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Burlington Coat Factory Left Out in the Cold in New York

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In *Matter of Midway Shopping Ctr. v. Town of Greenburgh*, the New York Supreme Court, Westchester County, dismissed for lack of standing petitions challenging real property tax assessments. The Court essentially scolded Burlington Coat Factory Warehouse of Scarsdale, Inc. ("Burlington"), referred as a "sophisticated tenant," for failing to secure explicit language in the lease agreement giving Burlington the right to contest or review any real property tax assessment.

Facts

Burlington leased space from Midway Shopping Center ("Midway") in the Town of Greenburgh, New York. Under the lease agreement, Burlington was to pay, as rent, its proportionate share of all real estate taxes. The lease agreement also contained a provision giving Burlington, the tenant, the right to require Midway, the landlord, to initiate a proceeding to contest any real estate tax at Burlington's expense. In 1997 Burlington informed Midway that it was exercising such right with respect to a 1997 real property tax assessment as well as for any future year in which a similar level of assessment was issued. Midway, dubbed by the Court in its decision as "The Reluctant Taxpayer" basically took no actions to contest the assessments. As a result, Burlington filed petitions contesting the assessments for the years 1997 through 2002.

The petitions filed by Burlington identified the petitioner as "Midway Shopping Center, by Burlington Coat Factory Warehouse of Scarsdale, Inc."¹ Burlington also filed Property Appearance Forms representing that it was the authorized representative for Midway. In addition, subsequent to filing petitions for all years in 2005, Midway filed authorizations with the county clerk designating Burlington to act as its representative in all proceedings before the Town of Greenburgh Board of Assessment Review. The lease agreement between Burlington and Midway terminated in November, 2002.

Holding

In the decision the Court held that Burlington was not authorized by Midway to represent Midway's interests in challenging any property tax assessments for the years

¹ Burlington mistakenly filed the petition for 2001 under its own name without mentioning Midway. A motion by both Burlington and Midway requesting a *nunc pro tunc* amendment was dismissed by the Court.

in question.² Apparently the Authorizations filed by Midway in 2005 did not persuade the Court that Midway had authorized Burlington as its representative at the time the petitions were filed.

In addition, the Court held that Burlington, as a tenant (*i.e.*, a fractional lessee) and not the actual owner of real property, was not responsible for paying the real property tax in question. Therefore, Burlington did not have standing to challenge the assessments.

With respect to Midway's reluctance to respond to Burlington's request to contest the assessments, the Court stated that "[s]uch refusal did not create 'an implied contractual right to protect (Burlington's) interest and file suit on behalf of itself and/or on behalf of Midway.'"

Furthermore, the Court noted that Burlington considered bringing suit against Midway for breaching the terms of the lease agreement. Burlington's counsel stated that the issue would "most probably be resolved through the court in separate proceedings." The Court went on to state that Burlington had the opportunity, but failed to obtain explicit language in the lease which would have provided it with the right to contest the tax assessments on behalf of the landlord.

Practice Pointer

This case offers lessons on standing for property tax protests as well as on drafting lease agreements. Standing to protest taxes cannot be created after-the-fact. Tenants responsible for property taxes should request clear and binding authorization to contest property tax assessments and carefully follow the formalistic requirements to ensure petitions are filed by the proper taxpayers. Beware of lease agreements where the landlord has no incentive to contest the property tax assessments. This situation may explain Midway's apparent reluctance to pursue the protest. Drafters should generally avoid contract provisions placing the burden on a party to bring an action where that party has little or no vested or pecuniary interest in the outcome.■

² Note, the Respondents in this matter brought various motions on procedural related issues (*e.g.*, failure to comply with filing and service requirements) which are not discussed in this article.



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