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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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In the Matter of
2 PERLMAN DRIVE, LLC.

Index Nos: 2401/03
2164/04

Petitioner,

-against-

DECISION & ORDER

THE BOARD OF ASSESSORS AND/OR THE
ASSESSOR OF THE VILLAGE OF
SPRING VALLEY AND THE BOARD OF
ASSESSMENT REVIEW,

Respondents.

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DICKERSON, J.

THE R.P.T.L. § 727(1) MORATORIUM: TWO EXCEPTIONS REVIEWED

Real Property Tax Law [" R.P.T.L. "] § 727(1) prohibits changes to real property tax assessments within three years of a Court ordered reassessment with certain exceptions, two of which, R.P.T.L. § 727(2)(g) [25% or greater change in occupancy rate] and § 727(2)(i) [change in classification or use] are discussed herein.

Factual Background

The subject property, known as 2 Perlman Drive, is improved with an office building and is identified as Section 57.65, Block 1, Lot 8. The Petitioner purchased the subject property in August 2002 for \$2.5 million dollars¹.

The 2000 & 2001 Petitions

The prior owner of the subject property, Pascack Health Care Institute [" PHC "], commenced a prior tax certiorari proceeding which was settled by Stipulation of Settlement dated November 26, 2001 [" the Stipulation "] and by a Court Order dated January 17, 2002. The Stipulation resulted in reductions to the 2000-2001 and 2001-2002 tax years' assessments. No proceeding was initiated with respect to the 2002-2003 tax year.

The 2003 & 2004 Petitions

The Petitioner filed tax certorari Petitions challenging assessments for tax years 2003 and 2004. Before this Court is Respondents' Motion for Summary Judgment seeking dismissal of the 2003 and 2004 Petitions because they are prohibited by R.P.T.L. § 727(1).

The Three Year Moratorium : R.P.T.L § 727(1)

R.P.T.L. § 727 is entitled " Prohibition against change in assessment following litigation ". R.P.T.L. § 727(1) states the general rule as follows: " Except as hereinafter provided, and except as to any parcel of real property located within a special assessing unit as defined in article eighteen of this chapter where an assessment being reviewed pursuant to this article is found to be unlawful, unequal, excessive or mis-classified by final court order or judgement, the assessed valuation so determined shall not be changed for such property for the next three assessment rolls prepared on the basis of the three taxable status dates next occurring on or after the taxable status date of the most recent assessment under review in the proceeding subject to such final order or judgement. Where the assessor or other local official having custody and control of the assessment roll receives notice of the order or judgement subsequent to the filing of the next assessment roll, he or she is authorized and directed to correct the entry of assessed valuation on the assessment roll to conform to the provisions of this section."

The R.P.T.L. § 727(2) Exceptions

The exceptions to R.P.T.L. § 727(1) are contained in R.P.T.L. §§ 727(2)(a)-(i) as follows: " An assessment on property subject to the

provisions of subdivision one of this section may be changed on an assessment roll where:

(a) There is a revaluation or update of all real property on the assessment roll;

(b) There is a revaluation or update in a special assessing unit of all real property in the same class;

(c) There has been a physical change (improvement) to the property;

(d) The zoning of such property has changed;

(e) Such property has been altered by fire, demolition, destruction or similar catastrophe;

(f) An action has been taken by any office of the federal, state or local government which caused a discernable change in the general area where the property is located which directly impacts on property values;

(g) There has been a change in the occupancy rate of twenty-five percent or greater in a building located on a property which is not

eligible for an assessment review under title one-A of this article (small claims assessment review);

(h) The owner of the property becomes eligible or ineligible to receive an exemption; or

(i) The use or classification of the property has changed."

Petitioner's Arguments

R.P.T.L. §§ 727(2)(g),(i) Apply

The Petitioner asserts that R.P.T.L. §§ 727(2)(g),(i) apply in that " the occupancy and economic condition of the property have changed since the last taxable status date covered by the prior settlement [January 2001] sufficiently to allow an assessment to be challenged on a property which would otherwise be subject to the three year ' moratorium ' of RPTL 727 as ' there has been a change in the occupancy rate of twenty-five percent or greater in a building...' RPTL 727(2)(g) and ' the use...of the property has changed ' RPTL 727(2)(i) "2.

The R.P.T.L. § 727(2)(g) Exception

It is Petitioner's view that a comparison of the rent roll submitted in 2001 to the rent roll submitted in 2003 reveals more than a twenty-five percent change in the occupancy rate of the subject property³. Petitioner determined an occupancy rate of 64.4% from the 2001 rent roll, by dividing the vacant space of 10,725 square feet by 30,165 square feet [the total number of square feet] resulting in a vacancy rate of 35.67%. This number is then subtracted from 100%, yielding an occupancy rate of 64.4%. Examining the 2003 rent roll using the same formula [20,584 vacant square feet divided by 30,165 total square feet results in a vacancy rate of 68.2% which is subtracted from 100%] yields an occupancy rate of 31.8%. Petitioner claims that this evidences a 32.6% change in the occupancy rate [$64.4\% - 31.8\% = 32.6\%$]⁴. Hence, the Petitioner argues that there has been a greater than 25% change in the occupancy rate since the last tax year settled [2001] and the 2003 tax year, thereby bringing the matter within the R.P.T.L. § 727(2)(g) exception.

The R.P.T.L. § 727(2)(i) Exception

The Petitioner also claims that R.P.T.L. § 727(2)(i) is applicable since " the use of the building has changed from all medical use prior to our purchase in 2002 to a multi-tenanted general office use at a

diminished rent by 2004. Specifically, while medical space commands well over \$20.00 sq. ft. rent, Perlman's average new leases of non-medical space are in the \$15-\$17 sq. ft. range evidencing a 25% loss in occupancy rates at the property "5.

Change Of Use: Medical Facility To General Office Building

The Petitioner claims that prior to its purchase of the subject property, the previous owner, PHC, had owned and, through an inter-related entity, operated the property as a medical/ outpatient hospital facility which was affiliated with Pascack Valley Hospital. The building had been previously occupied by doctor's offices and surgical suites, and approximately 6,800 square feet of Suite 101 had been leased to Pasack Health Care Medical Associates, an entity related to the Pasack Health Care Institute⁶. After the Petitioner purchased the subject property it was unable to attract similar medical tenants willing to pay the higher rental rates previously reached when the property was affiliated with Pascack Valley Hospital. As a consequence the use of the building has changed from all medical use [pre-2002] to a multi-tenanted general office building [2004] collecting diminished rents.

Economic Occupancy Rates

Due to this change in use the Petitioner also claims that there has been a greater than 25% loss in the " economic occupancy rates ". The Petitioner asserts that although the term " occupancy rate " is not defined in the statute, it is commonly used to describe the income or rent being received from a given party⁷.

The Petitioner argues that " a change in occupancy rate would, therefore, be defined as the difference in the amount of income being generated at a property from one period of time to another. Under this definition, the change in the occupancy rate of this property meets the criteria of RPTL 727(2)...The occupancy rates at the property have decreased by both the amount of occupied space in the building as well as the achievable rents at the property between 2001, prior to Perlman's purchase, and January 2003 and January 2004 "⁸.

The Prospective 2005 Petition

Additionally, Petitioner opines that, once it proves that a R.P.T.L. § 727(2) exception is applicable, Petitioner has the right to file not only for the 2003-2004 tax year but for the 2004-2005 tax year as well, admitting that there is no case law to that effect⁹. The Petitioner then states that " if the Court finds 2004/05 to also be subject to RPTL 727, independently, the property can show an occupancy

rate change sufficient to meet the exception in the statute for that tax year as well "10.

The Respondents' Arguments

The R.P.T.L. § 727(2)(g) Exception Does Not Apply

According to Respondents, the subject property had an occupancy rate of 41.75% as of January 2002 [derived by leased space of 12,593 square feet of a total of 30,165 square feet], and an occupancy rate of 31.76% as of January 2003 [derived by leased space of 9,581 square feet of a total of 30,165 square feet]¹¹. The Respondents assert that the appropriate formula to be used in the instant matter is 41.75% - 31.76% yielding a 9.9% change in occupancy rate and, therefore, the R.P.T.L. § 727(2)(g) exception does not apply¹².

Counting Owner Occupied Space

Respondents assert that if the owner occupied space is included in the determination of the occupancy rate, the total leased space would be 18,093 square feet and the occupancy rate would go up to 63.30% in 2002 yielding a greater than 25% change in occupancy rate [31.54%]. However, Respondents argue that " an owner who was not paying rent and left on its own or at the behest of a new owner thus creating the change

in occupancy rate should not count toward a change. To allow an owner to move to create the necessary change in occupancy rate to challenge a frozen tax settlement under RPTL 727 would be contrary to law, policy and equity "13.

The R.P.T.L. § 727(2)(i) Exception Does Not Apply

As for the R.P.T.L. § 727(2)(i) exception Respondents claim that Petitioner's lease data as provided in the rent rolls shows that there is a mixed use of the building which includes professional offices such as law offices¹⁴. Respondents complain that Petitioner " offers no basis that a medical building is a different use from other professional space or even from general office space. The only evidence provided is an alleged economic difference in rent from (\$)15-(\$)17 rents from non-medical uses to rents of \$20 and above in medical uses..."¹⁵.

Economic Occupancy Rate

Respondents disagree with Petitioner's view that the term " occupancy rate " in R.P.T.L. § 727(2)(g) means " economic occupancy rate ". Respondents also reject Petitioner's view that if the rents were decreased by 25% or more Petitioner could avail itself of this exception since " Petitioner does not actually show any evidence of a rent

reduction in excess of 25%. A mere conclusory statement is inadequate as a matter of law "16.

DISCUSSION

Summary judgment is appropriate if there are no factual issues in dispute [See e.g., Andre v. Pomeroy, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131 (1974)(" Summary judgement is designed to expedite civil cases by eliminating from the Trial Calendar claims that can be properly resolved as a matter of law. Since it deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues...")]. The moving party bears the initial burden of making a *prima facie* showing of entitlement [See e.g., Bowen v. Dunn, 306 A.D.2d 929, 762 N.Y.S.2d 465 (4th Dept 2003)], which burden then shifts to the opposing party to come forward with proof to demonstrate the existence of an issue of fact [See e.g., Marinelli v. Shifrin, 260 A.D.2d 227, 228, 688 N.Y.S.2d 72 (1st Dept 1999) ; New York Service Higher Education Corp. v. Ortiz , 104 A.D.2d 684, 685, 479 N.Y.S.2d 910 (3d Dept 1984); Stern v. Stern, 87 A.D.2d 887, 888, 449 N.Y.S.2d 534 (2d Dept 1982)].

Factual Issues In Dispute

Stated, simply, the Respondents have not met their burden of proof. The Petitioner, however, has demonstrated the existence of factual issues sufficient to warrant a trial, including but not limited to, whether " owner occupied " space constitutes occupied space when calculating the occupancy rate, whether the term " occupancy rate " includes the " economic occupancy rate ", or the rent received, and whether there has been a sufficient change in the occupancy rate and in the use of the subject property during the years at issue to bring the matter within the R.P.T.L. §§ 727(2)(g),(i) exceptions.

Accordingly, Respondents' Motion for Summary Judgement is denied in its entirety.

Dated: White Plains, N.Y.
July 18, 2005

HON. THOMAS A. DICKERSON
JUSTICE SUPREME COURT

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ENDNOTES

1. Affidavit in Opposition of Dale Allinson sworn to February 9, 2005 [" Allinson Aff. "] at paras. 3-5.

2. Allinson Aff. at para. 9.

3. Allinson Aff. at Ex. B (Supporting Affidavit of Judah Klein sworn to February 2, 2005 [" Klein Aff. "] at pp. 4-5).

4. Allinson Aff. at paras. 13-15; Exs. B, E.

5. Klein Aff. at para. 8.

6. Klein Aff. at para. 4.

7. Petitioner's Memorandum of Law dated February 9, 2005 [" P. Memo. "] at p. 8 citing Beacway Operating Corp. v Concert Arts Society, Inc., 123 Misc. 2d 452, 474 N.Y.S.2d 227 (Civil Ct., New York Co. 1984) ("occupancy rate of \$20,000 per month"); Thirty-Third Equities Company, LLC v. Americo Group Inc., 294 A.D.2d 222, 743 N.Y.S.2d 10 (1st Dept. 2002); Salvation Army v. Alvertson, 157 Misc.2d 418, 597 N.Y.S.2d 545 (Civil Ct., New York Co. 1992).

8. P. Memo. at pp. 8-9.

9. Allinson Aff. at para. 16.

10. Allinson Aff. at para. 17.

11. Affirmation of Bruce M. Levine dated January 24, 2005 [" Levine Aff. "] at para. 9.

12. Levine Aff. at para. 9 (Respondents calculated a change in occupancy rate by using the methodology adopted in Washington Commons Associates v. Board of Assessors and the Board of Assessment Review of the City of Albany, 4 Misc. 3d 1027(A), 2004 WL 2169398 (NY.Sup.), 2004 N.Y. Slip Op. 51075(U), wherein one subtracts the new occupancy rate from the old one to yield the change in occupancy rate).

13. Levine Aff. at para. 2.

14. Levine Aff. at Ex. B; Reply Affidavit of Bruce M. Levine sworn to March 3, 2005 [" Levine Reply Aff. "] at para. 5.

15. Levine Reply Aff. at para. 5.

16. Levine Reply Aff. at para. 4.