

McCarthy v County of Nassau, N.Y.
2020 NY Slip Op 35806(U)
September 29, 2020
Supreme Court, Nassau County
Docket Number: Index No. 607458/2020
Judge: James P. McCormack
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SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack

Justice

SEAN M. McCARTHY,

Petitioner(s)/Plaintiff(s),

-against-

COUNTY OF NASSAU, NEW YORK; NASSAU
COUNTY DEPARTMENT OF ASSESSMENT;
ASSESSMENT REVIEW COMMISSION,
LAURA CURRAN, in her official capacity as
County executive; AND DAVID F. MOOG in his
official capacity as County Assessor for Nassau
County; TOWN OF OYSTER BAY; and
PLAINEDGE UNION FREE SCHOOL
DISTRICT,

Respondent(s)/Defendant(s).

TRIAL/IAS, PART 18
NASSAU COUNTY

Index No. 607458/2020

Motion Seq. No.: 001, 002, 003 004 &
005

Motion Submitted: 9/23/2020

The following papers read on this motion:

Orders to Show Cause/Supporting Exhibits/Memoranda of Law.....XX
Notices of Motion/Supporting Exhibits/Memoranda of Law.....XXX
Affirmations/Affidavits in Opposition.....XXXX
Memoranda of Law in Opposition.....XX
Reply Affirmations.....XX
Memoranda of Law in Reply.....XX¹

¹The court heard oral arguments on all motions on September 23, 2020. The court took into consideration those arguments, as well as all the motions papers, in reaching its decision.

Petitioner/Plaintiff, Sean McCarthy (McCarthy), moves this court by order to show cause (Motion Seq. 001) for a preliminary injunction enjoining all Defendants from levying and collecting taxes through the Nassau County Reassessment Phase-In Act of 2020². McCarthy moves separately by order to show cause (Motion Seq. 002) for a temporary restraining order (TRO)³ and a preliminary injunction enjoining all Defendants from levying and collecting taxes pursuant to the Reassessment Phase-In Act of 2020. Defendant, Plainedge Union Free School District (the District) opposes McCarthy's motions and moves to dismiss the petition and complaint (Motion Seq. 003) pursuant to CPLR §3211(a)(7). Defendant, the Town of Oyster Bay (the Town), opposes McCarthy's motions and moves to dismiss the petition and complaint (Motion Seq. 004) pursuant to CPLR §3211(a)(7). The Town does not oppose the District's motion. Defendants, County of Nassau, New York, Nassau County Department of Assessment, Assessment Review Commission, Laura Curran, in her official capacity as County Executive; and David F. Moog in his official capacity as County Assessor for Nassau County (the County Defendants) oppose McCarthy's motions and move to dismiss the petition and complaint (Motion Seq. 005) pursuant to CPLR §3211(a)(7). The County Defendants do not oppose the Town's or the District's Motions and neither the Town nor the District opposes the

²The Reassessment Phase-In Act of 2020 is codified in Nassau County Administrative Code 6-34.0

³The order to show cause for the TRO was presented to this court on August 27, 2020. Believing that granting the TRO would have awarded McCarthy his ultimate relief, the court denied the TRO.

County Defendants' Motion. McCarthy opposes the District's, the Town's and the County Defendants' motions.

McCarthy commenced this hybrid Article 78 matter by summons and complaint dated July 21, 2020. All Defendants moved to dismiss in lieu of answering the complaint and petition. The complaint and petition contains five causes of action, to wit: (1) violation of Federal equal protection and due process, (2) violation of New York State equal protection and due process, (3) violation of New York State Constitution Article 16, Section 2, (4) violation of 42 USC §1983 and (5) a stay pursuant to Art. 78.

McCarthy is a resident and homeowner in Nassau County, New York. Specifically, he owns a home at 217 N. Hickory St., Massapequa, located within the Town of Oyster Bay and the Plainedge Union Free School District. McCarthy's home was built in early 2017, and he purchased the home in December 2018. His neighbor at 218 N. Hickory Street has a house nearly identical to McCarthy's. It was built around the same time, is on the same size lot, is the same style, and is the same size except it has a little less than 200 square feet more floor area. This matter involves the impact of the Reassessment Phase-In Act of 2020 has on McCarthy as compared to his neighbor and many other Nassau County homeowners.

In 2010, the prior Nassau County administration put a "freeze" on home values for real estate tax assessment purposes. For the next seven years, the assessed values of all Nassau County homes remained the same. The amount of real estate tax revenue is

determined by the budget, and not by the amounts collected. If homeowners grieved their taxes and were successful in getting a reduction, they would pay less taxes, but the amount of the reduction would then be spread out among the remaining homeowners. This creates a system where homeowners who do not grieve their taxes have their taxes increased due to the reductions received by the homeowners who did grieve their taxes.

As an illustration, assume there are 10 total houses in Nassau County, and the total tax revenue in the budget is \$1,000.00. Based upon assessments, each resident was to pay \$100.00 in taxes. Then assume five of the residents grieved their taxes and five did not. The five that grieved their taxes each received a \$20.00 reduction. Their taxes would each be reduced to \$80.00. But the \$100.00 in total reduction would then get spread out among the five homes that did not grieve their taxes. Nassau County would still receive \$1000.00 in tax revenue, but would receive \$400.00 from the homes that grieved their taxes and \$600.00 from the homes that did not grieve their taxes. In other words, the homeowners who did not grieve their taxes had to shoulder the reductions of those who had, by having their taxes increased by a combined \$100.00.

From 2010 to 2017, this system was in place in Nassau County, and at the same time the assessed value of the homes remained at the 2010 level. In 2018, the current administration commenced a reassessment of all homes, and this reassessment was completed in 2019. The reassessment stopped the "freeze" and intended to bring the assessed value of homes current, meaning to their 2019 values. However, due to the

freeze, and the fact that many residents grieved their taxes each year, many homes were under assessed and under taxed. These homes were likely to see a significant increase in their taxes under the reassessment. The homes where people did not grieve their taxes were over taxed, and would likely see a reduction in their taxes. In an attempt to prevent the “shock” of having many homeowner’s real estate taxes increase drastically, the current administration sought to institute a five year “phase in” of the reassessment. Under the phase in, the under assessed, under taxed residents would have their assessed value, and tax burden, increased gradually over a five year period. To enable Nassau County to institute the phase in, the New York State legislature passed enabling legislation RPTL §485-u. The Nassau County Legislature then adopted the Reassessment Phase-In Act of 2020 on March 23, 2020.

The Phase-In Act impacted all Nassau County homes except for those that had improvements or reductions or removal of other exemptions. Specifically, the Act stated that the phase in “shall not include assessment increases due to a physical improvement or a removal or reduction of an exemption on property.” This exception had a very different impact on McCarthy’s home and that of his neighbor, as well as many other homes in his area. Under the reassessment, McCarthy’s house (217 N. Hickory) had a fair market value (FMV) of \$806,000.00 and his neighbor (281 N. Hickory) had a FMV of \$821,000.00. Without the phase in, McCarthy would pay \$22,986.75 in taxes and his neighbor would pay \$23,414.54. With the phase in, McCarthy pays \$36,870.75 and his

neighbor pays \$25,434.41. Even homes that have a significantly higher FMV than McCarthy's would pay anywhere from \$10,000.00 to \$12,000.00 less than him in taxes. For example, McCarthy references a home at 240 N. Walnut Street in Massapequa that has a FMV of \$940,000.00 but will only pay \$26,898.26 in taxes. McCarthy argues that real estate taxes of \$36,870.75 are more appropriate for a home with a FMV in excess of \$1,200,000.00.

The cause of the difference in tax amounts is the exemption for improved properties in the Phase-In Act. McCarthy's property was built in 2017, but the permits were not filed until 2018. The Reassessment, and the Phase-In Act, look back two years, to 2018, and thus McCarthy's property is seen as having improvements in 2018. Therefore, he is not eligible for the benefits of the phase in. His neighbor's property was built around the same time McCarthy's home was built, but the permits were filed in 2017. As a result, the neighbor's property is not considered an improved property in 2018, and it receives the full benefits of the phase in. Due to the disparate impact the phase-in act had on McCarthy and his nearly identical neighbor, as well as other neighbors, McCarthy commenced this action arguing the Phase In Act is unconstitutional.

**MCCARTHY'S PETITION (MOTION SEQ. 001),
MCCARTHY'S MOTION FOR A TRO AND
PRELIMINARY INJUNCTION (MOTION SEQ. 002)
AND THE COUNTY DEFENDANTS'**

MOTION TO DISMISS (MOTION SEQ 005)⁴

It is well established that to prevail on a motion for preliminary injunctive relief, the movant must clearly demonstrate a likelihood of success on the merits, the prospect of irreparable harm or injury if the relief is withheld and that a balance of the equities favors the movant's position (see *Wheaton/TMW Fourth Ave., LP v. New York City Dept. of Bldgs.*, 65 AD3d 1051 [2d Dept. 2009]; *Pearlgreen Corp. v. Yau Chi Chu*, 8 AD3d 460 [2d Dept. 2004]). The decision to grant a preliminary injunction is committed to the sound discretion of the court (see *Tatum v. Newell Funding, LLC.*, 63 AD3d 911 [2d Dept. 2009]; *Bergen-Fine v. Oil Heat Inst., Inc.*, 280 AD2d 504 [2d Dept. 2001]), as the remedy is considered to be a drastic one (see *Doe v. Axelrod*, 73 NY2d 748 [1988]). Consequently, a clear legal right to relief which is plain from undisputed facts must be established (see *Wheaton/TMW Fourth Ave., LP v. New York City Dept. of Bldgs.*, 65 AD3d 1051, *supra*; *Gagnon Bus Co., Inc. v. Vallo Transp., Ltd.*, 13 AD3d 334 [2d Dept. 2004]; *Blueberries Gourmet v. Aris Realty*, 255 AD2d 348 [2d Dept. 1998]).

Article 63 of the CPLR governs the issuance of preliminary injunctions and temporary restraining orders. Pursuant to CPLR § 6301, a preliminary injunction may be granted in an action for permanent injunctive relief to restrain the defendant, during the pendency of said action, from doing that which the plaintiff seeks to enjoin permanently,

⁴Because the County's motion could render the petition and the Co-Defendants' motions moot, the court will consider that motion together with McCarthy's petition and motions. Further, during oral arguments, it was all but conceded that the District and the Town were not proper parties to this litigation.

by the final judgment. In addition, a preliminary injunction may be granted in any action where it appears that a defendant threatens, or is about to do, or is doing, or procuring to be done, an act in violation of the plaintiff's rights, respecting the subject of the action, which is likely to render the judgment ineffective. To constitute the "subject of the action" within the contemplation of CPLR § 6301, the property or assets for which restraint is sought must be unique or sufficiently specific and the very object of the claim giving rise to the demand for preliminary injunctive relief (*see Credit Agricole Indosuez v. Rossiyskiy Kredit Bank*, 94 NY2d 541 [2000]; *Coby Group, LLC v. Hasenfeld*, 46 AD3d 593 [2d Dept 2007]).

Likelihood of Success on the Merits

Regarding the equal protection and due process claims, McCarthy acknowledges that neither the Federal constitution nor the New York State constitution require that all taxpayers be treated the same. (*Foss v. City of Rochester*, 65 NY 2d 247 [1985]). Instead, the constitutions require "...that those similarly situated be treated uniformly." *Id.* at 256. The *Foss* case is cited to by all parties and shares some similarities with the matter herein. In *Foss*, the city of Rochester passed legislation that differentiated between two types of properties, homestead and non-homestead. Homestead properties were largely residential properties with no more than three families living on them. Non-homestead were largely commercial properties that included properties with four or more

families living on them. The *Foss* court did not take issue with taxing the two classes differently, or that the non-homestead properties shouldered nearly double the tax burden despite the fact that there were nearly an equal number of homestead and non-homestead properties. The problem in *Foss* was that non-homestead properties within the city limits of Rochester were taxed a different rate than non-homestead properties outside the city limits, even though all such properties were within the same county. This was caused by a situation not present in the within matter, in that within the county there were separate assessing units that could levy taxes. Regardless, the *Foss* court made it clear that such geographical distinctions were not “per se prohibited”, but under the facts of that case resulted in “invidious discrimination”.

To be clear, the court’s issue in *Foss* was not creating two classes and treating them differently, but was the treatment of similarly situated parties within the same class:

Monroe County is taxing non-homestead property in Rochester at a higher rate than similar non-homestead properties outside of the City of Rochester simply because, under the provisions of article 19, Rochester imposes a higher share of the tax levy on non-homestead properties than do the other towns in the county. *Id.* at 257.

Relying on *Foss* and other authority, McCarthy argues that the Phase In Act treats him differently than those similarly situated. He likens the Phase In Act’s impact upon him and his neighbor, and other properties within the Town, to the impacts upon the

similarly situated non-homestead properties in *Foss*. Citing to *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty.*, 488 US 336 (1989), he states that it is unconstitutional to reassess one property at FMV while assessing a similarly situated property at less than FMV. In *Allegheny*, taxes were to be based upon FMV. Where a property was recently sold, the tax rate was based upon 50% of the sale price. For properties that were not recently conveyed, the tax rate ended up being considerably lower. One of the plaintiffs in *Allegheny* paid 33 times more in real estate taxes than a similarly situated property simply because the plaintiff's property had been recently conveyed and the neighbor had not. The United State Supreme Court found that such a significant difference violated the plaintiffs' equal protection and due process rights. *Id.* Perhaps most closely aligned to the facts of this case, the Appellate Division, Third Department in *Montgomery v. Board of Assessment Review of Town of Union*, 30 AD3d 747 [3rd Dept 2006]) found, on a motion for summary judgment, that an issue fact existed as to whether a tax system where newly constructed homes were taxed based upon FMV, but older homes were not, was improper. The *Montgomery* court does not explain what basis the older homes were taxed on.

McCarthy alleges that dividing properties into new construction and not new construction has no rational basis, and is arbitrary and capricious. The court must note that while McCarthy repeatedly uses the phrase "new construction", the scope of the exception of the Phase In Act is much broader in that it includes improved properties, not

just newly constructed homes.

Based upon the aforementioned authority, among others, McCarthy claims he faces the same type of discrimination as the taxpayers in those cases at the hands of the Phase-In Act, leading to the conclusion that he will likely succeed on the merits on his constitutional claims. As his 42 USC §1983 claim is based upon the denial of his equal protection and due process rights, they are linked together and he has a likelihood of success on that claim as well.

As for his procedural due process claims, McCarthy alleges the timing of the adoption of Phase-In Act deprives him of the ability to challenge his assessments for 2020-21 and 2021-22 tax years.

Finally, as for his claim pursuant to New York State Constitution Article 16, Section 2, McCarthy quotes the section directly: "The legislature shall provide for the supervision, review and equalization of assessments for purposes of taxation. Assessments shall in no case exceed full value." The Phase In Act results in his property being taxed at a rate up to 60% higher than fair market value.

Irreparable Injury

Because he has been denied constitutional rights, McCarthy argues that irreparable injury is presumed. (*Mitchell v Cuomo*, 748 F.2d 804 [2d Cir. 1984]). Further, he claims that the higher tax burden has diminished the value of his home, preventing him from

selling it and recovering its full FMV. Finally, he alleges that if he is forced to pay the phase-in rate of taxes, he will never be able to recover his overpayment should the act be found unconstitutional at a later time due to the fact of ever increasing tax rates to cover the taxes not paid by the under taxed, under assessed properties.

Balance of the Equities

As for the balancing of the equities, McCarthy claims that if the Phase In Act is allowed to proceed, and he must pay the phase in tax rate, he will be forced at a later time to seek a refund. As argued *supra*, he claims that he will never fully get his refund because the under taxed, under assessed properties will not be paying their share, meaning homes like his will continue to get increases in taxes. In other words, by seeking and being entitled to a refund, he is in essence causing the County to raise his taxes.

The court notes that, other than seeking a TRO which has been denied, the arguments in favor of a preliminary injunction in Motion Seq. 002 are virtually the same as those in support of the petition and complaint.

The County Defendants both oppose the petition and complaint and the motions, and also move to dismiss the petition and complaint pursuant to CPLR §3211(a)(7). In reviewing a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court is to accept all facts alleged in the complaint as being true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the

alleged facts fit within any cognizable legal theory (see *Delbene v. Estes*, 52 AD3d 647 [2nd Dept. 2008]; see also *511 W.232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144 [2002]. Pursuant to CPLR § 3026, the complaint is to be liberally construed. *Leon v. Martinez*, 84 NY2d 83 [1994]. It is not the court's function to determine whether plaintiff will ultimately be successful in proving the allegations. *Aberbach v. Biomedical Tissue Services*, 48 AD3d 716 [2nd Dept. 2008]; see also *EBCI, Inc. v. Goldman Sachs & Co.*, 5 NY3D 11 [2005].

The pleaded facts, and any submissions in opposition to the motion, are accepted as true and given every favorable inference (see *511 W. 323rd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d at 151-152; *Dana v. Malco Realty, Inc.*, 51 AD3d 621 [2d Dept 2008]; *Gershon v. Goldberg*, 30 AD3d 372, 373 [2d Dept 2006]). However, a court may consider evidentiary material submitted by a defendant in support of a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7) (see CPLR § 3211[c]; *Sokol v. Leader*, 74 AD3d at 1181). “When evidentiary material is considered” on a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), the criterion is whether the plaintiff has a cause of action, not whether they have properly stated one, and unless it has been shown that a material fact as claimed is not a fact at all or that no significant dispute exists, the dismissal should not be granted (*Guggenheimer v. Ginzburg*, 43 NY2d at 275; see *Sokol v. Leader*, 74 AD3d at 1182).

The County Defendants start out by arguing the well-settled law that a legislative

act, such as the Phase In Act, has a strong presumption of constitutionality. (*Hotel Dorset Co. v. Trust for Cultural Resources of City of N.Y.*, 46 NY2d 358 [1978]). Further, the County Defendants cite to *Foss, supra*, that taxpayers do not need to be treated the same, but that those who are similarly situated should be treated uniformly.

The County Defendants claim that McCarthy does not have standing because the Phase In Act, by exempting him from its reach, does not impact him merely because he may face a “less immediate reduction in property taxes.” The court rejects this argument outright. McCarthy has very clearly established he is impacted by the Phase In Act due to a nearly 33 1/3% increase in his real estate taxes.

Assuming he does have standing, the County Defendants argue his constitutional rights have not been violated, and cite to *Tax Equity Now NY LLC v City of New York*, 182 AD3d 148 (1st Dept 2020). In *Tax Equity*, the plaintiffs make a similar argument to McCarthy in that their constitutional rights have been violated based upon the fact that they are being treated differently for real estate tax purposes than those similarly situated to them. The Real Property Tax Law set up four classes of property in New York City, to wit: Class 1- one, two and three family residential properties, Class 2- all other residential property including condominiums, cooperatives and rental buildings, Class 3- utility real property, and Class 4- all other real property. The RPTL also contains a tax cap on each class of properties. For Class 1 properties, assessed values may not increase more than 6% in one year, or more than 20% in any five year period.

The *Tax Equity* plaintiffs argued, *inter alia*, that the tax cap was unconstitutional because certain Class 1 properties would appreciate at a faster rate than others, resulting in the rapidly appreciating properties being under assessed when compared to more properties whose value appreciated slowly. The First Department acknowledged that plaintiff's argument was accurate, and that there was disparate treatment within a single class, but still found the legislation was constitutional:

Even though plaintiff is correct that the statutorily imposed assessment caps provided for in RPTL 1805(1) have a different effect on otherwise similarly situated Class One properties based on how much these properties have appreciated, such different effect is not actionable here because the legislature has a rational basis for making a distinction between those properties which appreciate rapidly and those which appreciate more gradually. The legislature adopted the assessment caps provided for in RPTL 1805(1) to protect homeowners from *sudden dramatic tax increases* which would make continued home ownership more burdensome and unaffordable for many homeowners. This distinction is not palpably arbitrary, does not amount to invidious discrimination and is rationally related to the achievement of a legitimate governmental purpose. *Id.* at 158, citing to *Trump v Chu*, 65 NY2d 20 [1985](emphasis added).

The *Tax Equity* court then cites to *Foss, supra*, for the proposition that taxpayers need not be treated equally, but that those within the same class be treated uniformly. In citing to *Nordlinger v Hahn*, 505 US 1 (1992), the Tax Equity court found it was not a violation of equal protection that the tax caps created "dramatic disparities" among similarly situated property owners, because the tax caps rationally furthered a legitimate state purpose. In

Tax Equity, that state purpose, like in the within matter, was to avoid the shock of sudden increases in property taxes. *Tax Equity* at 158.

Relying on *Tax Equity*, *Nordlinger* and other authority, the County Defendants herein argue that the Phase In Act cannot be found unconstitutional. This court is constrained to agree. Though the *Tax Equity* court was dealing with a tax cap, as opposed to an exemption for improved property, the result of disparate treatment among similarly situated properties is the same. Herein, the Phase In Act is applied uniformly among the class, even though some taxpayers receive a greater benefit from it. *Id.*

Further, this court finds that *Foss, supra*, is distinguishable from the facts herein. In *Foss*, there were a number of different taxing units, and because of that properties within the same class were taxed differently based upon where they were located geographically and which tax unit they were in. Because some were impacted by more than one taxing unit, they were taxed a completely different rate than those in other taxing units. Herein, like in *Tax Equity*, there is one taxing unit, Nassau County, and that one law is applied uniformly among all properties, even though the impact of it varies on certain homeowners.

McCarthy's argument that treating new construction differently than existing homes is unconstitutional is further unavailing. The U.S. Supreme Court in *Nordlinger, supra*, clearly finds that a taxing authority may treat new construction differently:

...the State legitimately can conclude that a new owner at the time of acquiring his property does not have the same reliance

interest warranting protection against higher taxes as does an existing owner. The State may deny a new owner at the point of purchase the right to “lock in” to the same assessed value as is enjoyed by an existing owner of comparable property, because an existing owner rationally may be thought to have vested expectations in his property or home that are more deserving of protection than the anticipatory expectations of a new owner at the point of purchase. A new owner has full information about the scope of future tax liability before acquiring the property, and if he thinks the future tax burden is too demanding, he can decide not to complete the purchase at all. By contrast, the existing owner, already saddled with his purchase, does not have the option of deciding not to buy his home if taxes become prohibitively high. *Nordlinger v. Hahn* at 12-13.

McCarthy purchased his property in December 2017, which was a month after the County Executive election had been decided, and where the winning party had ran on a platform of reassessment and changing the real estate taxing system. That McCarthy may approve of the reassessment, but disapprove of the Phase In Act does not change the fact that he was in the position described in *Nordlinger*.

What is harder to reconcile is the neighbor across the street. The tax rolls in Nassau County look back two years. No argument is made that this look back period is unconstitutional or void for some other reason. Nor does the court so find, or would it so find if the look back was one year, or three years. Of course, if it was one year, McCarthy and his neighbor would benefit from the phase in, and if it was three years, neither of them would benefit from the phase in. As it is, the look back is two years, and because the permits for McCarthy’s property were filed in 2018, the phase in exemption applies to

him. It may not seem fair, and the court agrees it is not, but that does not make it unconstitutional. The line had to be drawn somewhere, and no one complains that a two year look back is unreasonable. As such, the distinction between McCarthy and his neighbor results in each of them being impacted differently, but not in an unconstitutional manner.

McCarthy further argues that it is unconstitutional to assess his home based upon FMV while assessing other homes at less than FMV (*See Montgomery v. Board of Assessment Review Town of Union, supra*). He claims that while the County defendants use a different vernacular, in that they claim that all parties are taxed based upon FMV but some are entitled to a certain exemption, it is a distinction without substance. In the end, one house is assessed at FMV and another is not. The problem with this argument is not in its logic but its application. There are numerous exemptions of which McCarthy does not complain that some of McCarthy's neighbors may be entitled to that he may not. For example, if McCarthy is not a veteran, but his neighbor is, his neighbor is entitled an exemption that McCarthy is not. The same can be said for his neighbors that are over 65 years of age. While McCarthy and his neighbors may all be entitled to the STAR exemption, and it is alleged McCarthy has taken advantage of it, his neighbors who are over the age of 65 actually get a bigger exemption than he does. Finally, there is an exemption for clergy-owner property. The argument that none of these reductions are "exemptions" but just an excuse to base real estate taxes on something less than FMV

would be hard to argue logically, but they are accepted as exemptions, they are referred to as exemptions in the law and in the New York State Constitution, Art. 16 §1, and they are not being challenged as being exemptions. This court cannot reconcile or justify allowing the STAR exemption to remain legal as an exemption, but reject that Phase-In act because it is only an “exemption” in name. In the end, the impact is exactly the same- residents pay less in property taxes than they would have absent the exemption.

This court does not find its reasoning at odds with the holding in *Montgomery v. Board of Assessment Review of Town of Union*. In that case, the court found that new construction was taxed at FMV and older homes were not. Herein, the court finds that all properties are being taxed at FMV but some are entitled to an exemption that others are not. To the extent that this court’s reasoning can be seen as contradictory to that of *Montgomery*, this court then declines to follow the reasoning of *Montgomery*, and chooses to follow the reasoning of *Tax Equity, supra*.

In light of all the foregoing, the court finds that McCarthy has failed to establish a likelihood of success on the merits of the constitutional claims. Further, as his §1983 claim was linked to the alleged violations of his constitutional rights, he does not have a likelihood of success on the merits of that claim as well.

Turning to his NYS Constitutional Art. 16, Section 2, argument, the court notes that the *Tax Equity* court found that Art 16, Section 2 only applied to the New York State Legislature: “...to the extent plaintiff argues that the City defendants, separate from the

State defendants, have failed to equalize assessments, this section of the New York State Constitution is clearly directed at the state legislature and does not in any way apply to the City defendants.” *Tax Equity* at 163. McCarthy complains that the First Department offers no authority for this finding, and that the state has the power to delegate taxing authority to other municipalities. While it is true the *Tax Equity* court did not cite to any case law indicating Art 16, Section 2 only applies to the state, McCarthy offered no authority that states it applies to every municipality in the state. However, assuming it does apply to the Nassau County legislature, the court finds the Phase in Act does not violate Art. 16 Section 2. Based upon the terms of the Phase In Act, McCarthy has not established that the property is being taxed at greater than “full value”. As such, the court finds McCarthy is unable to establish a likelihood of success on the merits of the Art. 16 Section 2 claim.

For similar reasons, the court finds that the complaint and petition fails to state a cause of action. The court finds no evidence of a constitutional violation of any section of the Federal or New York State Constitutions, nor has McCarthy stated a claim alleging his civil rights have been violated under 42 USC §1983. The Art. 78 must also be dismissed as McCarthy fails to state a claim that any action by any of the Defendants was arbitrary or capricious.

Finally, the motions of the District (Motion Seq. 003) and the Town (Motion Seq. 004) will be granted. Neither entity was a proper party to these proceedings as they had

no control over the amount of tax paid by McCarthy. Their only authority was to collect taxes assessed by the County Defendants and turn it over to the County Defendants for the County Defendants to then disburse. Further, by dismissing the complaint against the County Defendants, the complaint against the District and Town have been rendered moot.

Accordingly, it is hereby

ORDERED, that McCarthy's motion for a preliminary injunction (Motion Seq. 001) is DENIED in its entirety; and it is further

ORDERED, that McCarthy's motion for a TRO and a preliminary injunction (Motion Seq. 002) is DENIED in its entirety; and it is further

ORDERED, that the County Defendants' motion to dismiss the complaint and petition for failing to state a claim pursuant to CPLR §3211(a)(7) is GRANTED in its entirety; and it is further

ORDERED, that the District's motion to dismiss the complaint and petition against them for failure to state a claim (Motion Seq. 003) is GRANTED as the District was not a proper party to this proceeding and as dismissal of the complaint and petition against the County Defendants render the complaint and petition moot as against the District; and it is further

ORDERED, that the Town's motion to dismiss the complaint and petition against them for failure to state a claim (Motion Seq. 004) is GRANTED as the District was not a

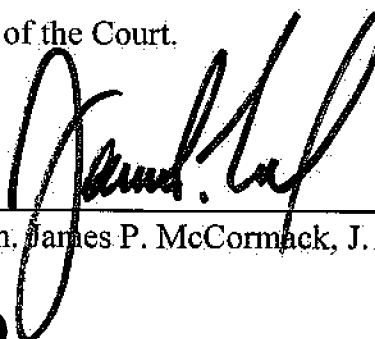
proper party to this proceeding and as dismissal of the complaint and petition against the County Defendants render the complaint and petition moot as against the Town.

The court has considered all other arguments raised by the parties, including the arguments about the alleged lack of notice of the passage of the Phase In Act and finds them all to be without merit. Any relief not specifically granted is denied.

The complaint and petition are dismissed.

This constitutes the Decision and Order of the Court.

Dated: September 29, 2020
Mineola, N.Y.



Hon. James P. McCormack, J. S. C.

ENTERED

Oct 07 2020

NASSAU COUNTY
COUNTY CLERK'S OFFICE