Matter of Jai Ganesh Realty, LLC v Soliman
2022 NY Slip Op 35186(U)
November 17, 2022
Supreme Court, Bronx County
Docket Number: Index No. 811393/2021E
Judge: Mary Ann Brigantti
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
--X
In the Matter of the Application of JAI GANESH REALTY, LLC,

Petitioner,

DECISION and ORDER
Index No. 811393/2021E

For a Judgment under Article 78 of the Civil Practice Law and Rules

-against-

SHERIF SOLIMAN, in his capacity as THE COMMISSIONER OF FINANCE OF THE CITY OF NEW YORK, and CITY OF NEW YORK,

Respondent.
--X
HON. MARY ANN BRIGANTTI

Upon the foregoing papers, the petitioner Jai Ganesh Realty, LLC ("Petitioner") seeks an order pursuant to CPLR article 78, vacating and reversing the April 21, 2021 final administrative determination of the New York City Department of Finance that denied Petitioner's request to recalculate abatement benefits under the "ICAP" program, and for such other and further relief as this Court deems just and proper. The respondents Sherif Soliman, in his capacity as the Commissioner of Finance of the City of New York, and the City of New York (hereinafter collectively referred to as "Respondent") cross-move for an order pursuant to CPLR 3211 and 7804(f) dismissing the verified petition as a matter of law, granting Respondent costs, fees, and disbursements, together with such other and further relief as this Court deems just and proper. Petitioner opposes the cross-motion.

Background

Petitioner is the owner of the real property known as 500 Exterior Street, Bronx, New York, a/k/a Bronx Block 2351, Lot 21 (the "Premises"). Respondent is empowered by the New York City Charter and Administrative Code to fix real property tax assessments on all parcels of real property located within New York City.

This proceeding initiated pursuant to CPLR article 78 seeks to reverse a final administrative decision by Respondent dated April 21, 2021. This matter concerns Respondent's implementation of certain abatement benefits for the Premises under the Industrial Commercial

Abatement Program ("ICAP"). ICAP allows property owners who are developing commercial or industrial property to obtain an abatement from real estate taxes for set number of years based upon a specific methodology for calculating the abatement.

The Premises is presently improved by an 11-story hotel. At some unspecified time in 2011, Petitioner filed a preliminary application with Respondent for ICAP benefits and was assigned application number 14289. Later that year, Petitioner obtained a building permit from the New York City Department of Buildings ("DOB") and commenced construction on the hotel. However, in or around July 2011, all construction stopped due to a lack of funding for the project. Construction did not resume until more than two years later, in or around April 2014. Petitioner states that it proceeded as if the initial ICAP application (#14289) was abandoned.

On December 18, 2013, Petitioner filed a new preliminary ICAP application which Respondent assigned as application number 18675. On April 15, 2014, the DOB issued a renewal permit for the construction of a hotel on the Premises. Almost immediately thereafter, the construction began anew. Petitioner alleges that, as required by the ICAP program, it filed a final application for ICAP benefits on June 12, 2014, even though construction was not yet completed. Construction continued, and on July 27, 2017, a temporary certificate of occupancy ("CO") was issued.

Petitioner alleges that since the CO was temporary, additional work was to be performed, and it was the regular practice of the Department of Finance ("DOF") assessor to issue additional physical increases that record the additional work. Under ICAP rules, only four years of increases can form the basis of an ICAP abatement. Therefore, on March 26, 2021, Petitioner's owner submitted a letter to the DOF stating that it would forego any additional ICAP abatement benefits past the post-completion year. Petitioner asserts that, in light of the above, the first year of the ICAP should have been the fiscal year in 2019 (7/1/2018 – 6/30/2019 tax year). However, Respondent began the ICAP benefits in fiscal year 2017 (7/1/2016 – 6/30/2017 tax year) and used the 2011 building permit as the base year to calculate the ICAP base benefit. Annexed to the petition is an email from Respondent's employee Erica Chan dated April 21, 2021. The email states that the case has been reviewed, and:

> "[t]he applicant and representative failed to withdraw the application #14289 when submitted the application #18675, and agreed to the denial letter which was issued for application #18675. We implemented the ICAP abatement under application #14289 on 12/3/2018 from tax year 2016/17 to 18/19 to parent lot 2, and future tax year on new lot

> 21. There is no rejection from applicant and representative. Applicant and representative is responsible for all your decision making. We are unable to change the final decision after years" (Petition at Ex. G).

Petitioner argues that Respondent should have treated the December 18, 2013 preliminary application, and the April 15, 2014 building permit (the second application, #18675) as the beginning of ICAP-related work. The 2011 building permit should not have been considered because under ICAP's predecessor program, called the Industrial Commercial Incentive Program ("ICIP"), once a construction project is dormant for more than two years, the project is deemed abandoned and a new ICIP application starts the process anew. Petitioner asserts "upon information and belief," Respondent followed this same procedure for ICAP applications. Petitioner further alleges that on February 10, 2017, DOF enacted Chapter 36 of the Rules of the City of New York ("RCNY") which codified this practice.

Petitioner thus contends that Respondent should have used the April 15, 2014 building permit as the first building permit to determine ICAP benefits, which would have entitled Petitioner to all increases that occurred as a result of construction that was performed during the four-year period after April 15, 2014. The first application should be deemed abandoned and a nullity, and only the second application should have been used. Petitioner alleges that it specifically requested this exact relief in an email to Erica Chan on April 19, 2021. In a response that same day, Ms. Chan wrote: "I got what you mean. I will update the permit date to 4/15/2014" (Petition at Ex. G). Nevertheless, this relief was not implemented in the final determination.

Petitioner asserts that, in light of this error, Petitioner has been damaged from fiscal year 2019 through fiscal year 2022 in the approximate amount of $1,046,000 in property tax overcharges, and for the next 21 years, Petitioner will be injured in an amount of $5,500,000 if this error is not corrected. Petitioner contends that Respondent acted arbitrarily and capriciously, and in violation of law, their rules, regulation and practice in failing to properly calculate ICAP benefits.

Respondent cross-moves, pre-answer, to dismiss the petition. Respondent argues that the petition must be dismissed as a matter of law. First, the exclusive procedure for a taxpayer to challenge a tax assessment under these circumstances is a proceeding under article 7 of the Real Property Tax Law ("RPTL"). Respondent further asserts that the facts as alleged in the petition establish that Respondent's decision to grant ICAP abatement benefits was done in accordance with applicable statutes and not arbitrary or capricious. Respondent alleges that Petitioner improperly seeks to rely on rules in place under ICAP's predecessor (ICIP), which ended in 2008, and the rules specifically implemented for ICAP in March 2017.

In opposition to the motion and in further support of the petition, Petitioner asserts that under either the former ICIP rules or newly promulgated ICAP rules, Petitioner was entitled to ICAP benefits utilizing the April 15, 2014 building permit. Petitioner alleges that the applicable regulations deemed a project as "abandoned" where, as here, construction work commenced by an applicant had ceased for at least two consecutive years. Under such circumstances, a subsequent building permit will be deemed the first building permit to determine the effective start date for the calculation of ICAP benefits. Petitioner further submits an affidavit of its member, Nik Patel, who attests that the renewed building permit constituted a "new project" since the two-year delay in construction caused an increase in building costs that exceeded 10%. Petitioner stresses that Respondent's custom and practice at relevant times was to follow the former ICIP rules and to use the 2014 building permit as the initial permit. Petitioner contends that Respondent acted arbitrarily in failing to comply with its own promulgated rules in effect at the time of the applications, and Respondent's final determination is thus not entitled to deference.

Petitioner further asserts that, contrary to Respondent's contentions, its CPLR article 78 proceeding is the proper vehicle to challenge the denial of benefits under ICAP. Petitioner alleges that Respondent failed to correct a clerical error in accordance with New York City Administrative Code §11-206 thus warranting an article 78 action. Furthermore, such a proceeding is appropriate where the taxpayer is challenging the taxing authority's method of tax assessment. Petitioner also alleges that Respondent is barred from claiming that an article 78 proceeding is improper since the issue was never raised in its final determination letter dated April 21, 2021.

Finally, Petitioner seeks leave to amend the petition to conform it to the proof submitted to include the claim that the second application concerned a "new project" in accordance with ICIP rule 19 NYCRR 14-05(g) and ICAP rules, RCNY Chapter 36 §§36-04 and 36-05(b).

Respondent submits a memorandum of law in reply to the opposition and further support of its cross-motion. Respondent's contentions in reply are addressed *infra* if necessary.

Standard of Review

"In the context for a CPLR article 78 proceeding, it is established that judicial review is limited to a determination of whether the administrative decision is arbitrary and capricious, or lacks a rational basis … and where such rational basis exists, an administrative agency's construction and interpretation of its own regulations are entitled to great deference" (*Slesinger v. Department of Hous. Preserv. & Dev. of City of N.Y.*, 39 A.D.3d 246 [1st Dept. 2007]). "The test for whether an administrative agency's determination is arbitrary and capricious is whether the determination 'is without sound basis in reason and is generally taken without regard to the facts'" (*Matter of Muhammad v. Zucker*, 137 A.D.3d 429, 430 [1st Dept. 2016], quoting *Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d 222, 231 [1974]).

Respondent moves, pre-answer, to dismiss the petition. In response to a CPLR article 78 proceeding, a respondent may "raise an objection in point of law by setting it forth in [its] answer or by a motion to dismiss the petition, made upon notice within the time allowed to answer" (*Matter of Levy v. SUNY Stony Brook*, 185 A.D.3d 689, 690 [2d Dept. 2020]; CPLR 7804[f]; CPLR 3211[a]). Where a defendant moves to dismiss pursuant to CPLR 3211(a)(7) and 7804(f), "only the petition is considered, all of its allegations are deemed true, and the petitioner is accorded the benefit of every possible [favorable] inference" (*id*. [cleaned up]). A petition sufficiently states a claim pursuant to article 78 where, as relevant here, it alleges that the determination sought to be reviewed as "made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (*id*. [cleaned up]). While "factual averments set forth in a petition must be taken as true in the context of a motion to dismiss pursuant to CPLR 3211(a) and 7804(f), no such deference is given to the legal conclusions drawn by the pleader nor its interpretation of the statutes [or contracts] involved" (*id*. [cleaned up]). Bare legal conclusions, without more, are insufficient to state a valid claim for relief under article 78 (*id*.).

Furthermore, "factual claims either inherently incredible or flatly contradicted by documentary evidence" are not entitled to any presumption of truth … when evidentiary material outside of the pleading's four corners are considered, and the motion is not converted into one for summary judgment, the question becomes whether the pleader has a cause of action, not whether the pleader stated one and, unless it has been shown that a material fact claimed by the pleader is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (*id*. at 691 [cleaned up]; *see also Maas v. Cornell Univ.*, 94 N.Y.2d 87, 91 [1999]). Dismissal is appropriate only where the documentary evidence submitted flatly rejects a petitioner's well-pleaded and cognizable claim, and "conclusively establishes that [petitioner] has no cause of action" (*Basis Yield Fund [Master] v. Goldman Sachs Group, Inc.*, 115 A.D.3d 128, 134 [1st Dept. 2014]).

Applicable Law and Analysis

The Court first addresses Respondent's threshold contention that the petition must be dismissed because a proceeding under CPLR article 78 cannot be used to challenge an excessive tax assessment. It is settled that RPTL article 7 "is the exclusive avenue for judicial review of real property tax assessments 'unless otherwise provided by law'" (*Matter of Orchard Partners, LLC v. New York City Dept. of Fin.*, 204 A.D.3d 527, 527-28 [1st Dept. 2022], citing *City of Mount Vernon v. State Bd. of Equalization & Assessment*, 44 N.Y.2d 960, 962 [1978], quoting RPTL §700). In other words, a taxpayer alleging "illegality, overvaluation or inequality as to assessments" must commence a proceeding under RPTL article 7 (*Kahal Bnei Emunim v. Town of Fallburg*, 78 N.Y.2d 194, 204 [1978], quoting RPTL §706). Thus rule also applies when a taxpayer is challenging an alleged wrongful denial of a partial tax exemption, as such denial means that the property is subject to an increased tax burden (*see 1688 Rojav Realty LLC v. Frankel*, 32 Misc.3d 1247[A] [Sup Ct, NY Cty, 2011], citing *inter alia*, *Stabile v. Half Hollow Hills Cent. School Dist. of Huntington & Babylon*, 83 A.D.2d 945, 945 [2d Dept. 1981] and *Matter of Laurel Hill Farms, Inc. v. Board of Assessors of Nassau County*, 51 A.D.3d 794, 795 [2d Dept. 2008]). When determining whether a proceeding should have been brought under RPTL article 7, courts look to whether the gravamen or crux of the petition is that the taxpayer is alleging that it was subject to an excessive tax assessment (*see Matter of 9 Orchard Partners, LLC*, 204 A.D.3d at 528; *see also Matter of Kraebel v. New York City Dept. of Fin.*, 217 A.D.2d 416 [1st Dept 1995]). The RPTL defines "excessive assessment" as "an entry on an assessment roll of the taxable assessed valuation of real property which is excessive because the real property failed to receive all or a portion of a partial exemption to which the real property or owner thereof is entitled pursuant to the law authorizing the partial exemption" (RPTL §701[4][b]).

Relevant to the present action, the First Department has recently noted, "…other courts in this state have specifically held that denial of participation in, or benefits under, the ICAP program, as well as under similar abatement programs, are exclusively reviewable under article 7 of the RPTL, and these holdings have not been disturbed" (*Matter of 9 Orchard Partners, LLC.*, 204 A.D.3d at 528, citing *1688 Rojav Realty LLC v. Frankel*, 32 Misc.3d 1247[A]; and *NYCTL 2011-A Tr. v. 816 Crossbay LLC*, 42 Misc.3d 1203[A] [Sup Ct, Queens Cty, 2013]). In *1688 Rojav Realty LLC*, the respondent-Department of Finance denied the petitioner's ICAP benefits application because petitioner allegedly did not file a timely final application within one year of the date it first obtained its building permit. The petitioner commenced a proceeding under CPLR article 78, arguing that the one-year time period should have been calculated from a different date, pursuant to earlier correspondence sent by respondent. The court granted the respondent's motion to dismiss, holding that since the crux of the petitioner's claim is that it would be subject to an excessive tax assessment caused by the ICAP benefits denial, an action to challenge that decision fell solely within the purview of RPTL article 7 (32 Misc.3d 1247[A] at *3). In *816 Crossbay LLC*, a foreclosure proceeding on a tax lien certificate, the court held that the property's owners' claim that it was wrongfully denied a tax abatement under ICIP (the predecessor to ICAP) was equivalent to a claim that the tax assessment was "excessive," and had to be presented in a proceeding under RPTL article 7 (42 Misc.3d 1203[A] at *2).

In this case, the gravamen of the petition is that Respondent failed to properly process Petitioner's applications for ICAP abatement benefits, resulting in a partial denial. As a result, Petitioner claims that it did not receive the full tax abatement that it was entitled to, resulting in an overcharge of real property taxes over the past four fiscal years. This Court finds that such allegations are analogous to the claims made by petitioners in the matters outlined above, cited with approval by the First Department. Such allegations constitute a challenge to an "excessive assessment" and Petitioner's exclusive remedy was to commence a proceeding under RPTL article 7, not CPLR article 78.

Petitioner's contentions on this issue are unavailing. On this point, Petitioner argues: (1) its CPLR article 78 action is proper because it is attempting to correct Respondent's clerical error in making a tax assessment, (2) Petitioner is challenging the respondent's method of tax assessment, which is properly commenced in a CPLR article 78 proceeding, and (3) Respondent is barred from claiming that this proceeding is improper because Respondent never raised this issue in its final determination letter dated April 21, 2021.

It is true that a proceeding under CPLR article 78 is appropriate if the petitioner-taxpayer is alleging that a tax assessment is erroneous due to a clerical error (*Matter of Better World Real Estate Group v. New York City Dept. of Fin.*, 122 A.D.3d 27, 36 [2d Dept. 2014]; *see Board of Managers of Liberty View Condominium v. New York City Department of Finance*, 188 A.D.3d 450, 451 [1st Dept. 2020]; New York City Administrative Code §11-206). "Clerical error" is undefined by Admin. Code §11-206, therefore Courts have given effect to the plain meaning of the phrase (*Matter of Better World Real Estate Group*, 122 A.D.3d at 35). "Generally, a clerical error is an error resulting from a minor mistake or inadvertence, such as in writing or copying something on the record, rather than an error in reasoning or judgment" (*id*. at 36 [internal citations omitted]).

Here, even when accepting Petitioner's allegations as true, Respondent's final determination dated April 21, 2021, was not the result of an inadvertent mistake, or a writing or copying error. The final determination states that the applicant failed to withdraw the initial completed ICAP application (#14289), when it submitted and completed its second application (#18675), and the applicant agreed to the denial letter that was issued for the second application. Respondent thus implemented the ICAP abatement benefits under the first application. Such language indicates that reasoning and judgment went into making this determination. While Petitioner clearly disagrees with that reasoning, there was no clerical error involved. Furthermore, the earlier email from Respondent's employee is not evidence of a clerical error. If anything, the email itself was an error that Respondent subsequently corrected when it sent its final determination.

Petitioner also argues that its proceeding under CPLR article 78 is proper because it is challenging the method of Respondent's assessment. However, this exception only applies where the taxpayer's "challenge is directed at 'the alleged illegal use of a method involving *several properties*" which is not the case here (*78 S. First Hous. Dev. Fund Corp. v. Crotty*, 150 A.D.2d 218, 221 [1st Dept. 1989][Milonas, J., dissenting][emphasis added], *rev'd on dissenting memo*, 75 N.Y.2d 982 [1990], quoting *Matter of Park Place Coop. v. Board of Assessors of County of Nassau*, 102 A.D.2d 893 [2d Dept. 1984]).

Finally, Petitioner's contention that Respondent is barred from claiming that a CPLR article 78 proceeding is improper is without merit. Respondent has not changed the substantive reasoning behind its final determination. Respondent could not have raised the issue of Petitioner's improper procedure at that time, before any action to challenge the final determination was commenced.

In light of the above, the Court finds that the petition must be dismissed because Petitioner's challenge is exclusively reviewable under article 7 of the RPTL (*Matter of 9 Orchard Partners, LLC*, 204 A.D.3d at 529). Consequently, the Court does not reach the additional contentions made in support of, and in opposition to, Respondent's motion to dismiss, and Petitioner's request for leave to amend is moot.

Conclusion

Accordingly, it is hereby

ORDERED, that the petition is denied and this proceeding is dismissed, and the Clerk of this Court is hereby directed to enter judgment accordingly.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of this Court.

E N T E R

Dated: November 17, 2022

Mary Ann Brigantti

Mary Ann Brigantti, J.S.C.