

**NEW YORK CITY TAX APPEALS TRIBUNAL
ADMINISTRATIVE LAW JUDGE DIVISION**

In the Matter of the Petition

of

ABE BERKOWITZ

:
:
:
:
:
:
:

ORDER

TAT (H) 04-3 (RP)

Schwartz, A.L.J.:

Upon the motion, filed on October 17, 2005, of Petitioner, Abe Berkowitz, for an order pursuant to Rule §1-07(b) of the Rules of Practice and Procedure (the "Rules") of the New York City (the "City") Tax Appeals Tribunal ("Tribunal") dismissing the Reply to Request for Admission and/or Stipulation of Facts (the "Reply") of the Commissioner of Finance (the "Commissioner" or "Respondent") as untimely; or dismissing the Reply "because it is replete with violation after violation of the Rules" and, pursuant to Rule §1-05, for summary determination in favor of Petitioner ("Petitioner's Motion"); Petitioner's affidavit, and various supporting exhibits, including affidavits of other individuals; the Affirmation in Opposition to Petitioner's Motion of Assistant Corporation Counsel Martin Nussbaum, Esq., dated December 5, 2005, and the supporting exhibits submitted therewith; the Reply Affidavit of Petitioner dated December 15, 2005 and the supporting exhibits and affidavits submitted therewith; and the Sur-Reply Affirmation in Opposition to Petitioner's Motions dated December 19, 2005; the following order is issued.

ISSUES

1. Whether the Reply should be dismissed as untimely.
2. Whether the Reply should be dismissed because it violated the Rules.
3. Whether Summary Determination should be granted in Petitioner's favor to the effect that no Real Property Transfer Tax ("RPTT") is due because the transfer at issue was the transfer of a minority LLC interest by a IRC §501(c)(3) religious and educational tax exempt organization.

FINDINGS OF FACT

1. The Commissioner issued a Notice of Determination dated January 23, 2002 asserting an RPTT deficiency against Petitioner in the amount of \$244,640.12, consisting of \$126,303.13 of tax, \$33,151.09 of interest (computed to February 22, 2002) and \$75,185.90 of penalty with respect to a transfer on June 13, 1999 of an economic interest in real property (the "Interest") located at 27 North Moore Street in the City.

2. Following the discontinuance of a proceeding at the Conciliation Bureau of the City Department of Finance (the "Department"), Petitioner filed a Petition dated January 1, 2004 with the Tribunal asserting, *inter alia*, that: (1) no tax was due because the beneficial owner of the Interest was Mesivta Nachlas Yaakow ("MNY"), an organization exempt from tax under IRC §501(c)(3) and Petitioner was merely acting as MNY's nominee; (2) the Interest was a 40% interest in 27 North Moore Associates, LLC ("North Moore") which should not have been aggregated with another

transfer to find a transfer of a controlling economic interest; and (3) the consideration for the transfer was \$3,200,000 rather than the \$5,192,500 asserted in the Notice of Determination.

3. A Hearing in this matter had been scheduled for August 17 and 19, 2005.

4. The documents accompanying the Request asserted, *inter alia*, that Petitioner had assigned the Interest to MNY on September 19, 1998 and was acting as the undisclosed nominee for MNY at the time of the Transfer. The Request also asserted that the consideration amount of \$5,192,500 asserted on the Notice of Determination was incorrect as the sale proceeds were actually \$3,483,000.

5. The Request contained nineteen numbered paragraphs, each containing statements that, in the aggregate, addressed the ultimate issues that are in dispute in the case. None of the items about which Petitioner requested an admission and/or stipulation of fact involved merely an admission as to the genuineness of any document. To the extent documents were the subject of the Request, Petitioner sought an admission and/or stipulation as to the legal effect of such document or requested that an inference be drawn from the document. Apart from the first paragraph of the Request which discussed the Notice of Determination, none of the asserted facts in any of the other paragraphs which might affect the outcome of this case contained statements about which the Commissioner has any independent information.

6. Petitioner included certain documents with the Request including a document entitled "Assignment of Limited Liability Company Interest" (the "Purported Assignment"), and a document

entitled "Nominee Agreement" (the "Purported Nominee Agreement"). Both documents state that they are effective "as of September 18, 1998." Each of the Purported Assignment and the Purported Nominee Agreement is a two-page document. Each document contains the full text of the relevant document including the signatures of both parties to that document on the first page and the acknowledgments of these signatures on the second page. However, the first page and second page of each document is in a different type face.

7. Petitioner also included certain documents from Apple Bank which stated that \$3,483,000 was wired from an attorney escrow account to an account of MNY on November 12, 1999. Petitioner characterized this transfer as the transfer of the sale proceeds from the sale of the Interest "for the use and benefit of the true owner and principal" (MNY) and requested that the Commissioner admit and/or stipulate to this characterization.

8. The Request also included affidavits from various individuals attesting to different facts at issue in the case and about which Petitioner requested an admission and/or stipulation.

9. One paragraph in the Request asked for an admission that a certain photograph (the "Photograph") was a true and accurate picture of the building and the dedication of the MNY synagogue and school building. However, this paragraph also requested an admission and/or stipulation that the dedication was "in recognition of Berkowitz's charitable contribution of his 40% LLC interest in North Moore on September 18, 1998, that made the purchase of the building possible."

10. Several of the items dealt with in the Request would not have any effect on the outcome of the case. For example, Petitioner

requested an admission that prior to the issuance of the Notice of Determination, the Department did not notify him that the transfer of a forty percent interest in North Moore could be aggregated with the transfer by another party.

11. The Request was accompanied by a cover letter which stated, in pertinent part:

If for any reason you are unable to timely comply with our Request for Admissions and/or Stipulation of Facts in accordance with the intent and spirit of the Rules of Practice and Procedure, please indicate your consent to an extension of the hearing date; or advise us as soon as possible if it is necessary to request that the Court grant an extension of the Hearing date until such time as the Court can entertain any motion that may be necessary to determine any objections you may have to our Request for Admissions and/or Stipulation of Facts.

12. Neither the Request nor the accompanying cover letter contained the statement required by Rule §1-07(a)(3) that the Request pertains to matters as to which Petitioner reasonably believes there can be no substantial dispute at the hearing.

13. On August 3, 2005, a telephone conference was held at which Richard Levine, Esq. appeared as Petitioner's newly retained counsel in addition to Petitioner's then representative Donald Jay Pols, Esq. Mr. Levine requested, and was granted, a postponement to prepare for the Hearing. The Hearing was rescheduled for September 26 and 27, 2005. The Commissioner's Representative, Mr. Nussbaum consented to the postponement.

14. On or about August 22, 2005, Respondent forwarded to Petitioner's counsel the Reply to the Request. The Reply contains nineteen numbered paragraphs addressing each of the items in the Request in detail. The Reply explains what portion of each

paragraph in the proposed admission/stipulation could be agreed and those areas where Respondent objected. Among other objections, Respondent was unwilling to stipulate to various key facts asserted in certain affidavits because she was not willing to waive the right to cross examine the persons who signed the provided affidavits. Respondent was also unwilling to stipulate to the reduced consideration amount based on the information that Petitioner provided with the Request.

15. The Reply also indicated that the Commissioner requested that certain documents be stipulated to including:

- a. letters from the IRS authorizing the release to the Tribunal of Petitioner's tax returns and stating that 27 North Moore did not file returns for the periods 1997, 1998 and 1999 (the "IRS Letters");
- b. the Operating Agreement of North Moore (the "Operating Agreement"), Article 7.04(a)(vi) of which requires contemporaneous consent of the other members to an assignment;
- c. the Purchase and Sale Agreement of April 28, 1999 (the "Purchase and Sale Agreement") which lists the consideration for the Interest as being \$4,800,000;
- d. the decision in *Berkowitz v. Fischbein*, 7 A.D.3d 385 (1st Dept., 2004); and
- e. a press release of Emmes Capital (the "Press Release") describing a \$7,750,000 bridge loan used by the surviving partner at the project at 27 North Moore in the City to buy out his other partners.

Respondent advised Petitioner that in the event Petitioner did not stipulate to these documents, the Commissioner would offer them into evidence.

16. The Hearing that had been rescheduled for September 26 and 27, 2005 was subsequently cancelled based on Petitioner's representation that a settlement had been reached at a meeting between Petitioner and certain individuals at the Department without counsel present.

17. On October 17, 2005, Petitioner notified the Tribunal that he no longer wished to be represented by counsel and he filed the Motion *pro se*. In a subsequent telephone conference Petitioner confirmed that the case would not be settled.

STATEMENT OF POSITIONS

Petitioner asserts that since the Reply was served more than 20 days after the Request, pursuant to Rule §1-07(b), all matters about which an admission is requested must be deemed admitted. The Commissioner responds by pointing to the cover letter accompanying the Request which stated: "[i]f for any reason you are unable to timely comply with our Request for Admissions and/or Stipulation of Facts in accordance with the intent and spirit of the Rules of Practice and Procedure, please indicate your consent to an extension of the hearing date by consenting to the postponement of the Hearing date." Respondent contends that by agreeing to the postponement of the Hearing date during the telephone conference of August 3, 2005, she availed herself of Petitioner's offered waiver of the time for compliance with the Request. Petitioner counters that at no time during the telephone conference at which the postponement of the Hearing was discussed did Respondent request an extension of time to serve the Reply.

Petitioner also asserts that Respondent violated the Rules with respect to admissions and stipulations and should have admitted or

stipulated to certain facts that he believes he sufficiently established through documents and assertions. Petitioner contends that because Respondent violated the Rules, the Reply should be dismissed and all matters about which an admission was requested should be deemed admitted. Respondent counters that she properly complied with the Rules regarding admissions and stipulations since in every instance where the Reply requests a change in language or refuses to admit or stipulate, the Reply sets forth the specific reasons therewith for such change or refusal.

Finally, Petitioner asserts that once these various facts are deemed admitted, he is entitled to summary determination. Respondent claims there are material facts in dispute and summary determination therefore is not appropriate.

CONCLUSIONS OF LAW

Section 1-07(a) the Rules permits any party to serve a written request for admissions about the following matters:

- (1) the genuineness of any papers or documents;
- (2) the correctness or fairness of representation of any photographs described in and served with the request; or
- (3) the truth of any matters of fact set forth in the request. **The request shall include a statement that it pertains to matters as to which the party making such request reasonably believes there can be no substantial dispute at the hearing. . . .** [Emphasis added.]

Section 1-07(b) of the Rules provides, in pertinent part, that "such party is deemed to admit each of the matters as to which an **admission was properly requested** [emphasis added] unless within 20 days of service of the request" (or such later date as permitted by

the judge) the party on whom the request was served serves a verified statement:

(1) denying specifically the matters as to which an admission is requested; (2) setting forth in detail the reasons that those matters cannot be truthfully admitted or denied; or 3) setting forth a claim in detail that the matters as to which an admission is requested cannot be fairly admitted without some material qualification or explanation, . . .

Rule §1-09 provides, in pertinent part, that "the parties are required to stipulate, to the fullest extent to which complete or qualified agreement can or fairly should be reached, all undisputed facts not privileged that are relevant to the pending controversy." There is no time limit provided by this Rule for completing a stipulation, but the Rule provides that the "parties shall use their best efforts to conclude the drafting of the stipulation in advance of the scheduled hearing." Rule §1-09 contains no penalty for failing to agree to a stipulation.

The thrust of Petitioner's argument is that the Reply should be dismissed as untimely because Respondent did not serve it within twenty days of the service of the Request and, that as a result, all of the statements that were the subject of the Request should be deemed admitted pursuant to Rule §1-07(b). However, the Request was drafted in the alternative as a "Request for Admissions and/or Stipulation of Facts" and requested that "pursuant to Rule §1-07, the Commissioner either admit, or set forth in detail the reasons why the truthfulness of each of the following matters-of-fact cannot be admitted, and/or pursuant to Rule §1-09 why each of such facts cannot be stipulated." Thus, by Petitioner's own choice, Respondent was given the option of treating the Request as a request for admissions under Rule §1-07 or as a proposed stipulation of facts

under Rule §1-09, a Rule which contains no time limit in which a response is required. In addition, the Reply was served more than four weeks before the rescheduled Hearing date, giving Petitioner ample notice of Respondent's position so that Petitioner could have entered into a stipulation with respect to certain portions of the requested items and properly prepared for trial with respect to the disputed portions.

Moreover, even if Respondent should have treated the Request as a request for admissions, rather than as a proposed stipulation, Respondent was not in violation of Rule §1-07 because the Request itself was materially defective. Sanctions under Rule §1-07 (regarding admissions) only comes into play with respect to "matters as to which an admission was properly requested." Here, none of the matters about which an admission was requested was properly the subject of a request for admission, since Rule §1-07(a) permits requests for admissions only of three kinds of matters, none of which was present here.

Admissions can be requested with respect to the genuineness of a document. None of the items about which Petitioner requested an admission and/or stipulation of fact involved merely an admission as to the genuineness of any document. To the extent that documents were the subject of the Request, Petitioner sought an admission and/or stipulation as to the legal effect of such document.

Admissions also can be requested with respect to the correctness of the representation in a photograph. Petitioner did not merely request an admission/stipulation that the Photograph is a true and accurate picture of the building and dedication, but also requested an admission that the dedication shown on the building was "in recognition of Berkowitz's charitable contribution of his 40%

LLC interest in North Moore on September 18, 1998, that made the purchase of the building possible." This is not the proper subject of an admission.

Finally, admissions can be requested about the truth of certain limited matters of fact. However, with respect to factual matters, Rule §1-07(a)(3) requires a statement by the requesting party that she or he reasonably believes there can be no substantial dispute at the hearing about the matters as to which the admissions are requested. No such statement was included with the Request, nor could such a statement properly have been included, since the matters about which an admission or stipulation were requested were the very factual issues at the heart of the dispute.

As Rule §1-07 is very similar to CPLR 3123, the caselaw under that latter provision provides guidance as to the proper interpretation of Rule §1-07. The case law is clear that "a notice to admit pursuant to CPLR 3123(a) is to be used only for disposing of uncontroverted questions of fact or those that are easily provable, not for the purpose of compelling admissions of fundamental and material issues or ultimate facts that can only be resolved after a full trial." *Meadowbrook-Richman, Inc. v. Cicchiello*, 273 A.D.2d 6 (1st Dept. 2000). Where a party improperly demands that the other party concede matters that are in dispute, the party has no obligation to respond. *Id.* Here, the matters about which admissions were requested all go to the ultimate facts in dispute. Respondent was under no obligation to respond to the Request and these facts are not deemed admitted.

Accordingly, since the purported request for admissions is materially defective, it is not necessary to address the factual question of whether, by Respondent's agreeing to the postponement of

the Hearing date, she was also availing herself of Petitioner's offer to extend the twenty day period in which a response to a request for admissions is due under the Rules.

In addition, there is no merit to Petitioner's assertion that the Reply should be dismissed because "it is replete with violation after violation of the Rules." The essence of Petitioner's objection is that Respondent was not persuaded by the combination of Petitioner's assertions and the affidavits and other documents submitted to admit or stipulate to the numerous facts that are in dispute. The Rules do not require Respondent to do so. The Reply contains nineteen numbered paragraphs addressing each of the items in the Request in detail, explaining what portion of each paragraph in the proposed stipulation could be agreed and those areas where Respondent objected. Among other objections, Respondent was unwilling to stipulate to various key facts asserted in certain affidavits because she was not willing to waive the right to cross examine Petitioner's witnesses. She was also unwilling to stipulate to the amount of the consideration based on the information provided with the Request by the Petitioner. Respondent did all that she was required to do under the Rules.

Petitioner also seeks summary determination in his favor. Summary determination is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. *Daliendo v. Johnson*, 147 A.D.2d 312 (2d Dept. 1989); *Matter of Emigrant Savings Bank*, TAT(E) 94-130(BT) (City Tribunal, September 18, 1998). "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985) [citations omitted]. The existence of a single

issue of fact is sufficient to preclude summary judgment. The parties' proof must be viewed in the light most favorable to Respondent. *Nojaim Bros., Inc. v. CNA Insurance Companies*, 113 A.D.2d 109 (4th Dept. 1985). If there is any doubt as to the existence of a material and triable issue of fact, or even if the issue is "arguable," the drastic remedy of summary judgment should not be granted. *Glick & Dolleck, Inc. v. Tri-Pac Export Corp.*, 22 N.Y.2d 439 (1968). "Summary judgment is not justified where the existence of essential facts depends upon knowledge exclusively within the possession of the moving party and which might well be disclosed by cross-examination" *Baldasano v. Bank of New York*, 199 A.D.2d 184 (1st Dept. 1993), *citing Terranova v. Emil*, 20 N.Y.2d 493, 497 (1967).

There are numerous material questions of fact in dispute in this case. The key issue in the case is whether Petitioner actually assigned the Interest to MNY on September 18, 1998 as alleged. The Purported Nominee Agreement and the Purported Assignment Agreement each allegedly executed on September 18, 1998 do not have contiguous notarizations since the notarizations are found on a page after the signature page and are in a different type face. This creates a question as to when these documents were actually executed and whether Petitioner actually attempted to assign the Interest when he claims he did. While in affidavits Petitioner provided an explanation for this fact, Respondent is entitled to cross examine the individuals who provided those affidavits. In addition, the Operating Agreement requires the other members to contemporaneously consent to an assignment. There is no indication in the material submitted that all members so consented. Because North Moore did not file tax returns, it cannot even be determined from the materials submitted who was treated as the owner of the Interest for federal income tax purposes at the time of the Transfer. A second

issue, which becomes important only if Petitioner and not MNY was the owner at the time of the Transfer, is the amount of the consideration. In his Petition, Petitioner claimed that the consideration was \$3,200,000. In the Request, Petitioner characterized \$3,483,000 as the sale proceeds. However the Purchase and Sale Agreement states consideration of \$4,800,000. In addition, the Press Release shows a bridge loan of \$7,750,000 for the surviving member to buy out the other two members. Since the third member had a 20 percent interest and Petitioner or MNY had a 40 percent interest, this would indicate a potential value of \$5,115,000 for the Interest. These factual disputes can only properly be addressed at a Hearing. Accordingly, summary determination is denied.

ACCORDINGLY, IT IS CONCLUDED THAT:

A. Respondent is not deemed to have admitted any of the matters in the Request for Admissions and/or Stipulations because: (1) since the Request was drafted in the alternative as a request for admissions and/or stipulations, Respondent had the option of treating it as a proposed stipulation, the response to which has no time limit under the Rules; and (2) the matters as to which Petitioner requested admissions were not the proper subject of a request for admissions.

B. There is no merit to Petitioner's assertion that the Reply should be dismissed because "it is replete with violation after violation of the Rules."

C. Summary determination is denied as there are material issues of fact that must be addressed at a Hearing.

For these reasons, Petitioner's Motion is hereby denied.

It is so ordered.

DATED: January 12, 2006
New York, New York

MARLENE F. SCHWARTZ
Administrative Law Judge