

Brothers of Mercy of Montabaur Apts. Complex, Inc. v Town of Clarence

2018 NY Slip Op 33627(U)

July 10, 2018

Supreme Court, Erie County

Docket Number: 815012-2017

Judge: Henry J. Nowak

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**STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE**

**BROTHERS OF MERCY OF MONTABOUR
APARTMENTS COMPLEX, INC.,**

Petitioner,

vs.

MEMORANDUM DECISION

INDEX NO. 815012-2017

**TOWN OF CLARENCE,
ASSESSOR OF THE TOWN
OF CLARENCE, and CLARENCE
BOARD OF ASSESSMENT REVIEW,**

Respondents.

**HON. HENRY J. NOWAK, J.S.C.
Justice Presiding**

Petitioner Brothers of Mercy of Montabour Apartment Complex, Inc. (Brothers of Mercy Montabour) brings this Article 78 Petition seeking a declaration that a senior housing apartment complex located in Clarence, New York is tax exempt under Real Property Tax Law § 420-a. Respondents move to dismiss the petition pursuant to CPLR 3211 (a). After petitioner applied for an exemption pursuant to Real Property Tax Law § 420-a, the Town of Clarence Assessor denied the application on April 24, 2017. Brothers of Mercy Montabour sought a review by the Board of Assessment Review, which also denied the request on May 30, 2017. This Article 78 proceeding was filed on October 24, 2017.

At the outset, the court finds that the action by Brothers of Mercy Montabour was timely commenced. The four month statute of limitations ran from the filing of the final assessment roll, which was on June 30, 2017.

Real Property Tax Law § 420-a (1) (a) provides that a corporation may be exempt from taxation if it is organized or conducted exclusively for religious, charitable, hospital, educational, for moral or mental improvement of men, women or children purposes, or for two or more of such purposes, and used for carrying out thereupon one or more of such purposes. The Court of Appeals has held that term “exclusively” in the statute should be construed to mean “principal” or “primary,” such that purposes and uses that are incidental to the primary purpose and use will not defeat the exemption (*Matter of Greater Jamaica Dev. Corp. v New York City Tax Commn.*, 25 NY3d 614, 623 [2015]). However, exemption statutes are to be strictly construed against the taxpayer (*Matter of Yeshivath Sheorith Hapletah v Assessor of Town of Fallsburg*, 79 NY2d 244, 249 [1992]).

Brothers of Mercy Montabaur is a not-for-profit corporation that received the subject property as a donation from Brothers of Mercy, Inc., which owns an adjacent 128 acre campus. The property consists of a facility for senior citizens consisting of 111 apartments. The facility opened to residents in January 2016. At the time this proceeding was commenced, 105 of the 111 apartments were occupied, with a total of 120 residents.

Brothers of Mercy Montabaur charges rents ranging from \$ 2,600.00 to \$ 3,300.00 per month. If there is a second person occupying the apartment, Brothers of Mercy Montabaur charges an additional fee of \$ 500.00 per month. The fees charged by Brothers of Mercy Montabaur are well within the range of rental costs at similar facilities located nearby.

Brothers of Mercy Montabaur offers a great many services to promote moral and mental improvement of its residents at no additional cost. They include internet, a movie theater, transportation, a valet service, exercise classes, religious activities, recreational activities, live music, presentations by community members and emergency medical pendants that can be used

to summon an ambulance if necessary. In addition, Brothers of Mercy Montabaur maintains a Hardship Fund, currently funded at \$ 400,000.00, to assist residents if they have difficulty paying their monthly rent. The Hardship Policy is mentioned in each lease and is readily available to all residents. The CEO of Brothers of Mercy Montabaur has never challenged a request for reduction in rent and in 2017, agreed to reduce the rent for seven residents upon their request. Furthermore, Brothers of Mercy Montabaur identified ten apartments in the building which it rents for \$ 2,325.00 per month for residents who could not afford the published rate of \$ 2,675.00 per month.

Respondents argue that the use of the Hardship Fund for a small percentage of residents at the facility differs from subsidizing rent or charging less than fair market rental rates across the board. While Brothers of Mercy Montabaur indicates an intent to never evict a resident solely for financial hardship, it may do so under the terms of its lease. Also, Brothers of Mercy Montabaur takes measures at the outset of each tenancy to reduce the need to utilize its Hardship Fund, such as performing a credit check on each prospective tenant. Also, every application for residency requires that prospective tenants sign a warranty that they have assets and income that will be sufficient under foreseeable circumstances (1) to pay the financial obligation of Brothers of Mercy Montabaur and (2) to meet ordinary living expenses while a resident at the complex. Brothers of Mercy Montabaur also may require a prospective resident to furnish updated financial information from time to time. The record reflects no evidence that any resident was ever admitted despite an inability to pay full rent.

As a result, respondents claim that principal purpose and use of the Brothers of Mercy Montabaur facility is to provide senior housing. The Court of Appeals has found that “renting homes to elderly people who are not poor is not a ‘charitable’ activity” (*Adult Home at Erie Sta.*,

Inc. v Assessor, 10 NY3d 205, 214 [2008]; see also *Matter of Greer Woodycrest Children's Servs. v Fountain*, 74 NY2d 749 [1989]; *Matter of Presbyterian Residence Ctr. Corp. v Wagner*, 48 NY2d 885 [1979], *affg for reasons stated below* 66 AD2d 998 [4th Dept 1978]). Brothers of Mercy Montabaur characterizes its mission as supporting and promoting the welfare of senior citizens and the elderly in Erie County, not merely providing housing to them. It focuses on the services employed to support and promote residents' overall welfare. Brothers of Mercy Montabaur urges the court to analyze its services as wholly integrated and necessary to achieve the mission. For that reason, Brothers of Mercy Montabaur compares the instant case to *Mohawk Trust v Board of Assessors*, 47 NY2d 476, 480 (1979), where the Court granted a tax exemption for lands that were used "for a variety of environmental, conservation, educational and compatible recreational purposes."

Respondents rely upon a number of cases where exemptions were denied to other senior housing facilities. For example, in *Lake Forest Senior Living Community, Inc. v Assessor of City of Plattsburgh*, the court considered an exemption for "a 44-unit congregate living facility . . . used exclusively in furtherance of its charitable mission to provide moderately-priced housing and supportive services to the elderly" (72 AD3d 1302, 1303 [3d Dept 2010]). At that facility, monthly rental rates ranged from \$2,075 to \$2,483 (*id.* at 1304). Furthermore, the court noted:

"[a]lthough petitioner claims a 'policy' of not displacing residents if their finances become such that they are unable to pay rent, petitioner's standard lease agreement contains no indication that a tenant would not be evicted upon an inability to pay. In addition to housing elderly tenants, petitioner also provides an array of residential and supportive services tailored to address their special needs, including age-appropriate design features and amenities, emergency response and monitoring, health and wellness programs, medical transportation and other services such as laundry and trash removal."

(*Id.*). The court denied the exemption, finding that “petitioner's provision of housing to middle-income seniors at market rates, without subsidy, does not constitute a charitable activity” and the fact “petitioner also provides its residents with personal care services does not make its activity ‘charitable’ ” (*id.* at 1305).

Another example is *Presbyterian Residents Ctr. Corp. v Wagner*, 66 AD2d 998 (4th Dept 1978), *affirmed* 48 NY2d 885 (1979). After the trial court found the property to be exempt because the corporation was organized and the property used exclusively for the “moral or mental improvement of men and women,” the Appellate Division reversed, holding that:

“the apartment . . . is indistinguishable from a commercial apartment complex having appurtenant recreational facilities except that it houses elderly tenants, is designed and constructed with safety features and amenities appropriate to their age and includes a health facility as an integral part of the complex. . . .Petitioner's property does not qualify for exemption pursuant to the provisions relating to the moral or mental improvement of men and women. That provision of the statute was designed to benefit organizations such as the YMCA, YWCA, Boy Scouts and Girl Scouts [see NY Legis Ann, 1972, p 266]. Furthermore, it is not exempt as a charitable corporation. The purposes for which petitioner is organized are indistinguishable from the purposes of commercial real estate corporations generally, with the one exception that petitioner's complex is intended to serve elderly persons. Real property of nonprofit corporations is not exempt unless it meets the criteria of the statute and the operation of a housing project for the elderly does not, per se, qualify the property as an exempt charitable use.”

(*Id.* at 998–99).

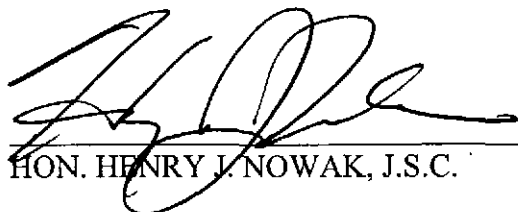
Brothers of Mercy Montabaur attempts to distinguish these cases, pointing out that its lease mentions the Hardship Policy and its supplemental services are provided free of charge, unlike in *Lake Forest Senior Living Community, Inc. v Assessor of City of Plattsburgh*, 72 AD3d 1302, 1304–05 (3d Dept 2010). Also, in *Presbyterian Residence Center Corp. v Wagner*, 66 A.D.2d 998 (4th Dept 1978), the incorporation document provided for the creation of an endowment fund to subsidize tenants who became unable to pay the standard fees and charges,

but the fund had not yet been created. Here, Brothers of Mercy Montabaur's Hardship Fund is established and funded with \$ 400,000.00. Another distinction is that the applicants in *Presbyterian Residence Center Corp.* had to pay an entrance fee ranging from \$8,500 to \$33,500, while Brothers of Mercy Montabaur requires no such entrance fee.

These differences may be meaningful to a particular resident but are insufficient for this court to reach a different conclusion. Courts have granted exemptions to charitable programs where housing is more incidental than in the present case. For example, exemptions were granted for a complex where residents live for a transitional period until they completed a program devoted to combating homelessness, substance abuse and other social ills (*Adult Home at Erie Sta., Inc. v Assessor*, 10 NY3d 205 [2008]) and for housing for transsexual women that promoted a particular religion (*Matter of Maetrum of Cybele, Magna Mater, Inc. v McCoy*, 111 AD3d 1098 [3d Dept 2013], *affirmed* 24 NY3d 1023 [2014]).

Therefore, the court finds that the purpose and use of the Brothers of Mercy Montabaur facility are primarily to provide rental housing to the elderly. Respondents' motions to dismiss are granted and the petition is dismissed. Submit order.

DATED: July 10, 2018



HON. HENRY J. NOWAK, J.S.C.