

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

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VILLAGE ATTORNEY

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WESTCHESTER  
COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
In the Matter of

MAMARONECK BEACH AND YACHT CLUB, LLC,

Petitioner,

-against -

ASSESSOR AND BOARD OF REVIEW  
OF THE VILLAGE OF MAMARONECK,

Respondent.

-----X  
**LaCAVA, J.**

**DECISION/ORDER**

Index No:  
6945/02  
6600/03  
5810/04  
5918/05  
6481/06  
7046/07

Motion Date:  
9/30/09

The following papers numbered 1 to 6 were considered in connection with this motion by respondent for an ORDER compelling the production of certain discovery, for a joint trial, and to strike the Notes of Issue:

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION/AFFIRMATION/EXHIBITS	1
MEMORANDUM OF LAW	2
AFFIRMATION IN OPPOSITION/EXHIBITS	3
REPLY AFFIRMATION/EXHIBITS	4
AFFIRMATION IN SUPPORT/EXHIBITS	5

In this tax certiorari matter, respondent (Village) seeks an order requiring that petitioners Mamaroneck Beach and Yacht Club (Club) provide certain discovery pursuant to Rule of Court 202.59 (22 NYCRR 202.59); seeks a joint trial of the instant matter with the tax certiorari matter presently pending before this Court against the Town of Mamaroneck (Town), and to vacate the Notes of Issue filed in the instant matter.

On July 20, 2007, this Court issued a Scheduling Order

directing, *inter alia*, the exchange of trial appraisals and reports of any other expert witnesses in the matter involving the Town. Soon thereafter, the Club provided the Town, pursuant to Rule of Court 202.59, copies of its tax returns and accounting statements relating to the tax years at issue. On September 18, 2007, and again pursuant to Rule of Court 202.59, the Town requested an audit of the Club's books. That audit was subsequently completed, and appraisal reports exchanged.

Now the Village, previously under a similar Order mandating appraisal exchange dates, seeks to compel petitioner to provide it with the appraisal report exchanged in the Town matter, and the audit as well. The Village also urges this Court to direct the joint trial of the Town and Village matters, arguing that judicial economy would be furthered by consolidation. Finally, the Village argues that the Notes of Issue must be struck unless the reports are exchanged and the audit disclosed, since Notes of Issue may not be filed until all discovery is completed, and yet discovery is not complete since the petitioner's appraisal report in the Town matter has not yet been exchanged with the Village.

#### **Discovery Motions**

Respondent, as set forth above, moves for several items of disclosure. Rule of Court 202.7 (22 NYCRR 202.7) provides:

§ 202.7 Calendaring of motions; uniform notice of motion form; affirmation of good faith

(a) There shall be compliance with the procedures prescribed in the CPLR for the bringing of motions. In addition, except as provided in subdivision (d) of this section, no motion shall be filed with the court unless there have been served and filed with the motion papers (1) a notice of motion, and (2) with respect to a motion relating to disclosure or to a bill of particulars, an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion.

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(c) The affirmation of the good faith effort to resolve the issues raised by the motion shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for

opposing parties was held.

Here, respondent has moved for disclosure, but has failed to include not only an affirmation of good faith, but, in the only affirmation provided, failed to set forth any of the particulars (the time, place and nature of the consultation and the issues discussed and any resolutions, or good cause why no such conferral took place) required in order to demonstrate good faith efforts to resolve the discovery dispute. Hence, the instant motion insofar as it seeks disclosure must be denied.

**The Town Matter Appraisal Reports**

**Rule of Court 202.59 (22 NYCRR 202.59) [b], [d] 1**

In any event, 22 NYCRR 202.59 [b], [c], and [d] 1 provides:

§ 202.59 Tax assessment review proceedings in counties outside the City of New York; special rules

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(b) Statement of income and expenses. Before the note of issue and certificate of readiness may be filed, the petitioner shall have served on the respondent, in triplicate, a statement that the property is not income-producing or a copy of a verified or certified statement of the income and expenses on the property for each tax year under review. For the purposes of this section, a cooperative or condominium apartment building shall be considered income-producing property; an owner-occupied business property shall be considered income-producing as determined by the amount reasonably allocable for rent, but the petitioner is not required to make an estimate of rental income.

(c) Audit. Within 60 days after the service of the statement of income and expenses, the respondent, for the purpose of substantiating petitioner's statement of income and expenses, may request in writing an audit of the petitioner's books and records for the tax years under review. If requested, the audit must be completed within 120 days after the request has been made unless the court, upon

good cause shown, extends the time for the audit. Failure of the respondent to request or complete the audit within the time limits shall be deemed a waiver of such privilege. If an audit is requested and the petitioner fails to furnish its books and records within a reasonable time after receipt of the request, or otherwise unreasonably impedes or delays the audit, the court, on motion of the respondent, may dismiss the petition or petitions or make such other order as the interest of justice requires.

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(g) Exchange and filing of appraisal reports.  
(1) The exchange and filing of appraisal reports shall be accomplished by the following procedure:

(i) The respective parties shall file with the clerk of the trial court one copy, or in the event that there are two or more adversaries, a copy for each adversary, of all appraisal reports intended to be used at the trial.

(ii) When the clerk shall have received all such reports, the clerk forthwith shall distribute simultaneously to each of the other parties a copy of the reports filed.

(iii) Where multiple parties or more than one parcel is involved, each appraisal report need be served only upon the taxing authority and the party or parties contesting the value of the property which is the subject of the report. Each party shall provide an appraisal report copy for the court.

(2) The appraisal reports shall contain a statement of the method of appraisal relied on and the conclusions as to value reached by the expert, together with the facts, figures and calculations by which the conclusions were reached. If sales, leases or other transactions involving comparable properties are to be relied on, they shall be set forth with sufficient particularity as to permit the transaction to be readily identified, and the report shall contain a clear and concise

statement of every fact that a party will seek to prove in relation to those comparable properties. The appraisal reports also may contain photographs of the property under review and of any comparable property that specifically is relied upon by the appraiser, unless the court otherwise directs.

(3) Where an appraiser appraises more than one parcel in any proceeding, those parts of the separate appraisal reports for each parcel that would be repetitious may be included in one general appraisal report to which reference may be made in the separate appraisal reports. Such general appraisal reports shall be served and filed as provided in paragraph (1) of this subdivision.

(4) Appraisal reports shall comply with any official form for appraisal reports that may be prescribed by the Chief Administrator of the Courts.

As petitioner points out, the Rules provide for simultaneous exchange of reports, in order to prevent a party from benefitting from the other party's valuation expert's opinions. The Village admits here that it seeks the petitioner's appraisal in the Town matter, in order to exploit petitioner's expert's work in the preparation of its own appraisal. That is specifically precluded by the Rule. In any event, the Rules also provide that the parties must only exchange copies of any appraisal reports intended to be used at trial. There has been no demonstration that petitioner intends to use the appraisal from the Town matter in this matter, so the appraisal is exempt from disclosure for that reason as well.

#### **The Audit**

As set forth above, respondent seeks not to conduct an audit based on the income and expenses provided by petitioner, but a copy of the forensic accounting prepared for the Town in the Town matter. Notably, it is far too late for respondent to seek an audit; see *Ames Dep't Stores Inc. v. Assessor of Greenport*, 276 A.D.2d 890 (3<sup>rd</sup> Dept. 2000), or the other cases cited by petitioner, which clearly provide that a waiver of the right to audit was effected by respondent simply failing to audit within the time period provided following the disclosure by petitioner of its income and expense statements.

### Discovery in Tax Certiorari Proceedings

Neither should respondent to be permitted to obtain disclosure which, by its lack of compliance with the Rules of Court, it failed to obtain previously. CPLR 3101 provides:

a) **Generally.** There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by:

(1) a party, or the officer, director, member, agent or employee of a party;

(2) a person who possessed a cause of action or defense asserted in the action;

(3) a person about to depart from the state, or without the state, or residing at a greater distance from the place of trial than one hundred miles, or so sick or infirm as to afford reasonable grounds of belief that he or she will not be able to attend the trial, or a person authorized to practice medicine, dentistry or podiatry who has provided medical, dental or podiatric care or diagnosis to the party demanding disclosure, or who has been retained by such party as an expert witness; and

(4) any other person, upon notice stating the circumstances or reasons such disclosure is sought or required.

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(d) Trial Preparation

2. Materials. Subject to the provisions of paragraph one of this subdivision, materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without

undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

The disclosure sought, the forensic accounting prepared by the Town, is clearly matter prepared in anticipation of litigation (the Town matter) and as such need not be disclosed by the Town or by petitioner to the Village.

In addition, it is well-established that proceedings commenced pursuant to RPTL Article 7 are Special Proceedings as provided-for in CPLR Article 4, and thus are governed by the discovery rules set forth in CPLR §408. (See *Xerox Corp. V. Duminuco*, 216 AD2d 950 [4<sup>th</sup> Dept. 1995]--"Because this proceeding was commenced pursuant to RPTL Article 7, disclosure is governed by CPLR 408, which requires leave of court".

CPLR § 408 provides:

§ 408. Disclosure. Leave of court shall be required for disclosure except for a notice under section 3123.

Here, for reasons set forth at length in the current and prior moving papers, petitioner and the Town entered into an agreement whereby items disclosed by petitioner to the Town are confidential, and may not be provided to other parties. The Village has failed to make even a pretense of showing how the accounting is necessary and material to its case, or that it is in some way prejudiced by the confidentiality agreement; rather, it merely seeks to use the audit in preparation of its appraisal report. The forensic accounting is the fruit of the disclosure process crafted by the parties, and the court declines to subject it to discovery by respondent.

#### **Striking the Notes of Issue**

It thus appears obvious from the moving papers that discovery is complete, except for the appraisal and accounting sought unsuccessfully, above, by respondent. Since discovery is complete, it was not inappropriate for petitioner to file the Notes of Issue herein.

Joint Trial

A review by the Court of the files in these two matters indicates that, due to the various proceedings occurring in these two matters, the previous Trial Scheduling Orders appear to have been stricken on more than one occasion. The Court is thus unable to gauge the actual readiness for trial of the parties in these matters. Consequently, the motion for a joint trial is denied with leave to renew, if necessary, following a Scheduling Conference to be conducted by the Court on January 13, 2010.

Based on the foregoing, it is hereby

**ORDERED**, that the motion by respondent for an ORDER compelling the production of certain discovery, and the striking of the Notes of Issue filed herein, is denied, in all respects; and it is further

**ORDERED**, that the motion for a joint trial is in all respects denied, with leave for respondent to renew, if necessary, following the Scheduling Conference which is to be conducted by the Court on January 13, 2010.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: White Plains, New York  
December 21, 2009



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