To be Submitted by:
WILLIAM MAKER, JR.

Court of Appeals
of the
State of New York

In the Matter of
DCH AUTO, as Tenant Obligated to Pay Taxes and
DCH INVESTMENTS INC. (NEW YORK),
as Tenant Obligated to Pay Taxes,

Petitioners-Appellants,

– against –

THE TOWN OF MAMARONECK, a Municipal Corporation, its Assessor and Board of Assessment Review and THE VILLAGE OF MAMARONECK, a Municipal Corporation, its Assessor and Board of Assessment Review,

Respondents-Respondents.

For a Review under Article 7 of the RPTL

BRIEF OF RESPONDENT-RESPONDENT THE TOWN OF MAMARONECK IN RESPONSE TO *AMICUS CURIAE* WAKEFERN FOOD CORP.

WILLIAM MAKER, JR.
Attorney for Respondent-Respondent
The Town of Mamaroneck, a Municipal Corporation,
its Assessor and Board of Assessment Review
740 West Boston Post Road
Mamaroneck, New York 10543
Tel: (914) 381-7815
Fax: (914) 381-7809
wmakerjr@townofmamaroneck.ny.org

Dated: April 28, 2022

Westchester County Clerk's Index No.: 23040/2009
Appellate Division Second Department, Docket No.: 2017-03016

Statement pursuant to 22 NYCRR § 500.13 (a)
of the Status of Related Litigation

There is no related litigation as of this date.

Table of Contents

Table of Contents, cont.

Table of Cases and Authorities

Table of Cases and Authorities, cont.

Statutes:

Other Authority:

This brief responds to the brief filed by Wakefern Food Corp. (Wakefern) in support of the petitioners-appellants.

Questions Presented

1. Did *Matter of Larchmont Pancake House v Bd. of Assessors* (33 NY3d 228 [2019]) reject the Second Department's holdings in the *Circulo/LPH/DCH* trilogy?[1]

This Court explicitly said that it did not.

2. Does RPTL 554 support the petitioners-appellants?

The Second Department did not specifically address RPTL 554.

3. Does the *Circulo/LPH/DCH* trilogy conflict with precedent?

By its decisions, the Second Department answered: No.

[1] This shorthand refers to the Appellate Division's decisions in *Matter of Circulo Housing Dev. Fund Corp. v Assessor* (96 AD3d 1053 [2d Dept 2012]), *Matter of Larchmont Pancake House v Bd. of Assessors* (153 AD3d 521 [2d Dept 2017]) and the subject of this appeal, *Matter of DCH Auto v Town of Mamaroneck* (178 AD3d 823 [2d Dept 2019]).

Point G[2]

This Court made it clear in *Matter of Larchmont Pancake House v Bd. of Assessors* (33 NY3d 228 [2019]) that it took no position on the issue now before it.

Wakefern implies that in *Matter of Larchmont Pancake House v Bd. of Assessors* (33 NY3d 228 [2019]), this Court showed its disagreement with the *Circulo/LPH/DCH* trilogy when it "declined to follow recent 2nd Department holdings" in *Circulo* and in the Appellate Division's decision in *Larchmont Pancake House* (*see* brief for amicus Wakefern at 5). Wakefern goes so far as to claim that the Second Department "ignore[d] the Court of Appeals' refusal to affirm these cases (sic) on the RPTL 524 standing issue . . . (*see* brief for amicus Wakefern at 7). These are astonishing misstatements.

In reality, this Court took an extraordinary step to make clear the limited scope of its holding. Since it did not address the issue of whether the Larchmont Pancake House had the right to file an administrative complaint, it may have been concerned that its holding might be misconstrued as expressing disfavor with the trilogy. To avoid such misunderstanding, the Court specifically advised Bench and Bar that

[2] The Town respondents-respondents have submitted briefs in opposition to two other amici, CVS Albany LLC et al. and Stop & Shop. Those briefs were divided into lettered points ending with Point F. This brief begins with Point G to avoid confusion that may be caused by repetitive point headings.

"[b]ecause petitioner lacks standing, we have no occasion to consider the parties' dispute concerning the scope of appropriate challengers under RPTL 524" (*see Larchmont Pancake House*, 33 NY3d at 240-241). By taking pains to point out the sole issue that it decided, the Court was cautioning not to fall victim to mischaracterizations of its holding, like the one attempted by Wakefern. The most that legitimately can be said is that this Court has neither accepted nor repudiated the *Circulo/LPH/DCH* trilogy.

Point H

Wakefern's proposition that the Second Department has undermined "decades of unchallenged and universally accepted precedent in drafting leases"[3] is belied by the petitioners-appellants' lease and by the lease in a case that Wakefern cites.

By the phrase quoted in this point heading, Wakefern suggests that leases are drafted so that a tenant does not have the right to call upon its landlord to aid in a fight against the demised property's assessment. The petitioners-appellants' lease proves Wakefern wrong.

[3] (*see* brief for amicus Wakefern at 7).

Section 5 (e) (iv) of the lease states that when required by law,[4] the landlord must "join and cooperate in [proceedings to contest the demised property's assessment] or permit them to be brought by Tenant in [the owner's] name" (R. 56). In order to meet the requirements of RPTL 524 (3), all the petitioners-appellants needed to have done was to invoke that section and have the landlord sign the administrative complaint or designate someone to do so on its behalf.

The 2014 administrative review illustrates just how simple the process is. By then the petitioners-appellants must have realized that they had not been following proper procedure. They arranged to have their landlord challenge that year's assessment (R. 160 – R. 165). The landlord did so by authorizing the petitioners-appellants' attorney to act on its behalf at the administrative level (R. 165). That attorney prepared the administrative complaint, signed it as the landlord's representative (R. 163) and submitted it to the Mamaroneck Town Assessor and Board of Assessment Review. After the Assessor promulgated the final assessment roll, that same attorney, now acting on behalf of the petitioners-appellants, pursued

[4] If the demised premises had been in Nassau County there would have been no such mandate as the petitioners-appellants could file administrative complaints in their own names (*see* RPTL 523-b [6] [a]).

judicial relief on their behalf (R. 168- R. 175), thereby bringing the issue of the Town's 2014 assessment properly before the courts.

The lease in the Supreme Court case that Wakefern cites also made the tenant responsible for paying real estate taxes. That lease also imposed an obligation upon the landlord to become involved in challenges to the assessment. Paragraph 19 (e) (i) provided that the owners "shall cooperate . . . in the institution of any such proceedings to contest the validity or amount of real estate taxes and will execute any documents required therefor" (*see Matter of 1201 Main Street I and II c/o Walgreen Eastern Co. v Bd. of Assessment Review* [Sup Ct., Westchester County, November 25, 2020, Tolbert, J. index Nos. 62798/2014 and 63952/2015]).[5]

These two cases demonstrate that contrary to the impression proffered by Wakefern, leases can and have been drafted so that a tenant can compel its landlord to co-operate in a way that satisfies RPTL 524 (3)'s mandatory condition precedent for an RPTL Article 7 proceeding.

[5] This case currently is on appeal to the Second Department. The language quoted from the lease appears on page 66 of the Record on Appeal to that Court.

Point I

Wakefern repeats the erroneous notion that a tenant with a contractual obligation to pay its landlord's real estate taxes is the 'taxpayer'.

Throughout this litigation, the petitioners-appellants and now Wakefern have argued that a tenant who contracts to pay its landlord's real estate taxes, is the 'taxpayer', i.e., the person taxed by the municipalities and the school district. That position is not correct.

Assessors only assess real property. A lease is personal property. Therefore, when the taxing authorities issue tax bills based upon the assessors' determination of value, they are not taxing the leaseholds (i.e., the tenants) but the underlying real estate (i.e., the owners) (*see* Town's Brief at 22-25). This conclusion is consistent with the Westchester County Tax Act § 283.614 (1) and RPTL 926 (1) and is reinforced by RPTL 304 (2) (*see* Town's Brief at 26-28).[6] All of these sections impose liability for the tax upon the property owner, albeit RPTL 926 (1) limits liability to owners who are residents of the taxing authority. Moreover, RPTL 922 (1) (a) requires tax bills to be mailed to "each owner of real property at the tax billing address listed (on the tax roll)", not to a person who is contractually obligated

[6] "Town's Brief" refers to the brief dated September 15, 2021 that the Town of Mamaroneck, its Assessor and Board of Assessment Review filed on this appeal.

to pay the tax.

This Court has recognized that the property owner, not the person paying the tax, is the 'taxpayer'. For example, when discussing the concept of being aggrieved for tax certiorari purposes, Judge Garcia, speaking for the majority, wrote: "[A]rticle 7's aggrievement provision consolidates the authority to seek judicial review of a challenged assessment, generally requiring non-owners to assume a direct obligation to pay *the owner's taxes*" (emphasis added) (*see* ***Larchmont Pancake House,*** 33 NY3d at 240). A discussion of the same topic thirty years earlier included: "[T]he party aggrieved was, by contractual rearrangement of the obligation, made wholly responsible for the entire tax levy in the stead of the *owner-taxpayer*" (emphasis added) (s*ee Matter of Waldbaum, Inc. v Fin. Adm't*, 74 NY2d 128, 133 [1989]).

Even in the case from which Wakefern quotes extensively and with emphasis[7] – *Matter of Sterling Estates, Inc. v Bd. of Assessors* (66 NY2d 122 [1985]) – the complainant was the property owner (*id*. at 124).

Though by contract, a tenant, like the petitioners-appellants, may take on the obligation to pay real property taxes, the tenant is not the one who is responsible to the taxing authorities for paying those taxes. The responsible party, the person upon

[7] (*see* brief for amicus Wakefern at 16).

whom the tax is imposed, i. e., the taxpayer, is the property owner whether the owner leases the property or not.[8]

Point J

RPTL 554 is consistent with the *Circulo/LPH/DCH* trilogy.

Wakefern seizes upon the word 'owner' in RPTL 554 (2) without realizing that the use of that word ties into the Second Department's construction of RPTL 524 (3) (*see* brief for amicus Wakefern at 13-14).[9]

The reference in RPTL 554 (2) to "any person who would be entitled to file a complaint" simply takes into consideration the provision in RPTL 524 (3) that allows an owner to deputize someone to file an administrative complaint on the owner's behalf. Since an owner can nominate a representative to file a complaint, the Legislature decided that such representative also can act on behalf of an owner when an obvious error in an assessment roll is to be corrected. The legislation is no more complicated than that.

---

[8] Finally, neither the petitioners-appellants nor their amici brethren have explained why being the 'taxpayer' is a relevant consideration. An administrative complaint not signed by the owner of the property would not comply with RPTL 524 (3), even if the tenant/signatory were considered to be the 'taxpayer'.

[9] In the Appellate Division, the petitioners-appellants also invoked RPTL 554. They have abandoned that statute before this Court.

7 Opinions of Counsel SBEA No. 73 – an opinion involving RPTL 554 – bears out this point. The opinion begins: "An application for correction of an error on a tax roll (Form EA-554) should be filed by the owner of the real property or his duly authorized agent." Later on page 1, counsel for the SBEA writes: "It should be apparent from the foregoing language that the applicants contemplated in section 554 . . . would only include the owner of the real property . . . and his duly authorized officer or agent."

By citing RPTL 554, Wakefern actually is supporting the Town respondents-respondents.

Point K

The *Circulo/LPH/DCH* trilogy does not conflict with existing case law.

In their main brief and in their briefs responding to the amici aligned with the petitioners-appellants, the Town respondents-respondents have demonstrated that the *Circulo/LPH/DCH* trilogy is consistent with precedent.

The Town has cited and quoted from *Matter of Sterling Estates, Inc. v Bd. of Assessors* (66 NY2d 122, 126 [1985]), *Matter of Raer Corp. v Vil. Bd. of Trustees* (78 AD2d 989, 989 [4th Dept 1980], *lv dismissed*, 52 NY2d 602 and 677 [1981]) and *Matter of Raddison Community Assn. v Long*, 3 AD3d 135, 139 [4th Dept 2003], *lv dismissed* 4 NY3d 870 [2005]) where the courts clearly state that the review

of an assessment begins with the filing of an administrative complaint by the property owner (*see* Town's Brief at 30-32).

The Town has shown why *Matter of McLean=s Dept Stores, Inc. v Commr.* (2 AD2d 98 [3d Dept 1956]) is irrelevant. It was decided before RPTL 524 (3) had been enacted and construed a local law of the City of Binghamton, not state law. Furthermore, the local law contained language that differs from RPTL 524 (3) (*see* Town's Brief at 48-50).

The Town distinguished the cases where titular title resides in an Industrial Development Agency (*see* Town's Brief at 73-75).

Finally, the Town questions Wakefern's citation of *Matter of Waldbaum, Inc. v Fin. Adm'r*, 74 NY2d 128 [1989]) since that case involved an assessment of real property in New York City. RPTL 524 (3) does not apply in the City of New York. There "any person or corporation claiming to be aggrieved by the assessed valuation of real estate may apply for correction of such assessment" (*see* NY City Charter §163-b).[10]

The administrative review procedure in the City of New York is the third example of statutes carving out exceptions from the requirements of RPTL 524 (3),

[10] Slightly different, but similar, language governs the protest of the assessments of class one properties (*see* NY City Charter §164-b [b]).

the others being RPTL 523-b (*see* Town's Brief at 38-40) and RPTL 586 (4) (*see* Town respondents-respondents' brief in response to amicus Stop & Shop at 12-13).

Conclusion

This Court is asked to interpret and apply the words of RPTL 524 (3) as written, against the backdrop of the Real Property Tax Law which deals only with real property and the common law which characterizes leaseholds as personal, not real property.

Applying the facts to these principles leads to the conclusion that the petitioners-appellants were not "the person whose property is assessed." Hence, the administrative reviews were defective[11] and did not supply a predicate for subject matter jurisdiction.

Nothing in Wakefern's brief persuasively argues against the Second Department analysis or its conclusion.

Dated: April 28, 2022

William Maker, Jr.
Town Center
740 West Boston Post Road
Mamaroneck, NY 10543
(914) 381-7815 or
(914) 925-1010

[11] with the exception of 2014.

wmaker@mfd-law.com

Attorney for the respondents-respondents, Town of Mamaroneck, its Assessor and Board of Assessment Review

Certification of Compliance

This certification is being made pursuant to 22 NYCRR §500.13 (c).

1. This brief was prepared on a computer using the Microsoft Word word-processing program.

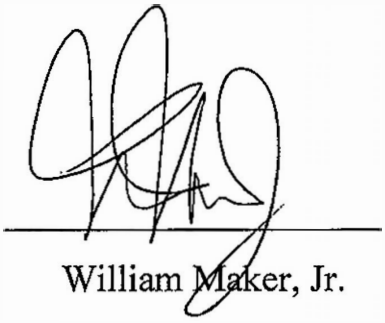
2. The type face is Times New Roman.

3. The point size of the main text and footnotes is 14.

4. The lines are double-spaced.

5. According to the word count function of the word-processing system, starting after the questions presented, the brief contains 2,253 words.

Dated: April 28, 2022



William Maker, Jr.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
)
COUNTY OF WESTCHESTER)

Ivan Diaz, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age, and resides at 2160 Holland Avenue, Bronx, New York 10462.

That on the 2nd day of May, 2022, deponent served the within:

BRIEF OF RESPONDENT-RESPONDENT THE TOWN OF MAMARONECK IN RESPONSE TO *AMICUS CURIAE* WAKEFERN FOOD CORP.

upon designated parties indicated herein at the addresses provided below by means of Federal Express Standard Overnight Delivery of 3 true copies of the same at the addresses of said attorney/parties with the names of each represented party:

MCCULLOUGH, GOLDBERGER & STAUDT, LLP
Attorneys for Respondent-Respondent The Village of Mamaroneck
1311 Mamaroneck Avenue, Suite 340
White Plains, New York 10605
(914) 949-6400
kstaudt@mgslawyers.com

GRIFFIN, COOGAN, SULZER & HORGAN P.C.
Attorneys for Petitioners-Appellants
51 Pondfield Road
Bronxville, New York 10708
(914) 961-1300
msc@gcshlaw.com

HERMAN KATZ CANGEMI WILKES & CLYNE, LLP
Attorneys for Amicus Curiae Wakefern Food Corp.
538 Broadhollow Road, Suite 307
Melville, New York 11747
(631) 501-5011
kclyne@hermankatz.com

Sworn to before me this
2nd day of May, 2022

Notary Public

Ivan Diaz

ERIC R. LARKE
Notary Public, State of New York
No. 01LA5067236
Qualified in Westchester County
Commission Expires March 5, 2023

17804