

New York City Tax Appeals Tribunal

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In the Matter of :
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JONIS REALTY/E. 29TH STREET, LLC. : ORDER
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TAT (E) 09-9 (RP)
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An Exception was filed in the name of Jonis Realty/E. 29th Street, LLC ("Jonis") (the "Exception") to the Determination of the then Deputy Chief Administrative Law Judge (the "DCALJ") dated July 21, 2010 (the "DCALJ Determination"). The DCALJ Determination granted the New York City Commissioner of Finance's ("Respondent's") motion for summary determination and sustained the Notice of Disallowance issued by the New York City Department of Finance (the "Department") dated May 21, 2008, denying a claim for refund of New York City Real Property Transfer Tax ("RPTT") (the "Notice").

Jonis appeared by Matthew Hearle, Esq. ("Hearle") and Andrew W. Albstein, Esq. ("Albstein") of Goldberg Weprin Finkel Goldstein LLP.¹ Respondent appeared by Joshua M. Wolf, Esq., Assistant Corporation Counsel, New York City Law Department. Briefs were filed by the Parties and oral argument was not requested.

A Petition for Hearing dated February 18, 2009, in the name of Jonis (the "Petition") was filed with the Administrative Law Judge Division. The Petition was signed by Hearle

¹Although the Petition for Hearing was filed in the name of Jonis, no current member of Jonis or a representative with a power of attorney properly executed by a current member of Jonis appeared or filed documents with the DCALJ. DCALJ Determination, at 1, n.1. In October 2010, a power of attorney, signed by a current member of Jonis, was filed with the Tribunal.

as the "representative" of Jonis. Attached to the Petition was a copy of a power of attorney purporting to appoint Hearle and Albstein as Jonis' representatives. This power of attorney was signed on July 20, 2008, by Steven Halegua as "a member" of Jonis (the "July 2008 Power of Attorney").²

Respondent in his Answer dated April 17, 2009, raised three affirmative defenses: (1) the refund claim filed with the Department on behalf of Jonis in 2007 (the "Refund Claim") is invalid because it was not "signed by the applicant or his duly authorized agent";³ (2) the Request for Conciliation Conference filed with the Department on behalf of Jonis in 2008 is defective because it was not executed by a duly authorized agent of Jonis; and (3) the Petition, having been executed by the attorneys "appointed" in the July 2008 Power of Attorney is defective because the July 2008 Power of Attorney was not executed by a duly authorized agent of Jonis. Despite ample opportunity to do so, neither a properly executed power of attorney nor any other documents curative of the jurisdictional defects in the Petition were submitted to the DCALJ.

Respondent filed a Notice of Motion for Summary Determination in Favor of Respondent (the "Notice of Motion") dated October 5, 2009, for an Order pursuant to the Rules of Practice and Procedure of the New York City Tax Appeals Tribunal at 20 RCNY §1-05(d)(1), granting summary determination and dismissing the Petition "on the grounds that no material issue of fact exists requiring a trial and that the facts and law mandate a determination in favor of [Respondent]" and "granting such other and further relief as this Tribunal deems just and proper." Notice of Motion at 1.

²Steven Halegua signed the power of attorney under a certification that he had the "authority to execute this Power of Attorney on behalf of the taxpayer."

³Real Property Transfer Tax Rules at 19 RCNY §23-14(b).

The DCALJ granted Respondent's motion for summary determination dismissing the Petition and sustaining the Notice on the grounds that the Tribunal lacked jurisdiction to hear the Petition. The DCALJ concluded that, by his own admission, Steven Halegua was no longer a member of Jonis after May 15, 2006, and, thus, had no authority to execute the July 2008 Power of Attorney pursuant to which the Petition was signed. Therefore, the Petition was invalid because it was not signed by a current member of Jonis or a representative of Jonis pursuant to a properly executed power of attorney. The DCALJ concluded that it was unnecessary to address "other issues raised in the Answer and motion."⁴ Therefore, the DCALJ did not expressly address whether the Refund Claim (signed by Steven Halegua) and the Request for a Conciliation Conference (signed by Hearle) were also invalid on the grounds that Steven Halegua had no authority to file either on behalf of Jonis.

The Exception was signed by Hearle and a copy of the July 2008 Power of Attorney signed by Steven Halegua "appointing" Hearle and Albstein as the representatives of Jonis was attached to the Exception. A new power of attorney, signed by Nathan Halegua, a "current member who has been authorized by the membership to execute same"⁵ was submitted to the Tribunal in October 2010 authorizing Hearle and Albstein to represent Jonis (the "October 2010 Power of Attorney"). Jonis' Brief in Support of Exception asserts that the DCALJ Determination should be vacated and the Petition reinstated and remanded to be heard on the merits because the October 2010 Power of Attorney remedied the defects in the July 2008 Power of Attorney and because there is a meritorious refund claim.

Respondent asserts that the DCALJ properly concluded that the Tribunal lacked jurisdiction to review the Petition because it was not signed by a member of Jonis or an

⁴DCALJ Determination at 2, n.3.

⁵Letter from Hearle, October 18, 2010, at 2.

authorized representative of Jonis and was, therefore, invalid. In addition, Respondent asserts that the October 2010 Power of Attorney, signed by Nathan Halegua, at most permitted Hearle and Albstein to appear in connection with the Exception.

For the following reasons we grant so much of the Exception that sought a remand of the matter.

To prevail on a motion for summary determination, a movant 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 University Medical Center, 64 N.Y.2d 851, 853 (1985). Our review of the documents submitted by the Parties indicates that there are material issues of fact and law and, therefore, the matter must be remanded for a hearing and determination without prejudice to any claim or argument that may be presented by the Parties.

A factual question to be resolved on remand is whether Steven Halegua was the grantor of an interest in Jonis and paid the RPTT that is the subject of the refund claim and, therefore, the true party in interest in this matter, which, in turn raises jurisdictional issues. Other issues to be considered on remand include whether Jonis could ratify any of the actions taken on its behalf by Steven Halegua regarding the Refund Claim, the Request for Conciliation and the Petition, in light of the failure to submit a proper power of attorney prior to October 2010. If the ALJ determines that the Tribunal has jurisdiction to reach the merits of this case, among other issues, it appears that there are questions as to the date of the third transfer and the correct amount of RPTT, interest and penalties paid and for which a refund is claimed.

The above is not intended to place any limitations on the extent to which the ALJ can make a record and proceed on remand. We have only identified questions and issues that we believe need to be addressed based on our review of the documents presented by the Parties. We do not take any position on the specific questions and issues that we have raised in this Order. In granting the Exception insofar as it sought a remand, we have neither decided that the October 2010 Power of Attorney resolves any of the jurisdictional issues present in this matter nor decided that a refund of RPTT is due.

Therefore, on Jonis' Exception, we grant so much of the Exception that sought a remand of the matter, we reverse the DCALJ's grant of summary determination in favor of Respondent and we reinstate the Petition.

IT IS SO ORDERED.

Dated: October 24, 2011
 New York, New York

GLENN NEWMAN
President and Commissioner

ELLEN E. HOFFMAN
Commissioner

ROBERT J. FIRESTONE
Commissioner