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Reporting on Significant Court of Appeals Opinions and Developments in New York Practice

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CASE LAW DEVELOPMENTS

Majority of Court of Appeals Holds Landmark Preservation Commission's Decision to Approve Development of Landmark Was Not Irrational or Affected by Error

Dissent Asserts That Removing Public Access Effectively Rescinds Landmark Designation

New York City's Landmark Preservation Commission (LPC) is responsible for establishing and regulating the City's landmarks. Under the Landmarks Preservation Law (LPL), the LPC has the authority to designate interior landmarks, defined as "[a]n interior, or part thereof, any part of which is thirty years old or older, and which is customarily open or accessible to the public, or to which the public is customarily invited, and which has a special historical or aesthetic interest or value." In addition, the LPC's express authorization is necessary before work can be done on a "landmark site" or a structure "containing an interior landmark." There are two types of approval. The LPC can issue a "certificate of no effect" if the proposed work does not "change, destroy or affect any exterior architectural feature . . . or any interior architectural feature" of a landmark. Alternatively, if an application seeks to "alter" or "demolish" a landmark, the LPC is required to issue a "certificate of appropriateness" (COA) before such work can begin.

Matter of Save America's Clocks, Inc. v. City of New York, 2019 N.Y. Slip Op. 02385 (March 28, 2019), concerned 346 Broadway, the old New York Life Insurance Company headquarters. After the City acquired the building, the LPC designated the building and portions of its interior as landmarks in 1987. In an initial designation report, the LPC referred to some of the building's special architectural features, including a rather unique tower, housing a mechanical clock with a mechanism shared apparently by only one other clock tower—Elizabeth Tower, home to the bell "Big Ben," in London.

In 2013, the City sold the building to a private developer, which sought to convert the building into private residences. This required the developer to obtain a COA. Significantly, the proposal sought to restore parts of the interior and to keep the clock tower mechanism in its original location and the banking hall and lobby publicly accessible. However, there were issues concerning access to the clock tower, which was to be part of a private residence, and whether the clock tower would continue to operate. After two public hearings, the LPC approved the proposal, concluding that "the proposed restorative work will return . . . the interior closer to [its] original appearance, and will aid in [its] long-term preservation." *Id*. at *3.

This proceeding challenged the COA, specifically with respect to the limited public access to the clock tower and the conversion of the clock from a mechanical to an electrical operation.

A majority of the Court of Appeals held that the LPC's decision was proper and not irrational or affected by errors of law. Specifically, it noted that the LPC made its determination and findings "following an extensive deliberative process, including multiple public hearings." *Id*. at *4. It rejected petitioner's argument that the decision to close off the clock tower was irrational because it was inconsistent with the statutory definition of an interior landmark. The majority agreed with the LPC that, while public access is a jurisdictional predicate for an *initial landmark designation* (a threshold condition), it did not preclude private use in the future. Moreover, permitting the electrification of the clock was also rational because, quoting the dissent in the Appellate Division below, "the operation of the clock would be modernized by electrification, thereby assuring its continued maintenance for the foreseeable future, and the visibility of exterior clock faces to the public would be enhanced . . . while the clock faces would remain in their original, pristine condition (citation omitted)." *Id*. at *5.

However, the dissent asserted that "[p]ublic access is an essential characteristic of an interior landmark" and that

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permitting the clock mechanism to be inaccessible to the public "effectively rescinded the clock's designation." *Id.* at *10. It pointed out that the LPL's definition of an "interior landmark" needs to apply throughout the life of the designated site. Moreover, "[e]ven if the plain text did not make clear that public access is an essential characteristic of an interior landmark, it would be a nonsensical interpretation of the statute that would permit a landmarked interior space to be closed off to the public indefinitely." *Id*. at *11. The dissent added that the LPL's legislative history supported the conclusion that public access was required for continued designation. Thus, if an approved alteration results in a complete denial of public access, an interior landmark cannot retain its designation.

The dissent similarly found the LPC's decision to be irrational and ultra vires in permitting the clock to be disconnected from its mechanism, "resulting in the destruction of an essential characteristic of the clock that warranted its interior landmark designation." *Id*. The dissent insisted that the decision to allow the denial of public access to the clock and to disconnect the clock mechanism contravened the LPL's purpose and public policy of preserving "unique structures and spaces that reflect the City's aesthetic, cultural, and historic values for everyone's enjoyment." *Id*.

Majority of Court Holds Lessee Who Paid All of the Property Taxes Was Not "Aggrieved"

Dissent Believes Majority Elevated Form Over Substance

The Real Property Tax Law (RPTL) provides a mechanism for the review of property tax assessments. In the first instance, a complainant can seek administrative review by filing a grievance complaint with the board of assessment review or with the assessor. Of interest here is RPTL § 524(3), which provides that such a complaint "must be made 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 a statement who has knowledge of the facts stated therein." After an administrative determination has been made, an "aggrieved party" can seek judicial review of the assessment via an RPTL article 7 tax certiorari proceeding. The petition must allege, as a condition precedent, that there was a proper filing of the above-referenced administrative review.

The issues in *Matter of Larchmont Pancake House v. Board of Assessors*, 2019 N.Y. Slip Op. 02441 (April 12, 2019), related to whether the petitioner, a non-owner, was authorized to seek administrative review and whether the petitioner had standing as an "aggrieved party" to bring the tax certiorari proceedings.

The petitioner is a family-owned corporation in Larchmont, operating an International House of Pancakes franchise. It paid the operating costs of the property on which the business was located, including property taxes. But, of relevance here, the property was owned by a Susan Carfora, until her death in 2009, when it was transferred to a revocable trust (the Carfora trust). Under the trust, the property was eventually transferred to her daughters, Irene Corbin and Portia DeGast, as tenants in common.

Petitioner filed timely administrative grievance complaints in the tax years 2010–2013, with each complaint attaching an authorization signed by Portia DeGast, as the petitioner's president or owner. After the assessments were *not* reduced, petitioner commenced these four separate RPTL article 7 review proceedings. The respondents moved to dismiss the petitions on the grounds that (i) the trial court lacked subject matter jurisdiction, because the petitioner was not the owner of the real property, a requirement for bringing the administrative proceeding, and (ii) the petitioner was not an aggrieved party and thus lacked standing to challenge the assessments. The trial court denied the motion, but the Appellate Division reversed, ruling that, while the petitioner was an aggrieved party, it was not authorized to file the grievance complaint because it never owned the subject property. Thus, it held that the trial court lacked subject matter jurisdiction to review the assessments because the petitioner "failed to satisfy a condition precedent to the filing of the petitions." *Id.* at *2.

A majority of the Court of Appeals affirmed, but on the ground that the petitioner was *not* an "aggrieved party" under RPTL article 7, which requires that the assessment have a *direct adverse effect* on its pecuniary interests. A taxpaying property owner is certainly aggrieved when an assessment is laid, because the property is worth less to her and in the market. A lessee of an undivided assessment unit *can* also be aggrieved by a tax assessment "if legally bound by the lease to pay the entire assessment on behalf of the owner at the time it is laid." *Id*. (citing to the Court's prior decision in *Matter of Waldbaum*, 74 N.Y.2d 128, 133 (1989), in which it held that the petitioner was not aggrieved).

Here, the majority noted that the petitioner was not the owner of the property and was not *legally bound* to pay real property taxes. The Court rejected petitioner's argument that the *Waldbaum* case was distinguishable because there the shopping center (in which the Waldbaum's grocery store was located) paid the property taxes, and the petitioner only paid a share of the taxes under its lease as "additional rent" based on a formula (as one lessee in a shopping center). Here, the petitioner was the sole occupant of the property and paid not a pro rata share, but all the property taxes *directly* to the taxing authority. The majority insisted that, like the petitioner in *Waldbaum*, the critical factor here was that the petitioner was not "legally responsible" to pay the tax liability. The Court noted that

> like any tenant – long-term or not – petitioner could have ceased paying the property taxes at any time without incurring any direct legal consequence vis-à-vis the taxing authority or the property owner. Instead, it was the property owner – the Carfora Trust – that risked loss of the property if the taxes were not paid. In other words, only a lessee who is "obligated to pay" an assessment is sure to "lose something from his own property or means." For those reasons, while "paying taxes always has a direct adverse effect on one's pecuniary interest," that alone has never been enough (citations omitted).

Id.

The majority stressed that requiring a "direct legal obligation" provides a bright line that promotes clarity, efficiency, and judicial economy, and "avoids needless confusion and thereby minimizes the risk of fractured and duplicative assessment challenges." *Id.* at *3.

The dissent criticized the majority for elevating form over substance and refusing to ignore the petitioner's error

in listing the name of its business, instead of the name of the trust that temporarily held legal title to the land. In doing so, the dissent complained that the majority abandoned "our rule of lenity" in disregarding "errors like this, so that taxpayers can vindicate their rights to an accurate and equitable property tax assessment." *Id*. The dissent disagreed with the majority that, to be aggrieved, a taxpayer must be "legally bound to pay" property taxes. All that is required is that the assessment have a "direct adverse effect on the challenger's pecuniary interest" and "because LPH actually paid the entirety of the taxes owed on the Boston Post Road land, the assessment (which determined the amount paid) had a 'direct adverse effect on the challenger's pecuniary interest' in the same way that paying taxes always has a direct adverse effect on one's pecuniary interest." *Id*. at *6.

The dissent distinguished the *Waldbaum* case because, as discussed above, there the lessee never paid the property taxes, the shopping mall owner did. Moreover, the lessee was one of several tenants occupying a single tax parcel. The dissent further insisted that even under the majority rule requiring petitioner to have a "legal obligation to pay," there was sufficient evidence of such an agreement obligating the petitioner to pay property taxes and other costs of maintaining the real property, to create an issue of fact.

Finally, as noted above, the dissent maintained that, even accepting the majority's conclusion that the trust was the only party that could bring the action, the trust consented to the filing of the tax certiorari petitions, and as a result "the use of [the petitioner's] name on the petition should be disregarded (or a right to amend to make a technical correction should be allowed) under our precedents, CPLR 2001, and CPLR 3026." *Id*.

Technical Error or Civil Harmless Error Doctrine

Mechanisms to Protect Petitioners Should Not Become a Crutch

As discussed above, the dissent in *Matter of Larchmont* felt that under any circumstances the majority erred in retreating from "our 'civil harmless error doctrine,'" by not overlooking the petitioner's error in listing the name of its business, rather than the trust. It specifically cited to: (1) CPLR 2001, which we discussed in detail in the December 2017 *Digest*, and which provides that the court can correct procedural mistakes, omissions, defects or irregularities, and "if a substantial right of a party is not prejudiced," an error "shall" be disregarded; and (2) CPLR 3026, which states, in connection with the construction of pleadings, that "[d]efects shall be ignored if a substantial right of a party is not prejudiced."

These, and other provisions—such as CPLR 2004, providing for extensions of time generally; CPLR 2005, permitting a court to excuse delay or default resulting from law office failure; CPLR 3012(d), permitting extensions of time to appear or plead; and CPLR 5019(a), which provides for the validity and correction of a judgment or order—are mechanisms that can protect a litigant in the event of mistakes, errors, delays or defaults. However, as noted in the December 2017 *Digest*, jurisdictional errors, such as the complete failure to file initiating pleadings within the statute of limitations or the failure to file the proper pleadings, cannot be excused. Moreover, a court cannot extend a statute of limitations. *See* CPLR 201.

There have been instances where courts have disregarded or permitted an amendment to correct the mistaken identification of a defendant or a plaintiff. *See, e.g., NYCTL 2011-A Trust v. Kahn*, 163 A.D.3d 837, 839 (2d Dep't 2018); *Covino v. Alside Aluminum Supply Co*., 42 A.D.2d 77 (4th Dep't 1973). Courts have also deemed a notice of appeal filed by a prior landlord to be that of the current landlords or treated an appeal filed solely on behalf of a claimant attorney's to also be taken by the claimant. *See Three Amigos SJL Rest., Inc. v. 250 West 43 Owner LLC*, 144 A.D.3d 490 (1st Dep't 2016); *Matter of Tenecela v. Vrapo Constr*., 146 A.D.3d 1217, n. 1 (3d Dep't 2017). *See also* Weinstein, Korn & Miller, New York Civil Practice, CPLR ¶ 2001.03 (David L. Ferstendig, LexisNexis Matthew Bender, 2d Ed.).

However, in *Matter of Larchmont*, the majority would not ignore the petitioner's error, contending that this case is "not about a 'clerical' error or 'technicality.'" 2018 N.Y. Slip Op. 02441 at *11 (n. 2).

A lesson to be learned is that, while there are protective provisions available to litigants to bail them out despite mistakes or errors, not all of them can or will be excused or disregarded. In addition, as has been stressed in this *Digest* for many years, extreme care in the commencement process is crucial: whether it is the timely commencement of an action, naming the proper parties or ensuring proper and timely service.

Majority of Court Rules That Condo Unit Owners Can Provide a Standing Authorization to the Board of Managers to Act on Their Behalf

Dissent Criticizes Majority's Opinion as Creating Uncertainty

Matter of Eastbrooke Condominium v. Ainsworth, 2019 N.Y. Slip Op. 02384 (March 28, 2019), arises out of various tax assessments made to the Eastbrooke Condominium property in Brighton, consisting of 402 individually owned units and a communal recreational area. In the years 2008–2011, the petitioner, the condominium board of managers, as agent for the individual owners, filed grievance complaints with respondents in connection with the annual assessments. The petitioner brought this proceeding after the respondents denied the complaints, filing a separate petition for each tax year.

The petitioner's right to act as agent for the individual condo unit owners emanated from Real Property Law § 339-y(4), which permits such an agency when a unit owner provides "written authorization to seek administrative and judicial review of an assessment." It also provides that the board of managers can "retain legal counsel on behalf of all unit owners for which it is acting as agent and to charge all such unit owners a pro rata share of expenses, disbursements and legal fees."

The petitioner's attorney on the assessment challenges sent letters annually to each owner explaining the tax assessment process and offering each the opportunity to participate in the challenge. The authorization in the letter advised that "[t]his authorization shall apply to all pending and future proceedings for tax assessment review and reduction relating to the [Eastbrooke Condominiums], unless revoked pursuant to the parties' representation agreement."

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Id. at *2.

Ultimately, some unit owners signed the authorization each year, some never signed and yet others signed only in some years. The respondent sought to limit the class of owners entitled to recover a refund: "only those owners who had subscribed to an agency authorization in each of the subject tax years had a right to receive a refund for each of those years." *Id*.

The issue presented was whether, under RPL § 339-y(4), a unit owner's authorization for one year was sufficient to provide authority for another year or the unit owner was required to give authorization for each tax year. A majority of the Court of Appeals held that there was nothing in the statute prohibiting a "standing" authorization or explicitly requiring a "fresh" authorization for each tax year. Regardless, the Court concluded that "at worst" the statute was ambiguous on this issue and an ambiguity in the tax law is to be resolved in the taxpayer's favor and against the tax authority. Thus, where, as here, an owner provides a standing agency authorization, it remains in effect until retracted or cancelled.

The dissent maintained that the majority misinterpreted RPL § 339-y (4), causing "uncertainty in an area of law requiring clarity," and improperly empowering "boards of managers to make decisions the legislature placed in the hands of property owners." *Id*. at *5. Viewing this statute in the "broader statutory scheme," the dissent emphasized that generally a property owner claiming a standard overvaluation needs to challenge each *assessment* separately by filing a new grievance complaint and ultimately, if required, a new proceeding for each tax year "because each assessment is typically treated as 'separate and distinct' from any other (citation omitted)." *Id*. at *6. Thus, the phrase "an assessment" (with the singular "an"), as used in RPL § 339-y (4), should be read similarly. Just as Real Property Tax Law articles 5 and 7 require separate challenges to "an assessment" for each tax year, "the legislature contemplated that the authorization given under section 339-y(4) would correlate to a particular assessment challenge and did not grant boards of managers the power to secure open-ended, continuing authorizations spanning multiple tax years." *Id*.

The dissent noted that unit owners, like other real property owners, have no obligation to participate in the proceedings and thus they can decide annually whether they will challenge the assessment; the majority's opinion shifted that decision to boards of managers upon receiving a standing authorization; because of the turnover in ownership and occupancy of the units, a single standing authorization would create uncertainty; unit owners may forget whether they signed on years before, empowering the board "in perpetuity absent express revocation"; and permitting a blanket authorization could subject a unit owner to costs under the statutory cost-sharing arrangement even where there is no recovery, resulting in an unpleasant and possibly surprising bill to an unsuspecting unit owner who may be unaware of the litigation.

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