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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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In the Matter of the Application of  
AMERICAN PROPERTY INVESTORS, LP  
by HUFF WILKES, LLP, Agent,

Petitioner,

v. Index #: 16820-04  
15801-03, 16665-02

THE TOWN OF MOUNT KISCO, ITS ASSESSOR and  
BOARD OF ASSESSMENT REVIEW,

Respondents.

-----X

In the Matter of the Application of  
AMERICAN PROPERTY INVESTORS, LP  
by HUFF WILKES, LLP, Agent,

Petitioner,

v. Index #: 5404-04  
5491-03

THE VILLAGE OF MOUNT KISCO, ITS ASSESSOR  
and BOARD OF ASSESSMENT REVIEW,

Respondents.

For a Review Under Article 7 of the RPTL.

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January 18, 2005  
Westchester County Courthouse  
111 Dr. M.L.K., Jr. Boulevard  
White Plains, New York 10601

BEFORE: HON. THOMAS A. DICKERSON,  
Supreme Court Justice

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APPEARANCES:

HUFF WILKES, LLP  
200 White Plains Road  
Tarrytown, New York 10591  
BY: DAVID C. WILKES, ESQ.  
AND: THOMAS A. MCTIGUE, ESQ.

JOHN J. DONOHUE, ESQ.  
19 North Moger  
Mount Kisco, New York 10549

JAMES PALMER, ESQ.  
Town of Mount Kisco

Sandra Perrone, CSR  
Senior Court Reporter

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2 THE COURT: Petitioner filed five  
3 notes of issue in this case. They are  
4 Index Numbers 16820-04, 15801-03,  
5 16665-02 against the Town of Mount Kisco,  
6 Index Number 5404-04 and 5491-03 against  
7 the Village of Mount Kisco.

8 On September 10, 2004, a scheduling  
9 conference was held in this matter. The  
10 parties by their attorneys David Wilkes  
11 and John Donohue and with the  
12 participation of Respondents' assessor  
13 appeared at the conference and set down a  
14 mutually agreeable schedule for the  
15 filing and scheduling of appraisals to  
16 take place on December 15, 2004, a  
17 pre-trial conference to take place on  
18 January 18, 2005, exchange of pre-trial  
19 memorandum on January 25, 2005, and trial  
20 to take place on February 22, 23, 24,  
21 2005.

22 There was no discovery requested by  
23 Respondents at this conference. On  
24 December 15, 2004, the appraisal exchange  
25 date, Petitioner delivered their trial

1  
2 appraisal to the Court pursuant to the  
3 scheduling order.

4 Respondents did not deliver their  
5 appraisal nor did they contact this Court  
6 with an explanation as to why their  
7 appraisal was not delivered pursuant to  
8 this Court's order.

9 On December 20, 2004, Tom McTigue  
10 from Huff Wilkes came to chambers  
11 inquiring whether Respondents had  
12 delivered their appraisal. He was told  
13 that they had not and my principal law  
14 clerk, Ms. Mechman, at my request, called  
15 Mr. Donohue to learn why he had not  
16 provided the Court with the appraisal.

17 Mr. Donohue informed Ms. Mechman  
18 that the appraisal was ready and would be  
19 delivered to chambers the following  
20 morning, December 21, 2004.

21 Mr. Donohue did not deliver the  
22 appraisal nor did he call the Court to  
23 explain why he had not delivered it. He  
24 did, however, have a letter hand  
25 delivered to the Court on December 21,

1  
2 2004, wherein he informed the Court that  
3 the property which is the subject of this  
4 action has "either been sold or is under  
5 a contract of sale or an agreement has  
6 been reached in principle between the  
7 owner of the property and the proposed  
8 purchaser."

9 Mr. Donohue then requested that an  
10 additional period of thirty days until  
11 January 15, 2005 be granted to the  
12 Village/Town of Mount Kisco to file their  
13 appraisal, so that they could give the  
14 information regarding the terms of the  
15 sale to the appraiser and expert  
16 witnesses.

17 Ms. Mechman called Mr. Donohue on  
18 December 21, 2004, and informed him that  
19 the Court had denied his request for a  
20 thirty-day extension for the filing of  
21 his appraisal.

22 Mr. Donohue informed the Court that  
23 he needed to speak to someone in his  
24 office and would probably file a motion  
25 regarding the issue of an extension.

1  
2 December 22, 2004, Petitioner filed  
3 the instant motion to strike any  
4 appraisal Respondents submit and to  
5 preclude the introduction of any  
6 testimony pertaining thereto that may be  
7 offered at trial.

8 Now, we are here for oral argument.

9 Just so the record is straight,  
10 papers that have been submitted to the  
11 Court consist of a Notice of Motion dated  
12 December 22, 2004, filed by Petitioner;  
13 an Affirmation in opposition to the  
14 motion to preclude by Mr. Donohue and  
15 that's dated January 5, 2005, and  
16 finally, a reply affirmation by  
17 Mr. Wilkes which is dated -- seems to be  
18 dated -- it obviously came last.

19 Those are the papers that we have  
20 before us and we are here for oral  
21 argument.

22 Mr. Wilkes, it is your motion.

23 MR. WILKES: Thank you, your Honor.  
24 There is no dispute that there was no  
25 appraisal put in to date. We are now

1  
2 more than a month after the Court ordered  
3 scheduled appraisal exchange date.

4 According to the scheduling order  
5 dated September 13, 2004, exchange of  
6 trial appraisals and reports of expert  
7 witnesses was to have occurred December  
8 15, 2004.

9 The Petitioner complied in every  
10 respect with the Court's order, not only  
11 filing a full trial appraisal report, but  
12 also filing two additional reports of  
13 Petitioner's anticipated experts  
14 regarding contamination at the property.

15 In connection with the filing of  
16 those reports, Petitioner would like the  
17 Court to know that Petitioner went to  
18 great lengths to ensure that those  
19 reports were filed in full compliance  
20 with the Court Order. We made no request  
21 for an extension despite fairly extensive  
22 efforts to make sure that the reports  
23 were filed timely.

24 The sole basis for Respondents'  
25 opposition to this motion to preclude any

1  
2 evidence from the Town and Village is not  
3 that there was some sort of an  
4 inadvertent error or that the Court Order  
5 was overlooked, but rather a deliberate  
6 strategic reason, a tactical reason based  
7 on an alleged contract entered into by  
8 the Petitioner for the subject property  
9 that would sell the property many months  
10 after the June 1, 2004 taxable status  
11 date. That taxable status date is the  
12 last relevant date for purposes of these  
13 proceedings.

14 The law in the Second Department is  
15 absolutely clear, and if you look at the  
16 Spiegel decision cited in our briefs, the  
17 Spiegel decision says, "The taxable  
18 status date," I am quoting, "is not  
19 tentative as the value of real property  
20 is required to be assessed according to  
21 its condition and ownership as of the  
22 taxable status date," and the Court there  
23 cited RPTL 302.

24 That's the precise situation that we  
25 have here. We are looking at the

1  
2 ownership of the property as of June 1,  
3 2004, not what might have come  
4 afterwards. On that very basis alone,  
5 the entire reason for not submitting an  
6 appraisal falls through.

7           There is just no basis for it in law  
8 and that brings us to the next issue  
9 which is whether or not there was any  
10 prejudice suffered by Petitioner by the  
11 failure to comply with the scheduling  
12 order.

13           Now, I should point out in that  
14 regard as well, that the scheduling order  
15 by its very terms recites, I am quoting  
16 from the schedule order, "All parties are  
17 put on notice that these dates are to be  
18 complied with and no adjournments shall  
19 be granted except with specific  
20 permission of the Court for good cause  
21 shown. Failure to timely comply may  
22 result in the imposition of sanctions,  
23 including the striking of pleadings  
24 and/or preclusion of evidence." That's  
25 exactly what the Petitioner is saying

1  
2 that this Court should do.

3 Had the facts been different, had  
4 there been a request on the 14th of  
5 December, even the 15th of December,  
6 before Petitioner took the final step in  
7 complying with this order, had there been  
8 a request from the other side to get more  
9 time, there was perhaps a discovery issue  
10 that wasn't completely resolved to their  
11 satisfaction, whether or not there was  
12 any real merit as a matter of law in that  
13 kind of a request, I'm sure that the  
14 Petitioner would not have had a problem  
15 consenting to the adjournment, allowing  
16 both sides to go back to their corners,  
17 do what was necessary.

18 It would probably allow the  
19 Petitioner more time because whatever  
20 happens, more time is always helpful in  
21 putting together things like appraisals  
22 and expert reports. It certainly  
23 wouldn't have hurt, but we certainly went  
24 through the effort to get it in and we  
25 did get it in on time.

1  
2           No request was made prior to the  
3           exchange date and here we are, about a  
4           month later, and we are now discussing  
5           whether or not, again, not whether or not  
6           there should be some forgiveness of  
7           missing a date, but really rather whether  
8           or not this tactical decision to base the  
9           failure to file an appraisal on a notion  
10          of law that's simply at odds with the  
11          Second Department's law, whether or not  
12          we should use that as the basis for  
13          allowing the Respondents to have more  
14          time to put in an appraisal here, the  
15          prejudice as far as the Petitioner goes  
16          is in attorney time, expert witness time,  
17          the time it took to expedite the  
18          appraisal in order to get it done right.

19                 The problem is that you can't unring  
20                 the bell. The reports are in. Even if  
21                 this Court were to say, we are going to  
22                 undo everything. We are going to allow  
23                 you to take back your reports and do  
24                 whatever you think you need to do to  
25                 them, it just doesn't work that way.

1  
2           As a practical matter, we can't sort  
3 of -- I'm not being apologetic for our  
4 appraisal and our reports. I think they  
5 are very well done and I think they are  
6 accurate, but given more time, everybody  
7 can kind of work something over.

8           I can't say what kind of a better  
9 job we could do if we had more time, but  
10 I can say that whatever the case may be,  
11 it will certainly involve, if we had to  
12 do that, it would involve more cost and  
13 attorney's time, more cost in our  
14 appraiser's time, more cost and we have  
15 two expert witnesses for contamination  
16 issues, more cost in their time.

17           Certainly, I think the prejudice is  
18 clear there as well as the fact that we  
19 are on the verge of a trial here and we  
20 don't need to start going back to square  
21 one with this.

22           I am happy to answer any questions  
23 the Court may have.

24           THE COURT: Have a seat. Thank you.  
25 Let's now hear from Mr. Donohue.

1  
2 MR. DONOHUE: Your Honor, if I may  
3 address one issue that the Court read  
4 out, the discussion I had with your law  
5 clerk, again, I'm not attributing  
6 anything to what she understood. That  
7 isn't what my recollection --

8 THE COURT: Well, what's your  
9 recollection?

10 MR. DONOHUE: My recollection was  
11 that we did not submit the appraisal and  
12 that I would get back to her the next day  
13 with an answer. At that point, there was  
14 --

15 THE COURT: You didn't tell her you  
16 were going to submit the appraisal the  
17 next day?

18 MR. DONOHUE: Again, that was not my  
19 recollection of what I said.

20 THE COURT: Okay.

21 MR. DONOHUE: Again, I don't want to  
22 mislead the Court. If that's what she  
23 heard me say, I'm not saying --

24 THE COURT: Let's move on to the  
25 legal argument, if any.

1  
2 MR. PALMER: Your Honor, first, let  
3 me preface by saying, the Village of  
4 Mount Kisco -- we have not made any  
5 deliberate attempt here to withhold  
6 information --

7 THE COURT: Why didn't you submit  
8 the appraisal?

9 MR. PALMER: We didn't submit the  
10 appraisal because the Village had  
11 requested documentation from the  
12 attorneys for the Petitioners, several  
13 vital pieces of information that we in  
14 all honesty did not receive, specifically  
15 at the conference that we had in  
16 September, I had asked the Petitioner's  
17 attorney for a copy of a contract of sale  
18 dated in January of 2004 along with  
19 listing information and broker  
20 agreements. We did not receive that.

21 Apparently, there must have been  
22 some confusion because what I did receive  
23 from the attorneys for the Petitioners  
24 almost two months after our conference  
25 date was a broker's agreement, what they

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would receive if the property was sold.

What I was looking -- what I thought I made clear to the attorneys for Petitioners at that date, was not only the contract of sale from January of 2004, but a very basic question, how was the property owner marketing the property, where was he actually listing it, who was he advertising it to and we never received that information and I got even -- the attorneys will know, the Village was not trying to stall.

I went back and forth to the attorneys. We tried to make arrangements to have our appraiser go out to the site which we did. We finally made arrangements back in October to go back to the site.

Mr. Wilkes met me there at the property with our appraiser. I asked him once again, is the other information going to be forthcoming, information that our appraiser can and does need. At that time, we did not receive that

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THE COURT: Why didn't someone give us a call and say, hey, look, we've got a problem, why can't we have an adjournment? Why didn't you do that?

MR. DONOHUE: I think we dropped the ball there, your Honor,.

THE COURT: There is no question you dropped the ball. That's obvious.

MR. DONOHUE: Yes, your Honor.

MR. PALMER: I can tell you, the Village prides itself and we have never -- I have never had a Small Claims case that for the past many years, we have never had a case that's even come close to going to trial, in part because we have always tried to work with the property owners and the attorneys representing the Petitioners. It is not our intent to take needless time away from the Court.

THE COURT: It's okay. That's not argument. I love this stuff. I've got nothing better to do than to do my job. It is not a matter of needless time. I

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am here.

Anyway, what is your legal argument?  
Do you want a stay? What's the argument?  
What's the justification?

MR. PALMER: The justification is we  
would like the information that we never  
received to give to our appraiser so we  
can complete our analysis to submit to  
the Court.

THE COURT: Anything else?

MR. DONOHUE: No, your Honor.

THE COURT: Anything else you want  
to say, Mr. Wilkes?

MR. WILKES: I just would like to  
point out that as your Honor, I think,  
noted, I don't want to restate what you  
already said, but there was no appearance  
before the appraisal exchange date that  
there were any remaining discovery  
issues.

There had been correspondence on  
that. I provided in good faith what I  
had to provide. There is even  
correspondence in the record here about

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that.

It is unfortunate, I just want to note at least for the record, it is unfortunate that we have to bring this motion because we certainly have no intention of hitting the Town or Village over the head with something or playing a gotcha, but unfortunately, if we don't do this, out of -- I will leave it at that.

THE COURT: Have a seat.

It is this Court's decision that Petitioner's motion is premature at this time since Respondents have, as we all know, not yet filed an appraisal with the Court.

Although Respondents' request for an extension of time to file their appraisal has already been denied, this Court wanted to give counsel an opportunity to put their arguments on the record.

There is no dispute that the last taxable status date at issue in these proceedings occurred on June 1, 2004. Information regarding the present sale of

1  
2 the subject property comes long after the  
3 last taxable status date and is not  
4 relevant to this proceeding, citing  
5 SKM Enterprises, Inc. v. Town of Monroe,  
6 2 Misc.3d 1004(A), West. Sup. 2004;  
7 Spiegel v. Board of Assessors, 161  
8 A.D.2d. 627, Second Department, 1990;  
9 Matter of General Motors Corporation v.  
10 Assessor of the Town of Massena, 146  
11 A.D.2d. 851, Second Department, 1989;  
12 Matter of Adirondack Mountain Reserve v.  
13 Town of North Hudson, 99 A.D.2d. 600,  
14 Third Department, 1984, affirmed, 64  
15 N.Y.2d. 727, 1984, all of those cases on  
16 point.

17 Accordingly, the request by  
18 Respondents for additional time to  
19 prepare and file their trial appraisal  
20 with the Court is denied.

21 The trial will go forward on  
22 February 22, 2005, with pre-trial  
23 memorandum of no more than fifteen pages  
24 each due on February 8, 2005, to give a  
25 little bit of time.

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If you can work things out  
beforehand, let us know. Anything else?

MR. WILKES: Thank you, your Honor.

THE COURT: Motion is denied because  
the appraisal hasn't been submitted yet.  
It is held in abeyance, bottom line. I'm  
sure we will hear it again on the first  
day of trial.

(Recess taken.)

THE COURT: Any further  
applications?

MR. DONOHUE: Your Honor, I had  
discussion with the Petitioner's counsel  
with respect to the Respondents' right to  
obtain the copy of the appraisal and the  
reports he filed in this proceeding, our  
right to have them at this time. We  
would like --

THE COURT: You want a copy of his  
appraisal?

MR. DONOHUE: Right.

THE COURT: What's your position?

MR. WILKES: I am concerned that if  
the Respondents are intending to actually

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put in an appraisal and since we won't know until and if the Petitioners move to strike that appraisal, we won't know whether or not Respondents' appraisal may actually be stricken or allowed in.

I am concerned in the event this might be allowed in, it is essentially giving the Respondents now an unfair advantage in that they are able to scrutinize our appraisal and decide what they want to pick on or work with or refute and it is not really a fair fight anymore.

It defeats the whole idea of an appraisal exchange on the same date where each appraiser is independently appraising the property. I would be concerned that there would be prejudice to the Petitioner.

THE COURT: You say no?

MR. WILKES: I say no, that's correct. I will leave it at that.

THE COURT: Now, here is what the rules say. I am now looking at Section

## PROCEEDINGS

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G, I think it is 22 --

MR. WILKES: NYCRR.

THE COURT: Section G says,  
Paragraph 1, "The exchange and filing of  
appraisal reports shall be accomplished  
by the following procedure: Subgroup I,  
The respective parties shall file with  
the clerk of the Trial Court one copy, or  
in the event that there are two or more  
adversaries, a copy for each adversary,  
of all appraisal reports intended to be  
used at the trial."

The way it is done in my part is  
that both sides bring their appraisals to  
my office, so I am the clerk.

Here is Subparagraph II, "When the  
clerk shall have received all such  
reports, the clerk forthwith shall  
distribute simultaneously to each of the  
other parties a copy of the reports  
filed."

In other words, you bring those  
reports to me on the same date, same  
time, same place, I do my magic and I

1  
2 give you those reports. Well, obviously,  
3 a prerequisite to getting the report is  
4 giving the report.

5 Now, the answer is no, you are not  
6 getting it, but if over the next 48  
7 hours, you can come up with a case that  
8 says you should get it, tell me. Do a  
9 little research. I am just reading  
10 what's in this, this book of rules.

11 If you find a case that says that  
12 even though you don't give a report, you  
13 should get a report, let us know. So the  
14 answer is no, you are not getting it, but  
15 if you can instruct us otherwise, I would  
16 be happy to comply to a higher authority.  
17 Anything else, any other applications?

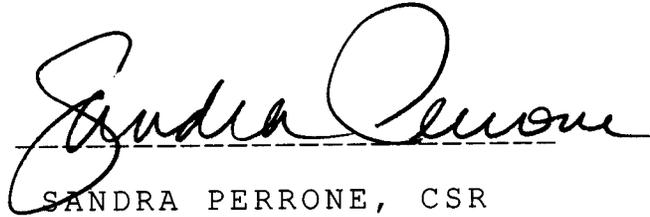
18 MR. DONOHUE: No, your Honor.

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PROCEEDINGS

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THIS IS TO CERTIFY THAT THE FOREGOING  
IS A TRUE AND ACCURATE TRANSCRIPTION  
OF THE ORIGINAL STENOGRAPHIC RECORD.



Sandra Perrone

SANDRA PERRONE, CSR

Senior Court Reporter