

**Brookdale Physicians' Dialysis Assoc., Inc. v  
Department of Fin. of the City of N.Y.**

2018 NY Slip Op 31841(U)

August 2, 2018

Supreme Court, New York County

Docket Number: 156074/2017

Judge: Margaret A. Chan

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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. MARGARET A. CHAN** PART IAS MOTION 33EFM

*Justice*

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INDEX NO. 156074/2017

BROOKDALE PHYSICIANS' DIALYSIS ASSOCIATES, INC. F/K/A  
CHURCH AVENUE ASSOCIATES, INC., SAMUEL AND BERTHA  
SCHULMAN INSTITUTE FOR NURSING AND REHABILITATION  
FUND, INC. F/K/A SAMUEL SCHULMAN INSTITUTE FOR  
NURSING AND REHABILITATION FUND, INC.

MOTION DATE 07/06/2017

MOTION SEQ. NO. 001

Petitioner,

- v -

DEPARTMENT OF FINANCE OF THE CITY OF NEW YORK,

**DECISION AND ORDER**

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for ARTICLE 78

Upon the foregoing documents, the petition is granted, and the cross-motion is denied.

Petitioner Samuel and Bertha Schulman Institute for Nursing and Rehabilitation Fund, Inc. (Schulman Inst.) is the owner of a building at 9701 Church Avenue, Brooklyn, New York, and a not-for-profit corporation that provides funds for charitable healthcare purposes. Petitioner Brookdale Physicians' Dialysis Associates, Inc. (Brookdale Dialysis) is a for-profit corporation that occupies the first floor and basement at 9701 Church Avenue, Brooklyn and pays rent to the Schulman Inst. Respondent Department of Finance of the City of New York (DOF) revoked petitioners' exempt status for the 9701 Church Avenue building for the 2014/15 tax year forward. Petitioners seek to annul the DOF's determination as arbitrary and capricious in this Article 78 petition, and the DOF cross-moves to dismiss the petition, to which petitioners oppose.

This is the second-time petitioners seek the same relief before this court, albeit for a different tax period. The prior Article 78 proceeding under index 101244/2013 was adjudicated in favor of petitioners in 2014 (NYSCEF doc. no. 2 – Order and Decision dated February 10, 2014, J. Margaret Chan). The facts in the instant matter are unchanged from those in the 2013 petition except for the tax periods.

Briefly, the facts, as provided in the last proceeding, and remains undisputed in the instant proceeding, are that Schulman Inst. "provides funds in support of charitable healthcare purposes through The Schulman and Schachne Institute for Nursing and Rehabilitation (Nursing Institute) and [The Brookdale Hospital]. Both Nursing Institute and Brookdale Hospital are located at One Brookdale Plaza, Brooklyn, New York - one block from the subject building - and are affiliated with each other under the Brookdale Health System. Brookdale Dialysis services 80% of the patients from Brookdale Hospital; its physicians work at Brookdale Hospital and the Nursing Institute, and its nurses, technicians and staff are Brookdale Hospital staff. Brookdale Hospital relies on Brookdale Dialysis' machines and they are used in providing over 8,000 in-patient treatments a year, about 22,000 treatments are done for out-patients in the subject building" (*id.*).

The February 10, 2014 decision found that the DOF's reliance on the fact that Brookdale Dialysis is a for-profit organization, without considering that the enmeshment of the operations of both Brookdale Dialysis and Brookdale Hospital, failed to meet its burden to show that the property was no longer eligible for the exemption. No appeal was taken.

In the instant proceeding, the DOF's cross-motion focuses on its allegation that "the Schulman Fund is making a profit on its lease to Brookdale Dialysis" (NYSCEF doc. no. 23 - Resp's Memo, p13). The DOF argues that a non-profit's use of an exempt property for profit-making purposes takes it out of the exempt status, regardless of how enmeshed the operations are with a not-for-profit organization (*id.*, p11). According to the DOF, the Shulman Inst. should have no cost since Brookdale Dialysis is responsible for paying for all utility, repair and maintenance of the property; and the cost and maintenance of its machinery (*id.* p13). Thus, as the DOF presents, petitioners are making a profit from the exempt property - the not-for-profit landlord profits through the rental income from its for-profit tenant, which in turn, profits through its operation from an exempt property. The DOF adds that because the Shulman Inst. is not a "free public hospital" or a provider of health care, petitioners are not entitled to an exemption under RPTL § 420-a[5] (*id.*, pp14-15). Finally, the DOF argues that the proper proceeding to challenge an excessive assessment is an Article 7, rather than an Article 78, proceeding (*id.*, pp 15-16).

Petitioners urges denial of the cross-motion based on res judicata grounds since the same arguments concerning the same property, parties, and facts were adjudicated in 2014. And, even if this matter were reviewed again, petitioners argue that the DOF failed to meet its burden again to show that the property is no longer eligible for the exemption. Petitioners also argue that an Article 78 proceeding is proper as they are challenging the DOF's Determination to revoke their exempt status, rather than the valuation of an assessment under RPTL Article 71.

## DISCUSSION

### Res Judicata

The DOF does not address res judicata in its cross-motion to dismiss the petition, although Corporation Counsel, representing the DOF, touches on it at oral argument when the issue was raised. Corporation Counsel argues that the prior decision addressed ten tax years prior to 2013; that each year yields a new determination; and, although the concept underlying the DOF's determination remains the same, the fact is that the statutory requirement is not met. Further, based on the DOF's investigation since 2013, new evidence yielded the instant determination to revoke the property's exempt status (tr. 2/14/18, p11). The DOF claims that the new evidence was not previously considered by the court.

While res judicata generally applies to administrative proceedings, it must be determined first "whether application of the doctrine of res judicata would be consistent with the function of the administrative agency involved, "the peculiar necessities of the particular case", and "the nature of the precise power being exercised"" (*Venes v Community School Bd. of Dist. 26*, 43 NY2d 520, 525 [1978] quoting *Matter of Evans v Monaghan*, 306 NY, at 324 [1954]). Application of res judicata is more appropriate for administrative proceedings that are quasi-judicial wherein the procedures used follow those in a court of law (*Jason B v Novello*, 12 NY3d 107, 113 [2009]). There is nothing in this record that indicates an adversarial or adjudicatory proceeding (*id.* at 113-114). This is not the type of proceeding where res judicata is appropriate.

### Real Property Tax Law § 420-a [1][a]

Real property owned by a corporation or association that is "organized or conducted exclusively for . . . charitable . . . purposes" are exempted from taxation (RPTL § 420-a [1][a]). The Court of Appeals has defined "exclusively" in this context to include 'principal' or 'primary' purposes as opposed to auxiliary or incidental to the exempt purpose (*Greater Jamaica Development Corp. v New York City Tax Com'n*, 25 NY3d 614, 623 [2015] quoting *Yeshivath Shearith Hapletah v Assessor of Town of Fallsburg*, 79 NY2d 244, 249 [1992] [internal quotation omitted]). The DOF claims that because the non-profit is receiving rent and thereby profiting from the exempt property, the exclusive or primary use of the property is irrelevant.

The burden is on the DOF to establish that the property is not exempt because the DOF revoked Brookdale Dialysis' previously-granted § 420-a tax exemption (*Greater Jamaica Development Corp*, 25 NY3d at 623; *Congregation Rabbinical Coll. Of Tartikov, Inc. v Town of Ramapo*, 17 NY3d 763, 764 [2011]). The DOF, while acknowledging its burden, nonetheless predicates its analysis by placing the burden on petitioner asserting that "[t]he factual allegations as set forth in the petition are insufficient as a matter of law to establish that the Subject Property is entitled to an exemption pursuant to RPTL §420-a." (NYSCEF doc. no. 20 – Kroening aff at ¶ 3).

The DOF's new evidence that the Shulman Inst. profits from the rent it receives from Brookdale Dialysis are the petition and the affidavit by Dr. Warren Shapiro in support of the petition (*id.*: NYSCEF doc. nos. 21-22 – petition and Shapiro aff in support of petition). How the allegations in the petition and supporting affidavit can form the basis of the determination at issue was not explained. The DOF posits that the mere fact that the Shulman Inst. earns a profit from the exempt property removes the property from the exempt status. Thus, the DOF concludes that “if the property is leased, the non-profit owner cannot make a profit on the lease.” (Koenig aff *id.* at ¶ 23). This argument is flawed.

The DOF's analysis that the property is not entitled to an exempt status if “an officer, member or employee of the property owner receives a “pecuniary profit” from the activity involved, . . .” (RPTL 420-a[1][b]) is an incomplete analysis. The inquiry does not stop at the mere fact that the Schulman Inst. receives rent from Brookdale Dialysis. The primary use of the exempt property must be examined (*Matter of Adult Home at Erie Sta., Inc. v Assessor & Bd. of Assessment Review of City of Middletown*, 10 NY3d 205, 215 [2008] [discussing respondent's analysis on RECAP, which receives market rent from its exempt property, stating “[t]he issue is not whether RECAP benefits, but whether the property is “used exclusively” for RECAP's charitable purposes”]). By failing to do so, the DOF has not met its burden. Hence, the DOF's determination to revoke petitioners' exempt status for the 9701 Church Avenue building for the 2014/15 tax year forward is arbitrary and capricious.

Finally, an Article 78 proceeding for the relief sought here is appropriate (*see Hewlett Associates v City of New York*, 57 NY2d 356 [1982]).

Accordingly, it is ORDERED that the Article 78 petition is granted to the extent that the Department of Finance's determination revoking the exemption is annulled; and it is further

ORDERED that respondent's cross-motion is denied in its entirety.

8/2/2018  
DATE

  
MARGARET A. CHAN, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE