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| Keyspan Generation LLC v Nassau County |
| 2011 NY Slip Op 32800(U) |
| October 13, 2011 |
| Supreme Court, Nassau County |
| Docket Number: 11440/99 |
| Judge: Michele M. Woodard |
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----X
KEYSPAN GENERATION LLC; KEYSpan CORPORATE
SERVICES LLC, and KEYSpan GAS EAST
CORPORATION d/b/a BROOKLYN UNION OF LONG
ISLAND,

Plaintiffs,

-against-

**MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 11
Index No.: 11440/99
Motion Seq. Nos.: 01 & 02**

NASSAU COUNTY, THE NASSAU COUNTY
DEPARTMENT OF ASSESSMENT, THE NASSAU
COUNTY BOARD OF ASSESSORS, CHAIRMAN OF THE
BOARD OF ASSESSORS, and THE NASSAU COUNTY
LEGISLATURE,

Defendants.

DECISION AND ORDER

-----X
LONG ISLAND LIGHTING COMPANY,

Plaintiff,

Index No.: 11695/97

-against-

THE BOARD OF ASSESSORS and/or THE ASSESSOR
OF THE COUNTY OF NASSAU, and THE COUNTY
OF NASSAU,

Defendants.

-----X

Papers Read on this Motion:

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| Defendants' Notice of Motion | 01 |
| Plaintiffs' Amended Notice of Cross-Motion | 02 |
| Defendants' Memorandum of Law | xx |
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| Plaintiffs' Memorandum of Law | xx |

In motion sequence number one, defendants, Nassau County ("County"), the Nassau County

Department of Assessment, The Nassau County Board of Assessors, Chairman of the Board of Assessors, and the Nassau County Legislature, seek an Order of this Court dismissing the Complaint of plaintiffs, Keyspan Generation LLC, Keyspan Corporate Services LLC and Keyspan Gas East Corporation d/b/a Brooklyn Union of Long Island (“Keyspan”), in Action No. 2 of the above-captioned actions, pursuant to CPLR §3211 (a) (7).

In motion sequence number two, the plaintiffs cross move for an Order of this Court joining Action No. 2 with Action No. 1 of the above captioned actions, pursuant to CPLR § 602(a), granting Summary Judgment against defendants in Action No. 1 and Action No. 2, and awarding sanctions based on the defendants’ assertion of arguments in its motion that it was collaterally estopped from litigating.

PROCEDURAL HISTORY

The instant motions arise out of challenges to the methodology utilized by the defendants for purposes of imposing taxes and special ad valorem levies upon real property located in non-countywide special districts, where plaintiffs alleged that the method applied during certain tax years, was illegal and unconstitutional. The first action was commenced in 1997 by Long Island Lighting Company (“LILCO”), challenging the assessments of the 1996/1997 and 1997/1998 tax years. The tax year, 1998/1999, was interposed pursuant to a stipulated agreement.

LILCO specifically alleged that the defendants violated the provisions set forth in RPTL §1802 in that defendants’ assessed the real property located in non county-wide special districts at **different uniform percentages** (emphasis added) of value for each class. As its imposition of non county-wide special district taxes was based on such assessments, the defendants’ conduct was illegal pursuant to RPTL §305, and unconstitutional under the Equal Protection provisions set forth in Article 17 §§1, 2 of the New York State Constitution and Article 1, §11 and the 14th Amendment of the United States

Constitution. During the pendency of the action, the parties executed a Stipulation of Partial Discontinuance pending Keyspan's acquisition of LILCO's interests.

In 1999, Keyspan commenced an action against the defendants challenging the 1999/2000 ad valorem levies imposed on its properties in non-countywide districts, which was amended to include a challenge to such levies imposed on its properties during the 2000/2001 tax years. The allegations in the Keyspan action are ostensibly the same as those set forth in the LILCO action.

Plaintiffs seek a refund of all excess or illegal taxes and overpayment of such taxes and levies, resulting from the misapplication of Real Property Tax Law, paid in the years, 1997/1998, 1998/1999, 1999/2000 and 2000/2001,.

FACTS

The facts are not in dispute. The plaintiffs, a utility provider of electricity and gas, maintain real property in non-countywide special districts which do not extend across the entire County. These districts do not fall within the statutory definitions of "portions" under Article 18 of the RPTL, which requires that such districts encompass an entire special assessing unit.

At the time of the underlying causes of action, Section 305 of the RPTL mandated that all property in any assessment district be assessed at an equal percentage, with exceptions that are set forth in Article 18. Such exceptions applied to the special assessment districts, New York City and Nassau County, which were required to classify its real properties into four different groups. Accordingly, Nassau County grouped its real property as follows: Class 1, single-family homes; Class 2, apartments and condominiums; Class 3, utility company properties; and Class 4, commercial properties such as factories, offices and stores. The plaintiffs' real property was situated within Classes (3) and (4).

According to plaintiffs, if Article 18 applied at the time of their respective actions, the

defendants should have classified their properties at uniform percentages of value within each class, and applied different tax rates based on Article 18's formula. In other words, the defendants should have used the entire statutory provision as provided in Article 18, that required adjusted base proportions. The tax rate would have been adjusted, which would have avoided the resulting inequity of real properties within a particular class bearing an disproportionate share of the tax burden.

Instead, defendants applied Article 18 to the subject real properties at a single tax rate without regard to the different percentages of value of the property. Their alleged actions resulted in the imposition upon plaintiffs' Class (3) properties of more than their equitable share of the tax burden for non-countywide special districts.

However, plaintiff's property is in a non-countywide special district and according to its position, it is therefore exempt from Article 18. As such, §305 of the RPTL should have been applied in assessing those properties during the tax years in dispute. According to defendants, they acted within the intent of the Legislature and within the scope of the relevant provisions of the RPTL.

ARGUMENTS:

The plaintiffs' arguments can be summarized as follows:

- Article 18 provides for classified assessments at a uniform percentage of value within each class and different tax rates for each class. If this statute applied to the imposition of ad valorem levies in non-countywide special districts, the defendants should have classified such real properties at uniform percentages of value within each class, and applied different tax rates to such properties. Defendants, however, imposed special ad valorem levies in such districts by applying a single tax rate without regard to the percentages of the assessed value of such real property.
- Article 18 did not apply to non-countywide special districts during the tax years in dispute, as such districts did not fall with the statutory definition of a "portion". The defendants should have applied §305 of the RPTL and apply one uniform percentage of value at a single uniform tax rate to all property

within such districts.

- Defendants are collaterally estopped from relitigating the issue at bar as the identical issue had been already decided in a prior action, *New York Tel. Co. v. Nassau County*, 1 NY3d 485 (2004). According to a 2006 unreported decision of the Nassau County Supreme Court, the defendants' motion was deemed frivolous in that their claims were without merit in law, and that they have had a full and fair opportunity to litigate the issue in prior proceedings. Further defendants have not proffered a reasonable argument for a reversal of the existing case law
- The defendants' method of assessment in non-countywide special districts was unconstitutional in that tax classifications are subject to equal protection review and the defendants are unable to establish a rational relationship to a legitimate governmental purpose for its actions. The methodology employed by the defendants caused the plaintiffs to bear an inequitable burden and it constituted "invidious discrimination".
- Plaintiffs are entitled to refunds and the defendant County is responsible for refunds under the Nassau County Administrative Code ("NCAC")§6-26.0(b)(3)(c).

The defendants' arguments are summarized accordingly:

- The Legislature, in enacting Article 18 of the RPTL, mandated that all real property within the County be classified, but as the statute sets forth a definition for "portions", non-countywide special districts were exempted from the Adjusted Base Proportion ("ABP") requirement.
- There is no statutory or legislative authority to support that the classification provisions of Article 18 did not apply for the purposes of imposing special ad valorem levies upon non-countywide districts.
- Section 1802 of the RPTL requires that an assessing unit assess real property in the unit in a consistent manner and plaintiff's interpretation that the statute requires a classified assessment system for "portions" as opposed to "non-portions" contradicts the statute. Further the NCAC and County Charter mandate that there is to be one assessment roll and such roll is to be used by the special district.
- The relevant statute is ambiguous and the County Assessor's interpretation should be given deference.

- The defendant County cannot be held liable for any refunds, if due, as NCAC §§6-24 (4) and 6-26 (b)(3)(c) have been superceded by New York State law and are therefore no longer effective.
- If this Court determines that the plaintiffs are to be awarded monetary relief, that such award should be prospective and not retroactive. Further, a large monetary judgment against the County would create an “enormous, financial burden” and conceivably be the County’s “fiscal coup de [grace]”.

Defendants, in its Memorandum in Reply, contend that plaintiffs are not seeking a refund but rather a reassessment, that the defendant County never received the monies collected pursuant to the ad valorem levy as such funds were used by the special district for its benefit, and that fiscal chaos would ensue if the County were made to issue a refund or even reassess the affected real properties.

DISCUSSION

Regarding defendants’ motion to dismiss action number two, pursuant to CPLR§3211(a)(7), when a motion is based on a failure to state a cause of action, the petition's legal sufficiency is judged solely on the face of the allegations and no consideration of the facts alleged in support of the motion will be permitted. Said another way, the Court’s scope of review is narrow and it is limited to ascertaining as to whether the pleading states any cognizable cause of action (see *Hogan v New York State Office of Mental Health*, 115 AD2d 638 [2d Dept 1985]).

In determining a motion to dismiss pursuant to CPLR §3211 (a) (7), “the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail” (see *Heffez v L & G General Const., Inc.*, 56 AD3d 526 [2d Dept 2008]). Further, on a motion to dismiss for failure to state a cause of action, the complaint must be liberally construed in the light most favorable to the plaintiffs and all factual allegations must be accepted as true (see *Holly v.*

Pennysaver Corp., 98 AD2d 570 [2d Dept 1984], *Wayne S. v County of Nassau, Dept. of Social Servs.*, 83 AD2d 628[2d Dept 1981]).

As to plaintiffs' cross motion for Summary Judgment, as to Keyspan, CPLR §3212 (a) provides in relevant part. "...[a]ny party may move for summary judgment in any action, after issue has been joined..." It is undisputed that the issue in Keyspan has not been joined. As such, the cross motion for Summary Judgment in favor of Keyspan is *denied* without prejudice to a renewal thereof upon joinder of the issue.

Before consideration can be given to the Summary Judgment motion regarding LILCO, this Court must decide plaintiff's cross motion for joinder of the LILCO action with Keyspan's action. CPLR §602 (a) generally provides: "...[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay..."

Further, a motion seeking a joint trial pursuant to CPLR §602(a) rests within the sound discretion of the trial court. When there are common questions of law or fact, a joint trial is warranted unless the opposing party demonstrates prejudice to a substantial right for joint trial. Here, the two actions involve common questions of law and fact.

Additionally, the parties are ostensibly the same entities, as the LILCO action was held in abeyance as it was in the process of evolving into Keyspan. Additionally, the defendants, who offered no real opposition, are not prejudiced as the issues at bar are identical. The County and LILCO clearly anticipated that the utility would file claims regarding additional tax years as per the terms of their stipulation:

“...The parties have agreed that judicial economy and convenience dictate that all of LILCO’s claims with respect to all tax years be interposed within one action and that a separate action with respect to the 1998/99 tax year would be duplicative...” (Amended Cross Motion, Exhibit E. Stipulation, ¶3”

The foregoing indicates that had LILCO not sold its interest to Keyspan, LILCO, most likely, would have amended its complaint to include the additional tax years, 1999/2000 and 2000/2001. Therefore, the interests of justice and judicial economy would be served by a joint trial (see *Sarrds, Inc. v. Dove Demolition Corp.*, 71 AD2d 1001[2d Dept 1979], *Alizio v. Perpignano*, 78 AD3d 1087 [2d Dept 2010]). Accordingly, this branch of plaintiffs’ cross motion is **granted**.

As to LILCO’s cross motion, it is well settled that on a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing of entitlement to judgment as a matter of law after tendering evidence sufficient to eliminate any material issue of fact from the case (see *Beck v Westchester County Health Care Corp.*, 52 AD3d 555 [2d Dept 2008]). Until the movant establishes its entitlement to judgment as a matter of law, the burden does not shift to the opposing party to raise an issue of fact and the motion must be denied. However, once the moving party establishes its entitlement to judgment through the tender of admissible evidence, the burden shifts to the non-moving party to raise a triable issue of fact (see *Pierson v. Good Samaritan Hosp.*, 208 AD2d 513 [2d Dept 1994]).

In order to appreciate the genesis of the current statutory authority and intent of the Legislature in enacting such authority, a cogent recitation of the statutory history is in order. For over 200 years, New York municipalities assessed real property at a fraction or percentage of full value. This practice resulted in inequities in the amount of taxes paid by real property owners although they owned similar parcels. Additionally, the commercial real property owner shouldered a continual disparate share of the

tax burden (A History of the Real Property Tax and Equalization in the State of New York. NYS Office of Real Property Services , December 2006). The then-existing §306 of the RPTL requiring real property assessments at its full value, provided in relevant part that "[a]ll real property in each assessing unit shall be assessed at the full value thereof." The foregoing statutory mandate was referenced in *Van Rensselaer v. Witbeck*, 1852 WL 5499 (1852) where that court stated: "...[w]e are informed....that the usual method is to estimate property at less than half its value, under the obligation of an official oath, which requires its full value to be stated. If this be so, the practice should be corrected"(A History of the Real Property Tax and Equalization in the State of New York. NYS Office of Real Property Services , December 2006, Part 1, Volume 6, No. 12).

Notwithstanding, few municipalities complied with the case law and the statute, and its assessors continued to assess properties at less than full value. Not only did disparate assessments continue, residential property values sharply increased and because these properties were not readily reassessed, they were assessed at a lower percentage of current market value than commercial properties. The need to address the inequities in real property taxation in New York State arose out of a 1975 Town of Islip assessment grievance where a property owner commenced a tax certiorari proceeding to declare the entire assessment roll of the Town of Islip void in that the assessments violated the requirements of RPTL §306.(A History of the Real Property Tax and Equalization in the State of New York. NYS Office of Real Property Services, April 2007, Part 5, Volume7, No. 4).

The Town of Islip's undisputed practice of assessing at less than 100 percent of full value was challenged and the matter was heard before the New York State Court of Appeals in the historical case, *Matter of Hellerstein v Assessor, Town of Islip*, 37 NY2d1 (1975). The Town of Islip contended that the Court of Appeals, in the past, had not addressed the disputed tax assessments and it relied on

seminal case, *C.H.O.B. Associates v. Board of Assessors of County of Nassau*, 16 NY2d 779 (1965) for support.

In *C.H.O.B.*, the court, while acknowledging the provisions set forth in RPTL §306, reasoned that value has been held to be synonymous with market value. Therefore, the statute does not mandate assessments at 100% of full or market value; it requires merely that the assessments be at a uniform rate or percentage of full or market value for every type of property in the assessing unit. Although the Town of Islip raised other defenses which were summarily dismissed by that court, it most heavily relied on the fact that RPTL §306 had been violated for some 200 years with the full knowledge of the Legislature and the courts. The *Hellerstien* court, while acknowledging the dilemma caused by the long-standing practice, concluded that the language of RPTL §306 was clear and unambiguous, and capable of only one interpretation. The court directed the Town of Islip to make its future real property assessments at full value. As a result of the *Hellerstein* decision, the amount of litigation regarding inequity in assessment of real property, dramatically increased. Further, that court's decision did little to rectify the basic unfairness and disparity in the assessment and taxation of real property in New York State (A History of the Real Property Tax and Equalization in the State of New York. NYS Office of Real Property Services , May 2007, Part 6, Volume 7, No.5).

In 1981, the Legislature would repeal full value as the sole standard of assessment in New York, preserve existing tax shares in special assessing units, and create a dual tax rate option. The Legislature then repealed RPTL §306, and replaced it with section 305, with exceptions provided in Articles 18 and 19. Section 305 of the RPTL provides in relevant part:

- “...1. The existing assessing methods in effect in each assessing unit on the effective date of this section may continue.
2. All real property in each assessing unit shall be assessed at a uniform percentage of value

(fractional assessment) except that, if the administrative code of a city with a population of one million or more permitted, prior to January first, nineteen hundred eighty-one, a classified assessment standard, such standard shall govern unless such city by local law shall elect to be governed by the provisions of this section.

3. Any assessing unit in which assessments are at full value by reason of a revaluation may adopt a level of assessment in accordance with this section..."

In addition, Article 18, in RPTL §1803, now mandated that the legislative body of each special assessing unit establish the base proportion for each class and for each "portion" included within its boundaries.

The basic definitions of the relevant terms, pursuant to RPTL §§ 1801, 1803 and 102 at the time of the underlying cause of actions, are provided herein:

Base proportion - : "... for a special assessing unit which is not a city, the proportion of the taxable assessed value of real property which each class constituted of the total taxable assessed value of all real property as entered on the final assessment roll completed and filed in calendar year nineteen hundred eighty-one of such special assessing unit or on the part of that assessment roll applicable to a portion of the special assessing unit, except that for town and county special districts not included within the definition of portion..."

Portion - "... the part of a special assessing unit, except a county included within a city, included within the boundaries of a city, village..., town excluding all villages therein, school district, or a special district **which encompasses an entire special assessing unit** (emphasis added) with the exception of one or more entire cities or villages..."

Special ad valorem levy - "... a charge imposed upon benefited real property in the same manner and at the same time as taxes for municipal purposes to defray the cost, including operation and maintenance, of a special district improvement or service, but not including any charge imposed by or on behalf of a city or village..."

Special assessment - "... a charge imposed upon benefited real property in proportion to the benefit received by such property to defray the cost, including operation and maintenance, of a special district improvement or service or of a special improvement or service, but does not include a special ad valorem levy..."

Special district - "... a town or county improvement district, district corporation or other district established for the purpose of carrying on, performing or financing one or more improvements or services intended to benefit the health, welfare, safety or convenience of the inhabitants of

such district or to benefit the real property within such district, and in which real property is subject to special ad valorem levies or special assessments for the purposes for which such district was established...”

Tax- “...a charge imposed upon real property by or on behalf of a county, city, town, village or school district for municipal or school purposes, but does not include a special ad valorem levy or a special assessment unless such special ad valorem levy is applicable to all taxable real property within a portion as defined [herein]...”

It is the plaintiffs’ contention, that the defendants have interpreted Article 18 in a way that would allow them to tax plaintiffs’ property in the non-county wide special district at any rate they choose. Here, the plaintiffs have submitted the relevant legislative record, the schedule of the assessed value of its real properties in the disputed tax years, and case law as evidence. The legislative history and bill jackets lend further support to its position that the Legislature amended the relevant statutes in an attempt to address the stream of litigation regarding the very issues at bar, particularly since there was a proliferation of “non-portions” at the time of the underlying actions. It is undisputed that in 1997, there were 70 “portions” and 250 “non-portions”.

The definition of “tax”, after the amendments to the statute became effective in August 2001, omitted the language “unless such special ad valorem levy is applicable to all taxable real property within a portion...” As already stated herein, there is no dispute between the parties that the plaintiffs’ real properties are classified as being within non-countywide special districts and that non countywide districts are not classified as “portions”. This supports that the imposition of ad valorem levies in non-countywide districts were excluded from the provisions of Article 18.

The plaintiffs’ arguments are further supported by legislative intent. The primary consideration of courts in interpreting a statute is to ascertain and give effect to the intention of the legislature (see

Tompkins County Support Collection Unit ex rel. Chamberlin v. Chamberlin, 99 N.Y.2d 328,[2003]).

The notes of the Legislature, evincing its intent to amend Article 18 to include non-countywide special districts, which became effective in August 2001, clearly indicates that it was not intended for Article 18 to apply to such districts during the tax years in question:

“.... In 1981, the legislature enacted chapter 1057 of the laws of 1981, a comprehensive amendment to the real property tax law. Article 18 of such law, entitled ‘preservation of class share of taxes in municipal corporations except counties within a city, included within the boundaries of a special assessing unit and limitation on increases in assessments therein,’ establishes a procedure for the classification of real property in a special assessing unit and for the allocation of taxes among classes. Although such article by its terms applies to all real property within a special assessing unit, it does not by its terms specifically apply to the allocation of taxes within certain county and town special districts located within special assessing units, unless the special district encompasses an entire special assessing unit. **The purpose and intent of this act is to ensure that the tax allocation principles of article 18 of the real property tax law are applied to special districts located within special assessing units, even if the special district does not encompass the entire special assessing unit.** (emphasis added)” RPTL §1803, Historical and Statutory Notes, L. 2001 c.191 §3.

In addition to the foregoing legislative support for plaintiff’s position, there is support from case law: “...During the tax years in question, however, those provisions [Article 18] did not apply for the purpose of imposing special ad valorem levies in non-Countywide special districts, which did not fall within the definition of a ‘portion’ (*New York Telephone Co. v Nassau County*, 297 AD2d at 665, 2d Dept 2002)].”

The Hon. Edward G. McCabe’s unreported decision of this Court, captioned *New York Telephone Company v Nassau County and et al.*, under Index No. 12762/97 where the plaintiff utility companies moved for summary judgment based on the identical issues and arguments set forth by the instant plaintiffs, is also noted. The Court held:

“...Since the establishment of base proportions has not been authorized by Article 18 for

non-portions, there is no legal way to allocate to each class within such non-portions its appropriate share of the tax burden and therefore, the mere partial application of Article 18 to such non-portions...is viewed..as unauthorized by the statute and violative of plaintiff's right to equal protection...." (see Appendix A. Memorandum of Law in Opposition to Plaintiff's Motion to Dismiss the Keyspan Complaint and in Support of Plaintiff's Amended Cross-Motion for Joinder and Summary Judgment).

Finally, the plaintiffs cite local authority mandating that the County is responsible for issuing refunds even though the tax revenue was collected for the benefit of and received by the non-countywide special district. It is noted that in the *New York Telephone Co.* case, the defendants argued that the relevant local code had been superceded by State law and that the non-countywide special districts were responsible for issuing any refund; however, that argument was rejected by this Court. The Court, through the decision of the Hon. Edward G. McCabe, dated October 26, 2006, determined that pursuant to NCAC 6-26.0 (b)(3) (c) and NCAC 6-24.0(4), that as a matter of law, tax refunds are a "County charge" (see Plaintiff's Initial Memorandum of Law, Appendix E).

The defendants' position was rejected in recent cases as well. The court in *New York Telephone Co. v Supervisor of Town of North Hempstead*, 77 AD3d 121 (2d Dept 2010) where the Town of Hempstead sought third party indemnification for tax refunds due to illegally imposed special ad valorem taxes and/or erroneous assessments, held that the NCAC provision regarding tax refunds applied and such refunds were a County charge. Further, the particular provisions, known as the County Guaranty, were not preempted by the RPTL. McKinney's RPTL § 559(2); NCAC § 6-26.0[b][3][c].

The County Guaranty is a special law that has survived despite several amendments to the Real Property Tax Law regarding erroneous tax assessments. Having reviewed RPTL §§ 556(6)(a) and 559(1) and (2), there is nothing in the language comprising either of these sections of law which

expressly provides that NCAC § 6-26.0(b)(3)(c) would be superceded or invalidated. Moreover, upon a careful reading of the Governor's Bill Jacket in reference to the 1974 amendments to the RPTL §556, such amendments "...[were] limited to clerical errors relating to computation and extension to unlawful entry, and it is actually a substantial re-enactment of current section 556." (Plaintiffs, Exhibits "J through "V" to Amended Cross Motion for Joinder and Summary Judgment, Exhibit R, Bill Jacket, L. 1974, ch. 177, at 11).

Therefore, as clearly indicated by the legislative history, RPTL § 556 was not intended to function so as to supercede or invalidate those laws in existence at the time of it's adoption, which included the County Guaranty, and was rather a re-establishment of those laws already in existence. Pursuant to RPTL § 559(2), the procedures for administrative corrections of errors, set forth in the NCAC, are superseded by RPTL Title 3 to the extent that they are inconsistent with RPTL Title 3.

Accordingly, judicially directed refunds of taxes or levies illegally imposed due to an error other than those administratively correctable pursuant to RPTL Title 3 are governed by the County Guaranty (see NCAC § 6-26.0[b] [3][c]; RPTL 2006; *Board of Educ. of Glen Cove City School Dist. v Nassau County*, 33 AD3d 576 [2d Dept 2006], *New York Telephone Co. v Supervisor of Town of North Hempstead*, 77 AD3d 121 [2d Dept 2010]).

As the LILCO plaintiffs have met its *primaefacie* burden, the burden now shifts to the municipal defendants. It is noteworthy that in its Memorandum of Law, the defendants actually state, "...[T]he County recognizes that the trial court in [*New York Telephone v. Nassau County*] previously decided that the County's method was in error and caused excess payments of taxes by the Petitioner there...We acknowledge that this Court may be bound by the Appellate Division decision, but we

respectfully include this point to preserve the issue for appellate review..."(see Defendants' initial Memorandum of Law, p. 21, ¶1).

While it is somewhat unclear as to why acknowledging the law as set forth by the Appellate Division, preserves the issue for appeal, this Court considers the foregoing a concession that the defendants are arguing issues that were previously litigated. The defendants even attempted to reargue the merits of that case, before the Court of Appeals upon the *New York Telephone Co.* plaintiffs' appeal on the issue of damages and/or tax refunds.¹ (see Exhibits J through V, in Support of Amended Cross Motion, Exhibit J, Tr. of Oral Argument Before the Court of Appeals, February 11, 2004) p. 44, ln. 16-19, p. 58, 11-13). In addition, the instant defendants have not submitted any evidence to support a reversal of this Court's prior decision or any facts that distinguish that case from the one at bar.

As to plaintiffs' motion for Summary Judgment, precluding the municipal defendants from relitigating the issue of its alleged illegal and unconstitutional tax assessment, this Court already decided this identical issue in prior proceedings. The defendants had full and fair opportunity to litigate the issue, and its relitigation of the tax assessment of the non-countywide special districts is

¹In the *New York Telephone Co.* Case, the trial court decided the matter on the merits and ordered that the matter be set for a hearing on the issue of tax refunds and damages. The matter was appealed to the Second Department, where it reversed the trial court's determination that a tax refund was due based on the possible fiscal consequences to the County. The matter was heard by the Court of Appeals, which reversed the Appellate Division's decision and remitted the matter to the trial court for further proceedings regarding the amount of refund to which the utilities were entitled, including any financial impact on the County (*New York Telephone Co. v. Nassau County*, 1 NY3d 485 [2004]).

therefore precluded (see *Shaid v Consolidated Edison Co. of New York, Inc.*, 95 AD2d 610 [2d Dept1983]).

The plaintiffs in the *New York Telephone Co.* action moved this Court to preclude defendants from offering evidence regarding the fiscal impact of tax refunds upon non-countywide districts in one of the numerous motion proceedings, while seeking a determination from this Court regarding the applicability of the relevant NCAC provisions. This Court, through the Hon. Edward G. McCabe's October 26, 2006 decision, as referenced herein, granted that plaintiffs' motion. Incredibly, the defendants are again making the very same arguments in the instant motion (see Plaintiff's Initial Memorandum of Law, Appendix E).

Notwithstanding the foregoing, the County in the *New York Telephone Co.* action again moved this same Court for partial Summary Judgment seeking an Order that the NCAC imposes liability on the non-countywide special districts rather than the County. The plaintiffs moved seeking a determination that defendants' motion was frivolous and that plaintiffs be awarded sanctions.

This Court in its unreported decision dated August 11, 2008 by the Hon, Edward G. McCabe, referencing his October 26, 2006 decision, denied the defendants' motion, holding that their application was frivolous in that those issues were already argued and decided. The Court, while noting that it had been twice judicially determined that the non-countywide districts are not responsible for any tax refunds, granted the plaintiffs' motion and pending the submission of costs and disbursements from the plaintiff, authorized the Court to award costs and sanctions.

In general, the making of frivolous and unnecessary motions warrants the imposition of sanctions, particularly where the party has been warned previously about frivolous conduct, where counsel's conduct creates needless work for the court, or to delay or prolong the resolution of litigation.

This includes filing a motion to dismiss a complaint based upon a defense that is without merit under the circumstances. This Court, has therefore determined that the defendants have engaged in frivolous conduct and the imposition for sanctions for such conduct is discretionary (see N.Y .Ct. Rules,§ 130-1.1 (c), *Levy v Carol Management Corp.*, 260 AD2d 27,[1st Dept1999]).

Defendants' contention that tax refunds and/or monetary relief can only be brought by way of an Article 78 proceeding is without merit. A tax certiorari proceeding is not the exclusive procedure for recovery of property taxes collected on basis of improper and/or illegal tax assessment of real property. Although such application is generally made be by way of tax certiorari proceeding, taxpayers can also challenge assessments by way of an Article 78 proceeding and/or action for declaratory judgment. CPLR §7801, RPTL §700 (1) (see also *Corporate Property Investors v. Board of Assessors of County of Nassau*, 153 AD2d 656 [2d Dept 1989]).

In prior cases, tax refunds have been issued to other plaintiffs by way of declaratory judgment. Such actions, however, have been converted to Article 78 proceedings in the event that the municipal defendant refuses to comply with a court order to issue a tax refund (see *EMP of Cadillac, LLC v Assessor of Village of Spring Valley*, 15 AD3d 336 [2d Dept 2005]).

This Court has considered defendants' remaining arguments and have determined that they are without merit. Accordingly, defendants' Motion to Dismiss the Complaint in Action No. 2 is *denied* in its entirety, plaintiffs' motion for Summary Judgment is *denied* as to Keyspan and *granted* as to LILCO. In addition to the issues precluded by the Order issued by this Court on August 11, 2008 in the *New York Telephone Co.* matter, the defendants are also precluded from relitigating issues regarding the illegality and unconstitutionality of the methodology it employed for purposes of imposing special

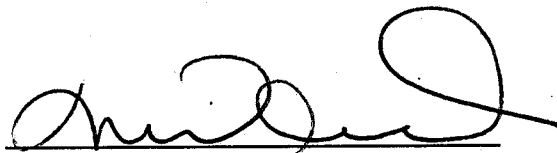
ad valorem levies upon real property located in non-countywide special districts during the tax years in dispute and prior to the August 2001 amendments of relevant sections of the RPTL.

The matter is to be set before this Court for a conference on November 7, 2011 at 10:30 a.m. to set a schedule for reassessment of the LILCO affected real properties during the tax years in dispute, specifically 1996/1997, 1997/1998 and 1998/1999, and for a hearing on the issue of any refunds, if due and owing to LILCO, and on the issue of costs and disbursements as this Court is authorized to award sanctions against the defendants.

This constitutes the Decision and Order of the Court.

DATED: October 13, 2011
Mineola, N.Y. 11501

ENTER:



HON. MICHELE M. WOODARD

J.S.C.

ENTERED

OCT 24 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

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