

<b>Matter of 37 Bay 26 St. LLC v Soliman</b>
2023 NY Slip Op 30093(U)
January 3, 2023
Supreme Court, Kings County
Docket Number: Index No. 530718/2021
Judge: Francois A. Rivera
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At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of January 2023.

HONORABLE FRANCOIS A. RIVERA

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In the Matter of the Application of  
37 BAY 26 STREET LLC,  
Petitioner,

**DECISION, ORDER, &  
JUDGMENT**  
Index No. 530718/2021

For a Judgment under Article 78 of the Civil Practice Law and Rules and/or for a Declaratory Judgment

- against -

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

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Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of petition filed on December 1, 2021, under motion sequence one, by 37 Bay 26 Street LLC (hereinafter petitioner) seeking a judgment pursuant to CPLR Article 78: (1) vacating and reversing the August 2, 2021 final administrative determination of the New York City Department of Finance (hereinafter DOF) denying the Petitioners J-51 exemption benefits; (2) declaring that the subject property is entitled to receive J-51 exemption benefits due to the extensive work performed by the petitioner; and (3) issuing a writ of mandamus compelling DOF's Assessor to place a physical increase on the subject property nunc pro tunc as of the 2016/2017 fiscal year.

- Notice of Petition
- Verified Petition
- Memorandum of Law in Support
- Exhibits A-M

- Answer
- Memorandum of Law in Opposition
- Exhibit 1
- Affirmation in Reply
- Memorandum of Law in Reply
- Exhibits A-G

## BACKGROUND

On December 1, 2021, the petitioner commenced the instant special proceeding pursuant to CPLR Article 78 seeking, inter alia, a declaratory judgment, by filing a notice of petition, verified petition, supporting documents and memorandum of law with the Kings County Clerk's office (KCCO). On July 29, 2022, Sherif Soliman, in the capacity as the Commissioner of Finance of the City of New York and the City of New York (hereinafter collectively as respondents) interposed an answer and memorandum of law in opposition to the petition by filing same with the KCCO.

The verified petition alleges the following salient facts. The petitioner is a limited liability company and the titled owner of real property known as 37 53<sup>rd</sup> Street, Brooklyn, New York (Block 6377 and Lot 22), a residential apartment building that contains 32 residential apartments (hereinafter the subject property). The petitioner performed extensive rehabilitation work on the subject property costing in excess of \$322,000.00. The petitioner submitted an application to the New York City Housing Preservation and Development (hereinafter HPD) to obtain J-51 benefits for the work that was performed. As a result, on January 22, 2016, the petitioner was issued a Certificate of Eligibility (hereinafter C of E) to receive both J-51 abatement benefits and J-51 exemption benefits.

The petitioner is receiving J-51 abatement benefits. The petitioner brings the instant special proceeding because the DOF has failed to issue any J-51 exemption benefits to the subject property. The C of E specifically provides under item number three in the middle section of the C of E that the subject property is eligible to receive 34 years of J-51 exemption benefits. The entire issue in this matter is that DOF has not issued any J-51 exemption benefits to the subject property. The petitioner contends that by failing to provide J-51 exemption benefits DOF has committed a clerical error that will deprive the petitioner of 34 years of J-51 exemption benefits. The petitioner submitted a request to correct this clerical error on multiple occasions. Numerous emails were sent to Nachez Saunders, the Deputy Director of Residential & Commercial Renovation Benefits at DOF.

On August 2, 2021, DOF denied petitioner's request to correct this clerical error which constituted a final administrative decision. DOF's declination decision specifically stated:

"We reviewed the assessment of this property in response to your request. In our review, we considered the information that you supplied and other available information about the property. After considering this information, we found that the original combination of assessment, exemption, and lot characteristics will remain unchanged for the years indicated on your filing. Specifically: We have determined that the issue in your application does not warrant a change to valuation, and therefore no action has been taken."

The petitioner contends that pursuant to NYC Administrative Code § 11-206 and 19 RCNY §53 et seq., DOF must issue J-51 exemption benefits to the subject property from July 1, 2016, which is the first fiscal year following the issuance of the C of E. The

exemption will then last for a total of 34 years. The petitioner contends, inter alia, that the respondents have acted contrary to law by arbitrarily and capriciously failing to issue J-51 exemption benefits for the subject property.

## LAW AND APPLICATION

CPLR Article 4 sets forth the rules governing special proceedings. CPLR 409 (b) provides in pertinent part that the court shall make a summary determination upon the pleadings, papers, and admissions to the extent that no triable issues of fact are raised. Pursuant to CPLR 409 (b), in a special proceeding, where there are no triable issues of fact raised, the court must make a summary determination on the pleadings and papers submitted as if a motion for summary judgment were before it (*see Matter of Korotun v Laurel Place Homeowner's Assn.*, 6 AD3d 710, 711 [2nd Dept 2004], citing *Matter of Friends World Coll. v Nicklin*, 249 AD2d 393 [2nd Dept 1998]).

In this Article 78 proceeding, the petitioner claims that the subject property failed to receive a physical increase attributed to certain improvements, resulting in no physical increase being assessed on the subject property. This resulted in the denial of a partial J-51 tax exemption pursuant to RPTL 489, Administrative Code of the City of New York § 11-243, and Title 28 of the Rules of the City of New York Chapter 5. Petitioner contends, inter alia, that this issue is cognizable as a clerical error or error in description under Administrative Code § 11-206, 19 RCNY § 53-02, and may be remedied through a special proceeding pursuant to Article 78 of the CPLR.

There is no dispute that the central issue in the instant special proceeding is the valuation of certain physical improvements petitioner made to the subject property. Without addressing petitioner's claim that a clerical error caused an erroneous valuation, the respondents seek dismissal of the proceedings on the basis that petitioner's claim may not be the subject of an Article 78 proceeding. The respondents contend that such a claim may only be litigated pursuant to Article 7 of the Real Property Tax Law, and not pursuant to CPLR Article 78 and Administrative Code § 11-206.

The Court of Appeals has already held that questions of property valuation, including both overvaluation and undervaluation, are within the exclusive purview of article 7 of the RPTL (*City of Mount Vernon v State Bd. of Equalization & Assessment*, 44 NY2d 960, 962 [1978]). This principle was recently reaffirmed in the matter of *9 Orchard Partners, LLC v New York City Dep't of Fin.* (204 AD3d 527, 528 [1<sup>st</sup> Dept 2022]). This decision by the First Department stands, inter alia, for the proposition that all questions regarding the valuation of physical increases to property, be they questions of overvaluation or undervaluation, may only be addressed under Article 7 of the RPTL, not Article 78 of the CPLR. Further, this decision cites to key Second Department decisions, namely *Joon Mgmt. One Corp. v Town of Ramapo* (142 A D3d 587, 588 [2nd Dept 2016]) and *Tricarico v Cty of Nassau* (120 AD3d 658, 660 [2nd Dept 2014]) which hold that questions involving the overvaluation or undervaluation of specific properties is exclusively the province of RPTL Article 7 review.

Instructively, the First Department in *Kraebel v. N.Y.C. Dep't of Fin.* (217 AD2d 416, 416 [1<sup>st</sup> Dept 1995]) held that a petitioner who challenges the amount of exemption received under the J-51 program is actually alleging that their assessment is excessive; as that term is defined in RPTL 701(4)(b), and so must proceed according to Article 7 of the RPTL, not Article 78 of the CPLR. Indeed, RPTL Article 7 is, by law, the exclusive means by which real property tax valuations may be challenged. The respondents' contention that the issues raised in the instant proceeding may not be brought in an Article 78 proceeding and may only be pursued under Article 7 of the RPTL is indeed correct. For the foregoing reasons, the petition must be denied, and the proceeding must be dismissed.

## CONCLUSION

The petition by 37 Bay 26 Street LLC for a judgment pursuant to CPLR Article 78 vacating and reversing the August 2, 2021, final administrative determination of the New York City Department of Finance denying the petitioners J-51 exemption benefits is denied.

The petition by 37 Bay 26 Street LLC for a judgment pursuant to CPLR Article 78 declaring that the subject property is entitled to receive J-51 exemption benefits due to the extensive work performed by the petitioner is denied.

The petition by 37 Bay 26 Street LLC for a judgment pursuant to CPLR Article 78 issuing a writ of mandamus compelling the New York City Department of Finance

Assessor to place a physical increase on the subject property nunc pro tunc as of the 2016/2017 fiscal year is denied. The petition is dismissed.

The foregoing constitutes the decision, order, and judgment of this Court.

ENTER:

Francis A. Rivera  
J.S.C.

FRANCOIS A. RIVERA  
J.S.C.

KINGS COUNTY CLERK  
FILED  
2023 JAN -6 AM 9:46