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| Matter of Lieb v Town of Smithtown Assessor's Off. |
| 2020 NY Slip Op 31869(U) |
| May 13, 2020 |
| Supreme Court, Suffolk County |
| Docket Number: 3660/2019 |
| Judge: William G. Ford |
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SHORT FORM ORDER

INDEX NO.: 3660/2019

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE of the SUPREME COURT

Motion Submit Date: 08-12-19
Motion Seq #: 001 - MD
Motion Seq # 002 - MG CASE DISP

In the Matter of the Application of

ANDREW M. LIEB

Petitioner,

PETITIONER'S ATTORNEY:

Leslie Mendoza, Esq.
Lieb at Law, P.C.
3087 West Main Street, Suite 100
Smithtown, New York 11787

For a Judgment pursuant to Article 78 of the
Civil Practice Law and Rules,

-against-

TOWN OF SMITHTOWN ASSESSOR'S
OFFICE, PETER D. JOHNSON, in his capacity
as ASSESSOR of the TOWN OF SMITHTOWN,

Respondents.

RESPONDENT'S ATTORNEY:

Matthew J, Jakubowski, Esq.
Town Attorney
99 West Main Street
Smithtown, New York 11787

Read on the petitioner's special proceeding commenced under Article 78, the Court considered the following: Petitioner's Notice of Article 78 Petition, dated July 11, 2019, with Verified Petition, and supporting papers; Respondents' Notice of Motion to Dismiss, dated July 26, 2019, and supporting papers; Petitioner's Affirmation in Opposition, dated September 12, 2019, and supporting papers; Respondents' Affirmation in Reply, dated September 18, 2019, and supporting papers; and upon full consideration of the foregoing; it is

ORDERED that the respondents' motion (seq. #002) for an order dismissing the petitioner's Article 78 petition, is considered under CPLR 3211 and CPLR §7804, and is hereby **granted** and, therefore, the petition (seq. #001) is **dismissed**; and it is further

ORDERED that counsel for respondents shall forthwith serve a copy of this Decision and Order upon counsel for petitioners via facsimile transmission and certified mail (return receipt requested), and shall promptly thereafter file the affidavit of such service with the Suffolk County Clerk; and it is further

ORDERED that, if applicable, within 30 days of the entry of this Decision and Order, respondents' counsel is also hereby directed to give notice to the Suffolk County Clerk as required by CPLR §8019(c) with a copy of this Decision and Order and pay any fees should any be required.

FACTUAL BACKGROUND AND PROCEDURAL POSTURE

This Article 78 proceeding arises from a petition filed by the petitioner, Andrew M. Lieb, who seeks, *inter alia*, an order and judgment reversing and setting aside the Small Claims Assessment Review (SCAR) disposition, so-ordered by the Hearing Officer on June 18, 2019.¹ Petitioner also seeks an order directing the respondent assessor to issue a corrected assessed tax value of \$3,220.00, instead of \$6,440.00, to reduce his property tax liability for the property, located at 43 Willow Ridge Dr., Smithtown, New York (Premises).

Petitioner purchased the Subject Premises from prior owner, Joseph Puleio, for the amount of \$455,000.00 on December 11, 2018. The petition contends that a SCAR Hearing was held in June, 2019, which resulted in what the petitioner refers to as a decision by the Hearing Officer, assessing the tax value of the property to be \$6,310.00. Petitioner alleges that the Officer improperly calculated the full market value of the Premises to be \$513,000.00, but should have used the \$455,000.00 purchase price as such market value. This, according to the petitioner, was a determination that was unreasonable, capricious, arbitrary and an abuse of discretion. Respondents oppose and move to dismiss the petition, arguing that such dismissal is warranted under CPLR §7804, based upon the documentary evidence submitted, which shows that the June 2019 disposition was not by a Decision of the Hearing Officer, but rather by Settlement Agreement of the parties.

STANDARD OF REVIEW

Pursuant to CPLR §7804(f), "[t]he respondent may raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition, made upon notice within the time allowed for answer." As set forth in CPLR 3211(a)(1), "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . a defense is founded upon documentary evidence." A motion to dismiss pursuant to CPLR 3211(a)(1) on the ground that the action is barred by documentary evidence may be appropriately granted where the documentary evidence utterly refutes the petitioner's factual allegations, conclusively establishing a defense as a matter of law (*see J.P. Morgan Securities Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 970 NYS2d 733 [2013]; *Cassese v SVJ Joralemon, LLC*, 168 AD3d 667, 92 NYS3d 127 [2d Dept 2019]; *Schiller v Bender, Burrows and*

¹ The disposition is annexed to the petition as "Exhibit 1." Petitioner refers to the date of the so-ordered disposition as June 13, 2019, while respondents refer to the date as June 12, 2019; however, it appears to the Court to have been so-ordered on June 18, 2019.

Rosenthal, LLP, 116 AD3d 756, 983 NYS2d 594 [2014]; *Thompson v Baier*, 84 AD3d 1062, 923 NYS2d 607 [2d Dept 2011]).

DISCUSSION

Petitioner, Andrew Lieb, challenges and seeks annulment of the SCAR disposition on the theory that the Hearing Officer wrongfully determined the full market value of the Subject Premises. According to the petition, therefore, the Officer erroneously over-assessed the tax amount, and issued a Decision that was unreasonable, capricious, arbitrary and an abuse of discretion. Petitioner alleges in paragraph 6 of the petition that “[he] filed a grievance complaint against the Town for a reduction of the assessed value of the Subject Property.” Petitioner failed to annex a copy of the grievance complaint to the petition and does not disclose the date that such complaint was filed.

In support of their motion, respondents annexed as an exhibit a copy of the tax grievance complaint, which reveals that the complaint was not filed by the petitioner, but by the prior owner of the Premises, Joseph Puleio, on July 25, 2018, nearly 5 months prior to petitioner’s purchase. Also not disclosed by petitioner in his petition, but revealed in the respondents’ dismissal motion, is the fact that the June 18, 2019 Hearing disposition was actually a so-ordered Stipulation of Settlement, not a Decision by the Hearing Officer. Not until his opposition to the respondents’ motion does petitioner acknowledge for the first time that the disposition was by Settlement Agreement; however, he argues, also for the first time, that Mark Lewis Tax Grievance Service, Inc. (“Mark Lewis”), who signed the Settlement Agreement, did not have petitioner’s authority to do so. This contention, however, is belied by the record evidence.

In his representative capacity, Mark Lewis submitted the SCAR grievance complaint on July 25, 2018, and it is apparent that after her purchased the Premises, petitioner Andrew Lieb proceeded as the petitioner in the SCAR proceedings below. In this regard, on top of the June 18, 2019 SCAR Hearing Settlement Agreement, “Lieb, Andrew” is identified as the “Petitioner.” In addition to the admission made by petitioner in his opposition, the fact that the parties settled the SCAR proceeding at the Hearing is also apparent from the Agreement itself, which states that “[t]his subject Small Claims Tax Review Proceeding is settled pursuant to the agreement of the parties ...” (emphasis added). The binding effect of the Settlement upon petitioner Lieb is also apparent, in that the Agreement constitutes a granting of the petition, and “shall have the same force and effect as a Decision of a Small Claims Hearing Officer.” Furthermore, just as Mark Lewis filed the SCAR tax grievance complaint as an authorized representative of the SCAR petitioner, Mr. Lewis’ representative authority to settle the SCAR proceeding was also apparent. Accordingly, at the Hearing, Mark Lewis executed the June 18, 2019 Settlement Agreement in his representative capacity for petitioner Lieb. Above Mark Lewis’ signature, the Agreement states that he signed as “Petitioner’s Representative on behalf of petitioner.” Below Mr. Lewis’ signature, the Agreement confirms

that he signed as “Petitioner’s Representative.”

Although not alleged in his petition, petitioner summarily alleges in opposition to dismissal that Mark Lewis did not have authority to enter into the June 18, 2019 Settlement Agreement. For example, petitioner contends in paragraph 21 of his opposition, that “Mark Lewis was not authorized to settle *at* the [Town’s] assessed valuation” (emphasis added). Such a latent, unsupported and conclusory contention, implying that Mark Lewis lacked *any* authority, however, is insufficient to refute the documentary evidence to the contrary. This is particularly true, given the fact petitioner does not argue that Mr. Lewis had *no* authority to settle. Indeed, the Settlement Agreement was favorable to the petitioner. In fact, the Settlement amount was not *at* the Town’s assessed valuation, it was actually *less than* such valuation. While the Town’s assessment was \$6,440.00, the parties settled at the negotiated, reduced assessment value of \$6,310.00.

In reply and in further support of their motion, respondents contend that in light of petitioner’s denial of Mr. Lewis’s authority, Mr. Lewis is a necessary party to this proceeding and petitioner’s failure to name Lewis as such warrants dismissal. Respondents’ contention in this regard is without merit. Mr. Lewis is not within the classification of those against whom Article 78 relief is available and, therefore, if any relief at all is available against Mr. Lewis, it is certainly not available in this proceeding (*see* CPLR §1001, §7803; RPTL §736[2]; *Matter of Greenfield v Town of Babylon Dept. of Assessment*, 76 AD3d 1071, 908 NYS2d 251 [2d Dept 2010]). Respondents correctly argue, however, that the documentary evidence warrants dismissal of this Article 78 petition (*see* CPLR §3211[a][1]; §7804[f]).

It is well established that stipulations of settlement are favored by the courts and not lightly to be set aside (*see Hallock v State of New York*, 64 NY2d 224, 485 NYS2d 510 [1984]; *Pierot v Marom*, 172 AD3d 928, 100 NYS3d 364 [2d Dept 2019]). Based upon the petitioner’s own contentions, as well as the documentary evidence, the June 18, 2019 SCAR disposition was a so-ordered Settlement Agreement, and Mark Lewis did have petitioner’s actual, if not apparent settlement authority (*see Amerally v Liberty King Produce, Inc.*, 170 AD3d 637, 95 NYS3d 338 [2d Dept 2019]). In any event, where, as here, a petitioner seeks to undo the parties’ so-ordered stipulation in connection with a prior special proceeding, petitioner’s only remedy is to commence a plenary action to set aside the settlement agreement (*see DiBella v Martz*, 58 AD3d 935, 871 NYS2d 453 [2d Dept 2009]; *Niagara Mohawk Power Corp. v Green Island Power Authority*, 260 AD2d 849, 688 NYS2d 763 [3d Dept 1999]). The petitioner failure to follow that course of action also warrants dismissal of this Article 78 proceeding. All other arguments are without merit.

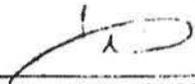
CONCLUSION

Based upon the foregoing, the respondents’ motion for dismissal (002) is **granted** the Verified Petition (001) is **denied** and the petition is **dismissed** in its entirety.

Respondent is hereby directed to settle judgment on notice in a manner consistent with the provisions of this Decision and Order.

This constitutes the Decision and Order of this Court.

Dated: May 13, 2020
Riverhead, New York



WILLIAM G. FORD, J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION