

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

**FILED AND
ENTERED ON
DATE**

**ROCKLAND
COUNTY CLERK**

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THEODORE BRODIE and SIMMA J. BRODIE as
GENERAL PARTNERS of the T.S.B. MOUNTAIN
FAMILY LIMITED PARTNERSHIP,

Index No: 7492/04

Petitioners,

DECISION & ORDER

-against-

OFFICE OF THE ASSESSOR, TOWN OF RAMAPO,

Respondents.

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DICKERSON, J.

THE STAR EXEMPTION-SLEEPING ON THEIR RIGHTS

The Petitioners, Theodore Brodie and Simma J. Brodie as General Partners of T.S.B. Mountain Family Limited Partnership [" the Brodies " and " T.S.B. "] filed a Notice of Verified Petition on November 3, 2004 " for a review pursuant to Article 78 of the Civil Practice Law and Rules and/or Article 7 of the Real Property Tax Law of

the assessment upon it(s) real property " located at 34 Mountain Avenue, Monsey, New York [" the subject property "]. The Petitioners claim that the subject property was entitled to the School Tax Relief Exemption [" the STAR exemption "] pursuant to Real Property Tax Law [" R.P.T.L. "] § 425 for years 1999, 2000, 2001 and 2002 and, hence, real property taxes paid during those years were " excessive... entitling them to a refund of all excess taxes paid "1.

Request For STAR Exemption Application Form Refused?

The Petitioners claim that " In early 1999, the Brodies verbally requested from the Ramapo Assessor's office, both over the telephone and in person, that they be given an Application for (the STAR Exemption) "2 and that the " Ramapo Assessor refused to even give petitioners a STAR application form... stat(ing) that STAR Exemption was not available to personal residence held in Family Limited Partnerships (such as the subject property³) "4.

No Complaints Made From 1999 To 2004

Evidently, the Petitioners did nothing further in their efforts to obtain or file a STAR Exemption application form for the years 1999, 2000, 2001 and 2002 and the Respondents " have no documentary evidence " " that the Assessor at that time advised (Petitioners) that a STAR

exemption would not be granted since the Assessor maintained that the STAR exemption was not available to Family Limited Partnerships "5. The Petitioners did not write a letter to the Respondents requesting a STAR Exemption application form for the years 1999, 2000, 2001 or 2002. The Petitioners did not file a proceeding pursuant to Article 78 of the C.P.L.R. seeking an Order requiring Respondents to make available such a form and process a STAR Exemption request for the years 1999, 2000, 2001 and 2002. The Petitioners did not bring this matter to the attention of the Board of Assessment Review [" B.A.R. "] of the Town of Ramapo. Their rationale for inaction being that since they could not file a STAR Exemption application form [because the Assessor's office refused to send them a form], the Assessor could, therefore, not reject it and without such a rejection there was nothing to protest and, hence, no claim to " present... to the Ramapo Board of Assessment Review " 6 [and, of course, no basis for the filing of an R.P.T.L Article 7 Petition for each year in dispute].

One Week To Pay Or Else

The first written complaint that the Respondents received was the Brodies' January 12, 2004 letter⁷ requesting " a retroactive exemption and refund for prior years " followed by a letter⁸ dated March 1, 2004 from Matthew Abramowitz, Esq. stating that Respondents have " one week

to refund my clients' realty tax overpayment " or " I shall commence legal action against you " .

The 2003 STAR Exemption

On December 29, 2002 the Petitioners filed a new deed " to their home from the T.S.B. Mountain FLP back to its original form under the names of Theodore Brodie and Simma J. Brodie "⁹. And on or about May 15, 2003 the Petitioners filed their " first application¹⁰ for an exemption pursuant to the STAR program for (the subject property and)... That application was granted "¹¹. " From that point on, petitioners have been receiving the STAR Exemption "¹².

The Motion To Dismiss

Instead of addressing the merits¹³ of the Petitioners' claims, the Respondents made a motion, pursuant to C.P.L.R. § 3211, seeking dismissal of the Petitioners' Verified Petition [" the Petition "] on the grounds that it is " barred by the applicable statute of limitations " which, if the Petition is construed as an R.P.T.L. Article 7 proceeding, would be 30 days [R.P.T.L. § 702(2)] from the filing of the 1999 Tax Roll¹⁴ or August 1, 1999 or if the Petition is construed as a C.P.L.R. Article 78 proceeding, would be 4 months [C.P.L.R. § 217(1)] from the filing of the 1999 Tax Roll or November 1, 1999. In either case

the statute of limitations has, clearly, expired since the instant Petition was filed on or about November 2, 2004.

The Petitioners' Response

In response the Petitioners set forth three arguments.

First, Petitioners assert that " Since the gravamen of the Petition is essentially one claiming a refund of excessive taxes paid from 1999 thru 2002, same is obviously governed by this three year statute of limitations (under R.P.T.L. § 556(1)(a)) "15.

Second, Petitioners characterize the Respondents' alleged refusal to send a STAR Exemption application form in 1999 as " a continuing wrong against Petitioner by levying excess taxes it was not entitled to throughout the period 1999 thru 2002 "16. Hence, according to Petitioners, the limitations period of 3 years starts in 2002, the last year under review.

Third, Petitioners assert that Respondents' hands are unclean since " it is illegal to tax property which should be wholly or partially exempt ". Hence, according to Petitioners, they are " not limited to an article 7 proceeding for judicial review of an assessor's decision, but may seek relief... by declaratory judgment or equity suit "17.

DISCUSSION

What Is The Proper Remedy?

The Petitioners are confused as to what remedy they seek. For example, in their Notice of Verified Petition they seek a " review pursuant to Article 78 of the (C.P.L.R.) and/or Article 7 of the (R.P.T.L.) of the assessment upon it real property ". However, within the context of the instant motion Petitioners assert that they are " not limited to an article 7 proceeding for judicial review of an assessor's decision, but may seek relief in New York courts by declaratory judgment or equity suit "¹⁸ citing Cody Inc. v. Town of Woodbury, 8 F. Supp. 2d 340, 343 (S.D.N.Y. 1998) which does not support their position. In fact, the Court in Cody, supra, held that an R.P.T.L. Article 7 proceeding is an " adequate (remedy) as a matter of law "¹⁹ in an action challenging an assessor's determination that property was nonexempt. What then is the proper remedy [See e.g., Matter of Markin v. Assessor of the Town of Orangetown, 6 Misc. 3d 1042(A)(West. Sup. 2005)(" What is the proper remedy...Must Petitioners proceed by way of R.P.T.L. Article 7 or may they collaterally attack the Assessor's methods by way of a C.P.L.R. Article 78 proceeding? ")]?

C.P.L.R. Article 78 Is The Proper Remedy

The appropriate remedy flows from the misconduct alleged [See e.g., Heron v. Division of Taxation, 209 A.D. 2d 989, 619 N.Y.S. 2d 454 (4th Dept. 1994)(" The appropriate Statute of Limitations in an action seeking declaratory relief is determined by the substance of the action and the relief sought...If the issues could have been raised and the relief sought could have been obtained in an action or proceeding with a specified limitations period, that period applies to the declaratory judgment action...Because plaintiffs could have brought a CPLR article 78 proceeding to obtain the relief requested in this declaratory judgment action, their action, brought more than four months after the issuance of the notices...is time barred ")].

In this case the alleged misconduct involves the inaction of an unnamed person working in the Assessor's office of the Town of Ramapo in 1999 who, in response to an oral request from the Brodies, refused to send them a STAR Exemption application form. The focus is, clearly, on the administrative actions or inactions of a governmental official. Hence, the instant Petition is best viewed as one seeking relief under C.P.L.R. Article 78 and the four month Statute of Limitations in C.P.L.R. § 217(1) would apply [See e.g., Matter of Trizec v. City of New York, 66 N.Y. 2d 807, 809, 498 N.Y.S. 2d 348 (1985)(" Whether considered as an incidental claim for damages in an article 78 proceeding or as such a claim in a declaratory judgment action,

the...cause of action was barred by the four-month limitation period applicable to article 78 proceedings "); Matter of Roebliq Liquors, Inc. v. Urbach, 245 A.D. 2d 829, 830, 666 N.Y.S. 2d 328 (3d Dept. 1997)(" Nevertheless, a party may not assert constitutional claims in an attempt to subvert the Statute of Limitations provided by CPLR 217 when the essence of the party's challenge is the specific actions of an administrative agency... including those of the taxing authorities...Inasmuch as petitioners' challenge is to the administrative actions of...the four month Statute of Limitations set forth in CPLR 217 is applicable "); Davidoff v. State Tax Commission, 208 A.D. 2d 1095, 617 N.Y.S. 2d 915 (3d Dept. 1994)(" Here, the essence of plaintiffs' claim is a challenge to the validity of the tax warrant. Inasmuch as the Commission's issuance of the warrant was an administrative act...the plaintiffs' action is governed by the four month Statute of Limitations applicable to CPLR article 78 proceedings ")].

R.P.T.L. Article 7 Is Not The Proper Remedy

In response to the alleged refusal of the Assessor's office to send a STAR Exemption application form the Brodies did nothing. No letters were written, no complaints were filed, no protests made to the Board of Assessment Review and no Article 7 Petitions were filed challenging the assessments for the years 1999, 2000, 2001 and 2002. It was not until

early in 2004 that the Brodies demanded retroactive application of the STAR Exemption to the years in dispute.

If the Petitioners had actually filed a STAR Exemption application form for each year 1999, 2000, 2001 and 2002 and such forms had been rejected by the Assessor and the Board of Assessment Review and Petitions had been timely filed for each year in dispute then a R.P.T.L. Article 7 proceeding may have been appropriate and the 30 day Statute of Limitations in R.P.T.L. § 702(2) would apply [See e.g., Matter of Long Island University v. Board of Assessors, 105 A.D. 2d 747, 748, 481 N.Y.S. 2d 400 (2d Dept. 1984) (" Although a taxpayer's exclusive remedy to redress the wrongful denial of a partial tax exemption is to commence a tax certiorari proceeding pursuant to the provisions of article 7 of the (R.P.T.L.) "); Matter of McDutchess Builders, Inc. v. Assessor of Town of Fishkill, 103 A.D. 2d 779, 477 N.Y.S. 2d 414 (2d Dept. 1984) (" It is not disputed that the proceeding was not commenced within 30 days after publication of the notice of completing and filing of the final assessment roll "); Goldstein v. Goldman, 85 A.D. 2d 664, 445 N.Y.S. 2d 211 (2d Dept. 1981) ("...on September 8, 1990, the petitioners served an application for review of their assessment. This was more than 30 days after the August 1 filing and publication of the notice of the filing "); Matter of Bablo v. Andrews, 4 Misc. 2d 105, 157 N.Y.S. 2d 427 (1956)].

R.P.T.L. § 556(1)(a) Does Not Apply

Petitioners assert that Respondents " perpetrated a continuing wrong...by levying and keeping excess taxes " and pursuant to R.P.T.L. § 556(1)(a) they are entitled to a three year Statute of Limitations period starting in 2002²⁰. R.P.T.L. § 556(1)(a) applies to taxes " attributable to clerical error or unlawful entry " or " where such tax was attributable to an error in essential fact "...and such application for refund is made within three years from the annexation of the warrant for such tax ". The terms " clerical error " and " error in essential fact " are defined in R.P.T.L. § 550 and none of the definitions apply to the alleged refusal of the Assessor's office to send the Brodies a STAR Exemption application form. " The Star application was never denied based upon a clerical error, an unlawful entry or an error in essential fact as those terms are used in RPTL Section 556. In fact the application(s) was never denied at all since no application prior to 2003 was ever filed "²¹.

Petitioners never filed a STAR Exemption application form for 1999, 2000, 2001 and 2002 and never protested in anyway the payment of taxes during that period [See e.g., Community Health Plan v. Burckard, 3 A.D. 3d 724, 725, 770 N.Y.S. 2d 485 (3d Dept. 2004) (" we fully agree with Supreme Court that because petitioner did not demonstrate that it paid the taxes involuntarily, i.e., under protest or duress, it would not be

entitled to the requested refunds even if its applications had been proper ")].

There Is No Basis For Equitable Estoppel

The Petitioners' " unclean hands " argument²² is really a request to toll the applicable four month Statute of Limitations based upon the doctrine of equitable estoppel [See e.g., Matter of Chrislex Staffing Ltd. v. New York State, 195 Misc. 2d 465, 758 N.Y.S. 2d 481 (West. Sup. 2003)(" The doctrine of equitable estoppel is a principal that is applied in the interest of fairness to preclude a party from speaking against his own acts, commitments or representations which induced another, who reasonably relied on such words or conduct and who would suffer injury if such conduct or representations which induced another, who reasonably relied on such words or conduct or representations, were allowed to stand...(citing) Conquest Sealing Corp. v. New York City, 279 A.D. 2d 546, 547 (2d Dept. 2001)(defendants affirmative acts ` lulled the plaintiff into *sleeping on its rights to its detriment* [emphasis added] and therefore...the doctrine of estoppel ` (was applied preventing the assertion of a 90 day claim filing requirement)'")].

Sleeping On Their Rights

The doctrine of equitable estoppel does not apply herein since the Respondents made no misrepresentations or affirmative acts which could reasonably have " lulled the (Petitioners) into sleeping on (their) rights ". Indeed, the Petitioners did fall asleep for four long years but did so of their own volition and without encouragement from the Respondents. Petitioners have only themselves to blame for failing to more vigorously pursue their rights, if any, to a School Tax Relief Exemption under R.P.T.L. § 425.

Based upon the foregoing the Petitioners' Verified Petition is dismissed as barred by the applicable Statute of Limitations.

This constitutes the Decision and Order of this Court.

Dated: White Plains, N.Y.
June 10, 2005

HON. THOMAS A. DICKERSON
SUPREME COURT JUSTICE

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ENDNOTES

1. Petitioner's Verified Petition [" P.V.P. "] at p. 1.
2. P.V.P. at para. 8.
3. See P.V.P. at paras. 5-7 (For the period 1999 to 2002 the subject property was owned by the T.S.B. Mountain Family Limited Partnership [" T.S.B. "] which according to Petitioners had been created in 1996 " solely to hold legal title to the subject premises for estate planning and asset protection purposes ". The Petitioners further assert that " The Brodies were without question the beneficial owners of the subject premises even though legal title was held in the name of (T.S.B.) ").
4. P.V.P. at paras. 9-10.
5. Affidavit of Scott Shedler sworn to January 5, 2005 [" Shedler Aff. II "] at para. 4.
6. P.V.P. at para. 12.
7. P.V.P. at para. 16 and Ex. C.
8. P.V.P. at para. 17 and Ex. D.
9. P.V.P. at para. 15 and Ex. B..
10. Affidavit of Scott Shedler sworn to December 3, 2004 [" Shedler Aff. I "] at Ex. A.
11. Shedler Aff. I at para. 2 (" No applications for an exemption pursuant to STAR were filed prior to that time ").
12. P.V.P. at para. 15.
13. The Petitioners assert that partnership-owned personal property such as Family Limited Partnerships [e.g. T.S.B.] should receive the STAR Exemption. See P.V.P. at paras. 19-69 (" Several forms of bifurcate ownership of a personal residence which are closely analogous to partnership ownership of a personal residence are expressly entitled to the STAR Exemption. Unlike these analogous forms of ownership, however, the language of RPTL Section 425 does not expressly entitle partnership-owned personal residences to the Exemption...Much like ownership in trust of cooperative form, conveying a personal residence to a family limited partnership essentially separates legal title to

the property, which vests in the partnership, from equitable or beneficial title to the property, which remains in the resident partners...In other words, although legal ownership changes upon conveying a personal residence to a partnership, beneficial ownership remains the same...").

14. Shedler Aff. at para. 3 and Ex. B.

15. Petitioners' Memorandum of Law dated December 28, 2004 [" P. Memo. "] at p. 2.

16. Id.

17. P. Memo. at p. 3.

18. P. Memo. at p. 3.

19. In *Cody Inc. v. Town of Woodbury*, 8 F. Supp. 2d 340, 343 (S.D.N.Y. 1998) the Court found an R.P.T.L. Article 7 proceeding to be an " adequate (remedy) as a matter of law ". The Court then reflected, in *dicta*, upon perceived inefficiencies in the administration of R.P.T.L. Article 7 proceedings in the 9th Judicial District of the New York State Unified Court System. " Whether New York provides a ' plain, speedy and efficient remedy ' by means of Article 7 of the N.Y.R.P.T.L. might be open to question. Most such cases address valuation rather than exemption. Calendars are congested and procedural niceties abound. Most cases are resolved by settlement rather than a judgment on the merits following trial...it does seem that the remedy is not in fact speedy and efficient, and those unwilling or unable to negotiate settlements must simply wait ". Since assuming responsibility for all tax certiorari, tax exemption and condemnation matters in the 9th Judicial District in 2003 this Court has made every effort to be " user friendly " by scheduling and presiding over as many trials as requested.

20. P. Memo. at p. 2.

21. Shedler Aff. II at para. 3.

22. P. Memo. at pp. 2-3.