

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC.,

ALBANY COUNTY CLERK

Petitioner,

DECISION and ORDER
(On Motions to Dismiss)

-against-

Index Nos. 6707-2009
5367-2010
A00087-2011
A00118-2012

THE NEW YORK STATE BOARD OF REAL
PROPERTY TAX SERVICES,

Respondent,

and

THE CITY OF NEW YORK,

Intervenor-Respondent.

(Supreme Court, Albany County, Special Term)

(Hon. Margaret T. Walsh, Acting Supreme Court Justice, Presiding)

APPEARANCES:

Gary Schuller, Esq.
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New York, New York 10158

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Attorney General of the State of New York
Mark G. Mitchell, Esq., Assistant Attorney General
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Zachary W. Carter, Esq.
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Philip M. Caal, Esq., Assistant Corporation Counsel
Attorney for the Intervenor-Respondent, City of New York
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Walsh, J.:

The Petitioner, Consolidated Edison Company of New York, Inc., is a public utility corporation that provides natural gas, electricity and steam to customers in the five boroughs of New York City. The Petitioner filed notices of petitions with verified petitions in Albany County against the Respondent, the New York State Board of Real Property Services, challenging its assessments of the Petitioner's special franchise property located within each of these boroughs for the years 2009, 2010, 2011 and 2012. The Respondent and the Intervenor-Respondent, the City of New York, have moved to dismiss the petitions filed for these four years pursuant to Real Property Tax Law ("RPTL") §718. The Petitioner opposes.

According to RPTL §718, "unless a note of issue is filed and the proceeding is placed on the court calendar within four years from the last date provided by law for the commencement of the proceeding, the proceeding thereon shall be deemed to have been abandoned and an order dismissing the petition shall be entered without notice and such order shall constitute a final adjudication of all issues raised in the proceeding, except where the parties otherwise stipulate or a court or judge otherwise orders on good cause shown within such four-year period."

The Respondent's notice of motion establishes that the 2009, 2010 and 2011 proceedings were originally assigned to the Honorable Michael C. Lynch. By *Letter Order* dated July 17, 2012, Justice Lynch directed these three proceedings be consolidated "for purposes of scheduling and trial, on consent" (*Notice of Motion*, Mitchell Aff. ¶ 11; Exh. G). The *Letter Order* further states that "the case schedule is adjusted as follows: * * * Petitioners shall file a note of issue by September 10, 2013" (*id.*, Exh. G). On February 1, 2013, Justice Lynch ordered that the 2012 proceeding be consolidated, for the purpose of scheduling and trial, with the 2009, 2010 and 2011 proceedings and otherwise reaffirmed the schedule set forth in the July 12, 2012 *Letter*

Order (*id.*, Mitchell Aff. ¶ 12; Exh. H). Subsequently, pursuant to the June 21, 2013 *Letter Order*, Justice Lynch adjusted the case schedule for the 2009, 2010, 2011 and 2012 proceedings and, among other things, directed the Petitioner to file a note of issue by March 31, 2014 (*id.*, Mitchell Aff. ¶ 13; Exh. I). The June 21, 2013 *Letter Order* specifically waived the requirements of RPTL § 718 that a note of issue be filed within four years of the date of commencement of a proceeding with respect to the 2009 proceeding (*id.*).

The Petitioner commenced a proceeding for 2013 which was consolidated with the four earlier matters pursuant to the June 21, 2013 *Letter Order*. On January 31, 2014, Justice Lynch held a conference during which an additional adjustment to the case schedule for the proceedings was made and memorialized in a *Letter Order* dated February 5, 2014. The adjusted schedule extended deadlines for disclosure and motion practice to dates after March 31, 2014; however, the deadline for filing a note of issue was not similarly extended.

The Petitioner commenced proceedings for 2014, 2015 and 2016. In April, 2014, Justice Lynch was appointed to the Appellate Division, Third Department. All of the tax certiorari proceedings were then reassigned to this Court.

On August 10, 2016, the Court held a conference with counsel to discuss the pending petitions. The discussions were memorialized in a *Letter Order* dated September 16, 2016 which, among other things, directed the Petitioner to serve upon the respondents by September 30, 2016 a draft appraisal report covering the valuation dates of July 1, 2009, 2010, 2011 and 2012, and directed the Respondents to submit a status report to the Court on or before January 5, 2017. The *Letter Order* further specifically stated that it would not “in any way” limit “the rights of respondents and/or intervenor-respondent the City of New York to move pursuant to Real Property Tax Law 718 for dismissal of any of the above-referenced proceedings” (*Notice of*

Motion, Exh. K). The Respondent and Intervenor-Respondent argue in their respective motions that, because no notes of issue were filed in the 2009, 2010, 2011 and 2012 proceedings, said proceedings must be dismissed with prejudice (*id.*, Mitchell Aff., ¶¶ 16-18).

The Petitioner argues that it was caught unaware by the instant motion to dismiss, where opposing counsel represented that an effort would be undertaken to reach a global compromise once their appraiser had the opportunity to review the Petitioner's draft appraisal, and, for reasons not relevant here, that an extension to April 2017 was needed to for the respondents' appraiser to undertake such review. During this extension of time, the Respondents filed the instant motions to dismiss. The Petitioner also argues that, as a result of the consolidation, the proceedings became, in effect, one proceeding and therefore there was a waiver of the time limitations for filing of the note of issue (*Schuller Aff. in Opposition*, ¶11; *Memorandum of Law* [citing CPLR §602]).

RPTL §710 governs consolidation of tax certiorari proceedings. The statute provides that “[a] justice before whom separate petitions to review assessments of real property are pending may on his own motion consolidate or order to be tried together two or more proceedings where the same grounds of review are asserted and a common question of law or fact is presented,....”

For tax assessment challenges commenced outside of New York City, a note of issue and certificate of readiness must be filed when “all disclosure” has been completed and a “statement of income and expenses has been served and filed” (22 NYCRR §202.59[a],[d][1]). The court rules require “[a] separate note of issue [to] be filed for each property for each tax year” (*id.*, [d][2]). The rules also permit consolidation or joint trial of real property tax assessment review proceedings (22 NYCRR §202.59[f]; and see, *Matter of Long Is. Industrials Group v. Board of Assessors*, 72 AD3d 1090, 1091 [2d Dept. 2010]).

“Consolidation is the fusing of two or more actions, giving rise to a single new action. The actions are merged and recaptioned, realigning the parties when necessary” (2 Weinstein-Korn-Miller, NY Civ Prac, §602.02). A joint trial, on the other hand, “preserves the integrity of each of the original actions, and the actions are simply tried together” (*id.*). “[C]onsolidation gives rise to a new action displacing the actions affected thereby, whereas a joint trial preserves the integrity of each of the actions. Thus, “[in] consolidated actions only one judgment is entered, while in joint trials separate verdicts and judgments are entered and each may be appealed from” (*Mars Associates, Inc. v. New York City Educational Constr. Fund*, 126 AD2d 178, 184-185 [1st Dept. 1987], quoting 2 Weinstein-Korn-Miller, NY Civ Prac §602.02, at 6-11).

In *Matter of Empire State Pipeline v. Town of Arcadia Assessor*, 270 AD2d 830 (4th Dept. 2000), the petitioner commenced a total of 56 separate tax certiorari proceedings in 14 towns for the years 1994 through 1997. The respondents successfully moved, over petitioner’s opposition, to consolidate the proceedings, and venue for the consolidated proceedings was transferred to one county. The order bore a single caption and index number for the 1997 tax certiorari proceeding and attached as an exhibit the motion for consolidation of the 56 RPTL article 7 proceedings. Approximately five months after the order was entered, the respondents moved to dismiss the 1994 and 1995 petitions pursuant to RPTL §718 for the petitioner’s failure to file notes of issue within four years of commencement. The Appellate Division reversed the lower court’s order dismissal of the petitions, holding that the ordered consolidation resulted in the merging of the earlier proceedings into a single proceeding under the 1997 caption. The Appellate Court noted that, because the 1994 petitions no longer had a separate existence and were merged into a single, consolidated 1997 proceeding, the motion to dismiss should have been denied.

Here, since their respective filings, each of the above-entitled proceedings have retained a

separate existence. None of Justice Lynch's letter orders directed any of the four proceedings at issue to be consolidated under a single index number, nor did the letter orders direct the clerk of the court to do so. No objections were made or clarifications sought by any of the parties. In the Court's view, it appears from the record that the intent was to join the four proceedings for purposes of trial and scheduling, rather than to consolidate them under a single index number. Moreover, the court rules require separate notes of issue to be filed for "each property for each tax year" with no exception. The last date on which a note of issue could be filed in the 2009 proceeding was March 31, 2014. The last date on which a note of issue could be filed in the 2010 proceeding was on August 10, 2014. The last date on which a note of issue could be filed in the 2011 proceeding was September 22, 2015. The last date on which a note of issue could be filed in the 2012 proceeding was on July 17, 2016. No stipulations or applications for extensions of time were obtained or made with any of the four-year periods. RPTL §718 directs dismissal of a tax certiorari proceeding unless a note of issue is filed within four years of its commencement, except where the parties otherwise agree or the court orders on good cause shown an extension of the four-year period. The statute is strictly construed and must be rigidly applied (*Matter of Waldbaum's #122, Inc. v. Board of Assessors*, 58 NY2d 818, 819 [1983]). "The four-year filing requirement is a 'mandatory provision and must be strictly applied'" (*Matter of Santa's Workshop, Inc. v. Board of Assessors*, 13 AD3d 1047, 1047-1048 [3d Dept. 2004], quoting *Matter of Pyramid Crossgates Co. v. Board of Assessors of Town of Guilderland*, 302 AD2d 826, 829 [2003], *lv denied*, 100 NY2d 504 [2003]). That the parties were subsequently arranging reviews of appraisals is irrelevant and does not obviate the plain language of the statute (*Matter of LaFarge v. Town of Mamakating*, 94 NY2d 802, 803-804 [1999]; *Matter of North Pole Resorts, Inc. v. Board of Assessors*, 13 AD3d 1046, 1046-1047 [3d Dept. 2004]).

For the reasons set forth above, the Respondents' motions to dismiss are granted. The petitions filed in 2009, 2010, 2011 and 2012 by the Petitioner are dismissed with prejudice.

Those arguments not specifically addressed herein were found to be unpersuasive, or were otherwise rendered academic.

Based upon the foregoing, it is

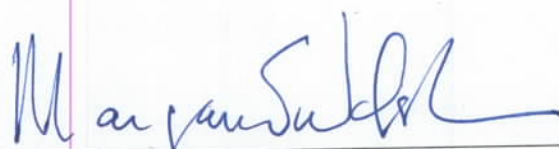
ORDERED AND ADJUDGED that the Respondents' motions to dismiss pursuant to RPTL §718 are GRANTED; the petitions filed by the Petitioner bearing index numbers 6707-2009, 5367-2010, A00087-2011 and A00118-2012 are hereby DISMISSED, with prejudice.

This constitutes the Decision and Order of the Court. The original Decision and Order and any other original papers submitted on this motion are being delivered by the Court to the Albany County Clerk's Office for uploading onto NYSCEF (E-Filing) for the A00087-2011 and A00118-2012 proceedings and for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel is not relieved from the applicable provisions of that rule respecting entry and/or notice of entry or service.

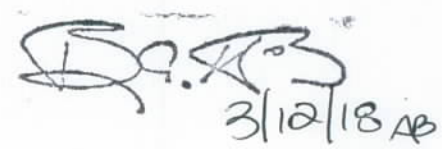
SO ORDERED.

ENTER.

Dated: February 28, 2018
Albany, New York



Margaret T. Walsh
Acting Supreme Court Justice


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Papers Considered:

1. *Notices of Motion* by Respondent The New York State Board of Real Property Tax Services dated February 24, 2017 with *Attorney Affirmations* of Mark G. Mitchell, Esq. dated February 24, 2017; and Exhibits "A" through "K" annexed; *Memorandum of Law* dated February 24, 2017 [motions to dismiss four proceedings];
2. *Notices of Motion* by Respondent-Intervenor The City of New York dated March 29, 2017 with *Attorney Affirmations* of Philip M. Caal, Esq. dated March 29, 2017; and exhibits annexed [motions to dismiss four proceedings];
3. *Affirmation in Opposition* of Gary Schuller, Esq., dated April 12, 2017, with *Memorandum of Law in Opposition* dated April 12, 2017;
4. *Reply Affirmations* of Mark G. Mitchell, Esq., dated April 20, 2017;
5. *Reply Affirmations* of Philip M. Caal, Esq., dated April 20, 2017.