

**Matter of Shubert Org., Inc. v Tax Commn. of the  
City of N.Y.**

2017 NY Slip Op 32655(U)

December 18, 2017

Supreme Court, New York County

Docket Number: 258951/07

Judge: Martin Shulman

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 1

In the Matter of the Application of  
THE SHUBERT ORGANIZATION, INC.,

Petitioner,

-against-

THE TAX COMMISSION OF THE CITY OF  
NEW YORK and THE COMMISSIONER OF  
FINANCE OF THE CITY OF NEW YORK,

Respondents.

Index No. 258951/07  
Index No. 259372/08  
Index No. 262003/09  
Index No. 263143/10  
Index No. 261555/11

**DECISION & ORDER**

**MARTIN SHULMAN, J.:**

Petitioner, The Shubert Organization, Inc. ("Shubert" or "petitioner"), moves pursuant to CPLR 2221(d) for reargument of this court's July 17, 2017 decision and order (the "7/17/17 order").<sup>1</sup> Alternatively, petitioner moves pursuant to CPLR 2221(e) for renewal of the 7/17/17 order. Respondents, The Tax Commission of the City of New York and The Commissioner of Finance of the City of New York (collectively, the "City" or "respondents"), oppose the motion and cross-move pursuant to CPLR 2221(d) for reargument of the 7/17/17 order. Shubert opposes the cross-motion.<sup>2</sup>

The 7/17/17 order *inter alia* granted respondents' motions to dismiss the petitions in the above cited RPTL Article 7 proceedings. In its underlying motion the City moved to dismiss pursuant to RPTL §718(1) based upon petitioner's failure to file notes of issue in each proceeding within four (4) years of the last date provided by law

<sup>1</sup> Separate, identical motions and cross-motions were filed under each of the above captioned index numbers. The motions and cross-motions in each proceeding are consolidated for disposition. This decision and order, issued under Index No. 258951/07, is applicable to the other four captioned proceedings.

<sup>2</sup> The relevant facts are detailed in the 7/17/17 order and will not be repeated herein.

for the commencement of each proceeding. This court found that, notwithstanding RPTL §718(1)'s mandatory language, a scheduling order dated January 26, 2016 (the "1/26/16 stipulation"), entered into after the four year statutory deadline had expired, nonetheless operated to extend Shubert's time to file the notes of issue to "on or about September 1, 2016" as provided at paragraph 6 thereof. However, the 7/17/17 order dismissed the petitions on the grounds that petitioner failed to comply with the 1/26/16 order's terms.

**Shubert's Motion for Reargument or Renewal**

In support of its motion to reargue, petitioner claims that this court misinterpreted the language of the parties' 1/26/16 stipulation. Shubert contends that this court's reading of paragraph 6 of the 1/26/16 stipulation is inconsistent with its express language. Specifically, while paragraph 6 provides a flexible deadline of "on or about September 1, 2016", this court's 7/17/17 order dismissed the petitions because notes of issue were not filed "on or before September 1, 2016." Petitioner characterizes the "on or about" language as implying that time was not of the essence in filing the notes of issue and in any event, respondents never demanded that they be filed.

Petitioner reiterates that the 1/26/16 stipulation provides for appraisal reports to be exchanged prior to filing the notes of issue and thus the parties intended to proceed in that order. In such event, Shubert maintains that its December 6, 2016 filing was reasonable given that the parties exchanged appraisal reports on November 1, 2016.

In opposition, respondents deny that the 1/26/16 stipulation revived the subject petitions because they had already been deemed abandoned as a matter of law. Assuming *arguendo* that it did revive them, the City claims this court correctly found that

Shubert failed to comply with the 1/26/16 stipulation's terms. Respondents dispute that they were obligated to demand that notes of issue be filed and note that such a requirement would be unduly burdensome.

**Respondents' Cross-Motion to Reargue**

The City seeks reargument of the 7/17/17 order to the extent that it claims this court misapprehended RPTL §718(1).<sup>3</sup> Respondents specifically take issue with the finding that the petitions in question were not abandoned as a matter of law because the parties stipulated to extend the filing deadline, albeit after the four year period had already passed. The City argues that this court misinterpreted RPTL §718(1) by incorrectly drawing a distinction between the time period allowed for extensions by court order and extensions by stipulation. Respondents reiterate the statute's mandatory language and maintain that this court's interpretation of RPTL §718(1) runs afoul of the legislative intent to rigidly enforce its terms and obtain finality. Finally, respondents claim that their counsel made a mistake by signing the 1/26/16 stipulation and inadvertently reviving the proceedings herein. They cite case law for the proposition that counsel's mistake cannot bind the City of New York, which did not consent to extending the filing deadlines.

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<sup>3</sup> The City claims that this court should summarily deny Shubert's motion because petitioner did not comply with 22 NYCRR §202.8 and CPLR 2214. Respondents state only that Shubert did not properly serve the notice of motion and copies of all supporting affidavits and briefs. However, the City does not elaborate how petitioner allegedly failed to comply with the cited provisions and as such the court is not in a position to address this issue.

### Analysis

A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. *Foley v Roche*, 68 AD2d 558 (1st Dept 1979); CPLR 2221(d)(2). Motions for leave to reargue are not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented. *Pro Brokerage, Inc. v Home Ins. Co.*, 99 AD2d 971 (1st Dept 1984); *William P. Pahl Equip. Corp. v Kassiss*, 182 AD2d 22 (1st Dept 1992).<sup>4</sup>

Shubert's motion for reargument is granted. Petitioner correctly notes that the 7/17/17 order miscites paragraph 6 of the 1/26/16 stipulation and its analysis and determination to dismiss the petitions was based upon failure to file notes of issue on or before September 1, 2016 rather than on or about that date. Nevertheless, Shubert still did not comply with the 1/26/16 stipulation by filing the notes of issue on or about September 1, 2016, having filed them some three months later on December 6, 2016. Accordingly, reargument is granted and upon granting reargument, this court adheres to its determination that petitioner's failure to comply with the 1/26/16 stipulation warrants dismissal of the petitions in question, albeit on different grounds.

The City's cross-motion for reargument is denied. This court did not misconstrue RPTL §718(1)'s last clause for the reasons stated in the 7/17/17 order. Respondents

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<sup>4</sup> With respect to renewal, CPLR 2221(e)(2) requires, *inter alia*, that a motion for leave to renew "shall be based upon new facts not offered on the prior motion . . . or shall demonstrate that there has been a change in the law that would change the prior determination." Shubert fails to allege any new facts or change in the law in support of its alternative request for renewal.

cite the Second Department's decision in *Matter of Waldbaum's #122, Inc. v Board of Assessors of City of Mount Vernon*, 90 AD2d 487 (2d Dept 1982), *aff'd* 58 NY2d 818 (1983), which stated "petitioner's failure to file a note of issue within four years of the date of service of the petition or to obtain *within that period* a stipulation or court order extending its time to file, resulted in a conclusive presumption that the proceeding had been abandoned (emphasis in original)." 90 AD2d at 487. The 7/17/17 order cites the Court of Appeals' decision affirming the Second Department's decision in *Waldbaum's*. However, unlike the Second Department, the Court of Appeals' analysis tracks the exact statutory language. See 58 NY2d at 819.

Further, as this court observed in the 7/17/17 order, the Court of Appeals in *Waldbaum's* focused on RPTL §718(1)'s mandatory language rather than interpretation of its last clause. *Waldbaum's* is also distinguishable in that the petitioner therein did not obtain any stipulation or court order, arguing instead that settlement discussions conducted after the four year period had elapsed revived the petitioner's right to pursue the abandoned petition. Accordingly, this court's interpretation of RPTL §718(1) is not contrary to the holdings in *Waldbaum's*.

This court has considered the parties' remaining arguments and finds them either unavailing or moot. For the foregoing reasons, it is

ORDERED that petitioner's motions to reargue are granted, and upon granting reargument the court adheres to its determination that dismissal of the petitions in question was warranted, albeit on different grounds than originally stated; and it is further

ORDERED that respondents' cross-motions to reargue are denied.

NYSCEF DOC. NO. 77

RECEIVED NYSCEF: 12/22/2017

Counsel for the parties are directed to appear for a pre-trial conference on January 2, 2018 at 9:30 a.m., at Part 1, 60 Centre St., Room 325, New York, NY, for purposes of setting a trial date for the remaining proceedings for tax years 2012/2013 through 2016/2017.

Dated: New York, New York  
December 18, 2017



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Hon. Martin Shulman, J.S.C.