

<b>Matter of Gingher v chan</b>
2014 NY Slip Op 32561(U)
September 29, 2014
Supreme Court, Suffolk County
Docket Number: 03348/2014
Judge: Richard Ambro
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MEMORANDUM

I.A.S. TERM  
PART 5

BY: HON. RICHARD AMBRO  
Justice

SUPREME COURT, SUFFOLK COUNTY

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In the Matter of the Application of  
ROBERT GINGHER and STEPHANIE J. DREW,

Petitioners,

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

-against-

ANDREW CHAN, SMALL CLAIMS  
ASSESSMENT REVIEW HEARING OFFICER,  
ASSESSOR of the TOWN OF ISLIP, and  
BOARD OF ASSESSMENT REVIEW of the  
TOWN OF ISLIP,

Respondents.

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DATE: September 29, 2014

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MOTION DATE: 3/3/2014

MOTION NO: CDISPSJ

The Court *sua sponte* vacates its memorandum decision and Order of August 12, 2014, based upon the recent discovery of papers filed by the Attorney General's Office on behalf of Respondent Andrew Chan, Small Claims Assessment Review Hearing Officer, that were not considered in the Court's initial decision. The new memorandum decision is as follows:

Petitioners, pursuant to Article 78 of the Civil Practice Law and Rules (CPLR) and article 7 of the Real Property Tax Law (RPTL), seek the vacatur of a Small Claims Assessment Review (SCAR) determination denying a reduction of the assessed value of their residence located at 29 Magoun Road, West Islip, New York.

Specifically, petitioners, claiming an unequal assessment, sought a determination

reducing the full market value of their property from \$651,515 to \$622,635 as of July 1, 2012, and a reduced assessed value from \$86,000 to \$66,393 as of that same date.

In addition, petitioners now seek an order compelling Respondent Town to reassess all real property in petitioner's community or on its rolls.

### SCAR Determination-Standard of Review

When a SCAR determination is contested, the reviewing "court's role is limited to ascertaining whether there was a rational basis for that determination." *Greenfield v. Town of Babylon Dept. of Assessment*, 76 AD3d 1071, 1074 (2<sup>nd</sup> Dep't. 2010).

### Reduction of the Full Market Value

The petitioners had the burden at the SCAR proceeding to demonstrate by "credible and substantial evidence" that their property was "assessed at a higher percentage of full market value than the average of all residential property on the same assessment roll." *Pace v. Assessor of the Town of Islip*, 252 AD2d 88, 92 (2<sup>nd</sup> Dep't. 1998), *Lauer v. Board of Assessors*, 51 AD3d 926, 927 (2<sup>nd</sup> Dep't. 2008). To meet that burden, petitioners were first required to have proved the full market value of the residence. RPTL §732(2); *Yee v. Town of Orangetown*, 76 AD3d 104 (2<sup>nd</sup> Dep't. 2010). To establish full market value, a "professional appraisal is not required, and the homeowner may use proof of a recent purchase price or sales prices or appraised values of comparable properties." *Id.*, at 113.

However, those methods notwithstanding, petitioners here attempted to establish the full market value of their property by submitting a professional appraisal dated November 12, 2011, which valued the property at \$650,000, and arguing that the property had thereafter depreciated approximately 4.5 percent as demonstrated by the increase in the Residential Assessment Ratio (RAR) from 12.38% (the July 1, 2011 ratio) to 13.2% (the July 1, 2012 ratio).

The RAR for an assessing unit is recalculated each year by dividing the assessed value of each residence sold in the preceding one-year period by its sales price (assuming the sale was at "arm's length"). *Pace v. Assessor of the Town of Islip, supra*, at 91. The resulting ratios are then arranged highest to lowest and the median ratio is selected as the RAR. *Greenfield v. Town of Babylon Dept. of Assessment, supra*, at 1075. Petitioners correctly assert that a decrease in the full market value of residences within an assessing unit would result in a corresponding increase in the RAR. In other words, an increase in a Residential Assessment Ratio will signal an overall decline in residential market values within an assessing unit. However, that's not to say that a percentage decrease in the overall full market value of homes within an assessing unit will apply uniformly to each individual residence within that community.

Indeed, by this method of calculation, essentially half of the homes sold in any given year will have ratios equal to or higher than the Residential Assessment Ratio, an equal number will

have ratios equal to or lower than the RAR, and perhaps only a single home will have a ratio which exactly matches the RAR. Thus, relying on an increase in the RAR (a broad valuation of homes within a community) is an imprecise and speculative method to establish the full market value of any individual residence within that assessment unit.

### Reduction of the Assessed Value

Moreover, the assessed value of a residence is determined by multiplying the full market value of that property by the RAR. *E.g.*, *Greenfield v. Town of Babylon Dept. of Assessment*, *supra*, at 1075. Here, having failed in the first instance to establish full market value, it is not then possible for petitioners to further argue a miscalculation of their assessed value.

In any event, petitioners argue that the RAR used to calculate the assessed value of their property was incorrectly determined to be 13.2%. Instead, based upon petitioners' own analysis of the sales of seventy-six properties in petitioners' community, concluded that the correct RAR was 10.66%. This argument, however, violated the "prohibition against maintaining inconsistent positions in a judicial or quasi-judicial proceeding." That is, "[o]ne cannot in the same proceeding rely upon evidence which he or she has brought into the case and then assail it." *Pace v. Assessor of the Town of Islip*, *supra*, at 92, *citations omitted*. Here, petitioners attempted to prove full market value relying on the year-to-year change in the RAR. If petitioners were correct, then the RAR values relied upon were correct as well. However, in arriving at their assessed value of \$66,393, petitioners' assailed the correctness of the Residential Assessment Ratios on which they had previously relied. Having relied upon the RAR to prove the full market value of their property, they could not then take a position impeaching that same evidence (indeed, urging a ratio of 10.66% would not simply assail their reliance on the established 2011 and 2012 RAR's, but would tend to prove, contrary to the petitioners' arguments, an appreciation in the value of homes within the assessment unit). *Id.*

Consequently, based on the foregoing, the hearing officer's determination, that the petitioners failed to meet their burden of presenting credible and substantial evidence of an unequal assessment, had a rational basis.

### The Reassessment of all Real Property within Petitioners' Community

Petitioners also request an order directing respondent Town to reassess all real property within petitioners' community based upon the holding in *Hellerstein v. Assessor of the Town of Islip*, 37 NY2d 1 (1975). While *Hellerstein* thematically touched upon the issue of assessment uniformity, the only issue before that Court was whether fractionally assessing properties was contrary to the statutory requirements of Real Property Tax Law §306, which required all

property to be assessed at full market value. Thus, the authority cited by petitioners does not strictly lend support to their argument. At any rate, the holding in *Hellerstein* was abrogated by the New York State Legislature when it repealed Real Property Tax Law §306 following the *Hellerstein* decision. See, *Wright v. Town Bd. Of Ticonderoga*, 169 AD2d 190, 191 n. 1 (3<sup>rd</sup> Dep't. 1991).

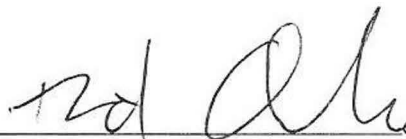
Moreover, petitioners offer no factual assertions to support the claim that there existed a community-wide disparate assessment of properties. See, CPLR §3013.

Respondent Andrew Chan

Respondent Chan argues, *inter alia*, that the article 78 petition should be dismissed with respect to him for lack of personal jurisdiction. Specifically, respondent, through the Attorney General's Office, claims that petitioners "failed to obtain jurisdiction over Andrew Chan, as they did not serve the Order to Show Cause upon the Office of the Attorney General as required by Article 78." In their reply, petitioners provide an Affidavit of Service indicating service of the RJI and Order to Show Cause upon the Attorney General by mail. That service notwithstanding, petitioners were also required to personally serve a copy on the Attorney General's Office. CPLR §7804[c]. This failure to so serve is jurisdictional and may not be cured by service by mail. *Rosenberg v. NYS Board of Regents*, 2 AD3d 1003 (3<sup>rd</sup> Dep't. 2003). Consequently, the Article 78 is dismissed against Respondent Chan for lack of personal jurisdiction.

Accordingly, the Article 78 is dismissed with respect to Respondent Chan and the relief sought in the petitioners' Article 78 motion is otherwise denied.

Settle Judgment.



HON. RICHARD AMBRO  
J.S.C.

CHECK ONE:  FINAL DISPOSITION     NON-FINAL DISPOSITION

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