

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
SCOTT AND KRISTYNA KATZ : DETERMINATION
for Revision of a Determination or for Refund of Mortgage : DTA NO. 826511
Recording Tax under Article 11 of the Tax Law with :
Reference to an Instrument Recorded on November 21, :
2012. :
_____ :

Petitioners, Scott and Krystyna Katz, filed a petition for revision of a determination or for refund of mortgage recording tax under Article 11 of the Tax Law with reference to an instrument recorded on November 21, 2012.

On July 24, 2015, the Division of Taxation, by its representative, Amanda Hiller, Esq., (Tobias A. Lake, Esq., of counsel), filed a motion seeking dismissal of the petition or, in the alternative, summary determination in its favor pursuant to 20 NYCRR 3000.5, 3000.9(a)(1)(i) and (b). Petitioners, appearing pro se, filed a response by their due date of October 26, 2015, which commenced the 90-day period for the issuance of this determination. After due consideration of the affidavits, documents and arguments presented, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly denied petitioners' claim for a refund of mortgage recording tax paid.

FINDINGS OF FACT

1. Petitioners, Scott and Krystyna Katz, have owned a one-family dwelling located on 222nd Street, Hollis Hills, New York (the property) since its purchase on January 13, 1998. At that time, petitioners, as borrowers, and Republic Consumer Lending Group, Inc., as lender, entered into a mortgage (mortgage #1) encumbering the property and securing a debt in the amount of \$280,000.00. Mortgage #1 was recorded on February 9, 1998. Mortgage recording tax in the amount of \$5,575.00 was paid on the \$280,000.00 amount.

2. In 2002, HSBC Mortgage Corporation (USA) became a successor by merger to Republic Consumer Lending Group, Inc., and petitioners' note was modified to reflect this change. Thereafter, in 2011, HSBC Mortgage Corporation (USA) assigned the note to Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for HSBC Bank USA, NA (HSBC Bank).

3. According to a mortgage payoff letter from HSBC Bank dated September 21, 2012, mortgage #1 had a balance in the amount of \$93,205.99, and a loan payoff amount of \$93,713.62.

4. Mortgage #1 carried an interest rate of 5.625%, and in the interest of borrowing at a lower rate, petitioners pursued alternative mortgage options. At the time, HSBC Bank did not offer an interest rate acceptable to petitioners, so petitioners chose to refinance with New York Community Bank (NYCB).

5. On September 24, 2012, petitioners executed a mortgage and note evidencing a mortgage loan in the amount of \$175,000.00 from NYCB (mortgage #2) against the property. MERS was acting as nominee for NYCB, and for purposes of recording the mortgage, MERS was listed as the mortgagee of record for this transaction.

6. The HUD-1 Settlement Statement dated September 24, 2012, evidencing the new loan, also showed petitioners borrowing \$175,000.00 from NYCB. Disbursement of the funds was as follows: the \$175,000.00 was used in part to pay off mortgage #1 to HSBC Bank (\$93,713.62) and cover the net settlement charges of acquiring mortgage #2 ($\$9,682.93 - \$436.50 = \$9,246.43$), resulting in \$72,039.95 to be remitted to petitioners, which they intended to use to repay multiple credit card debts. Mortgage recording tax in the amount of \$3,557.50 was paid as a part of the settlement charges.

7. On October 11, 2012, a Satisfaction of Mortgage was executed by MERS, as nominee for HSBC Bank, concerning the mortgage indebtedness of \$280,000.00 (mortgage #1), acknowledging that it had received full payment and satisfaction of the debt, and in consideration, satisfied the debt and discharged mortgage #1.

8. On November 21, 2012, mortgage #2 was recorded in the office of the city register of the city of New York, referencing the property, the parties (petitioners and MERS), and the mortgage amount of \$175,000.00.

9. Mortgage #2 did not indicate that it was either a consolidation with or extension of mortgage #1, nor did mortgage #2 make any references to mortgage #1, i.e., the prior recorded primary mortgage.

10. Petitioners filed a Real Estate Transfer Tax Claim for Refund seeking a refund in the amount of \$1,905.07. The stated basis for petitioners' claim was that they paid \$5,575.00 in mortgage recording tax when they recorded mortgage #1. When they obtained a new loan from NYCB in the amount of \$175,000.00, they were required to pay mortgage recording tax of \$3,357.50.00. Petitioners, in their refund claim, asserted that mortgage recording tax was due only on the increased amount of the loan and not on the entire amount of the second loan.

Therefore, petitioners maintained that tax was due only on the sum of \$81,286.38, the amount by which mortgage #2 exceeded the payoff balance of mortgage #1, and thus they are entitled to a refund in the amount of \$1,905.07.

11. The Division of Taxation's Transaction Desk Audit Bureau issued a letter dated July 1, 2004, denying petitioners' refund claim. The letter stated, in relevant part, as follows:

“In reference to your immediate concern, Tax Law Section 255 provides an avenue for exemption of additional mortgage recording tax applicable to a mortgage refinance. If subsequent to the recording of a mortgage on which all taxes were paid, specifically for the purpose of consolidating the lien and or a modification of such prior recorded mortgage, the resulting supplemental instrument is taxable only to the extent of any new and additional indebtedness. The process is commonly known in the mortgage industry as a consolidation, extension and modification agreement (CEMA).

Your prior \$280,000.00 mortgage with Republic Consumer Lending Group was presented and recorded on February 9, 1998 with the Office of the City Register in the normal and established manner. The mortgage was subsequently satisfied by way of a new and separate \$175,000.00 mortgage with New York Community Bank which was recorded on November 21, 2012. Since this is a new mortgage and not a supplemental instrument, recording taxes would be due pursuant to section 253 of the New York State Tax Law. There is no erroneous payment of mortgage recording taxes and no refund would be possible under these circumstances.”

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted:

“if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party” (20 NYCRR 3000.9[b][1]).

B. Section 3000.9(c) of the Rules provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. “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 NY2d 851, 853 [1985], *citing Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck, Inc. v. Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v. Vil. of Patchogue Fire Dept.*, 146 AD2d 573 [2d Dept 1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381, 382 [2d Dept 1960]). “To defeat a motion for summary judgment, the opponent must . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’” (*Whelan v. GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992] *citing Zuckerman*).

C. Article 11 of the Tax Law imposes a tax on the recording of mortgages on real property situated in the State of New York (Tax Law § 253). The tax is based upon the amount of the principal debt or obligation which is, or under any contingency may be, secured at the date of the execution of the mortgage or at any time thereafter (Tax Law § 253 [1]). The tax under section 253 is imposed on the privilege of recording a mortgage; the underlying debt serves as the basis for computation of the tax (*see Matter of Citibank, N.A. v. State Tax Commn.*, 98 AD2d 929, 931 [1983]).

D. Tax Law § 255 sets forth an exemption from the mortgage recording tax for recording a supplemental mortgage. More specifically, Tax Law § 255 (1) (a) (i) provides, in pertinent part, as follows:

“If subsequent to the recording of a mortgage on which all taxes, if any, accrued under this article have been paid, a supplemental instrument or mortgage is recorded for the purpose of correcting or perfecting any recorded mortgage, or pursuant to some provision or covenant therein, or an additional mortgage is recorded imposing the lien thereof upon property not originally covered by or not described in such recorded primary mortgage for the purpose of securing the principal indebtedness which is or under any contingency may be secured by such recorded primary mortgage, such additional instrument or mortgage shall not be subject to taxation under this article, except as otherwise provided in paragraph (b) of this subdivision, unless it creates or secures a new or further indebtedness or obligation other than the principal indebtedness or obligation secured by or which under any contingency may be secured by the recorded primary mortgage, in which case, a tax is imposed as provided by section two hundred and fifty-three of this article on such new or further indebtedness or obligation.”

E. 20 NYCRR 645.1 (a) provides the following concerning supplemental mortgages:

“A supplemental mortgage is an additional instrument or mortgage which is *recorded subsequent to the recording and prior to the discharge or satisfaction of a prior primary mortgage* on which all taxes, if any, accrued under article 11 of the Tax Law have been paid, *the terms of which make reference to the prior recorded primary mortgage*, and which is given and recorded:

- (1) for the purpose of correcting or perfecting such prior recorded primary mortgage;
- (2) pursuant to some provision or covenant in such prior recorded primary mortgage;
- (3) for the purpose of providing additional or further security for the payment of the principal debt or obligation secured by the prior recorded primary mortgage by spreading the lien of the prior recorded primary mortgage to additional real property or by imposing a new lien on such additional real property . . . ; or
- (4) for the purpose of coordinating or consolidating the liens of prior recorded primary mortgages to form a single and coordinate equal lien; or
- (5) for the purpose of modifying a prior recorded primary mortgage, for reasons including but not limited to the following:
 - (i) adjusting the term for the payment of the debt secured by the prior recorded primary mortgage;
 - (ii) changing the interest rate on the debt secured by the prior recorded primary mortgage;
 - (iii) substituting a new mortgagor for the mortgagor;

- (iv) substituting a new mortgagee for the mortgagee due to an assignment of the mortgage;
 - (v) evidencing a change in the amount of debt or obligation which is secured or which under any contingency may be secured by the prior recorded primary mortgage; or
- (6) for the purpose of severing the lien(s) of a prior recorded primary mortgage or mortgages into separate liens” (emphasis added).

F. In *Matter of David and Weiss* (Tax Appeals Tribunal, October 13, 1994), the Tribunal, after examining the Courts’ decisions as to which mortgages qualify for the section 255 supplemental mortgage exemption in *Sverdlow v. Bates* (283 AD 487 [1954]) and *Matter of Citibank*, stated as follows:

“We understand this to mean that in order for a subsequently recorded mortgage to qualify for the section 255 supplemental mortgage exemption, the taxpayer must have recorded it prior to discharging the lien of the original mortgage even if the subsequent mortgage secured the same debt as the original mortgage.

* * *

As a whole, the Tax Law and the case law indicate that even if the underlying debt remains the same, when a lien securing payment of the debt is discharged prior to the recordation of a subsequent mortgage securing payment of the same debt, the taxpayer must pay mortgage recording tax when recording the subsequent mortgage. Thus, for mortgage recording tax purposes, the status of the underlying indebtedness does not prove determinative. Instead, the controlling consideration is whether the taxpayer recorded the subsequent mortgage before discharging the lien of the prior mortgage. If not, the subsequent mortgage imposes a new lien subject to the Article 11 tax (*see Matter of Fifth Ave. & 46th St. Corp. v. Bragalini*, 4 AD2d 387, 165 NYS2d 312, 319).”

G. The supplemental mortgage exemption was also addressed in *Matter of Emerson* (Tax Appeals Tribunal, May 10, 2001) wherein the Tribunal, in deciding that mortgage recording tax was properly imposed upon the recording of the second mortgage, stated:

“The evidence established that there was no simple increase in the maximum principal amount of the first credit line mortgage. Instead, petitioner chose to expunge the first lien and replace it with another, new credit line mortgage obligation. . . . The first mortgage was paid off and ceased to exist. . . . As noted in the facts, the parties extinguished the first mortgage debt and created a new indebtedness with a separate mortgage. Neither the second mortgage nor credit line agreement contained provisions for the continuation of the original indebtedness or lien and neither of the documents even make reference to the first credit line agreement or mortgage. . . . In the instant matter, there was no showing that the parties intended to continue or confirm the prior mortgage. Rather, the evidence demonstrates two distinct and independent transactions, the second of which incurred mortgage recording tax on the maximum credit line amount.”

H. In the present matter, the evidence in the record clearly indicates that mortgage #2 did not supplement mortgage #1. On September 24, 2012, mortgage #1 was paid off and its Satisfaction of Mortgage was recorded on October 11, 2012. While mortgage #2 was executed on September 24, 2012, it was not recorded until November 21, 2012, a date which was approximately six weeks after the Satisfaction of Mortgage for mortgage #1 was recorded.

There is nothing in mortgage #2 to indicate that it corrected or perfected mortgage #1, that it provided additional or further security for the payment of mortgage #1, that it in any way coordinated or consolidated mortgage #1 with mortgage #2, that it modified mortgage #1 or that it severed the lien of mortgage #1 into a separate lien (*see* 20 NYCRR 645.1). Mortgage #2 created a new debt, which petitioners promised to pay to a new lender, NYCB, and it contained no reference to the previous mortgage with Republic or its successor HSBC Bank.

Petitioners unsuccessfully assert that they merely modified their original loan. A modification is an adjustment or alteration that partially changes a subject. This was not merely a modification, but a replacement of one debt for another, with all new terms, after the extinguishing of the original debt. Had petitioners merely modified the original loan, as alluded

to by the Division's denial letter, a Consolidation, Extension, Modification Agreement (CEMA) would have been used. The New York CEMA makes a clear reference to the combination of rights and obligations, notes and mortgages, as well as to "earlier agreements," meeting the requirement of 20 NYCRR 645.1 that the terms of the subsequent mortgage make reference to the prior recorded primary mortgage. Petitioners' mortgage was not a CEMA (*see* New York Consolidation, Extension, and Modification Agreement-Single Family-Fannie Mac/Freddie Mac Uniform Instrument, Form 3172, [www.freddiemac.com]), and although petitioners' purpose for refinancing their loan was to modify the terms of their original mortgage, i.e., lower their interest rate, the new mortgage was not a CEMA and simply does not meet the criteria in 20 NYCRR 645.1 (a) (5), as stated in its entirety. Critically important is the mandate of the Tax Appeals Tribunal in *Matter of David and Weiss* that, in order to qualify for the supplemental mortgage exemption set forth in Tax Law § 255 (1) (a) (i), petitioners had to have recorded mortgage #2 prior to discharging the lien of the original mortgage (#1). Since mortgage #2 was recorded on November 21, 2012, mortgage #1 was paid on September 24, 2012 and the Satisfaction of Mortgage recorded on October 11, 2012, it is clear that mortgage #2 was not recorded before mortgage #1 was discharged. While mortgage #2 was executed on September 24, 2012, a date which was prior to the discharge of mortgage #1, the Tribunal's language in *Matter of David and Weiss* is unambiguous that in order to qualify for the supplemental mortgage exemption, the taxpayer had to have *recorded* the subsequent mortgage prior to discharging the lien of the original mortgage, which, in the present matter, was not the case. Accordingly, the Division's denial of petitioners' claim for refund of mortgage recording tax was proper.

I. The Division's motion for summary determination is hereby granted and the petition of Scott and Krystyna Katz is denied.

DATED: Albany, New York
January 14, 2016

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE