

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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In the Matter of the Application of

THE STATE OF NEW YORK (NEW YORK STATE BOARD OF REAL PROPERTY SERVICES, NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION, and OFFICE OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES),

DECISION/ORDER

Petitioner,

Index Nos:
05357/05

- against -

THE TOWN OF HAVERSTRAW

Respondents.

For Review of a Tax Assessment under Article 7 of the Real Property Tax Law.

Motion Date:
2/11/08

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LaCAVA, J.

The following papers were considered in connection with this application by respondent for an Order dismissing petitioner's petition for failure to provide discovery in a timely manner:

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION	1
AFFIDAVIT/EXHIBITS	2
MEMORANDUM OF LAW	3
AFFIDAVIT/EXHIBITS	4
MEMORANDUM OF LAW	5
AFFIDAVIT	6
AFFIDAVIT	7
AMENDED MEMORANDUM OF LAW	8
REPLY MEMORANDUM	9
REPLY AFFIDAVIT	10

In this tax certiorari matter, respondent (Town) seeks an order dismissing the petition for petitioners State of New York (State)'s and New York State Office of Real Property Services (ORPS)'s alleged failure to comply with its discovery obligations in a timely manner.

State is the owner in fee of certain property amounting to 138 parcels within the Town, some within the Palisades Interstate Park; some within the Letchworth Developmental Center, and one associated with Helen Hayes Hospital. Upon the determination by the Town of the tentative assessed value of the said parcels for the tax year 2005, as per RPTL § 540, said assessments were forwarded to ORPS for a determination by the latter as to whether the assessed values were proper. ORPS, upon determining that the assessments were excessive, availed itself of a challenge to the assessment by filing, on May 18, 2005, a complaint with the Town Board of Assessment Review (BAR). Annexed to the complaint was an affidavit describing ORPS' valuation methodology, and a list of the parcels with the proposed assessments and the claimed actual proper assessed values.

Shortly thereafter, ORPS received a letter from the Town BAR requiring certain documents, including:

The basis of the inventories used by ORPS to challenge the assessed value;

the valuation methodology used to generate the values contained in the grievances;

a spreadsheet containing extensive details relating to state-owned lands not only within the town, but elsewhere in Rockland County, as well as in Westchester, Nassau, and Suffolk Counties.

A personal appearance by ORPS staff before the BAR was also demanded for a meeting of the BAR to occur on June 10, 2005.

On June 9, 2005, ORPS caused to be delivered to the BAR some of the requested information. This included:

The basis for the inventories (Palisades Interstate Park records);

That the valuation methodology consisted of

older, mass appraisals trended to current values; while worksheets were used previously which contained information relative to these appraisals, ORPS stated that such worksheets could no longer be located;

Regarding the BAR's request for non-Town and non-County land data, ORPS asserted that they had not relied on that information in preparing their complaint, since it was not relevant to their claim, and also that much of said information was simply not available, and that thus they would not supply it.

At the June 10 meeting, ORPS advised the BAR that, based on 1995 appraisals of the parcels which ORPS updated, current values for the properties were compiled. In order to test the accuracy of these values, ORPS also compared the updated appraisals to sales data for properties in two towns adjacent to Haverstraw, specifically Stony Point and Ramapo. ORPS conceded, however, that they had not provided any response to the second request except insofar as that request sought sales data which would reflect the subject properties' assessment (as opposed to specific data about the comparables which would reflect upon the assessments of those properties.)

During the meeting, while ORPS agreed to answer any questions posed to them by the BAR members, they objected to being questioned directly by Larry Farbstein, a consultant for the appraiser and a person who was not a member of the BAR. ORPS argued that Farbstein was a direct representative of the appraiser, and that appraisers themselves or their staff are precluded by RPTL § 523 (1) (b) from being members of the BAR. ORPS invited the Town to consult with counsel, and a recess was taken for that purpose, whereupon no further request by the Town to have Mr. Farbstein take part in the questioning was made.

Following the meeting, ORPS also supplied the following materials to the BAR:

The data used to support the 1995 appraisals;

the sales data and the adjustment schedule for the individual characteristics of the parcels;

an explanation of the methodology used to create the 1995 appraisals;

the trending data applied to update the 1995 appraisals, including the market appreciation rates;

the Stony Point sales data.

On or about July 6, 2005, the BAR notified ORPS that it would not act on the complaint. In essence, the BAR asserted that ORPS had failed, despite production of a large quantity of material, to provide the statistical or methodological bases of the values arrived at in the 1995 appraisals; that the 1995 appraisals were based on vacant land sales outside of the Town, the data for which ORPS was now declining to produce; and that, therefore, ORPS' refusal to comply with the BAR request "...might even constitute a willful refusal to comply...."

On July 13, 2005, ORPS responded by letter to the BAR, reminding them that it is their duty pursuant to RPTL §§525 (1) and (3) a, to make a final determination on the assessment, and thus by inference some action--grant or denial-of the petition is required. Finally, in anticipation of the expiration of the thirty-day period within which to challenge the BAR's action, ORPS filed the instant petition challenging the BAR determination.

Respondent Town now moves for dismissal of the petition, asserting that petitioner failed to provide the demanded discovery pursuant to RPTL §525, and for failure of petitioner to exhaust its administrative remedies. In particular, the Town argues that it properly requested information, including equalization rates, for non-Town State land, which demand ORPS refused since the latter deemed the request to be for irrelevant information; that the failure to comply was willful; and that ORPS improperly declined to answer questions at the hearing propounded by the Board's consultant.

ORPS opposes the motion, arguing that respondent has the burden of establishing that the State's actions were taken solely in an effort to frustrate the BAR's review of the complaint; that ORPS did not willfully fail to provide disclosure to the Town; and that ORPS properly declined to answer questions of the BAR's designee since he was also a consultant to the assessor and in addition was not a member of the Board.

QUESTIONING AT THE HEARING

RPTL § 525 provides

2. (a) On the date required by law, the board of assessment review shall meet to hear complaints in relation to assessments. At such hearing, the board of assessment review may administer oaths, take testimony and hear proofs in regard to any complaint and the assessment to which it relates. If not satisfied that such assessment is excessive, unequal or unlawful, or that real property is misclassified, the board may require the person whose real property is assessed, or his or her agent or representative, or any other person, to appear before the board and be examined concerning such complaint, and to produce any papers relating to such assessment. If the person whose real property is assessed, or his or her agent or representative, shall willfully neglect or refuse to attend and be so examined, or to answer any question put to him or her relevant to the complaint or assessment, such person shall not be entitled to any reduction of the assessment subject to the complaint. Minutes of the examination of every person examined upon the hearing of any complaint shall be taken and filed in the office of the city or town clerk. The assessor shall have the right to be heard on any complaint and upon his or her request his or her remarks with respect to any complaint shall be recorded in the minutes of the board. Such remarks may be made only in open and public session of the board of assessment review.

3. (a) The board of assessment review shall thereafter determine the final assessed valuation or taxable assessed valuation, or the actual assessment or transition assessment, or the proper class designation of the real property of each complainant and shall ratify assessment stipulations entered into by

the assessor and the complainant. When a complainant specifies that the assessment is unequal and the property is improved by a one, two or three family residence, in addition to other evidence presented, the board of assessment review shall consider the residential assessment ratio determined pursuant to section seven hundred thirty-eight of this chapter.

Thus, ORPS argues, the hearing must be conducted by the Board itself, and not its designee, and that therefore conduct of the hearing by questioning by a designee is improper.

Further, ORPS also points out that RPTL §523 provides "Neither the assessor nor any member of his or her staff may be appointed to the board of assessment review." Since participation on the Board by the assessor or a member of his staff is prohibited by the statute, and, since ORPS asserts, and the Town does not contest, that Farbstein held himself out to ORPS as a consultant to the assessor, ORPS here properly objected to Farbstein's participation at the hearing.

To be sure, as the Town points out, there is nothing to suggest that questioning by **counsel** for the Board would not be proper under RPTL §§ 525 and 523. However, no questioning was sought by counsel for the town here; it was sought, however, by someone who was not a member of the Board, and someone who was employed by and represented the Town Assessor. Under such circumstances, it was not improper for ORPS to have objected to being questioned by Farbstein.

In addition, it is uncontested that ORPS' objection was in the form not only of a refusal to be questioned by Farbstein, but also by a request that the BAR seek the opinion of counsel before proceeding. The record reflects that a recess then occurred for the express purpose of soliciting the opinion of the Town Counsel on that question, who was present at the hearing, and that, following the recess, no effort was made by Mr. Farbstein or the Board to have Mr. Farbstein question ORPS. In any event, then, the Town waived any impropriety in ORPS' refusal to answer questions solely when propounded by Mr. Farbstein, by failing to assert that Mr. Farbstein had a right to question respondent, on the record and following the recess to consult counsel on that issue.

ORPS' COMPLIANCE WITH THE BAR DISCOVERY REQUESTS

The Town argues that, on at least two occasions, namely immediately before and immediately after the BAR hearing, it made demands to ORPS for the production of certain documents and

information, and that, while ORPS did supply some of the documents and information requested, they failed to fully comply with the demands. ORPS contends, to the contrary, that the information and documents disclosed by them to the Town fully complied with their discovery duties, either by their supplying documents and information which they were required to provide, or because, despite their failure to provide some documents, production of those documents was not required by the statute.

As set forth previously, RPTL § 525 provides

2. (a) If not satisfied that such assessment is excessive, unequal or unlawful, or that real property is misclassified, the board may require the person whose real property is assessed, or his or her agent or representative, or any other person, to appear before the board and be examined concerning such complaint, and to produce any papers relating to such assessment.

As ORPS properly notes, "Courts have...refused to dismiss judicial challenges to realty assessments absent proof that noncompliance was occasioned by a desire to frustrate administrative review." *Matter of Doubleday & Co. v. Board of Assessors, Village of Garden City*, 202 A.D.2d 424, 425 (2nd Dept. 1994). The Town cites, among other cases, to *Matter of Doubleday* on the scope of judicial review on the issue of willful failure to cooperate by petitioners. In *Matter of Doubleday*, the Court properly noted that, while a willful failure to appear before the Board on a complaint, or to submit information thereon, might be cause for dismissal of a subsequent action relating to that claim, two factors strongly supporting a finding of a lack of willfulness on the part of a petitioner, were a failure by the Board itself to find willfulness, and/or that the petitioner/claimant failed to appear due to the imminency of judicial proceedings on the complaint.

Here, the Court notes that ORPS did, in fact, appear; that ORPS did submit, both before and after the hearing, a considerable amount of information and documents sought by the Town; that the Board, while it warned that a failure to cooperate **might** lead to a finding of willfulness, nevertheless did not explicitly find willfulness on the part of ORPS; and that ORPS, within two weeks of the last request for documents, filed the instant petition, in apparent (though, in fact, mistaken) belief that their 30 days to challenge the assessment ran from the July 1 filing of the final roll, and thus was almost expired. (The Town apparently filed the final roll well after the July 1 date.)

Similarly, in *Lynch v. Board of Assessors*, 227 A.D.2d 486 [2nd Dept. 1996], the Court held that the failure to produce documents demanded by the Board would not be held to justify dismissal of the petition, absent a finding of willfulness by the Board, or evidence in the record to support such a finding. (See also *Hyacinthe v. Glaser*, 104 A.D.2d 651 [2nd Dept 1984]-failure to appear before Board not grounds for dismissal of petition absent willfulness finding by Board; cf *Fox Meadow Partners v. Board of Assessment Review*, 227 A.D.2d 400 [2nd Dept 1996], where the Court found willfulness implicit in the petitioner's failure to appear before or supply documents to the Board, but only because the Board had unequivocally warned her that failure to appear or produce documents would be deemed willful neglect; see also *Sarsfield v. Board of Assessors*, 240 A.D.2d 506 [2nd Dept. 1997], ap dism 90 N.Y.2d 1007 [1997].¹)

The Town can point to no explicit finding by the Board of willful refusal on the part of ORPS to comply, nor to any evidence of willfulness other than the simple failure to comply, and to the above-cited objection (waived by the Town, the Court has noted) to questioning by the assessor's consultant. Absent any such finding in the record or such evidence, this Court simply cannot find that ORPS failure to produce was willful.

In addition, the parties currently concede that the information and documents not provided by ORPS to the Town relates to data for properties outside of the Town. As ORPS also properly notes, the information sought by the Board must, pursuant to the statute, be related to the "assessment" (i.e., of the subject property), and must be material to the proceeding. (See RPTL § 525 [2].) Even after full submission of papers by counsel and a conference on this matter, the Court is not persuaded of the relevance of data wholly unrelated to the subject property and/or its assessment, but instead to properties outside of the Town, and even outside of the County. Hence, and aside from the fact that there is no evidence the ORPS was falsely claiming that it did not

¹ The Court also notes that it is entirely unclear whether the Board in any event is even permitted to demand documents without or prior to affording the petitioner a hearing, as the Board (in the latter instance) did here. RPTL § 525 (2) appears to contemplate the conduct of a hearing, and at or following that hearing, a request for information. While the procedure followed by the Board—a demand for documents in advance of the hearing-- was upheld in *Lynch v. Board of Assessors*, 163 Misc. 2d 703 (Supreme Court, Nassau County, 1994), that decision was reversed on appeal in *Lynch, supra*.

have the data sought or that compilation and creation of the requested data would pose a hardship, the information sought by the Town was immaterial to the instant proceeding, and thus the proper subject of an objection by ORPS.

CONCLUSION

Respondent has moved for dismissal of petitioner's petition, for failure of petitioner to comply with its discovery obligations before the Town BAR pursuant to RPTL § 525. The Court finds that respondent ORPS complied with respect to all information and documents except those relating to assessments outside the Town and wholly unrelated to the subject properties' assessments, which ORPS declined to provide on grounds of immateriality. The Court further finds that the non-Town information was in fact not material to the BAR proceeding as asserted by ORPS, and thus disclosure, or dismissal for said failure to disclosure, was not warranted. And the Court finds that it was not improper for ORPS to object to questioning before the BAR by a consultant for the assessor, and that the Town waived any defect in this objection by consulting with counsel and apparently electing not to continue with the questioning in that manner. In any event, the Court also finds that dismissal is not appropriate absent proof of willfulness on the part of ORPS, or, in particular, a specific finding by the Board of willful refusal by ORPS to comply, both absent here.

Upon the foregoing papers, it is hereby

ORDERED, that the motion by respondent for an Order dismissing petitioner's petition for failure to provide discovery in a timely manner, is denied in all respects.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: White Plains, New York
April , 2008

HON. JOHN R. LA CAVA, J.S.C.

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