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No. 04377-07

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 12 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 11-7-07
Submission Date:-21-08
Motion Sequence No.: 001,002,003,004/ MOT D

HARBOR VIEW AT PORT WASHINGTON HOME OWNERS ASSOCIATION, INC. and JAMES NACOS, as President and Secretary, Respectively and Individually and on Behalf of all Homeowners similarly situated,

Plaintiffs,

- against -

TOWN OF NORTH HEMPSTEAD and PORT WASHINGTON GARBAGE DISTRICT,

Defendants.

COUNSEL FOR PLAINTIFFS
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(for Port Washington Garbage District)
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ORDER

The following papers were read on Defendants' respective motions to dismiss and Plaintiff's motion for summary judgment:

HARBOR VIEW AT PORT WASHINGTON HOMEOWNERS ASSOC., INC., *et al.*, v. TOWN OF NORTH HEMPSTEAD, *et ano.*

Motion Sequence No. 001

Notice of Motion dated October 22, 2007;
Affirmation of Adam I. Kleinberg, Esq. dated October 22, 2007;
Affidavit of Douglas Augenthaler sworn to on October 22, 2007;
Defendants' Memorandum of Law;

Motion Sequence No. 002

Notice of Motion dated October 23, 2007;
Affirmation of Linda K. Mejias, Esq. dated October 23, 2007;
Affidavit of Leslie C. Gross sworn to on October 23, 2007;
Affidavit of Ulrike Radau sworn to on October 22, 2007;

Motion Sequence Numbers 003, 004

Notice of Cross-motion dated February 6, 2008;
Affirmation of Linda U. Margolin, Esq. dated February 6, 2008;
Affidavit of Richard J. Greene sworn to on February 5, 2008;

Reply Affirmation of Linda K. Mejias, Esq. dated March 18, 2008;
Affidavit of Michael Levine sworn to on March 17, 2008;
Affidavit of Leslie C. Gross sworn to on March 18, 2008;
Affidavit of Ulrike Radau sworn to on March 17, 2008.

Defendant Port Washington Garbage District moves pursuant to CPLR 3211 (a)(7) for an order dismissing the complaint insofar as asserted against it.

Defendant Town of North Hempstead moves pursuant to CPLR 3211 (a)(7) for an order dismissing the complaint insofar as asserted against it.

Plaintiffs cross-move pursuant to CPLR 3212 for summary judgment.

BACKGROUND

The Harbor View at Port Washington community ("Harbor View") is a so-called senior residential development consisting of some 125 single family, semi-attached and

unattached homes and an adjacent six story, 145-unit condominium building (Cmplt. ¶¶ 1-3).

The Plaintiff, Harbor View at Port Washington Homeowners Association Inc. ("HOA"), is a non-profit entity responsible for overseeing the operation and maintenance of the community's common property and facilities (Cmplt. ¶¶ 4-5). The individual Plaintiffs herein, Richard J. Greene and James Nacos, are or were officers of the HOA.

The Defendants, Town of North Hempstead ("Town") and the Port Washington Garbage District ("District"), provide municipal garbage collection, disposal and recycling services to owners of residential properties in the Town, including single family homes, cooperatives and condominiums. The Town imposes *ad valorem* real estate taxes upon the owners of all such residential properties (Cmplt. ¶¶ 7, 9).

In 1998, the Town and HOA's predecessor entered into a "Development Agreement, Declaration of Covenants, Conditions, Restrictions and Easement Agreement" ("Agreement") pursuant to which the Town agreed that the development premises were to "be included in a municipal garbage district" (Cmplt. ¶12; Agreement, ¶ 2.6).

According to the Plaintiffs, the Town has nevertheless "refused" and/or failed to provide garbage collection services to homeowners in the development. Moreover, and despite this failure to provide collection services, the Town has nevertheless levied taxes in the approximate sum of $250.00 per homeowner since 2002 (Cmplt. ¶ 13).

It bears noting that the Offering Plan indicates that refuse collection would be handled privately, stating, "[r]efuse removal will be provided by a private contractor hired by the [Homeowner's] Association . . . [the cost for which] shall be a common expense . . . included in . . . monthly Association Assessments" (Offering Plan [Town Reply Aff., Exh. B], ¶ 6 at 5).

Notably, and for 2001-2002, the Offering Plan refers to an expense allotment of $40,500.00 for private refuse collection costs (Offering Plan § IV, "Expenses" ¶ at 8)

The Plaintiffs nevertheless contend that the HOA was "forced" to retain private refuse haulers to collect garbage and expended a sum of approximately $40,000.00 per year to do so (Cmplt. ¶ 15).

As further particularized in their opposing submissions, the Plaintiffs are apparently not asserting that the Defendants refused to provide collection, but claim instead, that the Defendants are currently refusing to provide pick-up service at the rear of the development's units – as had been performed by their privately retained carter.

In early 2007, and based upon the foregoing facts, the Plaintiffs commenced this action against the Town and District for a declaration that the *ad valorem* taxes imposed are invalid; that homeowners in the development are no longer required to pay garbage collection taxes; and for further relief enjoining the Town from prospectively collecting further taxes (Cmplt. ¶ 19).

The complaint alleges two additional causes of action by which the Plaintiffs seek recovery of: (1) the private refuse collection costs they expended; and (2) a refund of

the garbage taxes previously collected and paid by the unit owners (Cmplt. ¶¶ 20-23).

The Defendants have answered, denied the material allegations of the complaint and interposed various affirmative defenses.

The Town and District now move to dismiss the complaint pursuant to CPLR 3211(a)(7), asserting that the complaint is defective as a matter of law since neither Defendant received a formal, written demand for garbage collection prior to the commencement of the action.

Additionally, and relying on the cited Offering Plan provisions, the Defendants contend that the Plaintiffs intentionally "opted out" of their garbage collection rights by choosing a so-called special or "boutique" type service so as to "provide more luxurious and convenient pick-up such as back door pick-up".

Notably, in September of 2007, several months after this action was commenced, the Plaintiffs made a formal written demand for garbage disposal service.

By responsive letter, dated October, 30, 2007, the District advised the Plaintiffs, *inter alia*, that they would begin refuse collection, but only from the main road areas, which abut the "front of each residence." That is, rear-unit pick-up would not be provided. The District notes that it does not provide back door pick-up service to anyone. Therefore, all "other taxpayers are required to bring their garbage to the front curbside for pick-up."

The Plaintiffs have cross-moved for summary judgment on their pleaded claims as well as the unpleaded theory that they are now entitled to rear unit, garbage pick-up by the Defendants.

DISCUSSION

A. Standard of Review

1. Motion to Dismiss

When deciding a motion to dismiss made pursuant to CPLR 3211(a)(7), the court must determine whether the pleader has a cognizable cause of action, not whether it has been properly plead. Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977); and Rovello v. Orofino Realty Co., 40 N.Y.2d 633 (1976).

In making such a determination, the court must accept as true all the facts alleged in the complaint and any factual submissions made in opposition to the motion to dismiss. 511 West 232rd Street Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144 (2002); Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d 409 (2001); Smith v. Meridian Techs, Inc., 52 A.D.3d 685 (2nd Dept. 2008); and Danna v. Malco Realty, Inc., 51 A.D.3d 621 (2nd Dept. 2008).

The complaint must be liberally construed and the pleader must be given every favorable inference that can be drawn. Leon v. Martinez, 84 N.Y.2d 83 (1994); and Aberbach v. Biomedical Tissue Servs, Ltd., 48 A.D.3d 716 (2nd Dept. 2008).

"If we determine that plaintiffs are entitled to relief on any reasonable view of the facts stated, our inquiry is complete and we must declare the complaint legally

sufficient." Campaign for Fiscal Equity, Inc. v. State of New York, 86 N.Y.2d 307, 318 (1995).

2. Summary Judgment

Summary judgment is a drastic remedy which will be granted only when the movant established that there are no triable issues of fact. Andre v. Pomeroy, 35 N.Y.2d 361 (1974).

Once the movant has established a *prima facie* entitlement to judgment as a matter of law, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact or must demonstrate an acceptable excuse for its failure to do so. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980); Davenport v. County of Nassau, 279 A.D.2d 497 (2nd Dept. 2001); and Bras v. Atlas Construction Corp., 166 A.D.2d 401 (2nd Dept. 1991).

The function of the court in deciding a motion for summary judgment is to determine if triable issues of fact exist. Matter of Suffolk County Dept. of Social Services v. James M., 83 N.Y.2d 178 (1994); and Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 (1957). A motion for summary judgment should be denied if the court has any doubt as to the existence of a triable issue of fact. Freese v. Schwartz, 203 A.D.2d 513 (2nd Dept. 1994); and Miceli v. Purex Corp., 84 A.D.2d 562 (2nd Dept. 1984).

When deciding a motion for summary judgment, the court must view the evidence in a light most favorable to the non-moving party and must give the non-

moving party the benefit of all reasonable inferences which can be drawn from the evidence. Negri v. Stop & Shop, Inc., 65 N.Y.2d 625 (1985); and Louniakov v. M.R.O.D. Realty Corp., 282 A.D.2d 657 (2nd Dept. 2001). However, mere conclusions of law or fact are insufficient to defeat a motion for summary judgment. Banco Popular North America v. Victory Tax Mgt., Inc., 1 N.Y.3d 381 (2004).

B. *Ad Valorem* Levies

Special *ad valorem* levies – which "represent a key vehicle for financing garbage collection" – are charges " 'imposed upon benefitted real property in the same manner and at the same time as taxes for municipal purposes to defray the cost, including operation and maintenance, of a special district improvement or service . . .'" New York Telephone Co. v. Supervisor of Town of Oyster Bay, 4 N.Y.3d 387, 392-393 (2005), *quoting from* RPTL § 102 (14).

In order "for real property to be 'benefitted,' it must be capable of receiving the service funded by the special ad valorem levy." New York Telephone Co. v. Supervisor of Town of Oyster Bay, *supra* at 393, *citing* Applebaum v. Town of Oyster Bay, 81 N.Y.2d 733, 735 (1992); and New York Telephone Co. v. Supervisor of Town of North Hempstead, 19 A.D. 3d 465, 466 (2nd Dept. 2005).

Notably, "[t]he benefit can be potential and even theoretical and yet be sufficiently 'direct' to warrant special district taxation of the properties." Matter of Niagara Mohawk Power Corp. v. Town of Tonawanda Assessor, 17 A.D.3d 1090, 1091 (4th Dept.), *affd,* 6 N.Y. 3d 744 (2005). See also, New York Telephone Co. v.

Supervisor of Town of Oyster Bay, *supra* at 393-394.

Similarly, "[a]n ad valorem tax will not be deemed invalid unless the taxpayer's benefit received from the imposition of the tax is reduced 'to the point where it is, in effect, nonexistent'." Water Club Homeowner's Assn., Inc. v. Town Bd. of Town of Hempstead, 16 A.D.3d 678, 679 (2nd Dept. 2005), *quoting* Sysco Corp. v. Town of Hempstead, 227 A.D.2d 544, 545 (2nd Dept.), *lv. app. den.,* 89 N.Y. 2d 804 (1996); and Matter of Sperry Rand Corp. v. Town of North Hempstead, 53 Misc.2d 970, 973 (Sup. Ct. Nassau Co. 1967), *affd,* 29 A.D.2d 968 (2nd Dept.), *affd,* 23 N.Y.2d 666 (1968). See, Matter of Arcady Assoc. v. Village of Ossining, 158 A.D.2d 595 (2nd Dept. 1990); Landmark Colony at Oyster Bay Homeowners' Ass'n, Inc. v. Town of Oyster Bay, 145 A.D.2d 542 (2nd Dept. 1988). See also, M. Fortunoff of Westbury Corp. v. Town of Hempstead, 309 A.D.2d 906, 908 (2nd Dept. 2003).

Of course, "[w]here property is excluded from garbage collection services, the imposition of a garbage collection tax is invalid." (Barclay Townhouse at Merrick II Corp. v. Town of Hempstead, 289 A.D.2d 351 (2nd Dept. 2001); and Landmark Colony at Oyster Bay Homeowners' Assn. v. Town of Oyster Bay, *supra.*

Courts have dismissed refund actions where the taxpayers have failed to allege or establish that a formal demand for garbage disposal service was made prior to the commencement of the action seeking a refund. See, M. Fortunoff of Westbury Corp. v. Town of Hempstead, *supra* at 908; J.C. Penney Co., Inc. v. Town of Oyster Bay, 302 A.D.2d 561 (2nd Dept. 2003). See also, Water Club Homeowner's Assn., Inc. v. Town

Bd. of Town of Hempstead, *supra* at 680.

Preliminarily, it is undisputed that the Plaintiffs have neither alleged nor established that they made a formal, pre-action demand for garbage services. Their attempt to distinguish established precedent – which is clear and unequivocal in its import – is unpersuasive.

The record also belies Plaintiffs' speculative assertion that the municipal Defendants, during the site plan process or otherwise, imposed a requirement or condition that garbage service would not be supplied to the community. Indeed, the record supports the Defendants' opposing argument that no demand was made precisely because the Plaintiffs had voluntarily elected to supply unit owners with privately contracted refuse removal. The Plaintiffs have not filed a reply submission disputing the Defendants' claims in this respect.

Accordingly, the repeatedly asserted claim that the Defendants affirmatively agreed that the Plaintiffs would be included in the municipal garbage district, while true, adds nothing of substance to the Plaintiffs' theories of recovery. *Cf.,* Landmark Colony at Oyster Bay Homeowners' Assn. v. Town of Oyster Bay, *supra.*

Additionally, the fact that the Defendants declined to provide the specific type of service requested does not mean that the demand requirement was futile or excused. No case cited by the Plaintiffs holds as much. In fact, the Defendants responded to the request once it was finally made, by affirmatively offering collection services to the community.

In any event, the Court agrees that the Plaintiffs have failed to otherwise establish the validity of their claims relative to the challenged *ad valorem* taxes. The Plaintiffs do not seriously contend that the subject property is incapable "of receiving the service funded by the special ad valorem levy." New York Telephone Co. v. Supervisor of Town of Oyster Bay, *supra* at 393. Moreover, the Plaintiffs have not demonstrated that the Defendants actually refused to provide removal services once the Plaintiffs finally made their-post commencement, formal request for same. To the contrary, the record establishes that the Defendants did, in fact, agree to provide removal service; albeit it was service not to the Plaintiffs' liking. Additionally, while the front curb collection offered by the Defendants may be less convenient to unit owners, the Court rejects the claim that this service effectively constitutes no service at all – or is tantamount to an illusory or "nonexistent" benefit. See, Barclay Townhouse at Merrick II Corp. v. Town of Hempstead, *supra*.

The Plaintiffs further contend that there is nothing in the District rules which precludes the sort of pick up service they are now requesting. The more pertinent and determinative observation is that there is nothing in those rules – or any other statutory authority – which requires or mandates it. See, Matter of Arcady Assoc. v. Village of Ossining, *supra* at 596.

Finally, the Court must deny the related branch of the Plaintiffs' motion for judgment on the unpleaded theory that the Defendants are currently obligated to provide rear unit "garbage collection services to the community."

Accordingly, it is,

ORDERED, that the motion pursuant to CLPR 3211(a)(7) by the Defendants Port Washington Garbage District for an order dismissing the complaint, is **granted**, and it is further,

ORDERED, that the motion pursuant to CLPR 3211(a)(7) by the Town of North Hempstead for an order dismissing the complaint, is **granted**, and it is further,

ORDERED that the cross-motion pursuant to CPLR 3212 by the Plaintiffs for summary judgment is **denied**, and it is further,

DECLARED that the challenged *ad valorem* levies are valid; that the Defendants are not precluded from collecting said levies prospectively; that the Defendants are not obligated to compensate the Plaintiffs for private carting costs expended by the Plaintiffs since 2002; and Defendants need not refund *ad valorem* levies previously paid by the Plaintiffs.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
August 28, 2008

Hon. LEONARD B. AUSTIN, J.S.C.