

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

**FILED AND
ENTERED ON
DATE**

**ROCKLAND
COUNTY CLERK**

-----X
ORANGE AND ROCKLAND UTILITIES, INC.,
SOUTHERN ENERGY LOVETT, LLC, MIRANT NEW
YORK, INC. and MIRANT LOVETT, LLC,

Petitioners,

-against-

DECISION & ORDER

Index Nos: 4357-00
4696-01
5122-02
5279-03

TOWN OF STONY POINT ASSESSOR, TOWN OF
STONY POINT BOARD OF ASSESSMENT REVIEW and
the TOWN OF STONY POINT, ROCKLAND COUNTY
NEW YORK,

Respondents,

-and-

NORTH ROCKLAND CENTRAL SCHOOL DISTRICT
and COUNTY OF ROCKLAND

Intervenors-Respondents.

-----X
DICKERSON, J.

MOTION TO ADD AND SUBSTITUTE PARTIES

The Petitioner, Orange & Rockland Utilities, Inc. [" O&R "] owned the subject electricity generating station located in the Town of Stony Point, Rockland County [" the Lovett Station "] and on July 1, 1999 sold it to the Petitioner Southern Energy Lovett, LLC which was subsequently renamed Mirant Lovett, LLC¹. The Petitioner Mirant New York, Inc. was the parent corporation, a member and manager of the Petitioner Mirant Lovett, LLC.

Petitioners' Request

The Petitioners seek pursuant to C.P.L.R. §§ 2001, 3025 and 3026, (1) to add Mirant Lovett, LLC as a Petitioner in the 2001 and 2002 proceedings; (2) to substitute Mirant Lovett, LLC for Southern Energy Lovett, LLC in the 2000 proceeding; and (3) to determine that Mirant Lovett, LLC was a properly named Petitioner in the 2003 proceeding.

Respondents' Position

Respondents oppose Petitioners' motion on two grounds. **First**, they assert that Mirant New York, Inc. is not an aggrieved party because there is no evidence that it had a direct pecuniary interest in the assessed properties that make up the Lovett Station [" Petitioners have

failed to provide evidence to show that the 2001, 2002, and 2003 proceedings were instituted and/or authorized by an " ` aggrieved party ' within the meaning of Real Property Tax Law §704 (1) [McKinney's 2000 & Supp. 2004]. The lack of a proper party is not a mere technical defect and, when established, requires dismissal "2].

Second, Respondents assert that Mirant New York, Inc. " appears to have disclaimed any obligation to pay real property taxes in New York, including taxes relating to the property at issue in these proceedings ". Respondents rely on a March 5, 2004 submission to the United States Bankruptcy Court for the Northern District of Texas wherein Mirant New York, Inc. stated that " only Bowline, Lovett and NY-Gen arguably owe any taxes in New York. " Hence, Respondents contend that Mirant New York, Inc. is not an aggrieved party and lacked standing to bring the 2001, 2002, and 2003 proceedings in its own name³.

The Authority of Mirant New York, Inc.

Petitioners contend that the 2001 and 2002 proceedings were authorized since Mirant New York, Inc. was a member of Mirant Lovett, LLC at the time that the petitions were filed. They state that, pursuant to Mirant Lovett, LLC's operating agreements⁴, Mirant New York, Inc. was the manager of Mirant Lovett, LLC and as such Mirant New York, Inc. had the " power of authority, and shall be and hereby is authorized and empowered, in the name and on behalf of the Company, to do or cause to

be done any and all acts and things as may be necessary, appropriate, proper, advisable, incidental, or convenient to or in connection with the management of the Company..."⁵.

Respondents disagree noting that " Mark S. Lynch signed the petitions in his capacity as President of [Mirant New York, Inc.] and not in his capacity as President of [Mirant Lovett, LLC]... Petitioners do not provide evidence that [Mirant New York, Inc.] was the manager of [Mirant Lovett, LLC] at the time the petition was filed. Petitioners also fail to provide any evidence that [Mirant Lovett, LLC] actually authorized [Mirant New York, Inc.] to institute the 2001 proceedings "⁶. Respondents also assert that " Petitioners have not provided any evidence that when [Mirant New York, Inc.] filed the 2002 and 2003 petitions it was actually acting on behalf of [Mirant Lovett, LLC], rather than in furtherance of its own interests "⁷.

Timeliness Of The Amendment

Respondents also assert that the amendment of the 2003 petition pursuant to CPLR § 3025 was untimely and improper. Although Petitioners' contention regarding the 2003 petition dealt with CPLR § 3025 (a)⁸, Respondents reply to Petitioners' § 3025(a) argument by addressing CPLR § 3025 ©, wherein they contend that " CPLR § 3025 © cannot be used to substitute or add parties when the party that filed the original suit

was not a real party in interest or acting on behalf of a real party in interest "9.

Of Mistakes, Omissions & Defects

CPLR § 2001 states that " at any stage of an action, the court may permit a mistake, omission, defect or irregularity to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded ". CPLR § 3026 states that " Pleadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced."

As this Court held in Matter of Orange & Rockland Utilities, Inc. v. Assessor of the Town of Haverstraw, Index Nos. 4133/95, 4346/96, 4424/97, 4639/98, 4238/99, 4358/00, 4694/01, 5120/02 5278/03 (Rockland Sup. 2004)(J. Dickerson, Decision dated November 24, 2004), tax certiorari proceedings should not be discontinued under most circumstance because of mere technical defects [See e.g. Waldbaums Inc. v. Finance Administrator, 74 N.Y. 2d 128, 133, 544 N.Y.S. 2d 561 (1989); Matter of Great Eastern Mall, Inc. v. Condon, 36 NY 2d 544, 369 N.Y.S. 2d 672 (1975) ("[the] Tax Law relating to review of assessments is remedial in character and should be liberally construed to the end that the taxpayer's right to have his assessment reviewed should not be

defeated by a technicality'" citing People ex rel. New York City Omnibus Corp. v. Miller, 282 N.Y. 5, 9)].

In addition, parties may be substituted in real property tax proceedings where there exists a technical defect [See e.g. Matter of Rotblit v. Board of Assessors, 121 A.D. 2d 727, 504 N.Y.S. 2d 61 (2d Dept. 1986) (" Like an omitted authorization by the petitioner a defect with respect to the name of the petitioner, where there is proper authorization by the appropriate individual, is a ' technical defect which should not operate to bar the proceedings ' [case citations omitted]. The appellant " received 'adequate notice of the commencement of the proceedings' and *** [no] substantial right of [appellant] would *** 'be prejudiced by disregarding the defect' " and the misnomer may thus be properly cured by amendment of the petitions [case citations omitted] ")].

The Authority To Commence The Action

In Matter of Rotblit v. Board of Assessors, 121 A.D. 2d 727, 504 N.Y.S. 2d 61 (2d Dept. 1986) tax assessment review proceedings were commenced in the name of Max Rotblit, although that individual no longer owned the subject property. However, one of the record owners executed the authorizations for those petitions. Under those circumstances, the Appellate Division held " the Special Term appropriately deemed the defect in those petitions 'technical' rather than 'jurisdictional', and

permitted the names of the record owners to be substituted for that of Max Rotblit."

In Rotblit, supra, the entity having the authority to commence the action executed the authorization. In the instant matter, such authorized entity was Mirant New York, Inc. Respondents concede that the operating agreements provided Mirant New York, Inc., as manager, with the authority to commence the proceedings on behalf of Mirant Lovett, LLC. Respondents do not contest the fact that Mirant New York, Inc., and Mark Lynch, as President of both entities, executed the authorizations to file both the administrative complaints and petitions in the instant matter.

Consequently, the entity having the authority to commence the tax certiorari proceedings herein was Mirant New York, Inc. Therefore, to commence the 2001, 2002, and 2003 proceedings, Mark Lynch, as authorized representative of Mirant Lovett, LLC, executed the required authorization to file each of the respective petitions.

The Wholly Owned Subsidiary

In Matter of Arlen Realty and Development Corp. v. Board of Assessors of the Town of Smithtown et al, 74 A.D. 2d 905, 425 N.Y.S. 2d 855 (2nd Dept. 1980), the Court held that " Both Petitioner and its attorney had authority to act as agent for petitioner's wholly owned and controlled subsidiary, which, as a lessee, is clearly an 'aggrieved

party' (See Matter of Burke, 62 N.Y. 224; Real Property Tax Law, §704, subd 1)".

Clearly, the Appellate Division in Rotblit, supra, decided that the parent corporation [which would be Mirant New York, Inc. herein] had the authority to commence the proceeding for its wholly owned subsidiary [which would be Mirant Lovett, LLC herein]. The Appellate Division in Arlen Realty, supra, found that the parent corporation could request that the petition's caption be amended to correct a misnomer by having its wholly owned subsidiary named as a petitioner. The Appellate Division ruled it was error not to apply the liberal amendment prescriptions of CPLR § 3025, and reversed the trial court for not permitting the amendment of the caption. [See Arlen Realty, supra, (" Therefore Special Term erred in not granting leave to petitioner to amend its caption pursuant to CPLR §3025 (subd.[b])"].

The 2003 Petition Was Properly Amended

CPLR § 3025 (a) states that " A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it." In the instant matter, the 2003 Amended Petition filed September 16, 2003 naming Mirant Lovett, LLC as a Petitioner was made within the time constraints of CPLR § 3025 (a) in that the return date for the Respondents to submit their

answer to the original Petition [which was filed on July 30, 2003], was September 18, 2003. Hence, such amendment was timely made as of right pursuant to CPLR § 3025(a).

The 2000, 2001 & 2002 Petitions

With respect to the 2000 Petition, Southern Energy Lovett, LLC was the named petitioner since O&R sold the Lovett Station to it in July 1999. Southern Energy Lovett, LLC was subsequently renamed Mirant Lovett, LLC. Therefore, the name Mirant Lovett, LLC should be substituted for Southern Energy Lovett, LLC in the 2000 proceeding to reflect the proper name of the presently existing entity.

With respect to the 2001 and 2002 petitions, Mirant New York, Inc. was the named Petitioner. Pursuant to Mirant Lovett, LLC's operating agreements, Mirant New York, Inc. was manager of Mirant Lovett, LLC and as such Mirant New York, Inc. had the authority to make decisions in connection with the management of Mirant Lovett, LLC. Hence, this Court finds that, as a member and manager of Mirant Lovett, LLC, Mirant New York, Inc. was an authorized party and therefore properly commenced the 2001 and 2002 proceedings on Mirant Lovett, LLC's behalf. This Court also finds that Mirant New York, Inc. was an " aggrieved party ". It is therefore proper to add Mirant Lovett, LLC as a petitioner in the 2001 and 2002 proceedings¹⁰.

Accordingly, pursuant to CPLR §§ 2001, 3025(a), and 3026 and based upon the foregoing the Petitioners' Motion is granted in its entirety.

This constitutes the decision and order of this Court.

Dated: White Plains, NY
May 16, 2005

HON. THOMAS A. DICKERSON
SUPREME COURT JUSTICE

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ENDNOTES

1. Southern Energy Lovett, LLC was renamed Mirant Lovett, LLC for each of the 2001, 2002, 2003 and 2004 Town and County real property tax years [See Petitioners' Memorandum of Law dated February 28, 2005 [" P. Memo. "] at p. 2.

2. See Respondents Memorandum of Law in Opposition dated March 13, 2005 [" R. Memo. "] at p. 2.

3. See R. Memo. at p. 4. This issue was addressed in this Court's November 24, 2004 Decision in Matter of Orange & Rockland Utilities, Inc. v. Assessor of the Town of Haverstraw, Index Nos. 4133/95, 4346/96, 4424/97, 4639/98, 4238/99, 4358/00, 4694/01, 5120/02 5278/03 (Rockland Sup. 2004)(J. Dickerson), pp. 3-5 (" Evidently, while before the Texas Bankruptcy Court the Petitioners opposed a motion brought by the Respondent County of Rockland, to compel Mirant Bowline, LLC, Mirant NY-Gen, LLC and Mirant New York, Inc. to pay the unpaid real property taxes with respect to the Bowline Electric Generating Plant. Respondents contend that in response to that motion, Petitioners argued that only Mirant Bowline, LLC and Mirant NY-Gen, LLC " arguably owe any taxes in New York ". Respondents claim that Mirant New York, Inc. is the named petitioner in the instant proceedings for the years 2001, 2002 and 2003, yet it represented that it had no obligation " to pay the taxes it now disputes ". Therefore, Respondents argue, Petitioners should be required to prove Mirant New York, Inc.'s standing as an " aggrieved party ". Although Respondents never made a formal motion to dismiss, they have asserted that if Petitioners are unable to prove that Mirant New York, Inc. has standing as an aggrieved party, the instant tax assessment review proceedings for the years 2001, 2002 and 2003 must be dismissed....In response, Petitioners contend, that the statement they made in the Texas Bankruptcy Court was based on Mirant New York, Inc.'s position as a Debtor, and thereby, the statement was based on United States Bankruptcy Law. Petitioners also argue that real property tax invoices were sent to Mirant New York, Inc. for the 2003 Town and County real property taxes and that these taxes were paid. Respondents issued tax bills to Southern Energy New York, Inc. [the predecessor to Mirant New York, Inc.], and subsequently, to Mirant New York, Inc., which was subject to personal liability for said tax bills. In Waldbaum v. City of New York, 74 N.Y. 2d 128, 133, 544 N.Y.S. 2d 561 (1989), the Court of Appeals held that " Aggrievement was recognized where an assessment adversely affected a challenger's pecuniary interests causing the loss of something from his own

property or means." It is clear that the potential imposition of personal liability against Mirant New York, Inc. by the issuance of the real property tax invoices to it constituted a pecuniary interest").

4. P. Memo. at p. 2.

5. P. Memo. at p 2.

6.R. Memo. at p. 5.

7.R. Memo. at p. 6.

8.P. Memo at p. 7.

9.R. Memo. at p. 6.

10.This Court will also add Mirant Lovett, LLC as a petitioner for the 2001 and 2002 proceedings pursuant to CPLR § 2001.