

18 A.D.3d 836, 796 N.Y.S.2d 644, 2005 N.Y. Slip Op. 04388
(Cite as: **18 A.D.3d 836, 796 N.Y.S.2d 644**)

H
Supreme Court, Appellate Division, Second Department,
New York.
Ralph NEAMA, et al., respondents,
v.
TOWN OF BABYLON, Commercial Garbage District No. 2, etc., et al., appellants.
May 31, 2005.

Background: Commercial property owners brought action against town and others to recover a portion of a special tax assessment. The Supreme Court, Suffolk County, [Doyle](#), J., upon a decision of the same court, after a nonjury trial, granted plaintiffs' motion for class action certification and summary judgment on three causes of action in the complaint. Defendants appealed.

Holding: The Supreme Court, Appellate Division, held that plaintiffs failed to show that they were similarly situated with other property owners in the proposed class.

Affirmed as modified.

West Headnotes

[1] Jury 230  **19(17)**

[230](#) Jury
[230II](#) Right to Trial by Jury
[230k19](#) Civil Proceedings Other Than Actions; Special Proceedings
[230k19\(17\)](#) k. Proceedings Under Tax Laws. [Most Cited Cases](#)
A challenge to the validity of a tax assessment does not involve matters for a jury.

[2] Parties 287  **35.65**

[287](#) Parties
[287III](#) Representative and Class Actions
[287III\(C\)](#) Particular Classes Represented
[287k35.65](#) k. Taxpayers and License Holders or Applicants. [Most Cited Cases](#)
Plaintiffs seeking class certification in action to re-

cover a portion of a special tax assessment failed to show that majority of the proposed class, owners of improved commercial property in defendant garbage district, paid disputed tax assessment under protest and, consequently, that they were similarly situated with other property owners in the proposed class. [McKinney's CPLR 901](#).

[3] Parties 287  **35.63**

[287](#) Parties
[287III](#) Representative and Class Actions
[287III\(C\)](#) Particular Classes Represented
[287k35.63](#) k. Constitutional Challenges and Actions Against Government in General. [Most Cited Cases](#)

A class action is not superior to an ordinary lawsuit where it is brought against a government entity since stare decisis will afford adequate protection to the members of the class.

[4] Taxation 371  **2777**

[371](#) Taxation
[371III](#) Property Taxes
[371III\(J\)](#) Payment and Refunding or Recovery of Tax Paid
[371k2775](#) Right of Recovery of Taxes Paid
[371k2777](#) k. Voluntary Payment in General. [Most Cited Cases](#)
Generally, a tax voluntarily paid may not be recovered.

[5] Parties 287  **35.65**

[287](#) Parties
[287III](#) Representative and Class Actions
[287III\(C\)](#) Particular Classes Represented
[287k35.65](#) k. Taxpayers and License Holders or Applicants. [Most Cited Cases](#)
Commencement of a class action, purportedly on behalf of all similarly-situated taxpayers, to challenge imposition of special tax assessment was not a sufficient indication of protest by each proposed member of the class for purposes of determining whether class members would be entitled to refund after paying

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taxes.

**645 [Thomas E. Stagg, Debra L. Wabnik](#), of counsel), for appellants.

Costantino & Costantino, Copiague, N.Y. (Steven A. Costantino of counsel), for respondents.

THOMAS A. ADAMS, J.P., GABRIEL M. KRAUSMAN, NANCY E. SMITH, and PETER B. SKELOS, JJ.

*837 In a proposed class action by commercial property owners to recover a portion of a special tax assessment, the defendants appeal from an order of the Supreme Court, Suffolk County (Doyle, J.), dated May 14, 2003, which, upon a decision of the same court dated February 11, 2003, after a nonjury trial, in effect, pursuant to [CPLR 3212\(c\)](#), among other things, granted those branches of the plaintiffs' motion which were for class action certification and summary judgment on the first, third, and fifth causes of action in the complaint and, in effect, denied their cross motion for summary judgment dismissing the complaint.

ORDERED that the order is modified, on the law and the facts, by deleting the provision thereof granting that branch of the motion which was for class action certification and substituting therefor a provision denying that branch of the motion; as so modified, the order is affirmed, with costs to the plaintiffs.

[1] The Supreme Court properly conducted a nonjury trial, in effect, pursuant to [CPLR 3212\(c\)](#) to determine issues of fact raised on the competing motions for summary judgment. A challenge to the validity of a tax assessment does not involve matters for a jury (see **646 [Independent Church of Realization of Word of God v. Board of Assessors of Nassau County](#), 72 A.D.2d 554, 420 N.Y.S.2d 765). Moreover, the granting of summary judgment on the plaintiffs' equal protection and Town Law claims is supported by a fair interpretation of the evidence adduced at the trial and should not be disturbed (see [Matter of Frankel](#), 292 A.D.2d 526, 739 N.Y.S.2d 298; [Binns v. Billhimer](#), 271 A.D.2d 562, 706 N.Y.S.2d 706).

[2][3][4][5] However, we agree with the defendants' contention that the Supreme Court erroneously granted that branch of the plaintiffs' motion which was for class action certification pursuant to [CPLR 901](#). A

class action is not superior to an ordinary lawsuit where it is brought against a government entity since stare decisis will afford adequate protection to the members of the class (see [Matter of Martin v. Lavine](#), 39 N.Y.2d 72, 382 N.Y.S.2d 956, 346 N.E.2d 794; [Conklin v. Town of Southampton](#), 141 A.D.2d 596, 529 N.Y.S.2d 517). Furthermore, refunds are available only to those taxpayers who filed an appropriate protest (see [Duffy v. Wetzler](#), 260 A.D.2d 596, 688 N.Y.S.2d 659). This is because “[g]enerally, a tax voluntarily paid may not be recovered ([City of Rochester v. Chiarella](#), 65 N.Y.2d 92, 99, 490 N.Y.S.2d 174, 479 N.E.2d 810)” *838([Conklin v. Town of Southampton](#), *supra* at 597, 529 N.Y.S.2d 517). The plaintiffs failed to show that a majority of the proposed class-owners of improved commercial property in the defendant Commercial Garbage District No. 2-paid the disputed tax assessment under protest and, consequently, that they were similarly situated with other property owners in the proposed class (see [LaCarruba v. Legislature of County of Suffolk](#), 225 A.D.2d 671, 640 N.Y.S.2d 130; [Conklin v. Town of Southampton](#), *supra*). The commencement of a class action, purportedly on behalf of all similarly-situated taxpayers, is not a sufficient indication of protest by each proposed member of the class (see [Conklin v. Town of Southampton](#), *supra* at 598-599, 529 N.Y.S.2d 517).

To the extent that the Supreme Court, in its decision dated February 11, 2003, calculated the amount to be returned to the aggrieved taxpayers, we note that a mathematical error inflated the recovery figure. Any judgment to be entered on that decision should reflect an overpayment of \$741 in the special assessment charged to members of Commercial Garbage District No. 2 for the 1995 tax year, not \$1,044.

The defendants' remaining contentions are either unpreserved for appellate review or without merit.

N.Y.A.D. 2 Dept.,2005.
Neama v. Town of Babylon
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