

a Post-Trial Brief summarizing its legal position on December 28, 2012.

Counsel to the respective parties stipulated that Vivco Equities LLC is not a party to the proceeding.

ISSUES

I. Whether the Mortgage was an excludible lien because it encumbered a lot containing a one, two or three-family house and should not have constituted taxable consideration for the transfer.

II. Whether the grantee is liable for unpaid RPTT if the grantor has a contractual obligation to pay the RPTT.

FINDINGS OF FACT

1. Bronx Prospect Corp. (Bronx Prospect) acquired the Property on March 24, 2006 at a purchase price of \$415,000, at which time the Property consisted of one tax lot known as Lot 33 (Original Lot 33). A two story, frame house and a frame garage were situated on Original Lot 33.¹ The metes and bounds description of Original Lot 33 reflects that Original Lot 33 was 54.50 feet by 75 feet.

2. Simultaneously with its acquisition of the Property, Bronx Prospect gave a mortgage (Mortgage) securing a mortgage note (Mortgage Note) in the initial principal amount of \$447,500, to three parties: Sarka LLC as to a \$142,500 interest, Thomas Denaro as to a \$75,000 interest and, Ronald Magro (individually) as to a

¹ The Real Property Transfer Tax Return executed in connection with the Transfer described the Property as a one, two or three-family dwelling.

\$230,000 interest. (Sarka LLC, Thomas Denaro and Ronald Magro are collectively, Mortgagees).

3. The stated interest rate and the due date under the Mortgage Note were 18% per annum and March 23, 2007, respectively.

4. The Mortgage contained a so-called "due on sale" provision pursuant to which the entire principal amount and interest would become due at the option of the Mortgagee in the event of a sale or transfer of the Property. The Mortgage also provided that the principal and interest would become due at the option of the Mortgagee in the event of the actual or threatened alteration, removal or demolition of any building at the Property. The Mortgage contained no other provisions governing construction, alteration, removal or demolition of any structure on the Property.

5. On April 26, 2007, a document entitled "Zoning Lot Description And Ownership Statement By Building Department Permit Applicant"² (Zoning Lot Statement) was recorded against Original Lot 33. The Zoning Lot Statement referred to both Lot 33 and Lot 133. The Zoning Lot Statement describes Bronx Prospect as an "applicant" for present or future permits pursuant to the Zoning Resolution of the City of New York effective as of December 15, 1961 as subsequently amended (Zoning Resolution).

6. A Certification (Certification) Pursuant to Zoning Lot Subdivision C of Section 12-10 Of the Zoning Resolution was also recorded against Original Lot 33 on April 26, 2007.

² The full caption appearing on the document is "Zoning Lot Description and Ownership Statement By Building Department Permit Applicant To Be Recorded In the County Clerk's Of Register's Office" [sic].

7. Bronx Prospect defaulted under the Mortgage. In order to settle the debt and avoid a foreclosure proceeding, the Mortgagees and Bronx Prospect agreed that Bronx Prospect would sell the Property to Petitioner and V & C Realty Development Co., LLC (V & C), as purchasers (Purchasers).

8. A letter dated October 23, 2007 (October 23rd Letter) from Stan Prochazka (Prochazka), a principal of Sarka LLC, to Petitioner's counsel discussed the proposed sale of the Property from Bronx Prospect to Ronald Magro (Magro) and stated in pertinent part,

[a]fter this transfer shall be accomplished, the holders of the present mortgage will extend a loan secured by a note to the borrower to finance the reconstruction of the existing building on the property in the amount of \$37,000.

There is no evidence in the record that indicates whether or not the Mortgagees extended a loan in the amount of \$37,000 to Magro.

9. A statement dated November 21, 2007 from Sarka LLC stated that as of November 24, 2007, the amount due under the Mortgage was \$581,750 (consisting of the original principal of \$447,500 plus interest in the amount of \$134,250); the per diem interest after November 24, 2007 was \$223.75.

10. Bronx Prospect and Purchasers entered into an undated contract (Contract) for the sale of the Property at a purchase price of \$200,000. A rider (Rider) to the Contract directed payment of \$150,000 of the purchase price to the Mortgagees in reduction of the Mortgage.

11. The Rider also contained a representation that the subdivision of Original Lot 33 was completed and a new tax lot would be created by the closing. A portion of Original Lot 33 retained the designation lot 33 (New Lot 33) and a portion of Original Lot 33 was, upon such subdivision, designated as lot 133 (Lot 133). The Rider required Bronx Prospect to deliver to the Purchasers a release of the Mortgage lien on Lot 133 and to deliver Lot 133 free of all other liens and encumbrances.

12. Following such subdivision, New Lot 33 contained the dwelling and Lot 133 contained the garage. (Petitioner's exhibit 7, p. 2.)

13. The Contract required the "party required by law" to deliver a check for the applicable transfer taxes.

14. An agreement dated December 20, 2007 between the Mortgagees and the Purchasers (December 20th Agreement) reduced the interest under the Mortgage Note from 18% per annum to 12% per annum and extended the term of the Mortgage Note for six months. The change in interest rate constituted a reduction that was more than ten percent of the original interest rate. The change in the repayment term constituted a change that was greater than ten percent of the original term of the loan. Sarka and Denaro waived the interest that had accrued under the Mortgage Note through December 20, 2007.³ A recital in the December 20th Agreement stated that the Purchasers "are taking title subject to the Note [and] Mortgage for the purpose of completing construction on the [P]roperty."

³ The per diem interest through the Transfer Date based on 25 days at \$223.75 per day, is \$5,593.75, which, together with the accrued interest of \$134,250 to November 24, 2007 results in accrued interest of \$139,843.75.

15. By deed dated December 20, 2007 (Transfer Deed), the Property, which was described in the Transfer Deed as [New] Lot 33 and Lot 133, was transferred to Petitioner and V & C.⁴ The City Real Property Transfer Tax Return and the New York State Real Property Transfer Tax Report filed in connection with the Transfer stated that the Transfer consisted of two lots, [New] Lot 33 and Lot 133. The Real Property Transfer Tax Return stated that there was no cash consideration for the Transfer;⁵ however, the Property (*i.e.*, New Lot 33 and Lot 133) was subject to the lien of the existing Mortgage in the amount of \$447,500. No evidence was submitted that any payment was made to reduce the Mortgage. In this regard, the title insurance policy insuring Petitioner's acquisition of the Property states that the Property (having a metes and bounds description encompassing both New Lot 33 and Lot 133) was subject to the lien of the Mortgage at the time of the Transfer.

16. Based on the representation in the Contract that two separate tax lots would be created by the time of the closing, the fact that the Transfer Deed identified and conveyed two separate tax lots and, information filed by Petitioner on both the Real Property Transfer Tax Return and the New York State Real Property Transfer Tax Report, each of which stated that the Transfer involved two separate tax lots, it is concluded that the Original Lot 33 was subdivided into New Lot 33 and Lot 133 prior to the Transfer. (See tr at 41).

⁴ The metes and bounds description of the Property contained in the Transfer Deed was 54.50 feet by 75 feet.

⁵ The New York State Real Property Transfer Tax Report stated that the consideration for the Transfer was \$447,500.

17. Respondent submitted an undated affidavit by Stan Prochazka which was not notarized (Prochazka Affidavit). It states in Paragraph 6 that,

It was never the intention not to get paid off in accordance with the original terms of the [M]ortgage however the [M]ortgage went into default and Joe Williams (Williams) [the principal of Bronx Prospect] was not financially able to continue the project on Strang Avenue [Emphasis added.]

The Prochazka Affidavit further states that Williams "was renovating and subdividing property in the Bronx." The Prochazka Affidavit does not identify any particular property being renovated or subdivided by Williams.

18. Respondent issued Petitioner a Notice of Determination dated August 31, 2009, asserting an RPTT deficiency for the Transfer in the principal amount of \$4,475.00, plus interest computed to September 30, 2009 in the amount of \$580.09, plus a penalty of \$223.75 for a total amount due of \$5,278.84. The Notice of Determination set forth the following explanation of the deficiency:

Consideration is defined as the price actually paid or required to be paid for real property or an economic interest therein, without deduction for mortgages, liens or encumbrances, whether or not expressed in the deed or instrument. . . . It shall also include the amount of any mortgage, lien or encumbrance, whether or not the underlying indebtedness is assumed. . . .

* * *

Since you have failed to verify the accuracy of the taxable consideration reported, it was based on the amount reported on the real property transfer tax return. The taxable consideration was deemed to be \$447,500.

STATEMENT OF POSITIONS

Petitioner asserts that the Mortgage was an excludible lien and should not have constituted taxable consideration for the Transfer. Petitioner further asserts that the transferor, not the transferee was liable for any RPTT.

Respondent asserts that the Mortgage was not an excludible lien because it was a "construction loan" placed on the Property in anticipation of the eventual conveyance or transfer of the Property. Respondent also asserts that the structure situated on one of the lots is a garage, not a one, two or three-family house and the continuing lien deduction does not apply to such lot. Further, Respondent asserts that there is no document that separately allocates a specific portion of the Mortgage to each of the two tax lots and, for such reason, the full amount of the Mortgage is a lien on each of New Lot 33 and Lot 133.

CONCLUSIONS OF LAW

Administrative Code § 11-2102 (a) imposes a tax on each deed at the time of delivery by a grantor to a grantee when the consideration for the real property and any improvement thereon (whether or not included in the same deed) exceed twenty-five thousand dollars. The term "consideration" is defined in Administrative Code § 11-2101.9 as "[T]he price actually paid or required to be paid for the real property or economic interest therein, without deduction for mortgages, liens and encumbrances. . . It shall also include the amount of any mortgage, lien or other encumbrance, whether or not the underlying indebtedness is assumed." However, Administrative Code § 11-2102 (f) contains a limited exception with respect to a deed transferring title to a

one, two or three-family house that is encumbered by a mortgage. The burden of proof is on the Petitioner to establish that a lien or encumbrance qualifies as an excludible lien. Rules of City of New York Real Property Transfer Tax (19 RCNY)§ 23-03(k) (5).

Administrative Code § 11-2102 (f) contains the following exclusion from RPTT (Continuing Lien Exclusion):

Notwithstanding any other provision of this chapter, in determining the tax imposed by this chapter with respect to a deed, instrument or transaction conveying or transferring a one, two or three-family house . . . the consideration for such conveyance or transfer shall exclude, to the extent otherwise included therein, the amount of any mortgage or other lien or encumbrance on the real property or interest therein that existed before the delivery of the deed or transfer and remains thereon after the date of the delivery of the deed or transfer, other than any mortgage, lien or encumbrance placed on the property or interest in connection with, or in anticipation of, the conveyance or transfer, or by reason of deferred payments of the purchase price. . . . [Emphasis added.]

While New Lot 33 contains a one, two or three-family house, Lot 133 does not contain such a structure and contains only a garage.

Subsection (f) applies to one, two or three-family houses. The structure on Lot 133 is a garage and therefore the exclusion does not appear to be available with respect to Lot 133.

Under certain circumstances where two separate parcels are transferred, determining the appropriate RPTT treatment may require an analysis of whether one unit is an integral part of the other unit. For example, the Tribunal held, in *Matter of Cambridge*

Leasing Corporation, TAT(E) 03-11(RP) (September 12, 2006), that the transfer of a residential condominium unit and a unit ancillary to the condominium unit was subject to the lower RPTT rate because the separate parcel was an integral part of the residential condominium unit. Therefore, the type of structure situated on each of the two lots and the purpose of each lot relative to the other lot should be considered.

In this instance, the Zoning Lot Statement, which refers to permits, the Certification and the provision in the Rider that required the seller to subdivide Original Lot 33 into two lots as a prerequisite to the closing of the transaction, make it apparent that following the subdivision of Original Lot 33, the garage on Lot 133 was no longer intended to form an integral part of the dwelling on New Lot 33.

The entire principal amount of the Mortgage constituted a lien on Lot 133 at the time of the Transfer. Therefore, the lien of the Mortgage in the amount of \$447,500 must be included in the amount of the consideration with respect to the Transfer.

Since the Mortgage remained a lien on Lot 133, with respect to which the Continuing Lien Exclusion was unavailable, Respondent's assertion that the Mortgage was a construction loan given in anticipation of the eventual conveyance of the Property, will be discussed briefly.

Rules of City of NY Real Property Transfer Tax (19 RCNY) § 23-03 (k) (3) defines an "excludible lien" as:

. . . a mortgage lien, or other encumbrance that was placed on the real property or economic interest before the delivery of the deed or transfer and remains thereon after the

date of the delivery of the deed or transfer unless any of the following applies:

(i) The mortgage, lien or other encumbrance was originally placed on the real property or interest therein in connection with, or in anticipation of, the conveyance or transfer, or was increased in amount in connection with, or in anticipation of, the conveyance or transfer, to the extent of that increase in amount. A mortgage, lien or other encumbrance will be considered to have been originally placed on the property, or increased in amount, in connection with or in anticipation of the conveyance or transfer if: (A) the documents relating to the mortgage, lien, encumbrance, the underlying indebtedness, or the conveyance or transfer indicate that the mortgage, lien, encumbrance or underlying indebtedness is part of a plan to eventually transfer or convey the property or interest therein, or (B) in the case of a mortgage, lien or other encumbrance placed on the property within six months prior to the conveyance or the transfer, if all of the relevant facts and circumstances indicate that the mortgage, lien or other encumbrance has been placed on the property in connection with, or in anticipation of, the conveyance or transfer. [Emphasis added.]

Thus, a mortgage, lien or encumbrance that might otherwise have qualified as an excludible lien will not qualify as an excludible lien if it was originally placed on the real property or interest therein in connection with, or in anticipation of, the conveyance or transfer. 19 RCNY 23-03(k)(3)(i) provides that a mortgage will be considered to have been placed on the property in contemplation of a conveyance if the underlying documents relating to the mortgage, lien or encumbrance, the underlying indebtedness, or the conveyance or transfer indicate that the mortgage, lien, encumbrance or underlying indebtedness is part of a plan to eventually transfer or convey the property or interest therein.

Respondent relies on the following specific documents to support its position that the Mortgage was a construction loan placed on the Property in anticipation of eventual conveyance or transfer: (i) the October 23rd Letter, (ii) the December 20th Letter and (iii) the Prochazka Affidavit. Each of these documents post-dates the execution of the Mortgage. Moreover, as Bronx Prospect was not a party to any of the documents relied on by Respondent, such documents cannot be interpreted to reflect any original intent on the part of Bronx Prospect to have placed the Mortgage on the Property as part of an eventual plan to transfer the Property. Notably, the Prochazka Affidavit states that, “[i]t was never the intention not to get paid off in accordance with the original terms of the [M]ortgage.” (Emphasis added.) Further, the “due on sale” provision does not support the position that the Mortgage was originally placed on the Property in connection with, or in anticipation of an eventual conveyance.

Although the Mortgage does not appear originally to have been entered into in anticipation of an eventual conveyance, it nevertheless remained a lien on Lot 133 which does not contain a one, two or three-family house and, as such, the Mortgage was not an excludible lien.

Consideration has been given to two additional matters. First, as set forth in Petitioner’s exhibit 4, the accrued but unpaid interest was waived on the Transfer Date and constitutes a reduction in indebtedness that falls within the provisions of 19

RCNY 23-03(k)(3)(iii).⁶ The amount of the reduction in indebtedness in connection with the conveyance or transfer does not form a part of an excludible lien. Second, under Petitioner's exhibit 4 the interest rate under the Mortgage Note was reduced by more than ten percent and the repayment term was extended by more than ten percent. However, because the identity of the mortgagee remained unchanged, the change in interest rate and repayment term do not constitute a "material modification" of the Mortgage within the provisions of 19 RCNY 23-03(k)(3)(iv).⁷ Since the Mortgage in the principal amount of \$447,500 was a lien on Lot 133 on the Transfer Date, it is not necessary to discuss the application of either 19 RCNY 23-03(k)(3)(iii) or 19 RCNY 23-03(k)(3)(iv) in greater detail.

Petitioner asserts that the seller, Bronx Prospect and not Petitioner is liable for the RPTT.

⁶ 19 RCNY 23-03 (k)(3)(iii) provides, in pertinent part that, "[if a] mortgage, lien, or other encumbrance is discharged, canceled, or reduced in amount, [the excludible lien exemption does not apply] to the extent of the reduction in amount, in connection with the conveyance or transfer following the delivery of the deed or transfer. A mortgage, lien, or other encumbrance will be considered to be discharged, canceled, or reduced in amount in connection with the conveyance or transfer if: (A) the documents relating to the mortgage, lien, encumbrance, the underlying indebtedness or the conveyance or transfer indicate that the discharge, cancellation, or reduction in amount is in connection with the conveyance or transfer. . . ."

⁷ 19 RCNY 23-03 (k)(3)(iv) provides, in pertinent part that, [the excludible lien exemption does not apply if "t]he terms of the mortgage, lien, or other encumbrance are materially altered in connection with, or in anticipation of the conveyance or transfer."

Such section also provides in pertinent part that, (A) For the purposes of this subparagraph (iv), the terms of a mortgage, lien, or other encumbrance on the property or interest therein will be considered to be materially altered in connection with, or in anticipation of, the conveyance or transfer if within six months prior to, or within three months following, the conveyance or transfer (a) the identity of the mortgagee or holder of the lien or encumbrance has changed, and (b) there has been a change of ten percent or more in the interest rate, or repayment term remaining as of the date of the alteration with respect to the mortgage, lien, or other encumbrance, and the facts and circumstances indicate that the alteration is in connection with, or in anticipation of, the conveyance or transfer.

Administrative Code § 11-2104 provides, in pertinent part:

The tax imposed hereunder shall be paid by the grantor to the commissioner of finance . . . The grantee shall also be liable for the payment of such tax in the event that the amount of tax is not paid by the grantor or the grantor is exempt from tax. [Emphasis added.]

The liability of a grantee for any deficiency in RPTT arises thirty days after the transfer. (*Matter of Chaim Babad, Emanuel Steinmetz and Bernat Steinmetz*, TAT(E) 94-111(RP), *et al.* [December 5, 1997]). Notwithstanding the provision in the Contract that required Bronx Prospect to pay the RPTT, Petitioner is liable for the payment of the RPTT.

ACCORDINGLY, IT IS CONCLUDED THAT Petitioner, as grantee, is liable for the RPTT due on the Transfer as asserted by Respondent since the Mortgage was a lien on Lot 133 and Lot 133 was not eligible for the Continuing Lien Exclusion under Administrative Code § 11-2102 (f). The Petition of Ronald Magro, LLC is denied and the Notice of Determination dated August 31, 2009 is sustained.

DATED: May 20, 2013
New York, New York

Jean Gallancy-Wininger
Administrative Law Judge