

<b>45 Great Jones Apt. Corp. v Tax Commn. of the City of N.Y.</b>
2018 NY Slip Op 32723(U)
October 25, 2018
Supreme Court, New York County
Docket Number: 152939/2018
Judge: William Franc Perry
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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

*Justice*

-----X  
THE 45 GREAT JONES APARTMENT CORP.  
Petitioner.  
- v -  
THE TAX COMMISSION OF THE CITY OF NEW YORK,  
AND NYC DEPARTMENT OF FINANCE  
Respondents.  
-----X

INDEX NO. 152939/2018  
MOTION DATE N/A  
MOTION SEQ. NO. 001

**DECISION AND ORDER**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 18, 20, 25, 26, 27 were read on this motion to/for MISC. SPECIAL PROCEEDINGS.

Petitioner commenced this CPLR Article 78 proceeding to annul a determination made on January 31, 2018 by respondent Tax Commission of the City of New York (Tax Commission) to withdraw its offer to reduce the annual tax assessments for real property located at 45 Great Jones Street, New York, New York (Block 530, Lot 29) (the Property). For the reasons set forth below, the petition is denied and the proceeding is dismissed.

**Background**

Petitioner is the net lessee for the subject Property (petition ¶ 5). The Tax Commission is an independent administrative body that is tasked with reviewing annual real property tax assessments set by respondent NYC Department of Finance (DOF) (together, respondents) (answer ¶ 48).

In or about January 15, 2016, DOF issued a notice of property value to petitioner for the 2016/2017 tax year that set the assessed taxable value for the Property at \$3,244,032 (petition ¶ 8). Petitioner filed a timely application for a correction of the assessed value with the Tax

Commission; the application was denied after an in-person hearing (answer ¶ 74). Petitioner's request for reconsideration was also denied (petition ¶ 10).

In or about January 15, 2017, DOF issued a notice of property value to petitioner for the 2017/2018 tax year that set the assessed taxable value of the Property at \$3,503,544 (petition ¶ 11). Petitioner filed a timely application for a correction of the assessed value with the Tax Commission.

After an in-person hearing on July 26, 2017, a hearing officer offered to reduce the annual assessments for the Property for the 2016/2017 and 2017/2018 tax years (answer ¶ 76). The hearing officer generated Notice of Offer and Acceptance Agreement No. 17-10-0165 (the Notice of Offer). The first four pages of the five-page Notice of Offer set forth the "standard terms governing all offers" in 23 enumerated paragraphs (answer, exhibit 1 at 1). The pertinent portion of paragraph one, entitled "Instructions for acceptance," reads, "[i]f you sign the acceptance agreement, you agree to all of the stated terms . . ." (*id.* at 1). Additionally, paragraph 6 states, in part, that "[t]his agreement is binding on the application when delivered to the Tax Commission (*id.* at 2). The fifth and final page of the Notice of Offer is "a signature page that identifies the property, states the proposed final determination of the Tax Commission on . . . [the] application for correction, and states the date the offer expires" (*id.*). It shows that the original assessment of \$3,244,032 for the 2016/2017 tax year was reduced by \$1,231,420 to \$2,012,612 and that the original assessment of \$3,503,554 for the 2017/2018 tax year was reduced by \$1,476,760 to \$2,026,794 (petition, exhibit G at 2). The agreement section on the fifth page also states that "[t]he applicant accepts the proposed assessments and all of the terms printed above and on pages 1-4 . . ." (*id.*).

The parties do not dispute that petitioner executed the Notice of Offer and filed it with the Tax Commission well before the September 8, 2017 expiration date (petition ¶ 18; answer ¶ 79). Upon receipt of the executed document, which signaled petitioner's acceptance of the agreement, the Tax Commission entered the Notice of Offer into a computer system it shared with DOF, thereby triggering "implementation of the offer" (answer ¶ 62).

On or about September 5, 2017, DOF issued a notice of revised property tax assessment to petitioner. The notice reflected the changes in taxable value for the Property in accordance with the accepted Notice of Offer (petition, exhibit H at 1). DOF's online account history for the Property registered six credits totaling \$351,820.25 under transaction code 063 (petition, exhibit I at 1-2). DOF assigned that code to revisions of assessed value (petition, exhibit J at 2). DOF's quarterly tax bill statement dated November 17, 2017 also showed a \$1,476,760 reduction for the 2017/2018 tax year (petition, exhibit K at 2).

By letter dated January 31, 2018, the Tax Commission advised petitioner that its "acceptance on August 7, 2017" of the Tax Commission's offer of a two-year tax reduction "is returned herewith" (petition, exhibit L [the Withdrawal Letter] at 1). The Withdrawal Letter advised that "[a]ll offers of assessment relief are subject to review and approval by the Tax Commission . . . [w]hen deemed warranted as a result of the . . . auditing process" (*id.*). As a result, "approval may be denied, the offer withdrawn or the acceptance agreement revoked" (*id.*). The Withdrawal Letter further stated that "[t]he Tax Commission has determined to deny this offer its [sic] approval and withdraw the offer" based on "an audit which revealed that the offer was ill-advised" (*id.*). In a revised notice of offer and acceptance dated February 9, 2017, the Tax Commission proposed a modified assessment of \$3,120,000 for each of the 2016/2017 and 2017/2018 (petition, exhibit M at 1).

Petitioner commenced this proceeding for a judgment annulling the determination of the Tax Commission to withdraw the Notice of Offer and directing DOF to reinstate the assessments set forth in the original Notice of Offer and credit \$361,290.26 to petitioner's account. Petitioner alleges that the Tax Commission's withdrawal constituted an error of law and was arbitrary and capricious because the Tax Commission consented to the Notice of Offer by implementing certain changes to petitioner's account with DOF that reflected credits for reductions in the Property's annual tax assessments for 2016/2017 and 2017/2018. Petitioner submits that the Tax Commission's rejection of the Notice of Offer deprived it of the agreement's benefits, that the Tax Commission's action is prohibited by the voluntary payments doctrine, and that the Contract Clause of the U.S. Constitution prohibits enactment of legislation that impairs the "Obligation of Contracts" (petitioner's memorandum of law at 8).

In its answer to the petition, respondents assert that the Tax Commission's decision was not arbitrary and capricious because the Tax Commission is authorized by statute to review and deny an offer to reduce a tax assessment on real property. In a declaration submitted with respondents' answer, Ellen E. Hoffman (Hoffman) states that her duties as the president of the Tax Commission include setting agency policy, managing operations, and serving as a hearing officer<sup>1</sup> (Hoffman declaration, ¶¶ 1-2). Hoffman states that the Tax Commission examines between 27,000 and 29,000 applications requesting reviews of the assessed values for real property, and that the Tax Commission extends offers of reduction in assessment on only one-third of those applications (*id.*, ¶ 27). The Tax Commission also maintains an automated system whereby 800 to 1,000 offers are selected for audit each year based on factors such as the "offered reduction as a percentage of

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<sup>1</sup> The court observes that Hoffman's statement is in the form of an unnotarized declaration made "under the penalty of perjury" (Hoffman declaration at 1). It does appear that Hoffman's declaration qualifies as an affidavit (*see* CPLR 7804 [c] and [e]). Nevertheless, as petitioner did not raise the issue in reply, the court will overlook this apparent technical defect.

the total assessed value” (*id.*, ¶¶ 20-21). Following the completion of the audit process by a manager or supervisory assessor, an offer may be modified or revoked (*id.*, ¶¶ 20, 23). Hoffman submits that only 5% of the offers audited each year are modified or withdrawn.

The subject Notice of Offer reduced the assessment for the Property for each tax year by more than 40%, thereby triggering an internal audit (*id.*, ¶ 39). Hoffman, citing Real Property Tax Law §§ 581 and 1802 in support, explains that tax class 2 and 4 properties, which include cooperative apartment and condominium buildings, are evaluated under an income capitalization methodology, whereby the taxable value is calculated by comparing a property to comparable income-generating rental properties of similar age, size and location (*id.*, ¶¶ 11-12). Real Property Tax Law § 1805, though, prohibits a tax increase of more than 8% in a year and more than 30% over a five-year period (*id.*, ¶ 44). The subject Property, constructed in 2014, was comprised of retail space and five cooperative apartments, with each apartment averaging 2,600 square feet (*id.*, ¶ 40). As such, the Property was classified in the tax class 2A category. Hoffman asserts that if the reductions were improperly calculated, then the real property tax could not increase by more than 8% each year and by no more than 30% over five years. Therefore, a failure to audit the transaction would perpetuate the mistaken reductions and lead to a permanent undervaluation of the Property for tax purposes (*id.*, ¶ 44).

The audit revealed that the hearing officer had used inappropriate comparable properties to assess the taxable value of the Property, and that the hearing officer “overlooked what had been done the year before when the assessed value was confirmed both by the hearing officer assigned to the application and again by the Tax Commission president” (*id.*, ¶ 41). Consequently, the Tax Commission issued the Withdrawal Letter and proposed a modification of the amounts by which the assessments would be reduced.

In reply, petitioner argues that there is no distinction between the Tax Commission's implementation of the accepted Notice of Offer and an approval. Had the Tax Commission reserved its right to revoke the Notice of Offer, then DOF should not have processed a refund application.

#### Discussion

“In reviewing an administrative agency determination, the . . . court must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious” (*Matter of Brookford, LLC v New York State Div. of Hous. & Community Renewal*, 31 NY3d 679, 684 [2018], quoting *Matter of Gilman v New York State Div. of Housing & Community Renewal*, 99 NY2d 144, 149 [2002]). An action is considered arbitrary or capricious when it is taken “without sound basis in reason and is generally taken without regard to the facts” (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). “If the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency” (*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]; accord *Matter of Sullivan County Harness Racing Assn. v Glasser*, 30 NY2d 269, 278 [1972] [stating that “a court may not overturn an agency’s decision merely because it would have reached a contrary conclusion”]). Additionally, “courts must defer to an administrative agency’s rational interpretation of its own regulations in its area of expertise” (*Matter of Peckham*, 30 NY2d at 431).

The court finds that respondents’ determination to withdraw the Notice of Offer was not arbitrary or capricious and did not lack a rational basis.

New York City Charter § 163 (b) provides that “any person or corporation claiming to be aggrieved by the assessed valuation of real estate may apply for correction of such assessment.” The Tax Commission is specifically tasked with reviewing and correcting such assessments (New York City Charter § 153 [b]; Administrative Code of the City of New York § 11-225 [authorizing the Tax Commission “to reduce a tax imposed upon real property”]). Pursuant to the Rules of the City of New York Tax Commission [21 RCNY] § 4-12 (e), the Tax Commission may offer to correct an assessment by issuing a written notice of offer and acceptance agreement. Significantly, the rule reads:

*“(k) Offers are subject to review and approval and revocation by the Tax Commission.*

*(1) The Tax Commission may withdraw an offer at any time and for any reason prior to the Tax Commission’s approval of the offer, whether or not such offer has been accepted. Upon withdrawal of an offer, the Department of Finance shall reinstate the original assessment.*

*(2) An offer may be revoked within six years after its approval by the Tax Commission on grounds of illegality, irregularity, fraud or misrepresentation in the application or in oral or written submissions in support of the application, or because the applicant or any person acting for the applicant is convicted of, or enters a plea of guilty to, a crime related to the assessment of the property. Upon revocation of an offer, the Department of Finance shall reinstate the original assessment and may impose additional taxes with interest. The applicant shall forthwith return any refund paid as a result of the offer.”*

(21 RCNY 4-12 [k] [emphasis added]). Thus, 21 RCNY 4-12 (k) (1) expressly permits the Tax Commission to withdraw an offer to correct an assessment at any time and for any reason. Here, the Tax Commission conducted an audit of the Notice of Offer, and the audit revealed that the hearing officer who presented the initial Notice of Offer to petitioner erred in calculating the reductions, which resulted in a more than 40% decrease in the taxable value for two consecutive tax years. The Tax Commission issued the Withdrawal Letter because of the audit’s results and

before the Tax Commission approved the accepted Notice of Offer, as was permissible under 21 RCNY 4-12 (k) (1).

Petitioner contends that the Tax Commission may only revoke a written offer after it has been approved where there is evidence of “illegality, irregularity, fraud or misrepresentation in the application or in oral or written submissions in support of the application, or because the applicant or any person acting for the applicant is convicted of, or enters a plea of guilty to, a crime related to the assessment of the property” (21 RCNY 4-12 [k] [2]). While the Tax Commission did not cite such grounds in the Withdrawal Letter, petitioner effectively ignores the language in 21 RCNY 4-12 (k) (1), which authorizes the Tax Commission to withdraw a written offer for any reason. As noted earlier, the Tax Commission withdrew the Notice of Offer because of a mistake which was discovered after an internal audit. Furthermore, the language in 21 RCNY 4-12 (k) clearly contemplates a situation where DOF would have to reverse actions taken to implement an offer that has been accepted but not approved. In any event, as the Tax Commission never approved the Notice of Offer, RCNY 4-12 (k) (2) has no application to this proceeding.

Further support for the Tax Commission’s determination is found in the terms set forth in the Notice of Offer. Of particular relevance is paragraph seven of the Notice of Offer which reads, in part, as follows:

*“Approval. This agreement is contingent upon approval by the Tax Commission. The Tax Commission will notify the applicant in writing of its withdrawal of the offer if approval is denied. If the assessment has already been changed on the assessment roll, the Department of Finance will send you another Notice of Revised Assessment, the original assessment will be reinstated on the assessment roll, and additional taxes may be imposed. The applicant will be related from the provision of this agreement restricting the right to commence or continue an assessment review proceeding. The Tax Commission will return any stipulations of discontinuance you submitted”*

(answer, exhibit 1 at 2 [emphasis added]). The provision appears on the second page of the Notice of Offer. In executing the document, petitioner accepted the terms that appeared on pages one through four of the Notice of Offer, as indicated above. In addition, filing the executed Notice of Offer with the Tax Commission meant that the agreement was binding only upon petitioner, not respondents, pursuant to paragraph 6 of that document (answer, exhibit 1 at 2). Hence, petitioner was on notice that the Notice of Offer was subject to final approval by the Tax Commission and that the denial of such approval would result in a withdrawal of the written offer.

Moreover, paragraph seven clearly states that DOF shall reinstate the original assessment in the event the Tax Commission withdraws a written offer and after DOF has already amended the assessment roll, as was the case herein. Therefore, contrary to petitioner's assertion that the Tax Commission illegally raised a tax imposed on real property in violation of Administrative Code § 11-225, the effect of the withdrawal merely restored the original assessments for the 2016/2017 and 2017/2018 tax years.

Petitioner also likens the Notice of Offer to a settlement agreement and submits that the Tax Commission's rejection of the accepted Notice of Offer constitutes a breach of that agreement. It is well settled that "substantial public policy considerations favor the enforcement of settlement agreements as a matter of contract" (*Matter of Hofmann*, 287 AD2d 119, 121 [1st Dept 2001]). "To establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound (22 Jur 2d, Contracts § 9)" (*Kasowitz, Benson, Torres & Friedman, LLP. v Duane Reade*, 98 AD3d 403, 404 [1st Dept 2012], *aff'd* 20 NY3d 1082 [2013] [internal quotation marks and citation omitted]). Here, petitioner alleges that it had a good faith basis to challenge the assessments, and when presented with the applications for correction, petitioner and the Tax Commission elected to settle the dispute

by entering into the Notice of Offer. While petitioner timely accepted the Notice of Offer, the conditional language contained in paragraph seven negates the inference of a binding contract. The Notice of Offer was subject to the approval of the Tax Commission, and the Tax Commission retained the authority to revisit any offer prior to approval (*see e.g. Matter of United Methodist Retirement Community Dev. Corp. v Axelrod*, 110 AD2d 292, 294 [3d Dept 1985], *appeal withdrawn* 67 NY2d 1050 [1986] [concluding that a state agency had the authority to reconsider a determination that was never finalized]).

Likewise, petitioner's invocation of the voluntary payment doctrine is without merit. The voluntary payment doctrine "bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law" (*Dillon v U-A Columbia Cablevision of Westchester*, 100 NY2d 525, 526 [2003], citing *Gimbel Bros. v Brook Shopping Ctrs.*, 118 AD2d 532, 535-536 [2d Dept 1986]). Based on the terms of the Notice of Offer and the language in 21 RCNY 4-12 (k) (1), petitioner and respondents were well aware that the Notice of Offer was contingent upon final approval by the Tax Commission. Thus, petitioner can point to no evidence that suggests fraud or a mistake of material fact or law in the transaction.

Lastly, petitioner argues that the Contract Clause of the United States Constitution prohibits the Tax Commission from using 21 RCNY 4-12 (k) to revoke an unconditional offer that was unconditionally accepted. The Contract Clause reads, in relevant part, that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ." (US Const, art I, § 10, cl 1). As applied to this proceeding, the Contract Clause has no application. "The threshold inquiry is whether the state law has, in fact, operated as a substantial impairment of a contractual relationship" (*American Economy Ins. Co. v State of New York*, 30 NY3d 136, 150 [2017], *cert denied* 138 S Ct 2601 [2018] [internal quotation marks and citation omitted]), and thus, requires

the existence of a contractual relationship (*id.*). The Notice of Offer contained clear, conditional language that the agreement must be approved by the Tax Commission even though DOF may implement certain provisions prior to approval. Thus, petitioner cannot demonstrate that 21 RCNY 4-12 (k) impeded the parties' right to contract.

Accordingly, it is hereby

ORDERED that the application is denied and the petition is dismissed; and it is further

ORDERED that the clerk of the court shall enter judgment in favor of respondents and against petitioner dismissing the petition, with costs and disbursements as taxed by the clerk, upon submission by respondents of an appropriate bill of costs.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

10/25/2018  
DATE

  
W. FRANC PERRY, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED
<input type="checkbox"/>	GRANTED
<input checked="" type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	

APPLICATION:

CHECK IF APPROPRIATE: