

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

2018 NY Slip Op 32339(U)

September 20, 2018

Supreme Court, New York County

Docket Number: 250985/13

Judge: Martin Shulman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

-----X  
In the Matter of

Stella Baum, Frederick Baum & Helene Birns Trust  
u/w/o Abraham Baum,

Petitioners,

-against-

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

Respondents.  
-----X

SHULMAN, J.:

Petitioners move for partial summary judgment in the above-captioned Real Property Tax Law ("RPTL") Article 7 proceedings, as well as in the three other related RPTL Article 7 proceedings listed above, seeking an order directing respondents to reclassify the real property at issue as Tax Class 2, Subclass 2A for tax years 2013/2014 through 2016/2017, to correct the property's assessed valuation for all such years in accordance with RPTL §§ 1805(2) and to issue a refund for overpaid taxes for this period in accordance with petitioner's proposed method of calculation (see Mengar Aff. in Supp. of Motion at ¶12). Petitioners bring the instant motion in each of the four proceedings listed above.<sup>1</sup> All of the above captioned actions are deemed consolidated solely for purposes of this motion.

Index No. 250985/13

**Decision & Order**

Block 195, Lot 5

Index No. 255579/14

Index No. 258979/15

Index No. 251136/16

---

<sup>1</sup> The motion papers initially were filed under the 2013, 2014 and 2015 index numbers listed above. In response to respondents' opposition herein, petitioners conceded they had not filed a request for judicial intervention (RJI) under the 2016 index number at the time they filed this motion. Petitioners have since filed an RJI and filed this motion under the 2016 index number.

The real property at issue is a five story building located at 392 Broadway in Manhattan (the "property" or "building"). Petitioners maintain that the first and second floors are used for commercial purposes, while the third through fifth floors consist of six residential units.<sup>2</sup> Petitioners further state that the property has been so comprised since their predecessor in interest purchased it in 1986. Petitioners allege that although the building has been primarily used for residential purposes since 1986, the New York City Department of Finance ("DOF") mistakenly classified it in Tax Class 4 as a loft building with a store, rather than as a Tax Class 2 property.

Petitioners' motion seeks a recalculation of the building's assessed valuation ("AV") for the challenged tax years to reflect RPTL §1805(2)'s statutory caps on increases to property assessments. Petitioners support their motion with the following documentation, which they contend unequivocally establishes that the property has primarily been used for residential purposes at all relevant times:

- a 1996 certificate of occupancy issued by the New York City Department of Buildings (DOB) confirms that the first two floors were used for commercial purposes, while the third through fifth floors were used for residential purposes (Motion at Exh. 3); and
- at least as far back as 2014, notices of property value (NPV) issued by DOF calculate the building's gross square footage as 24,000, with 14,400 square feet allocated to residential use and 9,560 for commercial use (*id.* at Exh. 4).

Petitioners also submit an affidavit from petitioner Helene Birns, who avers that she has managed the property for over 25 years, during which time she was "present at the property about once a week." See Birns Aff., ¶3. Ms. Birns further confirms that,

---

<sup>2</sup> The building also includes a cellar and sub-cellar designated as storage space and a boiler room, respectively.

since her now deceased father purchased the building in 1986, the first and second floors have consisted of commercial space and the third through fifth floors have consisted of six residential units. *Id.* at ¶4.

Respondents agree that, based upon a recent inspection of the building, the property should be classified in tax class 2<sup>3</sup> beginning in the 2019/2020 tax year. However, they oppose reclassifying the property as being in Class 2 for the tax years at issue. As the property was properly classified as being in Class 4 during tax years 2013/2014 through 2016/2017, respondents contend that the AV's for each of these tax years were not excessive since RPTL §1805(2) applies only to Class 2 properties.

Respondents argue that the NPVs petitioners rely upon, which recite the building's square footage for both commercial and residential units, are not determinative of the building's alleged primary residential use because that information is subject to confirmation via inspection. They submit an affidavit from Glenn Calderon, a City Assessor who avers that he was unable to gain access to inspect the entire building on May 31, 2013 and as such, the information in the NPVs is unconfirmed.<sup>4</sup> See DeSena Aff. in Opp., Exh. A, ¶¶ 6-7. Under such circumstances, respondents claim that they have the right to assess the property via alternative means. In this case, Mr. Calderon states that his notes from May 31, 2013 indicate that a commercial

---

<sup>3</sup> While petitioners argue that the building should be classified as sub-class 2A, respondents' opposition states that sub-class 2B is the proper classification. For purposes of this motion, the distinction is irrelevant.

<sup>4</sup> The assessor states he was unable to gain access to floors two through five, but that an employee of the first floor commercial premises stated that those floors were used for combined living and work space.

tenant's employee informed him that "floors two through five were a combination of living and work space."<sup>5</sup>

**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 (1<sup>st</sup> 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).

While the moving party has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]), 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.*

---

<sup>5</sup> Respondents also claim that an inspection to confirm use and square footage is essential given the property's loft status because such properties historically undergo slow conversions from commercial to residential use.

Corp., 43 NY2d 260 (1977); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 (1979).

Here, petitioners submit an affidavit from Ms. Birns, an individual having personal knowledge of the building's commercial and residential makeup. Her allegations are corroborated by DOF and DOB records. Accordingly, petitioners have established prima facie entitlement to partial summary judgment regarding the property's erroneous classification.

Respondents fail to rebut petitioners' prima facie case. They correctly note that property may be assessed by alternative means when access thereto cannot be obtained and identify the basis for Mr. Calderon's conclusion that the property belonged in Tax Class 4. However, the question to be determined on this summary judgment motion is whether or not the city assessor's determination was correct, not whether the methodology he used to reach that determination was permissible. While Respondents argue that the DOB and DOF records petitioners rely upon are not dispositive, they do not dispute the factual allegations stated in Ms. Birns' affidavit. Accordingly, they fail to rebut petitioners' entitlement to partial summary judgment.

Finally, respondents do not dispute petitioners' calculation of the property's correct AV for tax years 2013/2014 through 2016/2017, and the calculations appear to be correct, as follows:

<u>Tax Year</u>	<u>Actual AV</u>	<u>Corrected AV</u>	<u>Difference in AV</u>
2012/2013	\$ 599,400		
2013/2014	\$1,093,500	\$647,352	\$446,148
2014/2015	\$1,345,050	\$699,140	\$645,910
2015/2016	\$1,328,400	\$755,071	\$573,329
2016/2017	\$1,415,250	\$779,220	\$599,773

For the foregoing reasons it is hereby

ORDERED that petitioners' motion is granted in its entirety; and it is further

ORDERED that respondents are directed to reclassify the subject property as Tax Class 2, Sub-Class 2A for tax years 2013/2014 through 2016/2017; and it is further

ORDERED that respondents are directed to correct the subject property's assessed valuations for tax years 2013/2014 through 2016/2017 to reflect RPTL §1805(2)'s limitations, which shall be calculated in accordance with this decision, and to refund any overpayments to petitioners.

Counsel for petitioners shall submit proposed orders implementing this decision's terms to chambers.

The foregoing is this court's decision and order.

Dated: September 20, 2018



Martin Shulman, J.S.C.