

BUREAU OF LAW

MEMORANDUM

Misc. Fed. Determinations
Mortgages - Land & Ten.
Sheepshead Cabana, Inc.
A-Z
1968

TO: State Tax Commission

FROM: E. H. Best, Counsel

SUBJECT: Application of Sheepshead Cabana, Inc.
(Miramar Yacht Club, Inc. and Nel-Jay
Realty Company, Inc.) for Refund of
Mortgage Recording Taxes

The entire file, including the report and recommendations of Hearing Officer Samuel Lorvan, and proposed order were submitted to the Law Bureau for review.

Sheepshead Cabana, Inc. seeks refund of \$2,500.00 out of \$2,875.00 paid to the Register of the City of New York (Kings County) on recording a mortgage on April 26, 1967.

Sheepshead, as lessee, leased two adjoining parcels of real property in Kings County, New York from Miramar Yacht Club, Inc. of which one parcel was owned by Miramar in fee, and the other parcel held by Miramar, as prime lessee, from Nel-Jay Realty Company, Inc., the fee owner. Both the lease from Nel-Jay to Miramar and the lease from Miramar to Sheepshead expire at the end of 1982, with renewal options to December 31, 2024.

Sheepshead was obliged under its lease to improve the property with a Cabana Club and a Yacht Club. In order to finance the improvements Sheepshead borrowed \$400,000.00 from Lafayette National Bank, executing on August 9, 1962 a mortgage on its leasehold on both parcels as security for the loan. Mortgage recording tax of \$2,000.00 was paid on recording on August 14, 1962. Subsequently, on February 5, 1963, Sheepshead borrowed \$115,000.00 additional from Lafayette, executing another mortgage on its leasehold, which later mortgage contained a provision consolidating it with the prior mortgage executed August 9, 1962 and on which there remained due a balance of \$385,000.00, to constitute a joint lien of \$500,000.00. Mortgage recording tax of \$575.00 was paid on recording on February 6, 1963.

On April 17, 1967 Sheepshead borrowed an additional \$75,000.00 from Kings County Lafayette Trust Company, successor by merger to Lafayette National Bank, executing a mortgage note. As security for the loan, a mortgage was executed by Sheepshead, Nel-Jay and Miramar, as mortgagors, which mortgage was consolidated with the two prior leasehold mortgages, on which remained an unpaid balance of \$500,000.00 to spread the lien on the fee of the real property subject to the leasehold, and other land of Miramar, as well, to the total extent of \$575,000.00. This

mortgage exempted Nel-Jay and Miramar (neither of whom had signed or was liable on the note) from liability for any deficiency judgment on default.

On recording this mortgage on April 26, 1967, the Register of the City of New York demanded a mortgage recording tax of \$2,875.00, based on a principal debt of \$575,000.00, refusing to grant exemption of \$500,000.00 of the balance due on the prior leasehold mortgages, as requested in the affidavit of the attorney for the mortgagee, submitted with the mortgage on recording. The tax was paid under protest to the extent it exceeded \$375.00, on the contention that the mortgage was supplemental and exempt as to \$500,000.00 of the principal debt under Section 255 of the Tax Law. The Register contended that the mortgage was fully taxable as a new fee mortgage.

The issue involves the taxable status of a mortgage on land, executed by new and additional parties, as additional security for a pre-existing debt under a modification agreement of an existing recorded leasehold mortgage.

Section 255 of the Tax Law exempts from recording taxes certain mortgages, including additional mortgages imposing liens on property not originally covered by or described in prior recorded mortgages on which the recording taxes have been paid, to secure the same debt. To the extent, only, that new or further indebtedness is created or secured, the tax is imposed.

The recording of a collateral mortgage executed by a new obligor, as additional security for an existing debt already secured by a recorded mortgage, which prior mortgage remains a lien of record, does not create or secure a new indebtedness, on which mortgage recording taxes may be imposed, People ex rel. Banner Land Company v. The State Tax Commission, 244 N. Y. 159. Likewise, where no new indebtedness is created or secured thereby, an extension agreement wherein the terms of payment are modified as to a new obligor, is not taxable on recording, Suffolk County Federal Savings and Loan Association v. Bragalini, 5 N Y 2d 579.

It matters little whether the identities of the parties, obligor and obligee are changed; whether the interest rate is changed; whether the time for payment is changed; whether or not the new instrument is denominated an "indenture," "supplemental mortgage," "extension agreement" or whether the instrument to be recorded consolidates the new lien with a prior lien and spreads the lien to additional property, Matter of Park and 46th Street Corporation v. State Tax Commission, 295 N. Y. 173; Bredsky v. Murphy, 26 A D 2d 225, aff'd 20 N Y 2d 828; Matter of Fifth Avenue Corporation v. Bragalini, 4 A D 2d 387.

Where, however, as in Consolidated Edison Company of New York v. State Tax Commission, 27 A D 2d 779, the original

debt was paid and discharged with the proceeds realized on the sale of a new obligation, the recording of the "supplemental" indenture was held taxable, as securing new indebtedness. This is not the case here.

The Brodsky case, cited above, is particularly cogent, in that it concerned a prior mortgage on land and a subsequent collateral mortgage on a leasehold on the same land. In the instant matter, Sheephead's prior mortgages on the leasehold were consolidated and spread on the lien of the land, afterward. The difference, if any, is purely chronological, and of no substantive effect. Accordingly, I am of the opinion that the consolidation and spreader agreement contained in the mortgage executed April 17, 1967 by Sheephead, Nel-Jay and Miramar was supplemental within the meaning of Section 255 of the Tax Law to the extent of the existing lien of the recorded consolidated leasehold mortgages. Inasmuch as no new indebtedness was created or secured by such mortgage to the extent of \$500,000.00, I am of the opinion that the Register of the City of New York erroneously demanded mortgage recording taxes in excess of \$375.00 on the recording thereof; that the report and recommendations of Samuel Lorvan, Hearing Officer, be adopted; and that the order of the Tax Commission be substantially in the form submitted.

/s/

E. H. BEST

Counsel

March 27, 1968
AR:dv

STATE OF NEW YORK
DEPARTMENT OF TAXATION & FINANCE
BEFORE THE STATE TAX COMMISSION

Case No. _____

In the Matter of the Instrument executed by _____ :

MIRAMAR YACHT CLUB, INC.,
NEL-JAY REALTY COMPANY, INC.
and SHEEPSHEAD CABANA, INC.

to

KINGS COUNTY LAFAYETTE TRUST COMPANY _____

ORDER

APPLICATION having been filed by Sheepshead Cabana, Inc., for review of the determination of the recording officer of Kings County imposing mortgage recording tax in the sum of \$2,875 on the instrument in the form of a mortgage dated March 28, 1967, executed by Miramar Yacht Club, Inc., Nel-Jay Realty Company, Inc. and Sheepshead Cabana, Inc. to Kings County Lafayette Trust Company, recorded in the office of said recording officer on April 26, 1967, in Book 410 of Records, page 315; and

APPLICATION having also been made for refund of \$2,500, part of mortgage recording tax of \$2,875 paid to said recording officer at recording of said instrument;

AND the refund, if ordered, having been assigned by the applicant to Silverman & Lifschitz, Esqs.;

AND HEARING having been held before Samuel Lorvan, Hearing Officer, on December 5, 1967: Present: Hon. J. Lee Rankin, Corporation Counsel of the City of New York, (Hon. Samuel K. Handel, Special Assistant Corporation Counsel, of Counsel) appearing for the City of New York; Harry Rappaport, Esq., appearing for Miramar; Schoen & Spodek, Esqs., (Jules Spodek, Esq., of Counsel), appearing for Nel-Jay; and Silverman & Lifschitz, Esqs., (Leonard Lifschitz, Esq., of Counsel) appearing for Sheepshead; and a report having been made by said Hearing Officer;

NOW THEREFORE after examination of the record, the proofs and various documents submitted in the proceeding and the report of the Hearing Officer, and after due deliberation, it is

DETERMINED BY THE COMMISSION

1. The report of the Hearing Officer dated March 15, 1968 be and the same hereby is adopted.
2. The mortgage dated March 28, 1967, executed by Miramar, Nel-Jay and Sheepshead to the Trust Company secures maximum principal indebtedness of \$575,000; that at recording it was supplemental within the meaning of Section 255 of the Tax Law to the extent of \$500,000 to previously recorded mortgages upon which tax had been duly paid; that sworn statement of facts complying with the provisions of that statute was filed at recording; and that said mortgage was subject at recording to mortgage recording tax of \$375 computed upon new or further indebtedness secured in the sum of \$75,000.
3. The recording officer of Kings County, at recording, erroneously collected mortgage recording tax to the extent of \$2,500.

ORDERED

1. That G. Michael Morris, Register of the City of New York, recording officer of the County of Kings, be and he hereby is directed to deduct the sum of Two Thousand Five Hundred Dollars (\$2,500) in his hands or which shall come to his hands and to refund said amount to the applicant's assignees, Silverman & Lifschitz, Esqs.

2. That two certified copies of this order be mailed to the said recording officer, one of which he is directed to file with the records of his office and the other with the Treasurer of the City of New York as a warrant for the disbursement.

DATED *Apr. 26, 1968*

STATE TAX COMMISSION

[Signature]
PRESIDENT

[Signature]
COMMISSIONER

[Signature]
COMMISSIONER