Matter of 436 Condominium Bd. of Mgrs. v Tax Commn. of the City of N.Y.
2015 NY Slip Op 32770(U)
December 15, 2015
Supreme Court, New York County
Docket Number: 261506/12
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARTIN SHULMAN, J S C Justice

PART 1

Index Number : [redacted] 261506/12
436 CONDOMINIUM
vs.
THE TAX COMMISSION
SEQUENCE NUMBER : 001
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/~~Order to Show Cause~~ — Affidavits — Exhibits A-G | No(s). 1
Cross-motion +
Answering Affidavits — Exhibits 1-4 | No(s). 2
Replying Affidavits -Exhibits A-E | No(s). 3
Replying Aff. in Cross-motion - Exhibits A-F | No(s). 4

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

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

Dated: DEC 15 2015

_____, J.S.C.
HON. MARTIN SHULMAN, 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

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In the Matter of the Application of

436 CONDOMINIUM BOARD OF MANAGERS,
Petitioner,

-against-

THE TAX COMMISSION OF THE CITY OF NEW YORK and THE COMMISSIONER OF FINANCE OF THE CITY OF NEW YORK,

Respondents.

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Index No. 261506/12

Decision & Order

HON. MARTIN SHULMAN, J.S.C.

Petitioner 436 Condominium Board of Managers ("petitioner" or "436 Condo") moves in this Real Property Tax Law ("RPTL") Article 7 proceeding[1] for partial summary judgment: (1) directing respondents to correct the assessed valuations ("AV") for the condominium tax lots herein (Block 438, Lots 1002-1005) for the tax years 2012/2013, 2013/2014 and 2014/2015[2] to reflect assessment caps mandated by RPTL §1805(2); (2) directing that the 2008/2009 tax year is the base tax year for purposes of recalculating the AVs of the condominium units herein; and (3) directing respondents to refund excess taxes paid for tax years 2012/2013 through 2014/2015. Respondents

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[1] Petitioner filed three separate petitions for tax years 2012/2013 (Index No. 261506/12), 2013/2014 (Index No. 263543/13) and 2014/2015 (Index No. 263288/14). The portion of the instant motion requesting consolidation of these three proceedings for purposes of determining this motion is granted.

[2] Petitioner's motion lists the index numbers for all three RPTL Article 7 petitions for tax years 2012/2013, 2013/2014 and 2014/2015, but only asks for relief with respect to tax years 2012/2013 and 2013/2014. Presumably the omission of the most recent tax year (2014/2015) from the motion was a mere oversight, as petitioner's reply papers request relief for all three tax years. As respondents have not objected to the inclusion of tax year 2014/2015, this decision addresses this most recent tax year.

the Tax Commission of the City of New York ("Tax Commission") and the Commissioner of Finance of the City of New York (collectively "respondents") oppose the motion and cross-move for partial summary judgment declaring that the 2010/2011 tax year is the base tax year for purposes of calculating RPTL §1805(2)'s assessment caps.

Background

The property at issue herein is located at 436 East 11th Street, New York, New York (the "building"). The building converted to condominium ownership in 2000 with tax year 2000/2001 being the first tax year reflecting individual condominium assessments. The building has four residential units and one commercial unit, each having its own individual tax lot designation.[3] The New York City Department of Finance ("DOF") classified the building as a Class 2 property from tax years 2000/2001 through 2009/2010 and changed the status to Class 2, Subclass 2C commencing with tax year 2010/2011. It is undisputed that the building qualified for Subclass 2C status as of its conversion in 2000.

Despite the misclassification, for the period 2000/2001 through 2008/2009 the building's aggregate AV generally stayed within limitations mandated by RPTL §1805(2) for Subclass 2C residential properties. See Azarian Aff. in Supp. of Motion at ¶8.

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[3] The building's residential units are designated as Lots 1002-1005 and the commercial unit is designated as Lot 1001. The commercial unit is not at issue in the within proceedings.

However, in tax year 2009/2010 the aggregate AV increased by 273 percent (from $276,299 in 2008/2009 to $1,031,851).[4]

436 Condo first challenged the building's AV by filing Applications for Correction of Assessed Valuation with the Tax Commission for tax years 2010/11 and 2011/2012. Those administrative proceedings were resolved upon petitioner's acceptance of an offer of settlement reducing the 2010/2011 assessment to $679,997 and the 2011/2012 assessment to $734,999. See Cross-Motion at Exh. 4. Thereafter, having realized the classification error, 436 Condo declined the Tax Commission's reduction offer for a subsequently filed application challenging tax year 2012/2013 and filed the RPTL Article 7 petitions commencing the instant proceedings for tax years 2012/2013 through 2014/2015.

Petitioner's Motion

Petitioner relies upon RPTL §1805(2), which provides that assessments for Class 2 properties having less than eleven residential units, such as the subject building, shall not be increased by more than 8% in any one year ("1 year cap") or 30% in any five year period ("5 year cap"). Initially enacted in 1984, the benefits of RPTL §1805(2)'s limitation on tax assessments were only made available to qualifying condominiums and cooperatively owned properties in 1992. DOF designated properties subject to the 1992 amendment as Tax Class 2, Subclass 2C.

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[4] As the building was still classified in 2009/2010 as Class 2, the increase was phased in at the rate of twenty percent per annum over five years pursuant to RPTL §1805(3).

436 Condo urges that fairness and equity require that the 2012/2013 through 2014/2015 AV's be reduced to be consistent with RPTL §1805(2)'s limitations had the building been reclassified as Tax Class 2, Subclass 2C beginning in tax year 2008/2009. Thus, the 2012/2013 AV could not exceed 30% of the 2008/2009 AV (and should be reduced from $793,144 to $359,189[5]); 2013/2014 could not be more than 8% above $359,189 (and should be reduced from $856,593 to $387,924); and the 2014/2015 AV could not exceed 8% of $387,924 (and should be reduced from $833,995[6] to $418,958). See Azarian Aff. in Support of Motion at ¶19; and Exh. E; Azarian Reply Aff. in Further Support of Motion and in Opp. to Cross Motion at ¶¶ 12-13.

Respondents' Opposition & Cross-Motion

Respondents make the following arguments and/or points:[7]

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[5] This amount conflicts with the amount stated in paragraph 2 of the Azarian Aff. in Support of Motion, which calculates this amount as $375,902. The inconsistency is irrelevant for purposes of determining this motion and cross-motion.

[6] This amount conflicts with the amounts identified in the charts at pages 5 and 7 of the Azarian Reply Aff. in Support of Motion and in Opp. to Cross-Motion, which calculates this amount as $883,995. As above, the inconsistency is irrelevant for purposes of this determining this motion and cross-motion.

[7] Respondents note that 436 Condo only filed a request for judicial intervention ("RJI") for index number 261506/12 (2012/2013 tax year). However, after serving and filing its motion, petitioner filed RJI's for the remaining two index numbers, thus rendering respondents' objection moot. Respondents further argue that the motion is procedurally infirm and should be denied by virtue of 436 Condo's failure to attach copies of each RPTL Article 7 petition. However, petitioner subsequently included copies of the petitions in its reply papers and as respondents are not prejudiced by the initial omission, this court will similarly deem the objection moot. See *Avalon Gardens Rehabilitation & Health Care Ctr., LLC v Morsello*, 97 AD3d 611, 612 (2d Dept 2012).

- Petitioner never challenged the assessments for tax years 2000/2001 through 2009/2010, thus they are final and not subject to review;

- by bringing the instant motion, 436 Condo is attempting to circumvent the terms of its settlement agreement with the Tax Commission, wherein it waived its rights to further review of the 2010/2011 and 2011/2012 assessments as well as prior assessments, and specifically agreed not to challenge same;

- by agreeing before the Tax Commission not to challenge prior classifications, assessments, etc., petitioner agreed that the subject tax lots were properly classified through the 2009/2010 tax year, and thus, 2010/2011 is the first tax year in which RPTL §1805(2) applied and is the current base year for purposes of determining RPTL §1805(2)'s 5 year and 1 year caps, and the assessments for the tax years at issue herein do not exceed both such caps.

Petitioner's Reply

In opposition to respondents' cross-motion and in further support of the motion, 436 Condo emphasizes that RPTL §1805(2) was enacted to protect small property owners from drastic tax increases. Petitioner further stresses that it does not seek to recalculate assessments prior to 2012/2013 and also does not seek refunds for taxes paid prior to 2012/2013, instead merely asking to be put in the same position it would have been in had the building been afforded the assessment caps it was entitled to receive from tax year 2000/2001.

Describing the building as a small, self-managed, non-luxury walk-up building, Deanna Glover, a unit owner and 436 Condo's secretary, submits a compelling affidavit[8] attesting to the harsh impact the building's tax assessments have had on the

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[8] In reply, respondents, citing *Ritt v Lenox Hill Hosp.*, 182 AD2d 560 (1st Dept 1992), object to the admission of Ms. Glover's affidavit into evidence, stating that there is nothing therein "that raises any substantially new point that could not have been raised initially in Petitioner's Motion, nor does it rebut any factual assertion raised in the Respondents' Cross-Motion." This court can discern no reason to disregard the Glover

four residential unit owners who have endured a "financial nightmare", some of whom were forced to relocate and/or were unable to sell their units due to the "extraordinarily high taxes." Glover Reply Aff. at ¶14. Petitioner makes the following relevant arguments in addressing respondents' cross-motion and opposition:

- RPTL §1805(2) does not require property to be classified in Tax Class 2, Subclass 2C for its assessment caps to apply; rather, the caps apply so long as the property, like the building herein, has more than three and fewer than eleven residential units;
- RPTL §1805(2) provides that no assessment shall increase more than 30% over **any** five year period, and here, the 2012/2013 assessment far exceeds the 5 year cap;
- the City of New York engaged in a "bait and switch" tactic by drastically increasing the building's AV for 2009/2010, then correcting the building's classification to Tax Class 2, Subclass 2C in the following tax year (2010/2011), then taking unfair advantage of the higher tax base for purposes of calculating the 5 year and 1 year caps; and
- the Tax Commission settlement does not preclude challenges to the 2012/2013 through 2014/2015 tax years as yearly tax assessments have no res judicata or collateral estoppel effects vis a vis future assessments.

Respondents' Reply

Respondents deny engaging in any "bait and switch" tactic and observe that 436 Condo fails to even address the terms of the Tax Commission settlement. They further note that parties can stipulate away statutory rights in RPTL Article 7 proceedings, particularly where, as here, petitioner was represented by counsel before the Tax Commission. Finally, in citing the Tax Commission settlement as grounds for denying petitioner's motion, respondents do not argue that the matter is res judicata. Instead,

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affidavit as it does not "introduce new arguments in support of the motion (citation omitted)." *Id.* at 562. As such, respondents have not been prejudiced by being unable to respond to any newly proffered arguments.

Respondents ask this court to apply basic principles of contract construction and enforce the settlement agreement's binding terms, which mandate "a finding that the first year the Tax Lots should be considered a Class 2C property is tax year 2010/2011." See Respondents' Reply Mem. of Law at p. 10. Citing this court's decision in *Oakwood Condominium v Tax Commn. of City of New York*, 2012 WL 1802563, NY Slip Op 31249(U) ("*Oakwood*"), respondents urge that the building is "not entitled to any limitation on increases in AV until . . . reclassified." *Id.* at *6.

Discussion

An award of summary judgment is appropriate when no issues of fact exist. *See* CPLR 3212(b); *Sun Yau Ko v Lincoln Sav. Bank*, 99 AD2d 943 (1st Dept), *affd* 62 NY2d 938 (1984); *Andre v Pomeroy*, 35 NY2d 361 (1974). In order to prevail on a motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Once such proof has been offered, in order to defend the summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact." CPLR 3212(b); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Freedman v Chemical Const. Corp.*, 43 NY2d 260 (1977).

At the heart of these motions is the parties' differing interpretations of this court's decision in *Oakwood* and Justice Cynthia Kern's decision in *JAM Enter., LLC v Tax Commn. of City of New York*, 36 Misc3d 762, 2012 NY Slip Op. 22155 (Sup Ct, NY

County) ("*JAM*").[9] As in the case at bar, the condominium property at issue in *Oakwood* had been classified as Tax Class 2 from that condominium's conversion in 1990/1991 and was reclassified as Tax Class 2, Subclass 2C in 2009/2010. As here, it was undisputed that the property qualified for RPTL §1805(2)'s assessment limitations from the time of its conversion.[10] Also as here, the petitioner did not challenge the classification error for several years. This court *inter alia* denied the petitioner's motion for partial summary judgment seeking a recalculation of the property's AV from the proposed base year of 1999/2000 (the year prior to the first year in which the assessments exceeded the 5 year and 1 year caps) and a refund of overpaid taxes for the challenged tax years (2009/2010 through 2011/2012). This court held as follows in *Oakwood*:

> This court agrees that RPTL §1805(2)'s clear and unambiguous language does not mandate a "rollback" as petitioner urges. That petitioner does not seek a refund of overpayments for tax years 2000/2001 through 2008/2009 is of no moment. There is simply no basis to recalculate the subject property's AV for the 2009/2010 through 2011/2012 tax years by going back to 2000/2001 and applying RPTL §1805(2)'s 8% and 30% caps retroactively. To do so would effectively rewrite history.
>
> The statute's plain language provides that RPTL §1805(2)'s benefits expressly extend to Tax Class 2 properties which have been identified on the tax assessment roll as having fewer than eleven residential units. Petitioner's property was not identified as such on any assessment roll until tax year 2009/2010 and petitioner failed to challenge the classification error prior to 2009/2010. Thus, **petitioner is not entitled to claim the statute's benefits for prior unchallenged tax years**. That

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[9] *Oakwood* was decided on May 9, 2012 and *Jam* on June 11, 2012.

[10] Although RPTL §1805(2) became applicable to condominiums effective January 1, 1993 (after the Oakwood Condominium's conversion), the statute applied retroactively, such that the 5 year caps were calculated commencing with tax year 1990/1991 (the year the property converted to condominium status).

> petitioner's property might have qualified to receive RPTL §1805(2)'s benefits in prior years is unavailing since petitioner admittedly did not challenge respondents' failure to identify the subject property as having less than eleven residential units. *See, e.g., Epstein v Tax Commissioner of City of New York* (Kings County Index No. 24024/89, April 16, 1990 [S. Leone, J]); and *Brigandi v Finance Administrator* (Kings County Index No. 28369/90, Nov. 13, 1991 [S. Leone, J], *aff'd* 201 AD2d 646 [1994]) . . . (Footnote omitted and emphasis added).

By contrast, under similar factual circumstances, the court in *JAM*, focusing on the inequity of permitting respondents to benefit from having a permanently higher tax assessment based upon their own classification error, held as follows:

> Petitioner has established its right to summary judgment as it has shown that the subject property was erroneously classified as Class 4 from the tax years 2001/2002 through and including 2009/2010 and that the 2010/2011 and 2011/2012 assessments on the subject property are thus not in accordance with the assessment cap laid out in RPTL §1805(2). This court adopts petitioner's argument that the assessments of the subject property for tax years 2010/2011 and 2011/2012 should be recalculated based on what the prior assessments would have been had the property been correctly classified in Tax Class 2 from tax year 2001/2002 and thus been afforded the benefits of RPTL §1805(2). To rule otherwise would allow the City to take advantage of its erroneous classification of the property at the expense of unknowing property owners.

36 Misc3d at 765. With respect to the 5 year caps, the court in *JAM* rejected respondents' argument, also made here, that the five year period should be measured from the first year DOF properly classified the property (2010/2011 both here and in *JAM*). *Id.* at 766-767.

Justice Kern further found that the *JAM* petitioner's failure to timely challenge the assessments for each year the property was misclassified did not warrant denial of summary judgment in that petitioner's favor. Declining to follow *Epstein v Tax Commr. of City of New York* (Kings County Index No. 24024/89, April 16, 1990 [S. Leone, J]),

cited and relied upon in *Oakwood*, that court stated that "to follow such a decision would provide the City with an incentive to either negligently or intentionally misclassify property in order to maintain a permanently higher assessment on such property at the expense of unknowing property owners." *Id.* at 767.

The starting point for determining 436 Condo's motion and respondents' cross-motion must begin with the statute itself. RPTL §1805(2) provides as follows:

> The assessment roll of a special assessing unit wholly contained within a city shall identify those parcels classified in class two which have fewer than eleven residential units. The assessor of any such special assessing unit shall not increase the assessment of any parcel so identified in any one year, as measured from the actual assessment on the previous year's assessment roll, by more than eight percent and shall not increase such assessment by more than thirty percent in any five-year period. The first such five-year period shall be measured from the individual assessment appearing on the assessment roll completed in nineteen hundred eighty-one provided that, if such parcel would not have been subject to the provisions of this subdivision in nineteen hundred eighty-one had this subdivision then been in effect, the first such five-year period shall be measured from the first year after nineteen hundred eighty-one in which this subdivision applied to such parcel or would have applied to such parcel had this subdivision been in effect in such year.

In relying upon *Oakwood*, 436 Condo stresses that this court measured the 5 year cap from the first year after 1981 in which RPTL §1805(2) would have applied to the property had it been in effect (in that case, 1990/1991, with 5 year caps thereafter measured from 1995/1996, 2000/2001 and 2005/2006, and 2005/2006 being the relevant starting point for calculating the 5 year cap for the challenged tax years). However, this court denied the *Oakwood* petitioner's request that 1999/2000 be deemed the base year and declined to "roll back" the assessed amounts for purposes of recalculating the challenged years.

No reading of *Oakwood* supports 436 Condo's request for this court to declare tax year 2008/2009, the fourth year of the second five year period,[11] to be the relevant base year for purposes of calculating the 5 year cap for the tax years at issue herein. Rather, *Oakwood* supports the finding that the 5 year cap for the tax years at issue herein should be calculated from tax year 2010/2011 (the first year of the second five year period - see fn 11, *supra*).

Petitioner relies upon RPTL §1805(2)'s language stating that property assessments shall not be increased "by more than thirty percent in **any** five-year period." Thus, according to 436 Condo, the assessment for tax year 2012/2013 ($793,144) must be corrected because it exceeds thirty percent of the 2008/2009 assessment ($276,299). Based on petitioner's calculation, the 2012/2013 AV should be reduced from $793,144 to $359,189, with subsequent years calculated based on this number, subject to the 1 year cap. See Motion at Exh. E. However, 436 Condo's argument ignores the remaining statutory language which specifically mandates the manner in which the 5 year caps are to be measured. For the foregoing reasons, the portion of petitioner's motion seeking an order declaring tax year 2008/2009 to be the base year for calculating assessments pursuant to RPTL §1805(2) is denied.

Turning to respondents' cross-motion, partial summary judgment is granted declaring that the 2010/2011 tax year is the base tax year for purposes of calculating RPTL §1805(2)'s assessment caps. Tax year 2010/2011 is both the first year in which

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[11] 436 Condo concedes that the first year RPTL §1805(2) would have applied to the building was 2000/2001 (the first year of condominium ownership), with subsequent five (5) year periods commencing with tax years 2005/2006 and 2010/2011.

the property was identified in Subclass 2C and the first year of the second five year period.

Having declared that 2010/2011 is the base year for purposes of calculating the 5 year cap in the case at bar, this court turns to petitioner's request to recalculate the AV for the challenged tax years in accordance with *JAM*. As this court found in *Oakwood*, because 436 Condo did not challenge DOF's failure to identify the property as being in Tax Class 2, Subclass 2C until tax year 2010/2011, it cannot go back to prior unchallenged tax years to recalculate the challenged tax years herein based on what the prior assessments would have been had the property been correctly classified.

This court finds no basis in the statutory language for the *JAM* court's calculation methodology and respectfully declines to adopt it. While acknowledging that the result in *JAM* serves the laudatory goal of protecting small property owners such as the unit owners herein, still, RPTL §1805(2) expressly provides for the 1 year cap to be "measured from the **actual assessment** on the previous year's assessment roll" (emphasis added). Prior assessments are final if not challenged and are not subject to review, particularly where, as here, the parties stipulated before the Tax Commission to the building's AV for tax years 2010/2011 and 2011/2012.

Here, the assessments for the challenged tax years (2012/2013 through 2014/2015) cannot exceed thirty percent of the 2010/2011 AV of $679,997, that being the agreed upon AV as per the Tax Commission settlement. The building's AV for 2012/2013 was $793,144, for 2013/2014 was $856,593 and for 2014/2015 was $833,995. As these figures do not exceed either the 5 year or 1 year caps, the portion

of petitioners' motion to correct the 2012/2013 through 2014/2015 AV's and for refunds of any overpaid taxes for such years must be denied.

This court has considered the parties' remaining arguments and finds them unavailing and/or unnecessary to address. For the foregoing reasons it is hereby

ORDERED that petitioner's motion is granted solely to the extent of consolidating the subject actions for purposes of this motion, and is otherwise denied; and it is further

ORDERED that respondents' cross-motion is granted, and tax year 2010/2011 is declared the applicable base year for calculating RPTL §1805(2)'s assessment increase limitations for the subject property.

The foregoing is this court's decision and order.

Dated: December 15, 2015

Martin Shulman, J.S.C.
Hon. Martin Shulman
J.S.C.