To Be Argued By:
Kevin M. Clyne
Time Requested: 15 Minutes

APL-2021-00103

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

Court of Appeals

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 BOARD OF ASSESSORS,
THE ASSESOR OF THE TOWN OF MAMARONECK,
and THE BOARD OF ASSESSMENT REVIEW,

Respondents-Respondents.

BRIEF OF *AMICUS CURIAE* WAKEFERN FOOD CORP. IN SUPPORT OF PETITIONER-APPELLANT

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SUMMARY STATEMENT

This memorandum of law is submitted *amicus curiae* by Wakefern Food Corp., in support of the appeal by DCH Auto, (hereinafter "DCH Auto" or "Petitioner") from the January 27, 2021 "So Ordered" Stipulation and Judgment Dismissing Severed Proceedings Entered by Supreme Court, Westchester County, dated January 21, 2021, and entered January 27, 2021, which finally resolves the underlying proceedings under index number 23040/2009, and brings up for review the non-final Decision and Order Supreme Court, Second Department dated December 11, 2019 in the above-captioned appeal (Matter of DCH Auto v. Board of Assessors,178 A.D.3d 823, 111 N.Y.S.3d 553 (2d Dept. 2019), lv granted, 37 N.Y.3d 903, 169 N.E.3d 1238 (2021).

In DCH Auto, the Town and the Village argued that the administrative complaints filed pursuant to RPTL §524 were defective since they were not brought in the name of the owner. 178 A.D.3d 823 at 825. A properly filed RPTL §524 administrative complaint is a necessary predicate to a proceeding commenced in Supreme Court pursuant to RPTL §704. The Appellate Division, Second Department affirmed the dismissal of subject consolidated proceedings, holding,

"in filing the administrative complaints under RPTL §524 in its own name, it failed to satisfy a condition precedent to the commencement of an RPTL Article 7 proceeding since it was neither the owner, nor identified in the complaints as an agent of the owner". Id.

The Court of Appeals recently had this issue before it and declined to follow recent 2nd Department holdings, as detailed in Larchmont Pancake House v. Bd. of Assessors, 61 N.Y.S.3d 45 (N.Y. App.Div.2d Dept.2017) ("Larchmont/2nd Dept.") or Circulo Hous. Dev. Fund Corp. v. Assessor of City of Long Beach, 947 N.Y.S.2d 559 (N.Y. App. Div. 2d Dept. 2012) ("Circulo").

In Larchmont Pancake House v Bd. of Assessors and/or the Assessor of the Town of Mamaroneck, 124 N.E.3d 230 (N.Y. 2019)[1] ("Larchmont/COA"), the Court of Appeals held that the petitioner lacked standing under RPTL Article 7, and therefore, decided not to consider the dispute concerning the scope of appropriate challengers under RPTL §524. In declining to consider scope of challenges under RPTL §524, this Court makes it clear that there is no bright line statutory restriction.

Wakefern Food Corp. respectfully requests that this Court recognize the difference between the underlying facts presented in the Larchmont Pancake House case, and those presented herein. In summary, the taxpayer/filing entity here:

(1) was a net tenant, operating under a written lease that unequivocally grants appeal rights to the tenant, and

(2) paid the subject property taxes pursuant to lease obligation to do so. As such, the tenant here has the direct legal obligation to assume the undivided tax liability emanating from the assessment challenged.

Without reversal of the DCH Auto decision, tenants with a contractual obligation to pay real estate taxes will not be able to exercise their contractual right to challenge the real property assessment, which the taxes they pay are based upon. Courts in the Second Department, starting with the interpretation of RPTL §524(3) in Circulo in 2012, and including the decision herein, have threatened the rights of taxpayers to have their assessments challenged. Circulo Hous. Dev. Fund Corp. v. Assessor of City of Long Beach, 947 N.Y.S.2d 559 (N.Y. App.Div.2d Dept.2012).

[1] The undersigned was counsel to the Petitioner-Appellant in Larchmont Pancake House.

The decision of the lower court abrogates a substantial right of taxpayers under net leases who had relied on decades of unchallenged and universally accepted precedent in drafting leases. Consequently, this shifts the burdens of appeal to uninterested parties, i.e., non-property tax paying owners. Ultimately, the DCH Auto decision (as well as Circulo and Larchmont Pancake House v. Board of Assessors and/or the Assessor of the Town of Mamaroneck, et al., 153 A,D,3d 521 (2d Dep't 2017)), leaves those taxpayers under net leases with the contractual burden of paying the taxes but without the ability to enforce the contractual right to challenge the property assessment. Further, it defeats the remedial purpose of the Real Property Tax Law without any clear statutory basis for doing so.

DCH Auto furthers the Second Department's break from established precedent that began with Circulo and Larchmont and ignores the Court of Appeals' refusal to affirm these cases on the RPTL 524 standing issue in Larchmont. Larchmont at 230.

The DCH Auto decision is also in conflict with the prior rulings of this Court in Waldbaum, Inc. v. Fin. Adm'r City of New York, 74 NY2d 128, 129 (1989), the Third Department in McLean's Dept. Stores, Inc. v. Commissioner of Assessments of City of Binghampton, 2 A.D.2d 98 (3d Dep't 1956), and Big V Supermarkets, Inc., Store #217 v. Assessor of Town of East Greenbush, 114 A.D.2d 726 (3d Dep't 1985), and the 4th Department in Ames Dept. Store, Inc., No. 418 v. Assessor, Bd of Assessors, 261 AD2d 835, 835 (4th Dept. 1999)(quoting Waldbaum, Inc. v. Fin. Adm'r of City of New York, 74 NY2d 128, 129 (1989) Each case holds that a lessee who is obligated to pay taxes as part of a lease and the right to challenge the assessment possesses the requisite unitary property interest necessary to maintain an RPTL Article 7 action.

Trial courts in New York State have also declined to follow the Second Department decisions.

In Rite Aid Corporation v. Town of Irondequoit, Index No. 2017/1377 (February 27, 2018) (Doyle, J.) (Sup. Ct., Monroe County), where a non-owner tenant with the contractual authority to contest real estate taxes, filed the tax grievance, the Supreme Court, Monroe County denied the Respondents motion to dismiss, which relied principally on the Second Department decisions in Circulo and Larchmont. The trial court determines that the 2nd Department decisions in Larchmont and Circulo involve petitioners who did not have a provision in their leases which authorized them to contest real estate taxes, and as such were inapposite to the case before it.

Further, the trial court opined that the rules of statutory construction do not favor the Respondent's restrictive construction of the Second Department's reading of RPTL §524(3). Id. The Court holds that the language of RPTL §524 is not restrictive and the Second Department's construction is not favored by decisional authority. Decisional authority holds that a "lessee who is obligated to pay taxes as a part of a lease and the right to challenge the assessment possesses the "requisite unitary property interest" necessary to maintain an Article 7 action." Rite Aid Corporation v. Town of Irondequoit, Index No. 2017/1377 (February 27, 2018) (Doyle, J.)(Sup. Ct., Monroe County) (Sup. Ct., Monroe County citing Ames Dept. Store, No.418 v. Bd. of Assessors, 261 A.D.2d 835 [4th Dept 1999]; Walgreen Eastern Co. v. Assessor, Index No. 2017/7289 (Doyle, J)(Supreme Court, Monroe County)(March 6, 2018).

A trial court in the Second Department[2] also refused to dismiss an action based on an administrative grievance filed by a non- owner, finding that "limitation of RPTL §524(3) to

[2] Subsequent to the Circulo and Larchmont Pancake House 2nd Department decisions, but prior to the 2nd Dept holding in DCH Auto.

property owners creates a condition precedent that would modify RPTL §704(1) since a petitioner may not necessarily be the aggrieved taxpayer". See Soundview II Associates v. Assessor, Town of Riverhead, Index # 2567/14) (Leo, J) (Sup. Ct, Suffolk County).

The Supreme Court, Westchester County[3] continues to go its own way and follow the 2nd Department in its interpretation that RPTL §524(3) limits filings to owners, but does so noting the fact that it had been reversed in Larchmont, and with the ambivalence expressed below:

> In the Matter of DCH Auto v. Town if Mamaroneck, 178 AD3d 823 (2nd Dept. 2019), the Court established the formula now used to determine correct filings *in this judicial department (emphasis added)*…In The Matter of Larchmont Pancake House v Bd of Assessors , 153 AD2d 521 (2nd Dept 2017), this Court was in fact reversed when it allowed for non owners to go forward on an Article 7 matter when in fact the Article 5 complains were not filed by the owners. In the Matter of the Application of 1201 Main Street I and II c/o Walgreen Eastern Co., Index #'s 62798/14, 63952/15, November 25, 2020 (Tolbert, J.), (Sup Ct., Westchester County).

There is an obvious conflict in authority throughout the State which requires a uniform determination by the state's highest court on which class of persons may file an administrative complaint under RPTL §524(3). We respectfully request that this Court determine that a person who is not an owner but is contractually obligated to pay real estate taxes and has the owner's authority to challenge the real estate taxes has standing to file a complaint for administrative review under RPTL §524(3).

[3] The court of origin on both the Larchmont Pancake House and DCH Auto cases.

POINT I

THE PETITONER IN DCH AUTO HAS THE CONTRACTUAL RIGHT TO COMMENCE PROCEEDINGS AND THE CONTRACTUAL OBLIGATION TO PAY THE REAL ESTATE TAXES, AND AS SUCH THIS MATTER IS FACTUALLY AND LEGALLY DISTINGUISHABLE FROM LARCHMONT PANCAKE HOUSE

In Larchmont Pancake House, this Court did not consider the dispute concerning the scope of appropriate challengers under RPTL §524, instead relying on a RPTL §704/aggrieved party analysis. 123 N.E. 3d 230 (N.Y. 2019).

RPTL §524(3) provides, in relevant part, that an administrative complaint must be based on a statement "by the person whose property is assessed, or by some person authorized in writing by the complainant or his officer or agent to make such statement who has knowledge of the facts stated therein." N.Y. Real Prop. Tax Law §524(3) (McKinney). RPTL §704(1) provides, in relevant part, that "[a]ny person claiming to be aggrieved by an assessment of real property" may commence a judicial proceeding pursuant to RPTL §704(1). N.Y. Real Prop. Tax Law §704(1) (McKinney).

The Court of Appeals acknowledged the dispute as to whether a petitioner is qualified as a non-owner to seek administrative review pursuant to RTPL §524(3). Id. The Court of Appeals even stated that, like an owner, a lessee who is "bound by his lease to pay an assessment" is likely to be put to litigation and expense" as a direct result of its legal obligation. Id at 6. Despite this acknowledgement, the Court focused its decision on the point that the petitioner was not "legally responsible" for paying the undivided tax liability, as it had no "direct contractual obligation" to pay the taxes. Id.

Consequently, the Court held that the petitioner lacked standing under RPTL §704 and ultimately declined to decide on the dispute regarding RPTL §524. Id. In focusing on the lack of a formal lease obligation and not following the restrictive, bright line determinations by the Second Department in both Larchmont Pancake House v. Bd. of Assessors, 61 N.Y.S. 3d 45 (N.Y. App. Div.2d Dept. 2017) and Circulo Hous. Deve. Fund Corp. v. Assessor of City of Long Beach, 947 N.Y.S. 2d 559 (N.Y. App. Div.2d Dept. 2012), the Court of Appeals clearly acknowledges that there is no such bright line statutory restriction preventing an appropriate non-owner from filing a RPTL §524(3) administrative complaint.

In DCH Auto, the Second Department Court held that tenant failed to satisfy the RPTL §524 condition precedent as it was not the owner, nor identified as an agent of the owner. It did not recognize the owner agency created by the lease. The facts in DCH Auto are clearly distinguishable from those in Larchmont Pancake House because of the clear, written obligations in the lease. The net lease provided that "the petitioner was to pay the real estate taxes for the period of the lease term, that the petitioner had the right to contest any assessment at its sole cost and expense, and that it had the right to settle any such proceeding without the consent of the owner." DCH Auto v. Town of Mamaroneck, 178 A.D.3d 823, 824, 111 N.Y.S.3d 553 (2d Dept. 2019).

This Court had noted that "in the absence of a direct contractual obligation the assessment's remote and consequential impact on petitioner is inadequate to confer standing." (emphasis added). Larchmont Pancake House, 124 N.E.3d 230 (N.Y. 2019) at 8. The only logical conclusion to reach from the Court's holdings is that if the tenant in Larchmont Pancake House had a direct, contractual obligation to pay the taxes, it would have been an aggrieved party under RPTL §704. Id.

Here, pursuant to the subject formal lease, the owner delegated its authority to contest real estate taxes to the tenant, and the tenant acted with the agency granted to it. Under this Court's recent holding in Larchmont Pancake House, the petitioner in DCH Auto is clearly an aggrieved party.

It is a common rule of statutory construction that when multiple statutes deal with same subject matter, they must be read in a way as to render them compatible, unless a contrary statutory intent is clearly expressed. See In re Enforcement of Tax Liens ex rel County of Orange, 75 AD3d 224, 903 NYS2d 60 (2010); McKinney's cons. Law of NY, Book 1, Statutes §§ 22. It would be contrary to the rules of statutory construction to determine that DCH Auto can file the petition pursuant to RPTL 704, but not the statutory predicate administrative complaint under RPTL §524 (3).

It is well established that the tax law "relating to review of assessments is remedial in character and should be construed to the end that the taxpayer's right to have [its] assessment reviewed should not be defeated by technicality." Larchmont Pancake House, 124 N.E.3d 230 (N.Y. 2019) (Wilson, J., dissenting), quoting People ex rel. New York City Omnibus Corp. v. Miller, 282 NY 5,9 [1939].

POINT II

THE SECOND DEPARTMENT IMPROPERLY CREATES AN OWNERSHIP REQUIREMENT IN RPTL § 524 (3)

The Second Department has improperly created an ownership requirement for taxpayers who wish to file administrative grievances. The holding in DCH Auto (and Circulo and

Larchmont Pancake- 2nd Dept) clearly contradicts decades of New York precedent, where the predicate administrative grievance was filed by a non-owner of a property and courts found subject matter jurisdiction over the subsequent court proceeding.

The Second Department has found that "person" means owner, despite the word "owner," or any derivation of "owner" not appearing in Section 524. DCH Auto, 111 N.y.S.3d 553 [N.Y. App. Div. 2d Dept. 2019]; Larchmont Pancake House, 61 N.Y.S.3d 45 (N.Y. App. Div. 2d Dept. 2017); Circulo, 947 N.Y.S.2d 559 (N.Y. App. Div.2d Dept. 2012). The decisions do not explain how it interpreted "person whose property is assessed" to exclusively mean "owner."

Article 5 of the RPTL uses the word "owner" over 100 times, yet the word is not used in Section 524 the provision in question. For example, RPTL §554(2), which sets forth the procedure to correct errors on tax rolls uses the word "owner," It states:

> Whenever it appears *to an owner of real property, OR any person who be entitled to file a complaint pursuant to section five hundred twenty- four of this chapter*, that a clerical error, an unlawful entry or error in essential fact described in subdivision one of this section is present on the tax roll in regard to his real property, *such owner or other person*, may, at any time prior to the expiration of the warrant, file an application in duplicate with the county director of real property tax services for the correction of such error.

N.Y. Real Prop. Tax Law §554 (McKinney) (emphasis added).

RPTL§554 clarifies, through use of the disjunctive "or", that property owners are a separate class of the persons and distinct from those who are entitled to file complaints pursuant to RPTL§524(3). If the Legislature intended this statutory construction regarding RTPL §524 (3), then it could have used the word "owner", as it did in Section 554, rather than "person whose property is assessed."

In the construction of a statute, meaning and effect should be given to all of its language, if possible, and words are not to be rejected as superfluous when it is practicable to give each a distinct and separate meaning. Bliss v. Bliss, 66 N.Y.2d 382, 389 (1985) (quoting McKinney's N.Y. Statutes §231 (McKinney)). The word "owner" is used throughout Article 5 of the Real Property Tax Law. There is a presumption that the legislature will use the same term consistently in different statutory sections. Mangam v City of Brooklyn, 98 N.Y. 585, 591-592 (1885). Conversely, when different terms are used in various parts of a statute or rule, it is reasonable to assume that a distinction between them is intended. Orens v. Novello, 99 N.Y.2d 180, 187 (2002).

The highlighted portions of §554(2) clarify two points:

1. Any person who may file a grievance complaint pursuant to RPTL §524 may file a correction of errors petition pursuant to RPTL §554.

2. The class of people who may file a grievance complaint pursuant to RPTL §524 includes, but is not limited to, owners.

"Or" is a disjunctive connector that means "in the alternative", and as such, has specific, intended interpretative consequences when used in a statute. As used within RPTL §554, it means that there is a class of persons beyond owners who can properly file a complaint.

The language in RPTL §554 cannot be ignored such that it is rendered meaningless or superfluous.

Furthermore, RTPL §524(3) provides, "by some person authorized in writing by the complainant or his officer or agent to make such statement who has knowledge of the facts stated therein." N.Y. Real Prop. Tax Law §524(3) (McKinney). The usage of the word "complainant" rather than "owner" implies that the complainant can be someone other than the property owner.

Once again if the Legislature had intended for the person to be the property owner, then it would have simply used the word "owner."

"Person whose property is assessed" does not mean "owner". The rules of statutory construction require that the Courts ascribe different meaning to each term, and further, that RPTL §524(3) and §704 be read to be compatible with each other. DCH Auto is an aggrieved party and must be permitted to file the administrative complaint of its real property assessment.

POINT III

THE SECOND DEPARTMENT UNEQUIVOCALLY AND IMPROPERLY CHANGED THE LAW WITH CIRCULO, LARCHMONT PANCAKE HOUSE AND DCH AUTO

The right of a tenant to file property tax appeals (where supported by the lease) was beyond controversy and was not raised in any case between 1956 and 2012, with the exception of one Third Department case. This case was heard prior to the enactment of the Real Property Tax Law. However, the statutory language, "person whose property is assessed," was examined and interpreted. McLean's Dept. Stores, Inc. v. Commissioner of Assessment of the City of Binghampton,2 A.D. 2d 98, 100 (3d Dep't 1956). Here, the Third Department held, "Since the right of judicial review is preserved for the benefit of persons claiming to be 'aggrieved,' it clearly follows that every complainant whose status is comprehended that that term is entitled to complain to the board and obtain the preliminary review necessarily precedent to the judicial proceeding." McLean's, 2A.D.2d at 100.

Further, this Court in Waldbaum, Inc. v. Finance Adm'r of City of New York, 74 N.Y.2s 128 (1989) cited to the McLean's case as precedent for the fact that non-owner aggrieved party

responsible for the entire tax on an undivided assessment unit had a right to seek assessment review. The McLean's precedent that controlled this issue for over 50 years is not cited in one of the recent Second Department decisions.

Several other cases have determined that the condition precedent was adequately satisfied by a non-owner. In Big V Supermarkets, Inc., Store #217 v. Assessor of Town of East Greenbush, 114 A.D.2d 726 (3d Dep't 1985), where a partial lessee and non-owner of a shopping center was bound to pay all of the taxes on the entire property, the Court exercised subject matter jurisdiction by finding that Big V could proceed with its assessment challenge. Additionally, in EFCO Products v. Cullen, 161 A.D. 2d 44 (2d Dep't 199068), the Second Department found the commercial lessee of a property under an Industrial Development Agency lease was able to challenge the assessment of its property at both the administrative and judicial levels. It is noteworthy that in neither case was the grievant the owner, and in neither case was there a finding of a lack of subject matter jurisdiction.

Moreover, this Court's decision overlooks the purpose of the administrative review of assessments. This Court in Sterling Estates, Inc. has underscored the importance of administrative review:

> The review and adjustment process, if adjustment is appropriate, permits the assessors to close the tax roll and establish the tax rate with some confidence that the revenues produced by the levy will be sufficient to meet budget requirements. Manifestly this administrative review procedure is not intended to be an idle exercise. It is designed to seriously address claimed inequities and adjust them amiably if it is possible to do so. The ***taxpayer*** and the municipality have a palpable interest in the amount and accuracy of individual assessments and the municipality has an additional incentive to resolve disputes concerning them as promptly as possible so that the roll may be stabilized and tax rates established. To that end, the Legislature has imposed detailed requirements on the assessors to conduct an orderly assessment process and specific condition on the procedure by which ***aggrieved taxpayers*** obtain administrative and judicial relief."

Sterling Estates, Inc. v. Board of Assessors of Nassau County, 66 N.Y.2d 122, 125 (1985) (emphasis added). The Court indicated that it was *aggrieved taxpayers* who could seek *both* administrative *and* judicial review, without differentiation between aggrieved taxpayers who owned the property and aggrieved taxpayers who did not.

CONCLUSION

The Second Department's decisions since Circulo, DCH Auto, & Larchmont Pancake House abrogate the rights of untold number of tenants with negotiated obligations to pay real estate taxes and the concomitant rights to challenge the assessments that are the basis for these taxes.

These decisions contradict the precedent established in this Court, and both the 3rd and 4th Departments, not to mention its own pre-Circulo jurisprudence. It does so without any statutory basis for doing so.

Furthermore, if DCH Auto stands, and is read together with this Court's recent decision in Larchmont Pancake House regarding when a tenant can be an aggrieved party, the result will be that one class of persons, tenants with clearly written leased based obligations and rights, can file the RPTL Article 7 proceeding but cannot file the predicate administrative complaint under RPTL §524(3). Statutes concerning the same subject matter must be read to be compatible with each other. Affirming DCH Auto will result in two sections of the Real Property Tax Law being incompatible with each other.

When these cases are read with the overarching gloss that the Real Property Tax Law is a remedial statute that should be liberally construed so as not to defeat the rights of a taxpayer on a technicality, DCH Auto must be overturned.

Dated: Melville, New York
March 25, 2022

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COURT OF APPEALS
STATE OF NEW YORK
CERTIFICATE OF COMPLIANCE

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