SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

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860 WEST TOWER, INC. and 870 EAST TOWER, INC.,

Plaintiffs,

-against-

NEW YORK STATE DEPARTMENT OF TAXATION, AND FINANCE, THOMAS H. MATTOX, in his Official Capacity as Commissioner of the New York State Department of Taxation and Finance, NEW YORK CITY DEPARTMENT OF FINANCE, and DAVID M. FRANKEL, in his Official Capacity as Commissioner of Finance of the City of New York,

Defendants.

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DECISION/ORDER
Index No.: 652341/2013
Seq. Nos.: 001,

HON. KATHRYN E. FREED:

Recitation, as required by CPLR 2219(a), of the papers considered in the review of these motions:

PAPERS	NUMBERED
STATE'S NOTICE OF MOTION AND AFFIDAVIT ANNEXED.....	1,2 (Exs. A-C)
CITY'S NOTICE OF MOTION AND AFFIDAVIT ANNEXED.....	.....3,4.....
PLAINTIFF'S CROSS MOTION AND AFFS. ANNEXED.....	5,6 (Exs. A-B)
ANSWERING AFFIDAVITS.....	.....7,8.....
REPLYING AFFIDAVITS.....	.....9,10.....
EXHIBITS.....	.....11-16....
OTHER.....	.....17-21.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTIONS IS AS FOLLOWS:

In this declaratory judgment action, plaintiff cooperative corporations 860 West Tower, Inc. ("860 WTI") and 870 East Tower, Inc. ("870 WTI") seek a declaration that their proposed merger would not be subject to New York Real Estate Transfer Tax ("RETT") pursuant to Tax Law sections 1401 and 1402. Defendants New York State Department of Taxation and Finance

("DTF"), and Thomas H. Mattox, in his Official Capacity as Commissioner of Taxation and Finance of the State of New York (collectively "the State"), move, pursuant to CPLR 3211 (a)(2) and (a)(5), to dismiss the complaint. Defendants the New York City Department of Finance and David M. Frankel, in his Official Capacity as Commissioner of Finance of the City of New York (collectively "the City"), move, pursuant to CPLR 3211(a)(2), to dismiss the complaint. Plaintiffs oppose the motions by the State and the City and cross-move for summary judgment on their complaint. For the reasons set forth below, the motions by the State and the City are **granted** and plaintiffs' cross motion is **denied**.

Factual and Procedural Background:

860 WTI and 870 WTI own the residential towers located at 860 and 870 United Nations Plaza in Manhattan, respectively. Although each tower was constructed over a common six-story office building as part of the same development project, the developer incorporated the towers into separate cooperative corporations. Since the towers were incorporated separately, each has a separate board of directors. However, they share a building superintendent, management company, management office, lobby, fitness room, garage, and mechanical systems. Given that 860 WTI and 870 WTI need to make certain joint decisions, and nothing requires the boards of the towers to cooperate, the boards of the towers adopted resolutions declaring that, upon receipt of a final determination or other adequate assurance that the State and City RETT will not be payable in connection with the merger, they would work together to pursue a merger of 860 WTI and 870 WTI.

In 2010, plaintiffs submitted a request for an advisory opinion ("AO") to DTF seeking to

ascertain whether the proposed merger of the cooperative corporations would be subject to a RETT. On February 22, 2011, DTF stated, in an AO issued to plaintiffs, that, pursuant to Tax Law sections 1401 and 1402, plaintiffs would owe the State RETT upon the merger of the corporations, and that a tax credit may simultaneously be permitted. Aside from the 2010 request to DTF for an AO, plaintiffs have sought no administrative or declaratory ruling from DTF.

On July 2, 2013, plaintiffs commenced the captioned action. In the complaint, plaintiffs 860 WTI and 870 WTI sought a declaration that they were not obligated to pay State or City RETT in the event they merged.

The State and City now move, pursuant to CPLR 3211(a)(2), to dismiss the complaint on the ground that this Court lacks subject matter jurisdiction over the matter. The State also moves in the alternative, pursuant to CPLR 3211(a)(5), to dismiss on the ground that the action is untimely. Plaintiffs cross-move for summary judgment on their complaint.

A "Statement of Undisputed Material Facts" submitted by plaintiffs represents that the merger "will take place." However, in an affidavit in support of plaintiff's cross motion, Emmet Hegarty, plaintiffs' Assistant Secretary, states that the merger "has the following terms" and annexes the board resolutions relating to the proposed merger. The resolution of 870 WTI reflects that the merger will take place only if the following three events occur: a) the board receives a final judicial determination, or other adequate assurances, that no RETT will be payable; 2) the boards can merge the corporations on terms consistent with the petition for an advisory opinion and c) the plan of merger is approved by the shareholders.

Positions of the Parties:

In support of their motions to dismiss the complaint pursuant to CPLR 3211(a)(2), the State and the City assert that this Court lacks jurisdiction over this matter since there is no actual controversy between the parties. The State and City assert that, since transactions on which the complaint is based may never occur, a determination by this Court on the effect of such a proposal would constitute an advisory opinion. Even if the merger were to occur at some point in the future, argue the State and the City, it may be consummated pursuant to terms different than those set forth in the request for an AO submitted by plaintiffs to the DTF. They assert that because plaintiffs seek a declaration regarding the taxability of a hypothetical and proposed transaction, this Court lacks the power to issue such an advisory opinion.

Alternatively, the State asserts that the complaint should be dismissed as untimely pursuant to CPLR 3211(a)(5) since, if this claim were justiciable, it would be subject to the four-month statute of limitations for Article 78 proceedings set forth in CPLR 217 because it seeks to challenge an administrative determination and, although the DTF rendered its AO on February 22, 2011, this action was not commenced until July 2, 2013.

The City also asserts that, even if a determination it made regarding whether the proposed transaction was subject to the RETT were reviewable by declaratory judgment, there has been no such determination by the City, but only by the State's DTF, which can be reviewed.

In opposing the motions by the State and the City, plaintiffs assert that the controversy between the parties is justiciable.

In support of their cross motion for summary judgment on the complaint, plaintiffs argue that they are entitled to a declaration that the merger is not subject to the City or State RETT.

They assert that, although their motion has been made prior to the service of their answer, it is not premature since there are no issues of disputed fact and the sole issue is one of statutory construction. They maintain that defendants' motions to dismiss should be converted to motions for summary judgment and that such summary judgment motions should be decided in their favor.

In opposition to defendants' motions, plaintiffs assert that the facts relating to the proposed merger are neither speculative nor hypothetical because the merger has been approved by the boards of each building and defendants have reviewed the terms of the proposed merger and have determined that the transaction is taxable. They further assert that, since their claim involves the applicability of a tax statute, they need not establish that they have exhausted their administrative remedies in order to commence a declaratory judgment action.

In an affirmation in opposition to plaintiffs' cross motion and in further support of the City's motion to dismiss, the City asserts that, contrary to plaintiffs statement that the merger will occur, the board resolutions submitted by plaintiffs reflect that the boards have merely resolved to work on a proposed merger and that such merger will not occur unless they are assured by a court or other authority that the transaction will not be taxable and they receive shareholder approval for the transaction. Since neither of these events have occurred, the City asserts that plaintiffs are clearly seeking an advisory opinion.

In a reply memorandum of law in further support of its motion, the City reiterates its argument that plaintiffs' are seeking an advisory opinion and further asserts that, contrary to plaintiffs' contention, its motion to dismiss should not be converted into one for summary judgment.

In a reply memorandum of law in further support of its motion and in opposition to plaintiffs' cross motion, the State argues that the complaint must be dismissed since it seeks an advisory opinion and that, in any event, it is time barred. Specifically, the State asserts that the proposed merger is a hypothetical transaction which may never occur or which may occur in a manner different from that proposed by the request for an AO. Alternatively, the State asserts that plaintiff's cross motion for summary judgment must be denied as premature since it was made before the joinder of issue.

Conclusions of Law:

Although this Court has the discretion to grant declaratory relief (*see* CPLR 3001; *Matter of Morgenthau v Erlbaum*, 59 NY2d 143, 148 [1983]), it may only resolve legal issues that would have an "immediate practical effect on the conduct of the parties," and it may not render an advisory opinion. *New York Public Interest Research Group [NYPIRG] v Carey*, 42 NY2d 527, 530 (1977). "The courts of New York do not issue advisory opinions for the fundamental reason that in this State '[t]he giving of such opinions is not the exercise of the judicial function.' *Matter of State Indus. Commn.*, 224 NY 13, 16 (Cardozo, J.)." *Cuomo v Long Island Lighting Co.*, 71 NY2d 349, 354 (1988).

The Court of Appeals has held that a declaratory judgment action is premature:

> If the future event is beyond the control of the parties and may never occur . . . Then any determination the court may make would be merely advisory since it can have no immediate effect and may never resolve anything. Thus it is settled that the courts will not entertain a declaratory judgment action when any decree that the court might issue will become effective only upon the occurrence of a future event that may or may not come to pass.

NYPIRG, 42 NY2d, *supra* at 531.

Here, the relief demanded by the complaint cannot be granted because the merger which plaintiffs seek to have declared as a non-taxable transaction has not occurred and there is no certainty that it will. Plaintiffs assert that the complaint "asks this Court to resolve an actual pending legal dispute concerning the prospective obligation of plaintiffs to pay a tax [defendants] have indicated an intention to assess against a merger [plaintiffs] have decided to enter into." Plaintiff's Memo. Of Law In Opp., at 8. However, as noted above, the board resolution states that the possible merger will not occur unless, inter alia, it is approved by the shareholders and plaintiffs obtain assurance that the transaction will not be subject to the RETT. However, plaintiffs papers are silent as to whether a shareholder vote has been held and, if so, what its results were. Thus, it is clear that the merger is beyond the control of the parties and may never occur. *NYPIRG*, 42 NY2d, *supra* at 531.

Contrary to plaintiffs' contention, *Queensview Housing Enterprise, Inc. v Grayson*, 179 AD2d 434 (1st Dept 1992) warrants the dismissal of the complaint. In that case, the Appellate Division found that a suit was unripe where plaintiff challenged the position of the City's Tax Department relating to the proposed merger of cooperative buildings set forth in an advisory opinion issued by the City relating to the application of the tax law to a proposed transaction that had not yet been consummated. Although the court in *Queensview* dismissed an Article 78

proceeding on the ground that petitioners were improperly attempting to challenge the non-final determination of an administrative agency, the court reasoned that the controversy was unripe for judicial determination because the "anticipated taxable effect of . . . advisory opinion letters on [plaintiffs was] "insignificant, remote, or contingent" (*citations omitted*). *Id.*, at 436. Here, any taxable effect of the merger would be contingent, at the very least, on a vote of the shareholders.

Additionally, the court in *Queensview* stated that the plaintiff cooperatives were not aggrieved by advisory opinion letters so as to make the controversy ripe for judicial review. Thus, this Court is constrained by *Queensview* to dismiss the complaint.

In asserting that the controversy is justiciable, plaintiff's rely on *Prodell v State of New York*, 211 AD2d 966 (3d Dept 1995). In that case, the Appellate Division, Third Department held that, while the courts of this state do not render advisory opinions, they may do so "where the practical likelihood is that the future contingency will occur." *Id.*, at 967. However in *Prodell*, the court held justiciable an action seeking a declaratory judgment that legislation providing for a tax assessment reduction was unconstitutional. Since a lower court had already applied the provision against plaintiffs, resulting in what the court held was a "substantial likelihood" that the assessment would be reduced (*id.*, at 968), that case is distinguishable herein, where there is uncertainty as to whether the merger will occur and, if it does, whether it will proceed under the exact terms set forth in the request for an AO.

Plaintiffs further rely, inter alia, on the case of *Trump Village Section 3, Inc. v City of New York*, 109 AD3d 899 (2d Dept 2013), in which the Appellate Division determined that plaintiff was not obligated to pay State and City real property transfer taxes. However, that case is distinguishable as well, since plaintiff's challenge was to taxes *already imposed on it*, as opposed

to taxes which might be levied in the future in the event certain contingencies occurred.

In light of the foregoing, the motions by the State and the City must be granted and the complaint dismissed pursuant to CPLR 3211(a)(2) on the ground that this Court does not have jurisdiction over this matter. Given this finding, there is no need to address the State's argument that the action is time barred. Additionally, since the complaint is dismissed, plaintiff's cross motion for summary judgment is denied.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion by defendants New York State Department of Taxation and Finance and Thomas H. Mattox, in his Official Capacity as Commissioner of Taxation and Finance of the State of New York, to dismiss the complaint insofar as asserted against them is granted; and it is further,

ORDERED that the motion by defendants the New York City Department of Finance and David M. Frankel, in his Official Capacity as Commissioner of Finance of the City of New York, to dismiss the complaint insofar as asserted against them is granted; and it is further,

ORDERED that plaintiffs' cross motion for summary judgment is denied; and it is further,

ORDERED that this constitutes the decision and order of the Court.

DATED: July 17, 2014

ENTER:

Hon. Kathryn E. Freed,
J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT