

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

ELIZABETH CELLA, et al.,

Index No. 620580/2017

Plaintiffs,

-against-

SUFFOLK COUNTY,

Defendant.

**MEMORANDUM OF LAW IN
SUPPORT OF
MOTION FOR PARTIAL
SUMMARY JUDGMENT**

Plaintiffs Winifred Esoff and Nicholas Accardi submit this Memorandum of Law in Support of their Motion for Partial Summary Judgment, and state:

Introduction

Suffolk County, like any of its residents, has three choices when balancing its budget to match its income with expenses. It can find more money, spend less, or do some combination of each. And like its residents, the County may not make its money illegally, even if it's easier.

The County chose the easy path. It raised the fees it charges to have its Real Property Tax Service Agency verify real estate documents filed with the County Clerk against County tax maps. County residents have paid off mortgages or home equity loans only to learn that filing a Satisfaction of Mortgage will cost \$500 in verification fees. Homebuyers have received the verification fee news in closing statements after committing to purchases.

The verification fees total around \$70 million in easy money expected by the County in 2018. But the Agency only costs just over \$1.2 million to run. The "service" it provides costs a fraction of that amount. For every dollar the

County spends on tax map verifications, it brings a hundred dollars into the County's General Fund to spend for other purposes.

Understandably, this scheme violates well-established New York law: A fee amount must reasonably relate to the cost of the service provided. A fee not directly related to the cost of the service or imposed to generate revenue to pay for general governmental functions is truly a tax. A fee that is truly a tax may not be imposed by the County without express statutory authority. No statute expressly authorizes the County to impose this tax, and it must be declared invalid as a matter of law.

Facts

The County created and established a Real Property Tax Service Agency under New York's Assessment and Improvement Law (Laws of 1970, Chapter 957). Ex. C, Suffolk County Charter, Article XXXIII. Among the duties the Legislature assigned to the Agency are preparing and maintaining County property tax maps, providing advisory appraisals to towns within the County, advising and supporting town assessors, providing annual reports, supporting County land acquisitions, and performing any other duties authorized by the County legislature pertaining to the assessment and taxation of real property. Real Property Tax Law § 1532.

The County subsequently added section A18-3 to its Administrative Code. It requires that instruments presented for filing or recording with the County Clerk "which affect or pertain to title of land" in the County be verified against the Agency's tax maps. Ex. D, Suffolk County Administrative Code § A18-3.A.

The Agency fee provision in § A18-3, amended multiple times since 1989, entitles the Agency to fees, payable to the County Clerk, for its tax map verifications. *Id.* § A18-3.G. In 2011, the County amended the Code to increase the fee for tax map verifications for instruments presented for filing or recording to \$60 per parcel. Ex. E, Resolution No. 1222-2011 (L.L. 11-2012). In 2015, the County amended the Code to increase the fee for tax map verifications for instruments presented for filing or recording to \$200 per parcel. Ex. F, Resolution No. 992-2015 (L.L. 34-2015). In 2016, the County amended the Code to add a \$300 tax map verification fee for mortgage instruments presented to the County Clerk for filing or recording. Ex. G, Resolution No. 1184-2016 (L.L. 36-2016).

In 2011, the Agency contributed \$5,265,630 to the County's General Fund. Ex. H, 2013 Suffolk County Operating Budget, p. 42. That same year, the Agency cost the County \$1,582,604 to operate. *Id.* at 925.

In 2015, the Agency contributed \$10,604,780 to the County's General Fund. Ex. I, 2017 Suffolk County Operating Budget, p. 33. That same year, the Agency cost the County \$1,343,109 to operate. *Id.* at 899.

After the 2015 fee increase, the Agency contributed \$34,017,260 to the County's General Fund in 2016. Ex. J, 2018 Suffolk County Operating Budget, p. 32. That same year, the Agency cost the County \$1,341,021 to operate. *Id.* at 942.

After the County added the new \$300 mortgage instrument fee, the County budgeted to collect \$32,150,167, from mortgage instrument verifications by the

Agency for the County's General Fund in 2017. *Id.* at 34. The County also budgeted the \$200 per parcel fee for all instruments to generate \$33,200,000 for the General Fund in 2017. *Id.* at 32. The County expected the Agency to cost \$1,191,141 to operate in 2017. *Id.* at 942.

The Agency's revenue derives primarily from tax map verification fees. Between 2011 and 2015, revenue from tax map sales ranged between \$200,000 and \$300,000 per year, with the remaining revenue coming from verifications. Ex. I, 2017 Suffolk County Operating Budget, p. 898.

Plaintiff Esoff owns real property in Suffolk County. Esoff Affidavit, ¶3. Last year, she paid off a home equity loan. *Id.* at ¶5. Her lender sent her a satisfaction of mortgage to file with the County Clerk. *Id.* at ¶6. The cover letter with the Satisfaction of Mortgage contained information for filing the document, including advice regarding the \$200 and \$300 tax map verification fees the County requires. *Id.* at ¶¶8 and 9.

Plaintiff Accardi owns real property in Suffolk County that he acquired last year. Accardi Affidavit, ¶¶3 and 4. He has a mortgage that was recorded with the County, along with documents relating to title. *Id.* at ¶5. He paid tax map verification fees for two parcels, plus the mortgage document as part of his closing costs. *Id.* at ¶¶5 and 6.

On October 24, 2017, Plaintiffs filed a complaint containing a count for declaratory judgment and a permanent injunction. Ex. A, Class Action Complaint. Plaintiffs seek to have the tax map verification fees declared invalid as unauthorized taxes and the County enjoined from further collection. The County filed its Answer on February 5, 2018. Ex. B, Answer.

Argument

“In New York, the State Legislature has the exclusive power to tax.” *Matter of United States Steel Corp.*, 7 N.Y.2d 454, 459 (1960). To the extent that the State Legislature delegates any part of that power to the County, it must be done in express terms and cannot be inferred. *County Sec. v Seacord*, 278 N.Y. 34, 37 (1938).

“A tax is a charge that a government exacts from a citizen to defray the general costs of government unrelated to any particular benefit received by that citizen.” *Walton v New York State Dept. of Correctional Services*, 13 N.Y.3d 475, 485 (2009). A fee, on the other hand, is a charge that a government exacts “as a visitation of the costs of special services upon the one who derives a *benefit* from them.” *Jewish Reconstructionist Synagogue of N. Shore, Inc. v Inc. Vil. of Roslyn Harbor*, 40 NY2d 158, 162 (1976) (emphasis in original).

Under the Municipal Home Rule Law § 10(1)(ii)(a)(8) and (9), the County may levy, administer, and collect taxes *authorized by the legislature*. Municipal Home Rule Law § 10(1)(ii)(a)(9-a) grants the County power for “[t]he fixing, levy, collection and administration of local government rentals, charges, rates or fees, penalties and rates of interest thereon, liens on local property in connection therewith and charges thereon.” Those powers, however, do not permit the County to implement and impose taxes not authorized by the State Legislature. *See e.g. Mobil Oil Corp. v Town of Huntington*, 380 N.Y.S.2d 466, 474 (Sup Ct, Suffolk County 1975).

The Real Estate Tax Law does not authorize the County to impose taxes through the Agency. Nor does it authorize the County to impose taxes to pay

for the Agency. The only fees the State Legislature contemplated the Agency charging relate to tax maps filed for subdivisions. Real Property Tax Law § 503. The County can only base its right to collect tax map verification fees on an implied ability under its home rule powers to charge fees to pay for an agency established by statutory mandate. *Suffolk County Builders Ass'n, Inc. v Suffolk County*, 46 NY2d 613, 619 (1979).

While the County, for argument sake, may be permitted under its home rule powers to impose charges it calls fees for the Agency's verifications, "[t]he label which is attached to an assessment is not dispositive of its true nature." *Albany Area Builders Ass'n v Town of Guilderland*, 534 N.Y.S.2d 791, 794 (3d Dept 1988), *affd.*, 74 N.Y.2d 372 (1989). "To the extent that fees charged are exacted for revenue purposes or to offset the cost of general governmental functions they are invalid as an unauthorized tax." *Torsoe Bros. Const. Corp. v Bd. of Trustees of Inc. Vil. of Monroe*, 375 N.Y.S.2d 612, 617 (2d Dept 1975).

Where a County possesses the implied power to impose fees under Municipal Home Rule in the context of licenses and permits, that power is "circumscribed by a similarly implied limitation that the fees charged be reasonably necessary to the accomplishment of the regulatory program." *Suffolk County Builders*, 46 NY2d at 619. That principle applies equally to fees to use a municipal service or facility. *Watergate II Apts. v. Buffalo Sewer Auth.*, 46 N.Y.2d 52, 58 (1978)("[T]he charges that the authority was empowered to collect were in the nature of fees which had to bear a direct relationship to the cost of furnishing the water services."). Fees exceeding the cost of the service provided,

and deposited into a municipality's general fund to defray the costs of government services generally, are taxes. *New York Telephone Co. v. City of Amsterdam*, 613 N.Y.S. 2d 993, 995 (3rd Dept 1994).

A. The tax map verification fees grossly exceed the cost of providing the service.

The County's 2015 and 2016 fee increases did not relate to raising revenue to pay the costs of providing a service. The Agency already more than paid for itself the year before the fee was more than doubled in 2012 (by unanimously overriding the County Executive's veto)—\$5.3 million in revenue versus \$1.6 million in expenses. Ex. E, L.L. 11-2012; Ex. H, 2013 Suffolk County Operating Budget, pp. 42 and 925.

In 2015, the Agency charged a \$60 per parcel verification fee. Ex. F. At that rate, the Agency already generated a surplus for the county greater than \$9 million—\$1.3 million in costs and \$10.6 million in revenue. Ex. I, 2017 Suffolk County Operating Budget, pp. 33 and 899. In 2018, the County budgeted the Agency's operating expenses to be lower than they were in 2015—\$1.24 million—while budgeting \$70 million in fee revenue from the 2105 and 2016 increases. Ex. J, 2018 Suffolk County Operating Budget, pp. 32, 34, and 942. While fees and expenses do not need to be congruent, a reasonable correspondence between fees charged and expenses incurred must exist. *Suffolk County Bldrs. Assn. v. County of Suffolk*, 46 N.Y.2d 613, 621 (1979). Here, however, the County misses the mark by a factor of at least *5800 percent*.

The Agency's tax map verifications do relate to documents filed with the County Clerk and the County Clerk does collect the fees on the Agency's behalf. Admin Code § A18-3. Those fees, however, do not relate to the County Clerk's

expenses. When the County increased the verification fee in 2015 the County Clerk already generated its own surplus—\$14.6 million in fee revenue versus \$7.1 million in total agency expenses. Ex. I, 2017 Suffolk County Operating Budget, pp. 33 and 295. In 2018, the County budgeted \$15.6 million in fee revenue against \$7.9 million in expenses for the County Clerk, separate and apart from the Agency’s tax map verification fees. Ex. J, 2018 Suffolk County Operating Budget, pp. 32 and 304. The Agency’s verification fees do not relate to any expense incurred by the County providing land records services.

According to the County’s 2018 Operating Budget, less than half of the Agency’s staff works on tax map verifications. *Id.* at 943. Assuming, for the sake of argument, that tax map verifications cost half of the Agency’s budgeted expenses, or \$612,000, those expenses are less than one percent of the fee revenue budgeted for 2018—\$70 million. Agency fees outpace its verification expenses by more than *10,000 percent*. In other words, for every dollar the County spends on tax map verifications it makes more than one hundred dollars.

Simple math suggests that fees of two dollars per parcel and three dollars per mortgage instrument more reasonably approximate the fees necessary to pay the County’s expenses for tax map verifications. And such lower fee amounts also correspond more closely to the real cost of the service, given the County’s stated intention “that the verification process will take but a few minutes at most.” Admin. Code § A18-3.D.

B. The County only imposes the tax map verification process and fees to generate revenue.

It is questionable whether the tax map verifications for the County Clerk's public land records fall within the scope of powers and duties the State Legislature intended for the Agency relating to assessments and taxation. Real Property Tax Law § 1532(4). No assessment or taxation purpose appears to be served by the tax map verifications.

Regardless, the resolutions enacting the local laws make clear that the County Legislature raised the tax map verification fees in 2015 and 2016 only to defray general governmental expenses. In each resolution the County Legislature acknowledged that the next year's Operating Budget included increased revenue from tax map verification fees, as opposed to increased Agency expenses. Ex. F and G. In 2016, Agency expenses were budgeted to go up only \$80,000 versus a projected \$24.7 million revenue increase from higher fees. Ex. I, 2017 Suffolk County Operating Budget, pp. 33 and 899. In 2017, the County expected the Agency to cost less to operate while its fee revenue would almost double. Further, both resolutions proclaim the purpose of the laws to increase tax map verification fees in Suffolk County "to offset administrative expenses." Ex. F and G. No specific expense is identified.

In 2011, on the other hand, the County Legislature purported to raise the Agency's fees to offset the County Clerk's expenses. But no such need existed. The County Clerk operated at a surplus in 2011, collecting fees totaling \$16.1 million while spending \$7.1 million. Ex. H, 203 Suffolk County Operating Budget, pp. 42 and 282. In 2015 and 2016, the County Legislature did not, because it could not, pretend that the increased Agency fees defrayed a specific

expense. In 2011, 2015, and 2016, the County raised the tax map verification fees for the sole purpose of generating revenue to defray general governmental expenses.

Standard of Review

CPLR 3213(b) provides, among other things, that a motion for summary judgment “shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. *See e.g. Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986)(Summary judgment should be granted if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.). The movant must make a *prima facie* showing of being entitled to judgment as a matter of law by submitting sufficient admissible evidence to demonstrate the absence of material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985).

Conclusion

No triable issues of fact exist. The County’s own Local Laws and Operating Budgets provide indisputable evidence that the tax map verification fees exceed the reasonable cost of the County’s services and exist only to defray general governmental expenses. As a matter of law, the fees under the County’s

Administrative Code § A18-3.G comprise taxes not authorized by the State Legislature. That provision of the Code must be declared invalid, and the County permanently enjoined from collecting fees under it.

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