

Matter of 731 Retail One LLC v Niblack

2025 NY Slip Op 32831(U)

August 8, 2025

Supreme Court, New York County

Docket Number: Index No. 160315/2024

Judge: Verna L. Saunders

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. VERNA L. SAUNDERS, JSC

PART 36

Justice

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INDEX NO. 160315/2024

In the Matter of the Application of
731 RETAIL ONE LLC,
Petitioner,

MOTION SEQ. NO. 001

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

- against -

DECISION + ORDER ON
MOTION

PRESTON NIBLACK, in his capacity as the Commissioner of the
NEW YORK CITY DEPARTMENT OF FINANCE, the NEW
YORK CITY DEPARTMENT OF FINANCE, and the CITY OF
NEW YORK,

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 16, 17, 18, 19, 20, 21, 22,
23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for

ARTICLE 78

In this petition, petitioner moves for an order (I) directing the New York City Department
of Finance ("DOF") to correct the assessed values of the premises located at 151 East 58 Street,
in New York County, for tax years 2021-2022 through 2023-2024, as required by NYC Admin.
Code § 11-206 and 19 RCNY § 53(b)(8); or (II) alternatively, an Order directing DOF to (a)
provide a detailed description of the reports, comparable properties and values utilized, and all
other information used in arriving at its initial property valuation of the premises for Tax Years
2021-2022, 2022-2023, and 2023-2024; and (b) provide a detailed explanation, along with a
description of the information considered and comparable properties and values utilized in its
review and determination of petitioner's clerical error application; (c) granting the petitioner
leave to amend this Article 78 petition based on the produced file; and (d) holding a court
hearing based on the parties' disputes concerning the determination of the aforementioned
clerical error for Tax Years 2021-2022 through 2023-2024; along with such other and further
relief as the court deems just, proper, and equitable (NYSCEF Doc. No. 1, petition).

The underlying facts of this case as set forth in the petition are as follows: on December
5, 2023, petitioner submitted a Request to Update ("RTU") form to DOF, seeking to have the
gross square footage of the premises corrected from 197,732 to 150,328 square feet in DOF's
records. Petitioner's request included the declaration of the Beacon Court Condominium, which
purportedly shows how the premises' floor area is allocated per use (NYSCEF Doc. No. 4,
RTU). On May 13, 2024, DOF corrected the information to reflect a gross square footage of
162,769, with 36,265 square feet allocated to office space and 126,531 to retail space (NYSCEF
Doc. Nos. 5-6, RTU determination and clarification). Simultaneous with the RTU, petitioner
submitted a Clerical Error Remission ("CER") form to DOF, seeking to have the taxable

assessments of the subject property corrected for tax years 2018-2019¹ through 2023-2024. The CER was necessary, argues petitioner, to have the actual assessments retroactively corrected and to refund petitioner the overpayment of taxes which were based upon the clerical error (NYSCEF Doc. No. 7, *CER submission*). On July 8, 2024, DOF denied petitioner's CER request, reasoning that it found "comparable properties within [petitioner's] market area for the contested years that were within the market value range of the adjusted square footage values." (NYSCEF Doc. No. 8, *CER determination*). Petitioner also submits a notice of property value for the tax year 2021-22, which it claims reflects petitioner was originally valued based on income of approximately \$174 per square foot, of a total of 197,732 gross square feet (NYSCEF Doc. No. 9, *NOPVs*). Petitioner argues that DOF should have maintained this \$174 per square foot value and, once it was determined that they had calculated this rent on 34,936 gross square feet that did not exist, DOF should have reduced the 2021-2022 assessed value commensurate with this decrease in gross income. Instead, DOF raised the per square feet value to \$212, making up for the deficit and effectively denying the assessment correction to which petitioner was entitled. According to petitioner, DOF took the same approach for the tax years 2022-2023 and 2023-2024: it increased the income per square foot from \$201, and \$182, respectively, to \$245, and \$221. Petitioner contends that DOF's claim that, upon further review, the comparable rents they found were exactly 20% higher than the comparable rents they originally believed to be best evidence of the value is an *ex post facto* exercise of agency power contrary to law, and arbitrary and capricious.

Petitioner explains that DOF values Tax Class 4 parcels (like the one at issue here) based on a capitalization of the net operating income ("NOI"). The NOI is equal to the gross income subtracted by operating expenses. The gross income is intricately connected to the gross square footage. Therefore, when the gross square footage changes, this impacts the assessed value, which is equal to the NOI divided by a capitalization rate. Additionally, real estate tax escalation is tied to the property's gross floor footage because the DOF attributes income to vacant space based on the gross square footage. Inasmuch as DOH removed 34,936 gross square footage from the premises, petitioner argues that the error warrants correction.

Respondent cross-moves, pursuant to CPLR 3211(a)(4), on the grounds that petitioner has pending Article 7 actions that seeks substantially the same relief as the instant petition (NYSCEF Doc. No. 18, *notice of cross-motion*). In the pending proceedings, filed on or about October 7, 2021, October 14, 2022, and June 13, 2023, bearing Index Nos. 256917/2021, 260692/2022 and 240020/2023, respectively, petitioner alleges that the property was over assessed, and, as such, the applicable assessed values should be lowered. Respondent contends that an Article 7 proceeding is the proper remedy for review of a property tax assessment unless otherwise provided by law. It further contends that the gravamen of petitioner's challenge here is that the subject property is over assessed for tax years 2021-2022 through 2023-2024, which is a challenge to the valuation that should be brought under Article 7 and not Article 78. As such, respondent maintains that this court should dismiss the instant Article 78 petition and allow petitioner's claims to be decided in the Article 7 proceedings. In the event the cross-motion is denied, respondent requests time to answer the petition (NYSCEF Doc. No. 20, *memorandum of law*). In support of its arguments, respondent submits the Article 7 petitions, as well as, a scheduling order for the pending matters (NYSCEF Doc. Nos. 21-22, *Article 7 petition and scheduling order*).

¹ Only tax years 2021/22 and forward are the subject of this application.

In opposition to the cross-motion and in further support of the petition, petitioner argues that a CER-based application pursuant Article 78 is not *res judicata* for an RPTL Article 7 case, nor is the reverse true, because petitioner maintains that CER and RPTL Article 7 are completely different claims: a CER claim seeks mechanical correction of an assessed value, within the strict confines of the DOF's rubric as set forth in its guidelines, while an RPTL Article 78 matter is a *de novo* review of all elements of the property tax assessment, including all the issues listed in the RPTL Article 7 petition. Article 78 and Article 7 petitions are often filed simultaneously, argues petitioner, and a decision finding otherwise will affect property owners and create greater backlog of Article 7 cases. Petitioner also argues that a positive determination of the CEF in this Article 78 proceeding may help to facilitate a settlement in the Article 7 proceeding. DOF implemented amendments to 19 RCNY §§ 53-01 and 53-03, effective January 5, 2025, which state that a CER may be filed in conjunction with and RPTL Article 7 proceeding but may not be filed after a final determination or settlement of an RPTL Article 8 proceeding or Tax Commission correction of the assessed value. Although petitioner submits this argument in support of its contention the DOF has endorsed the proposition that CER applications may be filed in conjunction with a RPTL Article 7 petition, petitioner concedes that the recent amendments do not apply to CER petitions submitted prior to January 5, 2025. Additionally, petitioner argues that defendant relies on arguments already rejected by both lower and appellate courts.

Generally, administrative determinations are challenged via CPLR Article 78 proceedings (CPLR 7801). “However, the proper procedure for challenging a tax assessment is to commence a tax certiorari proceeding pursuant to RPTL article 7, not CPLR article 78” (*Matter of Green 485 Owners LLC v Tax Commn. of the City of N.Y.*, 2009 NY Slip Op 32517(U), *4 [Sup Ct, NY County 2009], citing *Kahal Bnei Emunim & Talmud Torah Bnei Simon Israel v Town of Fallsburg*, 78 NY2d 194, 204 [1991]). The rationale is that “[a]rticle 7 of the RPTL ‘is the exclusive avenue for judicial review of real property tax assessments ‘unless otherwise provided by law’” (*Matter of 9 Orchard Partners, LLC v New York City Dept. of Fin.*, 204 AD3d 527, 527 [1st Dept 2022] [internal quotation marks and citation omitted]; see *City of Mount Vernon v State Bd. of Equalization & Assessment*, 44 NY2d 960, 962 [1978]). However, certain exceptions to the exclusive jurisdiction of RPTL article 7 exists, i.e., an article 78 proceeding is appropriate where the challenge is to the method of assessment (see *Matter of Averbach v Board of Assessors of Town of Delhi*, 176 AD2d 1151, 1152 [1991]).

Under NYC Admin. Code § 11-206:

“The commissioner of finance may correct any assessment or tax which is erroneous due to a clerical error or to an error of description contained in the several books of annual record of assessed valuations, or in the assessments-rolls. If the taxes computed on such erroneous assessment have been paid, the commissioner of finance is authorized to refund or credit the difference between the taxes computed on the erroneous and corrected assessments.”

However, the Rules of the City of New York (“RCNY”) § 53-01 allows owners of real property who believe their property was incorrectly assessed to submit a request for an

administrative review of their tax assessment with the DOF. This section permits the DOF to correct any future errors and past errors up to six years prior to the date of the application.

“CPLR 3211(a)(4) vests a court with “broad discretion” in determining whether to “dismiss an action on the ground that another action is pending between the same parties on the same cause of action” (see *Alvarez & Marshal Valuation Servs., LLC v Solar Eclipse Inv. Fund III, LLC*, 216 AD3d 447, 448 [1st Dept 2023], quoting *Whitney v Whitney*, 57 NY2d 731, 732 [1982]).

Here, upon consideration of the arguments advanced, this court, pursuant to its “broad discretion” under CPLR 3211(a)(4), grants the cross-motion dismissing the Article 7 proceeding. Inasmuch as the related RPTL Article 7 proceeding seeks the same reduced tax assessment petitioner now seeks in the instant petition and, considering that the instant issue is reviewable exclusively under RPTL Article 7 (see *Matter of Bi-Costal Props., LLC v Soliman*, 234 AD3d 540, 540 [1st Dept 2025]; *Matter of 174th TIC Owner LLC v Niblack*, 231 AD3d 401, 401 [1st Dept 2024]; *Matter of Bajraktari Realty Corp. v Soliman*, 223 AD3d 556, 556 [1st Dept 2024]; *Kraebel v New York City Dep’t of Fin.*, 217 AD2d 416, 416-417 [1st Dept 1995]), the petition is denied. Moreover, petitioner’s conclusory claim that the comparable rents found by defendants upon second review, which were determined to be higher than those originally relied upon, fail to establish that DOH’s actions were arbitrary and capricious. Accordingly, it is hereby

ORDERED that the cross-motion seeking dismissal, pursuant to CPLR 3211(a)(4), is granted and the petition is dismissed; and it is further

ORDERED that all other requests are denied; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for respondent shall serve a copy of this decision and order, with notice of entry, upon petitioner.

This constitutes the decision and order of this court.

August 8, 2025

HON. VERA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE