

**Matter of Aymes v Tax Commn. of the City of N.Y.**

2013 NY Slip Op 30629(U)

March 28, 2013

Sup Ct, New York County

Docket Number: 200010/2011

Judge: Martin Shulman

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: MARTIN SHULMAN  
J.S.C.  
Justice

*3/29/13*

PART 1

Index Number : 200010/2011  
CLIFFORD AYMES  
VS.  
THE TAX COMMISSION  
SEQUENCE NUMBER : 001  
DISMISS

INDEX NO. 200010/11  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001

The following papers, numbered 1 to 4, were read on this motion to dismiss

Notice of Motion/ <del>Order to Show Cause</del> — Affidavits — Exhibits <u>1-5</u>	No(s). <u>1</u>
<del>Notice of Cross-motion</del> + Answering Affidavits — Exhibits <u>A-J</u>	No(s). <u>2</u>
Replying Affidavits — <u>Exh. 1</u>	No(s). <u>3</u>
Replying Affidavit — Exhibits <u>K</u>	<u>1</u> <u>4</u>

Upon the foregoing papers, it is ordered that this motion ~~is~~ and cross-motion are decided in accordance with the attached decision and judgment.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**  
APR - 2 2013  
COUNTY CLERK'S OFFICE  
NEW YORK

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Dated: ~~Feb~~ March 28, 2013

MARTIN SHULMAN  
J.S.C., J.S.C.

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 1

In the Matter of CLIFFORD AYMES,

Petitioner,

Index No. 200010/2011

-against-

**DECISION & ORDER**

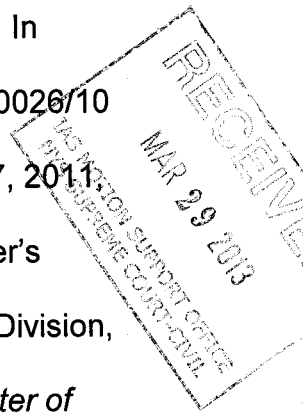
THE TAX COMMISSION OF THE CITY OF  
NEW YORK, NYC DEPARTMENT OF  
FINANCE, and CITY OF NEW YORK,

Respondents.

**MARTIN SHULMAN, J.:**

In this tax certiorari proceeding, respondents Tax Commission of the City of New York (Tax Commission), NYC Department of Finance (DOF) and City of New York (City) move, pursuant to CPLR 3211 (a) (1), (2), (4), (5) and (7), to dismiss the amended petition. Petitioner pro se Clifford Aymes cross-moves for leave to amend the petition.

Petitioner owns real property in New York County known as and located at 334-336 St. Nicholas Avenue and 316-318 West 127<sup>th</sup> Street, designated on the tax maps of the City of New York as county, block and lot number 1-1953-42 (the Property). In 2010, petitioner filed a petition in this court under N.Y. County index number 200026/10 challenging the Property's classification as Class 4 vacant property. On April 27, 2011, this court granted respondents' motion to dismiss the petition based on petitioner's failure to comply with statutory prerequisites. Motion, Exhibit 3. The Appellate Division, First Department ultimately affirmed this court's decision on May 10, 2012. *Matter of Aymes v Tax Commn. of City of New York*, 95 AD3d 567. In dicta, the First Department



noted that “dismissal of this proceeding for failure to exhaust administrative remedies does not, in and of itself, bar petitioner from seeking corrections relating to the subject property’s square footage, income, and expenses, which he properly sought in a Request for Review filed with the Department of Finance.” *Id.* at 567-568.<sup>1</sup>

After receiving notice on or about January 15, 2011 that the Property had been assigned a market value of \$70,000 and an assessed value of \$31,500, petitioner first made a request for review and then an application for correction to respondents. On or about April 28, 2011 respondents issued a notice of revised property value lowering the market value of the Property to \$62,000 and the assessed value to \$27,900. On or about May 18, 2011, petitioner commenced the instant proceeding by filing a petition alleging that the \$62,000 market value was excessive, unequal, erroneous and discriminatory (Original Petition). Motion, Exhibit 1.

On or about August 6, 2012, petitioner served an amended petition seeking to add to the Original Petition relief for the 2012/2013 tax year and, based upon the First Department’s dicta noted above, a claim regarding the square footage, income and expenses for tax year 2010/11 (Amended Petition). *Id.*, Exhibit 2. Respondents now move to dismiss this Amended Petition. Petitioner’s cross-motion seeks in relevant part leave to file a different amended petition dated January 10, 2013, as attached to the cross-moving papers (Proposed Amended Petition).

Petitioner has also commenced a separate Real Property Tax Law (RPTL) Article 7 proceeding under New York County index number 200227/12 for the 2012/13

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<sup>1</sup> In fact, the square footage has been revised since the tax year 2011/2012, as petitioner acknowledges. Amended Petition, ¶ 11.

tax year (New Petition). *Id.*, Exhibit 5. No request for judicial intervention has been filed in that proceeding. To summarize, the Original Petition addresses the tax year 2011/2012; the Amended Petition and the Proposed Amended Petition address tax years 2010/11, 2011/2012 and 2012/2013; and the New Petition addresses tax year 2012/2013.

Respondents' motion to dismiss the Amended Petition is granted. CPLR 3025 (a) provides that a "party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it." Here, the Amended Petition is a nullity because Petitioner's time to amend as of right had expired at the time he served it<sup>2</sup> and he did not obtain leave of court prior to serving it. See CPLR 3025 (b). Respondents argue, and this court agrees, that the time for petitioner to amend the Original Petition without leave of court has long elapsed.

Turning to Petitioner's cross-motion for leave to interpose the Proposed Amended Petition, leave to amend pleadings "shall be freely given upon such terms as may be just . . ." CPLR 3025 (b). While the decision to allow or disallow an amendment is left to the court's sound discretion (*see Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]), a court need not grant leave to amend a pleading

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<sup>2</sup> Pursuant to RPTL § 714 (1), when respondents fail to answer a petition within 20 days of its service, "all allegations of the petition shall be deemed denied." As petitioner commenced this proceeding on May 18, 2011, issue was deemed joined 20 days later (*Airmont Homes v Town of Ramapo*, 69 NY2d 901, 902-903 [1987]) and petitioner had an additional 20 days to amend as of right. The August 6, 2012 Amended Petition far exceeds this time period.

where the proposed amendment is palpably without merit (see *Probst v Cacoulidis*, 295 AD2d 331, 332 [2d Dept 2002]).

Here, the Proposed Amended Petition is palpably without merit. The Proposed Amended Petition asserts that the Appellate Division's decision allowed petitioner to challenge the square footage, income and expense for the Property, and it asks to revise the Property's square footage. It also alleges fraud in the manner in which square footage was assessed. Claims pertaining to tax year 2010/11 were fully litigated and dismissed in the 2010 proceeding, and any new claims or theories arising from that tax year are barred by res judicata and cannot be considered in this proceeding. See *O'Brien v City of Syracuse*, 54 NY2d 353, 357 (1981) (principles of res judicata require that "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy"); *Bikman v 595 Broadway Assocs.*, 88 AD3d 455, 455 (1st Dept 2011) (where claims have been fully litigated in prior proceedings the doctrine of res judicata bars them from being relitigated). The Appellate Division's dicta merely notes that petitioner might still seek administrative remedies, but it did not open the door for a petition, new, renewed or amended, absent such steps.

With respect to the claims pertaining to tax year 2012/13, this court finds no supporting authority for the proposition that petitioner may commence an Article 7 proceeding by amending a previously filed petition for another tax year. Respondent DOF makes annual determinations of the value of real property in New York City. Article 7 of the RPTL provides the exclusive remedy for a review of real property tax assessments. New York City Charter (NYC Charter) § 163 (f) requires an application of

correction to be filed with the Tax Commission to review the assessment between January 15th and March 1st of each year, and NYC Charter § 166 requires the commencement of a proceeding to review the Tax Commission's determination before October 25th of the year in which the determination is made. Failure to serve and file the petition "within such [specified] time shall constitute a complete defense to the petition and the petition must be dismissed." RPTL § 702 (3).

The statutory scheme clearly contemplates the filing of a separate petition for each tax year. Accordingly, amendment of the 2011 petition to add a challenge to a tax year other than the 2011/12 tax year would be improper. The New Petition is the appropriate vehicle for petitioner to challenge the 2012/13 assessment. This court has considered the parties' remaining arguments and finds them unavailing.

Accordingly, for the foregoing reasons it is

ORDERED that respondents Tax Commission of the City of New York, NYC Department of Finance, and City of New York's motion to dismiss the Amended Petition is granted; and it is further

ORDERED that petitioner Clifford Aymes' cross motion for leave to file an amended petition and other relief is denied.

The foregoing is this court's decision and order. Courtesy copies of this decision and order have been sent to the parties or their counsel.

Dated: New York, New York  
March 28 , 2013



Hon. Martin Shulman, J.S.C.

**FILED**  
APR - 2 2013  
COUNTY CLERK'S OFFICE  
NEW YORK