept as true, the facts "alleged in the complaint and submissions in opposition to the motion, and accord plaintiffs the benefit of every possible favorable inference," determining only "whether the facts as alleged fit within any cognizable legal theory." (*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409; see also, *People ex rel. Cuomo v Coventry First LLC*,

13 NY3d 108; *Polonetsky v Better Homes Depot*, 97 NY2d 46; *Leon v Martinez*, 84 NY2d 83; *Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703). The petitioners have set forth viable causes of action based on the allegations that ARC knowingly entered into a stipulation of settlement with petitioner's tenant, who did not qualify as an aggrieved person under the relevant law and legal precedent; and exceeded the administrative authority provided to them in RPTL § 523-b and ARC Rules of Procedure. Therefore, the petitioner contends that the stipulation of settlement entered into with petitioner's tenant, J.P. Morgan Chase, is illegal and should be voided.

The respondents' motion to dismiss the petition for failing to state a cause of action pursuant to CPLR 3211(a) is denied.

When a motion to dismiss the petition is denied, the Court must permit the respondent to interpose an answer. [See CPLR 7804(f); *Bethelite Community Church et al. v Department of Environmental Protection of City of New York*; 8 NY3d 1001; *Nassau County BOCES Cent. Council of Teachers v Board of Co-op. Educational Services*, 63 NY2d 100]. Respondents shall have twenty (20) days from the date of this order to interpose an answer.

Although not expressly requested in the Notice of Motion, but referred to in paragraph 2 of the Affirmation in Support, respondents also request the court to dismiss pursuant to CPLR 3211(a)11. due to the absence of persons who should be parties. Apparently the reference should be to CPLR 3211(a)10. which provides "the Court should not proceed in the absence of a person who should be a party." Respondents assert that J.P. Morgan Chase should be made a party since simply voiding the settlement will,

however, result in significant changes in the position of J.P. Morgan Chase, including the necessary return of its tax refund, without notice to it and an opportunity to participate.

CPLR 7802(d) provides that the Court may direct that notice of the proceedings be given to any person, and interested persons may be allowed to intervene.

The attorneys for the respondents shall serve a copy of this Order with Notice of Entry on petitioner's counsel, as well as J.P. Morgan Chase, and on the attorneys who represented J.P. Morgan Chase in the underlying tax certiorari proceedings. In addition, respondents' attorneys shall serve copies of all pleadings including motion papers and exhibits on J.P. Morgan Chase and its attorneys in the underlying tax certiorari proceeding no later than ten (10) days from the date of this order.

J.P. Morgan Chase may intervene. [See CPLR 7802(d)].

In the interests of judicial economy, the Notice of Petition for the relief requested by the petitioner is adjourned *sua sponte* to November 9, 2011.

All papers in opposition to the petitioner's Notice of Petition must be served no later than October 17, 2011. Reply papers shall be served no later than November 3, 2011.

In the event this matter is settled before the submission date, counsel shall forward a copy of the written stipulation to chambers.

This decision constitutes the order of the Court.

Date: **SEP 13 2011**



UTE WOLFF LALLY, J.S.C.

ENTERED
SEP 16 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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