SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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LEVEL 3 COMMUNICATIONS, LLC; RCN TELECOM SERVICES OF NEW YORK L.P.; TELX-NEW YORK SIXTH AVENUE LLC; and TELX NEW YORK LLC,

Index No. 156255/16

Plaintiffs,

Decision, Order & Judgment

-against-

JACQUES JIHA, THE COMMISSIONER OF FINANCE OF THE CITY OF NEW YORK, MARK SIN, CHIEF REAL ESTATE OF UTILITY CORPORATIONS ASSESSOR FOR THE CITY OF NEW YORK; THE DEPARTMENT OF FINANCE FOR THE CITY OF NEW YORK, THE CITY OF NEW YORK; and JOHN DOES,

Defendants.

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SHULMAN, J.:

In motion sequence 1, Defendants, Jacques Jiha, the Commissioner of Finance of the City of New York (Jiha); Mark Sin, Chief Real Estate of Utility Corporations (REUC) Assessor for the City of New York (Sin); the Department of Finance for the City of New York (DOF); and the City of New York (collectively "Defendants") bring a pre-answer motion pursuant to CPLR 3211 (a) (2), (4) and (7) to dismiss the complaint herein. Plaintiffs, Level 3 Communications, LLC; RCN Telecom Services of New York L.P.; Telx-New York Sixth Avenue LLC; and Telx New York LLC (collectively "Plaintiffs"), oppose the motion and, notwithstanding the fact that issue has not yet been joined, cross-move for summary judgment in their favor pursuant to CPLR 3211[c],[1] and

[1] CPLR 3211[c] allows the court, upon proper evidence, to treat a motion to dismiss as a motion for summary judgment whether or not issue has been joined and after adequate notice to the parties. Should this court determine that the complaint's allegations are sufficient to withstand a pre-answer motion to dismiss, Defendants indicate in their reply papers and opposition to the cross-motion that they do not object to treating their motion as a summary judgment motion. As this court finds that the

to consolidate this action with certain RPTL Article 7 proceedings they commenced challenging real property tax assessments for tax year 2015/2016.[2] Defendants oppose the cross-motion.

In motion sequence 2, Plaintiffs move to amend their cross-motion for summary judgment in motion sequence 1 to include a request for partial summary judgment adjudging the real property tax assessments at issue unlawful insofar as they assess anything other than, or in addition to, the net removal value of the backup generators powering the installations at issue. Defendants oppose this motion, which is consolidated with motion sequence 1 for disposition.

Background

Plaintiffs are fiber optics network providers who own backup power installations (the "Installations")[3] located in premises they lease ("Host Properties"). The Installations support Plaintiffs' telecommunications and data processing equipment. Plaintiffs' Installations and equipment are assessable as real property (RPTL § 102 [12] [f]; *RCN Telecom Services of NY, LP v Frankel*, 100 AD3d 538 [1st Dept 2012]) ("RCN-1").[4]

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complaint's allegations are insufficient to withstand Defendants' pre-answer motion to dismiss, the motion and cross-motion will be analyzed under CPLR 3211.

[2] Plaintiffs seek summary judgment declaring the real estate tax assessments at issue herein to be null and void and the Defendants' assessment practices unlawful.

[3] The Installations at issue primarily consist of generators but also include related fuel tanks, uninterruptible power supply equipment, backup batteries and associated distribution cables and control equipment.

[4] Prior to settling RCN-1 the parties conducted discovery with respect to the equal protection and other issues raised herein. Plaintiffs base their arguments on

Plaintiffs commenced this action seeking the following:

(1) damages, costs and attorney's fees pursuant to 42 USC §1983 based upon allegations that Defendants, acting under color of state law, violated Plaintiffs' Constitutional rights under the equal protection and dormant commerce clauses (1st cause of action);

(2) pursuant to CPLR § 3001 and 42 USC § 1983, a declaration that Defendants' failure to comply with NYC Admin. Code § 11-214 in separately assessing the Installations unlawfully denies Plaintiffs due process and renders such real property tax assessments unlawful (2nd cause of action);

(3) pursuant to CPLR § 3001 and 42 USC § 1983, a declaration that Defendants' practice of separately assessing the Installations in multi-tenant buildings to the tenants-owners is unlawful under RPTL § 304(1) (third cause of action);

(4) pursuant to CPLR § 3001 and 42 USC § 1983, a declaration that Defendants' practice of separately assessing the Installations under the RCNLD (reproduction cost new less depreciation) valuation approach is unlawful (fourth cause of action); and

(5) a stay of all applicable statutes of limitations based upon Defendants' failure to comply with NYC Adm. Code § 11-214 (fifth cause of action).

Plaintiffs' complaint is predicated upon allegations that Defendants:

(1) are violating various laws and regulations by improperly including the Installations' assessed values (AV) in the Host Properties' AV while also assessing the Installations separately, thereby resulting in double taxation;

(2) are discriminatorily singling out the Installations for separate assessment without separately assessing other tenant installations such as lighting, plumbing, heating and ventilation, which are also defined as assessable real property under RPTL §102(12)(f);[5] and

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deposition testimony obtained in RCN-1.

[5] Plaintiffs note that only 100-200 backup power generators are listed on DOF's assessment rolls, yet thousands of lighting, plumbing, heating and ventilation installations are not. They further allege that such other tenant installations are typically owned and/or installed by small local businesses, while Plaintiffs and other tenant installed backup generator owners tend to be large national companies engaged in

(3) are using an unlawfully discriminatory valuation methodology to assess the Installations, to wit, the disfavored RCNLD methodology, while Host Properties are assessed using the income capitalization method, which disregards the Installations' resale value.[6]

Discussion

Defendants' motion to dismiss is based upon their claims that Plaintiffs fail to state a cause of action under 42 USC §1983 and they are improperly seeking to bypass the statutory scheme set forth in RPTL Article 7 for challenging real property tax assessments. This court agrees on both grounds.

I. 42 USC §1983

42 USC §1983 provides in relevant part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ...

Plaintiffs first three causes of action, summarized above, are based upon three claims. First, Plaintiffs contend that DOF's assessment of the Installations separately from the Host Properties is unlawful and results in double taxation in violation of applicable law and their rights to due process. Second, Plaintiffs claim their Installations are being taxed differently than other tenant installations in violation of their rights to equal protection and under the dormant commerce clause. In support,

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interstate commerce.

[6] Plaintiffs allege that the resale value of the Installations upon removal is less than the cost of removing it and there are no allowances for depreciation. They further allege that assessments on the Installations are twenty times their resale value, while assessments on other tenant installations are half of the resale value.

Plaintiffs cite DOF's identification and taxation of the Installations while not separately identifying and taxing other tenant installations deemed to be assessable real property under RPTL §102(12)(f). Third, they claim that DOF impermissibly assesses the Installations using a different method of valuation than that used for the Host Properties, also in violation of their Constitutional rights.

A. Double Taxation

The complaint's second and third causes of action are based upon Plaintiffs' allegations that Defendants violated NYC Admin. Code §11-214 and RPTL §304(1), respectively. Plaintiffs base these allegations upon DOF's purportedly improper separate assessment of the Installations while also including the Installations' AVs as part of the Host Properties' AVs, thereby resulting in double taxation. Defendants explain that DOF's policy of separately identifying and assessing tenant owned backup generators is due to evolving technology, noting that equipment such as the Installations is unique in terms of character, size and complexity as compared to other tenant installations such as lighting, plumbing, heating and ventilation, which are also defined as assessable real property under RPTL §102(12)(f).

1. NYC Admin. Code §11-214

Plaintiffs allege that in assessing the installations separately from Host Properties; DOF fails to comply with Admin. Code § 11-214's apportionment of assessment procedures. Subdivision (a) thereof provides in relevant part that:

> The commissioner of finance may apportion any assessment in such manner as he or she shall deem just and equitable, and forthwith cause such assessment to be cancelled and new assessments, equal in the

> aggregate to the cancelled assessment, to be made on the proper books and rolls. . . .

The complaint notes that DOF initially assessed the Installations as part of the Host Properties rather than separately. However, effective as of tax year 2010-2011, DOF changed its assessment policy as stated in its Statement of Assessment Procedure ("SAP") dated December 10, 2009 entitled "When Will Equipment be Separately Assessed." The SAP provided for equipment such as the Installations to be assessed and taxed to the equipment's owner and market value to be based upon a cost approach (RCNLD).

Plaintiffs assert that NYC Admin. Code §11-214 required Defendants to make the initial separate assessments of the Installations as apportionments of the formerly aggregated assessments of the Host Properties. Rather than comply with these procedures, Plaintiffs claim that Defendants "have simply piled the purported assessed value of [the Installations] on top of the pre-existing all-encompassing assessed values of the host properties . . ." Complaint at ¶20.

In support of their motion to dismiss, Defendants maintain that NYC Admin. Code §11-214 does not apply to Plaintiffs' situation because Defendants have not apportioned a lot. They claim Plaintiffs' interpretation of this regulation would prohibit DOF from adding real property not previously subject to taxation to the assessment roll at its true market value. Finally, Defendants argue that "[n]othing in NYC Admin Code §11-214 can be read as requiring DOF to employ the fiction that the value of the real property being added to the assessment role for the first time . . . had been captured in prior building assessments." See Mem. of Law in Supp. of Motion at pp 9-10.

2. RPTL §304(a)

Plaintiffs further allege that separate assessment of the Installations is unlawful under RPTL § 304(1), which provides: "All assessments shall be against the real property itself which shall be liable to sale pursuant to law for any unpaid taxes or special ad valorem levies." In support, Plaintiffs allege that "separate assessments on lessee backup generator installations in multi-tenant premises are substantively unlawful under the RPTL both because they (a) separately assess property not lawfully subject to separate assessment; and (b) result in unlawful double taxation." Complaint at ¶39.

Plaintiffs interpret RPTL §304(1) as "limit[ing] separate real property tax assessments to complete and self-contained parcels of real properties of the sort capable of being separately conveyed in 'fee simple absolute' through real property tax sales . . . or through other duly recordable real property conveyances." *Id.* at ¶31. Plaintiffs' arguments rest on their claim that the Installations are physically inseparable from the Host Properties and cannot be conveyed in fee simple. *Id.* at ¶33.

Contrarily, Defendants interpret RPTL §304(1) as merely providing that real property may be sold for unpaid taxes and contend that it is inapplicable. Defendants maintain that Plaintiffs' argument that the Installations are physically inseparable from the Host Properties and thus cannot be conveyed in fee simple is only relevant if they were challenging whether the Installations are properly categorized as real property, which for purposes of this action Plaintiffs concede the Installations are assessable as real property.

3. Analysis

Plaintiffs' first, second and third causes of action are dismissed for three reasons. First, this court agrees that separate assessment of the Installations from the Host Properties does not violate the foregoing statutory requirements. As defendants correctly argue, RPTL §304(a) merely provides that real property may be sold for unpaid taxes and does not support Plaintiffs' claims. This statutory provision does not require, nor can it be implied, that real property must be capable of being separately conveyed in fee simple absolute in order to be assessable. As to NYC Admin. Code §11-214, this regulation is also inapplicable to the facts herein for the reasons noted in Defendants' motion. As Plaintiffs fail to establish that Defendants violated NYC Admin. Code §11-214(a) and RPTL §304(a), their first, second and third causes of action seeking damages under 42 USC §1983 based upon such purported violations must fail.

Second, neither provision requires a particular methodology for assessing RPTL §102(12)(f) equipment. As Defendants note, an agency such as DOF is free to adopt regulations that go beyond the text of enabling legislation as long as such regulations are not inconsistent with the statutory language or its underlying purpose. *Greater New York Taxi Assn. v New York City Taxi & Limousine Commn.*, 25 NY3d 600, 608 (2015). Further, courts must defer to an agency's interpretation of the statutes that fall within its expertise, so long as the interpretation is neither irrational, unreasonable or inconsistent with the governing statute. *Toys "R" Us v Silva*, 89 NY2d 411, 418-419 (1996).

Third, Plaintiffs' claim that Defendants have already included the value of the Installations in the Host Properties' assessment is merely a dispute over full value.

Defendants correctly argue that this court lacks subject matter jurisdiction over Plaintiffs' claims since their exclusive remedy is to commence a RPTL Article 7 proceeding, which Plaintiffs have done. *Kahal Bnei Emunim v Town of Fallsburg*, 78 NY2d 194, 204 (1991). For the foregoing reasons, Plaintiffs' first, second and third causes of action seeking declaratory relief and damages under 42 USC §1983 must be dismissed, and Plaintiffs' cross-motion for summary judgment on these claims must be denied.

B. Disparate Treatment

1. Equal Protection

In support of their motion to dismiss, Defendants deny that Plaintiffs are being "singled out" in violation of their Constitutional rights. Addressing Plaintiffs' claims of disparate treatment *vis a vis* other tenant installations, Defendants defend DOF's identification and assessment of the Installations based upon differences in the Installations' size, function and complexity and because they allegedly do not deliver services to the Host Properties, a fact Plaintiffs dispute. Defendants further maintain that the Installations do not add value to the Host Properties in the same manner as plumbing, air conditioning and similar tenant installations.

Defendants also maintain that a taxing authority is not bound to tax every member of a class or none and that it can make distinctions of degree having a rational basis. Moreover, they claim that administrative convenience and expense in collecting or measuring a tax can sufficiently justify differences in treatment. *Trump v Chu*, 65 NY2d 20, 27, *appeal dismissed* 474 US 915 (1985).

Plaintiffs deny that DOF has discretion to impose an effective surtax on properties like theirs and not impose a similar surtax on "garden variety" tenant installations. Rather, they contend that only the legislature has such power. They claim that violation of their equal protection rights occurs where an assessment practice allows similarly situated properties to be taxed unequally with no demonstration that such treatment is rationally related to achievement of a legitimate governmental purpose.

As stated in *Zahra v Town of Southold*, 48 F3d 674, 683 (2d Cir 1995), "[t]he Equal Protection Clause of the Fourteenth Amendment to the United States Constitution 'is essentially a direction that all persons similarly situated should be treated alike' (citations omitted)." As further held in *Trump v Cho*, 65 NY2d at 25, "the equal protection clause does not prevent State Legislatures from drawing lines that treat one class of individuals or entities differently from others unless the difference in treatment is 'palpably arbitrary' or amounts to an 'invidious discrimination' (citations omitted)."

Here, Plaintiffs' complaint alleges no facts, other than speculation, to establish their claim of disparate treatment. Nor do the complaint's allegations demonstrate that any difference in Plaintiffs' treatment is palpably arbitrary or amounts to an invidious discrimination. *Trump v Cho*, *supra*. In their reply and opposition to Plaintiffs' cross-motion, Defendants proffer an arguably legitimate state purpose justifying DOF's practice of assessing tenant owned backup generators while not assessing other assessable tenant installations. Defendants cite deposition testimony of Michael Hyman ("Hyman"), the New York City Deputy Commissioner of Finance, as establishing

that the Installations have not arbitrarily, capriciously or discriminatorily been singled out for disparate treatment. Hyman explained that the value of most RPTL §102(12)(f) equipment is implicit in its Host Property's value and that DOF determined that backup generator equipment is unique from other RPTL §102(12)(f) installations in terms of size, function and complexity.

As previously stated, agencies such as DOF are free to adopt regulations that go beyond the text of enabling legislation as long as such regulations are not inconsistent with the statutory language or its underlying purpose. *Greater New York Taxi Assn. v New York City Taxi & Limousine Commn., supra.* This court must defer to DOF's interpretation of the statutes falling within its expertise so long as the interpretation is neither irrational, unreasonable or inconsistent with the governing statute. *Toys "R" Us v Silva*, 89 NY2d 411, 418-419 (1996). Here, there is no indication that Defendants' assessment policies and procedures are palpably arbitrary or amount to invidious discrimination. Accordingly, Plaintiffs fail to establish their entitlement to damages under 42 USC §1983 and first cause of action must be dismissed.

2. Dormant Commerce Clause

Plaintiffs' allegations that Defendants violated their rights under the dormant commerce clause are also predicated upon mere speculation, rather than facts, and must fail for the same reasons that their equal protection claim fails. As no Constitutional violation can be established, the first cause of action seeking damages under 42 USC §1983 must be dismissed. Accordingly, the branch of Defendants'

motion to dismiss the first cause of action is granted, and the branch of Plaintiffs' cross-motion for summary judgment on said cause of action is denied.

3. Valuation Methodology

Plaintiffs' fourth cause of action challenges DOF's determination to use the RCNLD valuation method to assess the Installations. However, as the legislature has not mandated a specific method for determining market value, it is within DOF's discretion. The cost approach to valuation is not per se unlawful or discriminatory.

Moreover, as Plaintiffs essentially challenge the assessments as excessive, their exclusive remedy is to commence an RPTL Article 7 certiorari proceeding. For the foregoing reasons, Plaintiffs' fourth cause of action seeking declaratory relief must be dismissed, and Plaintiffs' cross-motion for summary judgment on this claim must be denied.

II. Stay of Statutes of Limitations

Plaintiffs' fifth cause of action alleges that due to DOF's systematic failure to comply with NYC Admin. Code §11-214, all relevant statutes of limitations should be deemed stayed. Defendants argue that this cause of action should be dismissed because no authority exists for granting such relief. This court agrees and the fifth cause of action is hereby dismissed. In light of the complaint's dismissal as set forth above, the branch of Plaintiffs' cross-motion seeking consolidation is moot, as is their motion (sequence 2) to amend the relief sought in motion sequence 1. This court has considered all remaining arguments and finds them either unavailing or moot. For all of the foregoing reasons, it is

ORDERED that Defendants' motion to dismiss pursuant to CPLR 3211 (motion sequence 1) is granted in its entirety and the complaint is dismissed; Plaintiffs' cross-motion (motion sequence 1) is denied in its entirety; and motion sequence 2 is similarly denied; and it is further

ORDERED, ADJUDGED and DECLARED that Defendants have not failed to comply with NYC Admin. Code §11-214 in separately assessing lessee owned backup generator installations, nor have they violated any of Plaintiffs' Constitutional rights; and it is further

ORDERED, ADJUDGED and DECLARED that Defendants' practice of separately assessing tenant owned backup generator installations in multi-tenant buildings to the tenant owners is not unlawful; and it is further

ORDERED, ADJUDGED and DECLARED that Defendants' practice of separately assessing lessee owned backup generator installations under the RCNLD approach is not unlawful.

The Clerk is directed to enter judgment in Defendants' favor dismissing the complaint herein. The foregoing is this court's decision, order and judgment.

Dated: New York, New York
November 28, 2017

Hon. Martin Shulman, J.S.C.

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Judgment