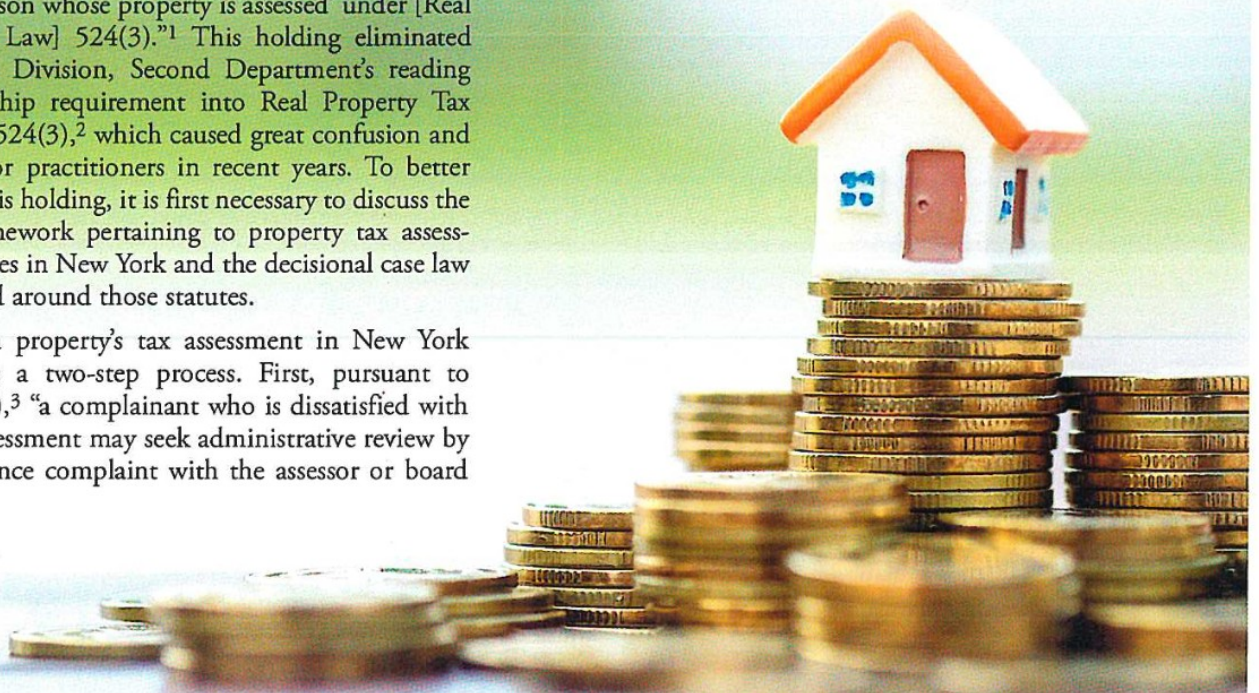


How a Housing Project, a Pancake House and a Car Dealership Impacted Tax Certiorari Practice in the State of New York

By Matthew S. Clifford

In *DCH Auto v. Town of Mamaroneck*, the New York State Court of Appeals unanimously reversed the Appellate Division, Second Department, and held that a “net lessee contractually obligated to pay the real estate taxes of the subject property is included within the meaning of ‘the person whose property is assessed’ under [Real Property Tax Law] 524(3).”¹ This holding eliminated the Appellate Division, Second Department’s reading of an ownership requirement into Real Property Tax Law (RPTL) 524(3),² which caused great confusion and uncertainty for practitioners in recent years. To better understand this holding, it is first necessary to discuss the statutory framework pertaining to property tax assessment challenges in New York and the decisional case law that developed around those statutes.

Challenging a property’s tax assessment in New York State involves a two-step process. First, pursuant to RPTL 524(3),³ “a complainant who is dissatisfied with a property assessment may seek administrative review by filing a grievance complaint with the assessor or board



of assessment review.”⁴ Second, once the board of assessment review has made a determination, any “aggrieved party” may seek judicial review of the assessment pursuant to RPTL article 7.⁵ A taxpayer is “aggrieved” under RPTL article 7 when the tax assessment has a “direct adverse effect on the challenger’s pecuniary interest.”⁶ An RPTL article 7 petition “must show that a complaint was made in due time to the proper officers to correct such assessment.”⁷

For over a century, New York courts had recognized that a person aggrieved by a property tax assessment (including persons other than the property owner) had standing to file a tax certiorari proceeding.⁸ Prior to 2012, it was understood by counsel for petitioners and municipalities alike that a party who had standing to file an RPTL article 7 petition possessed the requisite standing necessary to file the predicate grievance complaint with the municipal board of assessment review. This understanding evolved not only from the aforementioned case law, but from state guidance issued following the passage of RPTL 524(3) in 1982. This new provision tasked the commissioner of the Department of Taxation and Finance with preparing the complaint form to be used by complainants throughout the State of New York (with exception to cities having a population over 5 million people).⁹ In conjunction with drafting the complaint form, the State Board of Equalization and Assessment (now known as the Office of Real Property Tax Services, and hereinafter referred to as ORPTS) also drafted the accompanying instructions, which provided that “[a]ny person aggrieved by an assessment (e.g., an owner, purchaser or tenant who is required to pay the taxes pursuant to a lease or written agreement) may file a complaint (RP-524).”¹⁰

In addition, shortly after RPTL 524 was drafted, ORPTS was asked to opine “if a lessee in a shopping center has standing to bring a complaint before the board of assessment review and, subsequently, an Article 7 proceeding for judicial review of the assessment of the property containing the leased premises[?]”¹¹ After thoroughly analyzing existing case law, ORPTS concluded that “[a] shopping center lessee who is obligated by lease to pay taxes has the right to administrative and judicial review of the assessment of the property leased.”¹²

Circulo Housing Dev. Fund Corp. v. Assessor of City of Long Beach

In 2012, the Appellate Division, Second Department decided *Circulo Housing Dev. Fund Corp. v. Assessor of City of Long Beach (Circulo)*,¹³ a tax exemption case arising under RPTL article 4. Exemptions under RPTL article 4 are available exclusively to property owners, and only a property owner has standing to apply to the municipal assessor for those exemptions.¹⁴ In *Circulo*, the petitioner utilized three parcels identified as “East

Market Street,” “West Fulton Street,” and “East Hudson Street,” as a collective unit to operate a housing project for homeless individuals.¹⁵ The petitioner’s application for a property tax exemption pursuant to RPTL 420-a,¹⁶ as well as its grievance complaints, were denied by the City of Long Beach.¹⁷ Subsequently, the petitioner filed an RPTL article 7 petition challenging the denial of the exemption. The Supreme Court granted the city’s motion to dismiss, finding, inter alia, that the petitioner, who did not own the “East Hudson Street” property, lacked standing to commence the RPTL article 7 proceedings.¹⁸

The Second Department agreed with the Supreme Court, finding that because the petitioner did not own the “East Hudson Street” property, and there was no evidence before the court that the entity listed on the deed to that property filed a complaint, the petitioner “did not ‘show that a complaint was made in due time to the proper officers to correct such assessment,’ as is required (RPTL 706 [2]).”¹⁹ However, instead of citing to the ownership requirement found in RPTL 420-a pertaining to the exemption sought, the Second Department relied upon RPTL 524(3), which “requires that the property owner file a complaint or grievance to obtain administrative review of the tax assessment.”²⁰ This was the first time that an ownership requirement had been applied to RPTL 524(3), and the Second Department gave no reasoning and cited no rules of statutory construction to reach this result and did not reference the complaint instructions form or Opinion of Counsel prepared by ORPTS.

Larchmont Pancake House v. Board of Assessors

Five years later, in *Larchmont Pancake House v. Board of Assessors and/or the Assessor of the Town of Mamaroneck (“Larchmont Pancake House I”)*,²¹ the Appellate Division, Second Department applied this new ownership requirement to dismiss tax certiorari petitions filed by a non-owner occupant of the property. The property at issue was owned by Susan Carfora, and the business that operated on the property (an International House of Pancakes) was owned by Carfora and her daughters, Irene Corbin and Portia DeGast.²² There was no lease agreement between the property owner and the business owners; instead, the property owner and business operated under an informal agreement whereby the business paid the property taxes and occupied the property rent-free.²³ When Carfora died in 2009, the property was temporarily transferred into a trust before being transferred to its beneficiaries (her daughters).²⁴

Relying upon *Circulo*, the Town of Mamaroneck moved to dismiss the RPTL article 7 petitions, arguing that the Supreme Court lacked subject matter jurisdiction because the family business, and not the property owner,

filed the predicate grievance complaints and, consequently, petitioner failed to satisfy a condition precedent pursuant to RPTL 706(2).²⁵ The town also argued that the petitioner was not an aggrieved party and thus lacked standing to sue under RPTL 704(1). The petitioner opposed the motion, which the Supreme Court denied. The Town of Mamaroneck subsequently appealed.²⁶

The Appellate Division, Second Department reversed the Supreme Court's order and dismissed the petitions, finding that the condition precedent under RPTL 706(2) was not met because the family business, and not the property owner, filed the grievance complaints. Because the petitioner did not satisfy the condition precedent requirement, the Appellate Division concluded that Supreme Court "lacked subject matter jurisdiction to review the assessments[.]"²⁷

The petitioner sought, and the Court of Appeals granted, leave to appeal. In *Larchmont Pancake House v. Bd. of Assessors* ("Larchmont Pancake House II"),²⁸ the Court of Appeals focused on the issue of standing under RPTL 704(1). Although the petitioner paid the property taxes directly to the taxing authorities, the Court of Appeals concluded that the petitioner was not an aggrieved party within the meaning of RPTL 704(1), and thus lacked standing because it had "no legal authorization or obligation to pay the real property taxes[.]"²⁹ In so finding, the Court of Appeals noted that it had "no occasion to consider the parties' dispute concerning the scope of appropriate challengers under RPTL 524."³⁰

After Larchmont Pancake House I was decided, motion practice ensued throughout the 9th Judicial District and beyond, with municipalities seeking to dismiss RPTL article 7 petitions where the predicate grievance complaint was filed by a non-owner aggrieved party. In many instances, these motions were made notwithstanding the fact that at the time the grievance complaints were filed, petitioners' attorneys and the municipalities agreed that such filings were permissible pursuant to RPTL 524(3). As a result, net tenants whose leases obligated them to pay all of the property taxes and authorized them to challenge the real property tax assessments faced the real prospect of having the petition they filed dismissed and leave them with no possibility for judicial review.

DCH Auto v. Town of Mamaroneck

DCH Auto v. Town of Mamaroneck ("DCH Auto")³¹ involved the precise question left open by Larchmont Pancake House II: who may file a grievance complaint pursuant to RPTL 524(3)? Pursuant to its lease with the property owner, DCH was obligated to pay all of the property taxes and was authorized to challenge the real property tax assessments upon which the taxes were based.³² DCH timely filed grievance complaints challenging the property's assessments with both the Town

and Village Boards of Assessment Review.³³ At the time, the town's website stated that "[a]ny person aggrieved by an assessment, including a tenant who is required to pay the real estate taxes pursuant to a lease may file a complaint."³⁴ The town's website also directed taxpayers to the ORPTS website, which "similarly instructed that '[a]ny person who pays property taxes' including 'tenants who are required to pay property taxes pursuant to a lease or written agreement' may file an assessment challenge."³⁵

Upon receiving Notices of Determination from the Town and Village Boards of Assessment Review denying relief, DCH timely filed RPTL article 7 petitions challenging the town and village assessments.³⁶ Subsequently, and relying upon *Circulo*, the town and village jointly moved to dismiss all of the petitions, claiming a lack of subject matter jurisdiction due to DCH's "failure to satisfy a condition precedent for challenging the assessments," namely "[t]he failure of the [o]wner to submit [the] RP-524 [c]omplaints."³⁷ In opposition, DCH argued, inter alia, that the grievance complaints were properly filed because RPTL 524(3) did not provide that only an owner may file a complaint and that the plain text of RPTL 524(3) and Court of Appeals case law recognizes the right of a non-owner tenant who is responsible for paying the real property taxes to seek both administrative and judicial review of the assessment.³⁸

Based upon a stipulation of facts and documentary evidence jointly submitted by the parties, the Supreme Court granted the joint motion to dismiss the petitions, finding that it lacked subject matter jurisdiction because DCH "did not satisfy a condition precedent to the commencement of these proceedings because the owner did not file the complaints pursuant to RPTL 524(3)."³⁹ The court further held that "the failure of the owner to raise the RP-524 Complaint in the administrative process is a fundamental error which the courts cannot cure because of a lack of subject matter jurisdiction."⁴⁰

The Appellate Division, Second Department, affirmed, concluding that DCH "failed to satisfy the condition precedent to the commencement of an article 7 proceeding since it was neither the owner, nor identified in the complaints as an agent of the owner."⁴¹ The Appellate Division relied almost entirely upon its prior decision in *Circulo*.

The Court of Appeals granted DCH's motion for leave to appeal.⁴² The court began its analysis with the plain language of RPTL 524(3), and determined that the statute presented an ambiguity because the clause "person whose property is assessed" was not defined by the RPTL and was susceptible to more than one reasonable interpretation.⁴³ Recognizing that RPTL 524(3) did not require that a complaint be filed by the property owner, the court explained:

Had the legislature intended to require that only “owners” (or agents of owners) could initiate a grievance under RPTL 524(3), it would have been simple to use that word. Indeed, in RPTL article 5, the legislature used the word “owner” myriad times (RPTL 500; 502; 504[6]; 510–a; 510[1]; 511; 512[4]; 518; 520; 522[4][b]; 523[3]; 523–b; 524[4]; 525[4]; 543; 551–a; 553; 554; 556[2][b]; 556–b; 560[1]; 562; 564[1]; 566[1]; 574[1]; 575–a [3]; 575–b; 582; 586; 588[2]; 589[1]; 592[1][c]; 594; 596[3]). “We have firmly held that the failure of the Legislature to include a substantive, significant prescription in a statute is a strong indication that its exclusion was intended” (*People v. Finnegan*, 85 N.Y.2d 53, 58, 623 N.Y.S.2d 546, 647 N.E.2d 758 [1995] [citations omitted]). Here, the statutory language is broader – it provides that a complaint must contain a statement “by the person whose property is assessed” (RPTL 524(3)).⁴⁴

Additionally, the Court of Appeals noted that if a complaint is not filed by the “person whose property is assessed,” it nonetheless may be filed by “some person authorized in writing by the complainant.”⁴⁵ The court also observed that the legislature used the broad term “complainant” rather than the word “owner,” and “the statute gives no indication that the class of people who can authorize a third party to make the complaint is different from the class of people who may themselves file a grievance complaint.”⁴⁶ Moreover, the word “whose” “could reasonably be used and understood as denoting possession, not just ownership.”⁴⁷

The Court of Appeals next examined the legislative history regarding the clause “person whose property is assessed,” which demonstrated that a net lessee obligated to pay the real estate taxes of the leased real property may file a grievance under RPTL 524(3).⁴⁸ The court concluded that the legislative history and its own precedent made it clear that the legislature did not intend to limit the meaning of “person whose property is assessed” to “owners of real property.”⁴⁹

The court next explained that its interpretation construed the RPTL as a whole and harmonized RPTL 524 and 704:

Interpreting the RPTL such that a net lessee may both file the RPTL 524(3) complaint and (as is undisputed) the RPTL 704(1) petition, given that the complaint is a prerequisite to filing a petition, harmonizes the two statutory steps of our tax assessment scheme. Such a result ensures that the party with the economic interest and legal right to challenge an assessment will not be unable to raise a challenge because an out-of-possession landlord that lacks economic incentive fails to file an administrative complaint. It also avoids an inequitable result by which a net lessee may be precluded from obtaining full review of its assessment if the complaint was brought by an owner with different interests, because

a petitioner in an RPTL article 7 proceeding may not add grounds for review beyond those specified in the original RPTL 524(3) complaint (see *Matter of Sterling Estates, Inc. v. Board of Assessors of Nassau County*, 66 N.Y.2d 122, 127, 495 N.Y.S.2d 328, 485 N.E.2d 993 [1985]).⁵⁰

The Court of Appeals also recognized that its interpretation was “consistent with guidance from the New York State Department of Taxation and Finance, which instructs that lessees who are contractually obligated to pay real estate taxes are eligible to grieve tax assessments.”⁵¹

Finally, the Court of Appeals discussed the Appellate Division’s “restrictive” interpretation of RPTL 524(3), which held that “person whose property is assessed” only includes the property owner.⁵² This “restrictive” interpretation was based primarily upon the *Circulo* decision, which “was grounded on a misapplication of . . . *Matter of Sterling Estates* (66 N.Y.2d 122).”⁵³ As the Court of Appeals explained:

In *Circulo*, the Appellate Division interpreted RPTL 524(3) and announced that it contained an ownership requirement: “RPTL article 5 requires that the property owner file a complaint or grievance to obtain administrative review of the tax assessment” (*id.* at 1056, 947 N.Y.S.2d 559 [emphasis in original]). The Court gave no reasoning and cited no rules of statutory construction or legislative history to reach its holding, but instead cited only our decision in *Sterling*. In *Sterling*, however, we did not suggest – much less decide – that the owner of a property must file the administrative complaint. Instead, we emphasized that “it is essential that sufficient facts detailing the taxpayer’s complaint be presented to the assessors so that realistic efforts at adjustment can be made” (*Sterling*, 66 N.Y.2d at 125, 495 N.Y.S.2d 328, 485 N.E.2d 993). Our holding in *Sterling* turned on the substantive incompleteness of the administrative petition, not the identity of the filer (*id.* at 127, 495 N.Y.S.2d 328, 485 N.E.2d 993). Thus, to the extent that *Circulo* is inconsistent with our holding today, it should not be followed.⁵⁴

Accordingly, the Court of Appeals unanimously reversed the judgment and order of the Appellate Division brought up for appeal and denied the joint motion to dismiss.⁵⁵

Conclusion

The *DCH Auto* opinion is significant because it clarifies that a net tenant, who is contractually obligated to pay the landlord’s undivided interest in real estate taxes or if the lease confers to the tenant the right to challenge the real property taxes, has the right to file an administrative grievance complaint pursuant to RPTL 524(3). *DCH Auto* restored the law to its state of existence pre-*Circulo* and eliminated the Second Department’s reading of an ownership requirement into RPTL 524(3) where none

existed. As a result, net tenants contractually obligated to pay the real estate taxes can continue to file the administrative grievance complaints without the risk of dismissal solely because the tenant, and not the owner, filed the administrative grievance complaint.



Matthew S. Clifford is counsel to Griffin, Coogan, Sulzer & Horgan, which represented DCH Auto in this litigation.

Endnotes

1. 2022 N.Y. Slip Op. 03929, at *14 (June 16, 2022).
2. See *Circulo Housing Dev. Fund Corp. v. Assessor of the City of Long Beach*, 96 A.D.3d 1053 (2d Dep't 2012).
3. RPTL 524(3), entitled "Complaints with respect to assessments" provides, in relevant part:
Notwithstanding the provisions of section five hundred twenty-eight of this title, and except in cities with a population of five million or more, a complaint with respect to an assessment shall be on a form prescribed by the commissioner and shall consist of a statement specifying the respect in which the assessment is excessive, unequal or unlawful, or the respect in which real property is misclassified, and the reduction in assessed valuation or taxable assessed valuation or change in class designation or allocation of assessed valuation sought. Such statement shall also contain an estimate of the value of the real property. Such statement must be made by the person whose property is assessed, or by some person authorized in writing by the complainant or his officer or agent to make such statement who has knowledge of the facts stated therein.
4. *Larchmont Pancake House v. Bd. of Assessors*, 33 N.Y.3d 228, 235 (2019).
5. *Id.* The operative statute is RPTL 704(1), entitled "Commencement of proceeding" which provides, in pertinent part:
Any person claiming to be aggrieved by any assessment of real property upon any assessment roll may commence a proceeding under this article by filing a petition described in section seven hundred six of this chapter in the manner set forth in section three hundred four of the civil practice law and rules together with a notice in writing of an application for review under this article returnable not less than twenty nor more than ninety days after service of such petition and notice, except that in a city having a population of one million or more, such a proceeding shall be commenced by filing of a petition alone.
6. *Larchmont Pancake House*, 33 N.Y.3d 228 at 237 (quoting *Waldbaum, Inc. v. Finance Adm'r of City of N.Y.*, 74 N.Y.2d 128, 132 (1989)).
7. RPTL 706(2).
8. See, e.g., *In re Burke*, 62 N.Y. 224, 228 (1875) ("Either the owner whose title may be clouded by an illegal assessment, or a lessee who is under covenant to pay an assessment, is aggrieved when an invalid assessment is made . . ."); *In re Walter*, 75 N.Y. 354 (1878) (mortgagee was an aggrieved party following foreclosure where there was a deficiency upon sale and there was no proof that the mortgagor was personally liable for the deficiency); *EFCO Prods. v. Cullen*, 161 A.D.2d 44, 46-47 (2d Dep't 1990) (a nonfractional lessee who was contractually obligated to directly make payments in lieu of taxes levied against the lessor's undivided parcel was an aggrieved party with standing to maintain an article 7 proceeding); *McLean's Dep't Stores, Inc. v. Comm'r of Assessment of the City of Binghamton*, 2 A.D.2d 98, 100 (3d Dep't 1956) (lessee who was obligated to pay all property taxes under the terms of a lease was an aggrieved party under former Tax Law article 13 and had standing to file an administrative complaint); *Big "V" Supermarkets, Inc., Store # 217 v. Assessor of the Town of E. Greenbush*, 114 A.D.2d 726, 727-28 (3d Dep't 1985) (a fractional lessee of a shopping center who was contractually obligated to make payments in lieu of taxes levied against the entire property was an aggrieved party); *Ames Dep't Store, Inc., No. 418 v. Assessor*, 261 A.D.2d 835 (4th Dep't 1999) (fractional lessee obligated to pay a proportionate share of the real property taxes and which had a contractual right to contest said property taxes, was an aggrieved party within the meaning of section 704(1)).
9. See RPTL 524(3).
10. See https://www.tax.ny.gov/pdf/current_forms/orpts/rp524ins.pdf (last visited Aug. 5, 2022). ORPTS Publication 1114, entitled "Contesting Your Assessment In New York State," similarly advised that "[a]ny person who pays property taxes can grieve an assessment, including property owners, purchasers, [and] tenants who are required to pay property taxes pursuant to a lease or written agreement." See <https://www.tax.ny.gov/pdf/publications/orpts/grievancebooklet.pdf> (last visited Aug. 5, 2022).
11. 7 Opinion of Counsel SBEA No. 123 (Sept. 7, 1982).
12. *Id.* This Opinion of Counsel relied, in part, upon *McLean's Dep't Stores, Inc. v. Comm'r of Assessment of the City of Binghamton*, 2 A.D.2d 98, 100 (3d Dep't 1956), which involved the challenge to a property tax assessment brought under a local law. There, the Appellate Division, Third Department held that a lessee who was obligated to pay all property taxes under the terms of a lease was an aggrieved party under former Tax Law article 13 and had standing to file an administrative grievance complaint under the local law.
13. 96 A.D.3d 1053 (2d Dep't 2012).
14. See *Charter Dev. Co., LLC v. City of Buffalo*, 6 N.Y.3d 578 (2006); *Hebrew Free Sch. Ass'n v. Mayor, Aldermen & Commonalty*, 99 N.Y. 488 (1885); *Al-Ber, Inc. v. N.Y. City Dep't of Fin.*, 80 A.D.3d 760, 761 (2d Dep't 2011); *Young Ismel of Far Rockaway, Inc. v. N.Y.*, 33 A.D.2d 561 (2d Dep't 1969).
15. *Circulo*, 96 A.D.3d at 1054.
16. *Id.* RPTL 420-a, entitled "Nonprofit organizations; mandatory class" provides, in pertinent part:
Real property owned by a corporation or association organized or conducted exclusively for religious, charitable, hospital, educational, or moral or mental improvement of men, women or children purposes, or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes either by the owning corporation or association or by another such corporation or association as hereinafter provided shall be exempt from taxation as provided in this section.
17. *Id.*
18. *Id.* at 1055.
19. *Id.*
20. *Id.* at 1056 (emphasis in original).
21. 153 A.D.3d 521 (2d Dep't 2017).
22. *Id.* at 521.
23. *Larchmont Pancake House v. Bd. of Assessors*, 33 N.Y.3d at 239 n.1.
24. *Larchmont Pancake House I*, 153 A.D.3d at 521.
25. *Id.*
26. *Id.*
27. *Id.*
28. 33 N.Y.3d 228 (2019).
29. *Id.* at 240.
30. *Id.* at 240-41.
31. 2022 N.Y. Slip Op. 03929 (June 16, 2022).
32. See *id.* at *2.
33. *Id.*
34. *Id.* (internal quotations omitted).
35. *Id.* (quoting N.Y. State Dep't of Taxation & Fin., Office of Real Prop. Tax Servs., *Contesting Your Assessment in New York State* (Feb. 2012), <https://www.tax.ny.gov/pdf/publications/orpts/grievancebooklet.pdf> (last accessed June 9, 2022)).
36. *Id.*
37. *Id.* (internal quotations omitted).
38. *Id.*
39. *Id.* (internal quotations omitted).
40. *DCH Auto*, 2022 N.Y. Slip Op. 03929, at *2 (internal quotations omitted).
41. *Id.*
42. 37 N.Y.3d 903 (2021).
43. *DCH Auto*, 2022 N.Y. Slip Op. 03929, at *4.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *DCH Auto*, 2022 N.Y. Slip Op. 03929, at *6.
50. *Id.*
51. *Id.* (citing N.Y. State Dep't of Taxation & Fin., Off. of Real Prop. Tax Servs., *Contesting Your Assessment in New York State* (Feb. 2012) ("Any person who pays property taxes can grieve an assessment, including . . . tenants who are required to pay property taxes pursuant to a lease or written agreement"), <https://www.tax.ny.gov/pdf/publications/orpts/grievancebooklet.pdf>).
52. *Id.*
53. *Id.*
54. *DCH Auto*, 2022 N.Y. Slip Op. 03929, at *6.
55. *Id.*