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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF WESTCHESTER JOINT WATER WORKS,

Appellant,

-against-

No. 77

ASSESSOR OF CITY OF RYE,

Respondent.

20 Eagle Street
Albany, New York 12207
April 27, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: First matter on the
2 calendar is number 77, Matter of Westchester Joint
3 Water Works v. the Assessor of the City of Rye.

4 Counsel.

5 MR. DAVIS: Good morning, Ms. Chief Judge,
6 and good morning, Your Honors; may it please the
7 court, my name is Stephen Davis. I'm the attorney
8 for the appellant in this case, and I'm from White
9 Plains. And I do request three minutes of rebuttal
10 time.

11 CHIEF JUDGE DIFIORE: You have three
12 minutes, sir.

13 MR. DAVIS: Thank you.

14 CHIEF JUDGE DIFIORE: You're welcome.

15 MR. DAVIS: This case is a recommencement
16 case. The dismissal case is gone and finished, and
17 this is for leave to recommen - - - to recommence
18 after the dismissal, and only to the issues related
19 to recommencement are the issues before the court.

20 CHIEF JUDGE DIFIORE: So, counsel, what's
21 the purpose of the good cause shown provision if a
22 party can later invoke C.P.L.R. 205(a)?

23 MR. DAVIS: In every dismissal statute,
24 provides for dismissal and the parties can always
25 invoke the recommencement provision, and by

1 recommencing - - - and that's a provision of the
2 statute so that litigants get their day in court on
3 the merits of the case. It does render every
4 dismissal statute superfluous. It's nothing novel.
5 And in two cases of this court, one with the Long
6 Island Railroad, where notice of arbitration was - -
7 - well, actually, notice that they were going to file
8 a claim had to be filed, dismissal for not doing so,
9 and the other one for suing to get some taxes
10 straightened out, you had to pay the tax first.

11 JUDGE ABDUS-SALAAM: So if there's a
12 dismissal on the merits, counsel, then you cannot
13 recommence the case; is that correct?

14 MR. DAVIS: If it's a dismissal on the
15 merits, you cannot recommence. But this case
16 involved a procedural failure, a failure subsequent
17 to the commencement to mail out copies of the tax
18 certiorari papers to a nonparty, the superintendent
19 of schools. And the statute was - - -

20 JUDGE ABDUS-SALAAM: Well, by statute,
21 they're not a necessary party, but they're entitled
22 to notice, correct?

23 MR. DAVIS: They're entitled to notice.

24 JUDGE ABDUS-SALAAM: Before - - - before
25 you bring your lawsuit or at the time you bring it.

1 MR. DAVIS: No, subsequent to commencement,
2 within ten days after commencement. And that's to
3 give them the opportunity to intervene, and the
4 statute so provides.

5 JUDGE ABDUS-SALAAM: But you - - - but your
6 client didn't do that in this case.

7 MR. DAVIS: Unfortunately, I didn't do that
8 for ten years - - - for nine years running.

9 JUDGE STEIN: Well, and isn't the purpose -
10 - - one of the purposes of that notice and to allow
11 them to intervene is so that they can adequately
12 prepare for - - - for any - - - one thing being
13 refunds that might be owed if - - - if the proceeding
14 is - - -

15 MR. DAVIS: Well - - -

16 JUDGE STEIN: - - - is decided favorably to
17 the petitioner?

18 MR. DAVIS: They're - - - they're really
19 not prejudiced because, on the recommended action,
20 they once again will have the opportunity to
21 intervene and to set their - - -

22 JUDGE STEIN: Well, that's not clear, is
23 it, under the - - -

24 MR. DAVIS: - - - rights.

25 JUDGE STEIN: - - - under the Education Law

1 whether that - - - that would allow the - - -

2 MR. DAVIS: The Educat - - - there's - - -
3 there's nothing in the Education Law that says that
4 they - - - that they can't intervene later on. No,
5 they will not be able to make - - - create the
6 sinking fund, but for generations - - -

7 JUDGE STEIN: Well, that - - - that could
8 be pretty presid - - - prejudicial, couldn't it?

9 MR. DAVIS: No, it couldn't because for
10 generations, school districts, when they had to make
11 their refunds, they would borrow the money. It
12 really makes no financial difference whether or not
13 they create a sinking fund or whether they borrow it
14 after the action's commenced.

15 JUDGE PIGOTT: Well, that's not exactly
16 true. In fact - - - in fact, that's why the statute
17 did - - - why they amended the statute to give them
18 notice because, you know - - - and by the time - - -
19 and this is another one, you've got ten years going,
20 now they've tried to cut that off and say you - - -
21 you can only wait, you know, about three years and
22 you better move your - - - your cert case.

23 MR. DAVIS: Well, they can - - - at the - - -
24 -

25 JUDGE PIGOTT: But the reason - - - just to

1 finish my thought, the reason was the school
2 district's saying wait a minute, you know, these
3 things are going on for ten years; you know, the
4 school taxes are, let's say, 36,000 dollars; that's
5 360,000 dollars; and if we have to take that out of
6 this budget for all those, we can't do it. So you
7 got to give us notice, and then we can start setting
8 - - - setting money aside, and then we're better off.

9 MR. DAVIS: With a thirty-five-million-
10 dollar-a-year budget of this particular school
11 district, we're talking about a de minimis amount.
12 We're talking about, if you pay it out over time on
13 borrowing the money, it would be about one-tenth of
14 one percent a year.

15 JUDGE PIGOTT: Right, right. And that - -
16 - that's a reason to vote against the amendment, but
17 the fact of the matter is that they did amend it and
18 they said they're entitled to notice, and the reason
19 is so that they could plan for it and set these
20 sinking funds aside. And I mean, you make an
21 argument that, you know, maybe they - - - that
22 shouldn't be, but that's what it is.

23 MR. DAVIS: I - - - I'm not arguing that it
24 shouldn't be. I'm arguing that it makes no financial
25 difference. If you borrow the money later on, you've

1 got to pay back the same money. I get the impression
2 that the big problem the school district has here is
3 that they don't want to refund the taxes in the first
4 place. But if you've been over - - - if the property
5 is over assessed and the taxpayer is harmed by it,
6 he's entitled to a refund. The law requir - - -
7 provides for refunds.

8 JUDGE STEIN: Well, but isn't 205(a), it -
9 - - it requires that - - - it only applies when an
10 action has been timely commenced in the first place.

11 MR. DAVIS: This was.

12 JUDGE STEIN: Right. So assuming this was,
13 but isn't the purpose of that so that the party
14 against whom the action was brought would have had
15 timely notice?

16 MR. DAVIS: And on - - -

17 JUDGE STEIN: And isn't that the same
18 purpose of the notice in - - - in the RPTL?

19 MR. DAVIS: That's the purpose, and upon
20 recommencement, you can be absolutely sure I will
21 give timely notice. I won't make the same mistake
22 twice.

23 JUDGE STEIN: But - - - but it - - - but
24 it's a requirement of - - - my point is it's a
25 requirement of - - - of the C.P.L.R. provision that

1 there be timely notice in the first place - - - not
2 that there be timely notice when it's recommenced
3 which is what you're arguing.

4 MR. DAVIS: No, it doesn't.

5 JUDGE STEIN: Okay.

6 MR. DAVIS: The - - - the notice provision
7 provides whether it's in the first instance or
8 whether on a - - - it's a recommenced case. It's a
9 brand new case on recommencement, and I'll have to do
10 everything that I would have had to do the first time
11 around, which includes recommence - - - giving notice
12 to the school district subsequent to commencement.

13 JUDGE ABDUS-SALAAM: Counsel, what's your
14 best case for this being a procedural problem as
15 opposed to one on the merits?

16 MR. DAVIS: Well, I take a look at the two
17 cases cited in support of the decision, both the
18 Wyeth case and this case, which was Cornwall Yacht
19 Club and Yonkers Contracting, and neither of the two
20 of them had to deal with procedural matters, which
21 this is a procedural matter. There's nothing
22 substantive about the case. It does not go to the
23 heart of the cause of action that, subsequent to
24 commencement, the school district didn't know about -
25 - - know about it for several years. That's got

1 nothing - - - a tax certiorari proceeding deals with
2 the value of real estate. Having notice of it has
3 got nothing to do with the value of real estate. So
4 it's not a matter of merits.

5 Now if - - - as in the Cornwall Yacht Club
6 case, that case had been decided by consent judgment
7 in settlement of the tax certiorari, so the taxpayer
8 was stuck with the judgment. That's why that one was
9 a judgment on the merits. He was stuck with it. He
10 consented to it. It - - - but it had nothing to do
11 with whether or not he - - - so he - - - he couldn't
12 be heard to complain later on, not because it - - -
13 it made the statute superfluous but because he
14 consented to a final resolution, the consent judgment
15 to - - -

16 JUDGE FAHEY: Well, bas - - -

17 JUDGE STEIN: - - - the tax certiorari
18 proceeding.

19 JUDGE FAHEY: Basically, though, you have
20 four cases, right; Lavancher, which is a Fourth
21 Department case; and Con Ed, which is a Second
22 Department case - - -

23 MR. DAVIS: Yes.

24 JUDGE FAHEY: - - - has granted 205(a).

25 MR. DAVIS: And I've got two more.

1 JUDGE FAHEY: You've got two more too?

2 MR. DAVIS: Yes, I've got the
3 Bloomingdale's case.

4 JUDGE FAHEY: I see.

5 MR. DAVIS: In the Bloomingdale's case, the
6 Appellate Division Second Department, I'm sure
7 another panel of the Appellate Division Second
8 Department, saw no problem in allowing the taxpayer
9 to litigate the case.

10 JUDGE FAHEY: And what's your - - - you're
11 running out of time. What's your last one?

12 MR. DAVIS: The last one was - - -

13 JUDGE FAHEY: Don't worry if you don't have
14 it right in front of you.

15 MR. DAVIS: Yeah, I - - - I don't have it.

16 JUDGE FAHEY: It's no - - - don't worry.
17 It's - - - it's no problem.

18 MR. DAVIS: Oh, Con Edison, Bloomingdale's,
19 and Lavancher.

20 JUDGE FAHEY: Yeah, let - - - let me ask
21 one last question.

22 MR. DAVIS: Yes.

23 JUDGE FAHEY: There has been a - - - we
24 have been referred to W.T. Grant v. Srogi case. Are
25 you familiar with that?

1 MR. DAVIS: Yes, I am.

2 JUDGE FAHEY: All right, just - - -

3 MR. DAVIS: In that - - -

4 JUDGE FAHEY: Slow down. In that case, the
5 court - - - I don't know if it's a ruling or merely
6 an observation. It says "As a general rule, there
7 should be no resort to the provisions of the C.P.L.R.
8 in instances where the RPTL expressly covers the
9 point in issue."

10 MR. DAVIS: Yes. And that - - -

11 JUDGE FAHEY: That language is tough for
12 you.

13 MR. DAVIS: Yeah, that case has got it
14 backwards.

15 JUDGE FAHEY: I see.

16 MR. DAVIS: Or at least the interpretation
17 made by the respondents have it backwards. It's the
18 question which is the important statute. In that
19 case, the RPTL was the important statute as to costs,
20 and there the RPTL prevail - - - prevailed. In this
21 case, the recommencement statute is the important
22 statute, so that present - - - prevails over - - -

23 JUDGE FAHEY: The reason I ask is because
24 it seems like you have an RPTL statute that narrows
25 your ability to recommence over 205(a) which has no

1 restrictions at all on your recommencement. And
2 normally, you would say that the statute that narrows
3 the right to recommence or narrows the right to take
4 a particular action, would - - - would preempt these
5 - - - the broader statute.

6 MR. DAVIS: Well, the RPTL says nothing
7 about recommencement. It's totally silent about
8 recommencement.

9 JUDGE FAHEY: No, I understand. It says
10 good - - - it says good cause shown for - - - for
11 reconsideration.

12 MR. DAVIS: Right, to me - - -

13 JUDGE FAHEY: That's what we're talking
14 about here.

15 MR. DAVIS: - - - that means they - - - an
16 extension of leniency by the legislature. In effect,
17 what the legislature did is that it said first, try
18 to show good cause. If that doesn't work, well, you
19 still have 205(a) available to you. And my last
20 point, just to wind up, is that, in effect, this case
21 has created a fifth exception to the recommencement
22 statute. What it says is if you don't - - - if you
23 can't establish a need for leniency, then you're not
24 entitled to recommencement, and I don't think that's
25 what the legislature had in mind.

1 CHIEF JUDGE DIFIORE: Thank you, sir.
2 Counsel.

3 MR. SHARFF: Good afternoon, Your Honors;
4 Marc Sharff, Shaw, Perelson, May & Lambert for the
5 Rye Neck School District. My initial note, Your
6 Honor, is - - - is W.T. Grant v. Srogi. We don't
7 think the court needs to reach 205(a) at all. The
8 legislature set forth a very clear, very specific
9 statute in 708(3) under the RPTL. They did so, in
10 fact, looking at the legislative history and it's
11 contained within the briefs, in - - - in attempting
12 to ensure that a school district, in particular, the
13 unique relationship and role of a school district in
14 tax certiorari proceedings is protected so that it
15 gets notice of tax certiorari petitions. Under - - -

16 JUDGE RIVERA: He says you're not
17 prejudiced. You're not harmed because you get a loan
18 or there are other ways that you could address this
19 concern. Is that true?

20 MR. SHARFF: I'm - - - I'm sorry, Your
21 Honor?

22 JUDGE RIVERA: I'm saying he's saying
23 you're not harmed in this. There's no prejudice.
24 You could find a loan or there's some other way to
25 protect that - - - that budgetary concern addressed

1 by the cert.

2 MR. SHARFF: Well, with all due respect to
3 counsel, that's correct, there are other ways, but
4 the purpose of the statute is to allow the school
5 district to make that choice, what's in the best
6 interest of the particular school district. In this
7 particular case, we have a school district that, long
8 before these proceedings, had created a tax
9 certiorari reserve fund, which it's permitted to do
10 so under very strict statutes, and had done so so
11 that it could - - -

12 JUDGE RIVERA: And that outweighs the
13 interest of the taxpayer on - - - on a correct
14 assessment?

15 MR. SHARFF: I'm sorry?

16 JUDGE RIVERA: That outweighs the interest
17 of the taxpayer of a correct assessment?

18 MR. SHARFF: I don't think it would
19 outweigh at all. I think it's on behalf of the
20 taxpayers because here the school district is able to
21 incrementally set aside funds that it potentially
22 could need in the event there's a tax cert
23 proceeding. It - - - it has a right to intervene
24 upon notice, but it also has a right to set aside
25 funds. Some districts do that, some districts don't.

1 The key with the legislature is to give the school
2 district that choice, to give it that option what's
3 in its best interest - - -

4 JUDGE FAHEY: But - - - but there does have
5 to be prejudice, you would admit?

6 MR. SHARFF: I would - - - I would
7 certainly acknowledge that there's extreme prejudice
8 in this particular case, which is unusual.

9 JUDGE FAHEY: It's tough to say that - - -
10 that you having to - - - to finance 300,000 dollars
11 in payback that you would be legally obliged to pay
12 if you had been notified on time is comparable to the
13 prejudice of losing 300,000 dollars completely.

14 MR. SHARFF: I'm not sure I would - - - I
15 would share that, Your Honor, because here's the
16 situation: the school district makes a choice had it
17 gotten notified - - -

18 JUDGE FAHEY: Um-hum.

19 MR. SHARFF: - - - it's putting money
20 aside. Now if it has to cut that check, we're
21 talking about a school district, and it's in the
22 record too, that generally does not have many tax
23 cert proceedings. Roughly - - -

24 JUDGE FAHEY: How big is the budget?

25 MR. SHARFF: - - - 100,000 dollars.

1 JUDGE FAHEY: How big is the school
2 district budget?

3 MR. SHARFF: Thirty-five - - - thirty-five
4 million dollars, approximately, now.

5 JUDGE FAHEY: So the number counsel gave is
6 correct.

7 MR. SHARFF: But small commercial
8 properties, so in the record they generally have - -
9 - roughly, they've averaged over ten years, I'm
10 disputing in the record, 100,000 dollars in refunds.
11 This one matter would be 200,000 dollars. They would
12 have to find that out of the general fund or bond it.
13 I'm not suggesting they couldn't do that, but they've
14 chosen that's not the best policy for the school
15 district, and they have a right to be notified.
16 That's what was taken away here, and the statute was
17 expressly designed for that because the right of the
18 school district, even though it's a not a party, to
19 be notified is absolutely critical.

20 JUDGE PIGOTT: Well, you're the - - -

21 MR. SHARFF: And it's - - -

22 JUDGE PIGOTT: You're the big tax - - - I
23 don't want to say assessor because you're not the
24 assessing unit, but the - - - the city is the one
25 that assesses it but in terms of the amount of money

1 that the taxpayer has to pay, the school district
2 quite often is the bigger lump of money.

3 MR. SHARFF: Absolutely.

4 JUDGE PIGOTT: So - - -

5 MR. SHARFF: And - - - and in fact, Your
6 Honor, I think that's part of what makes the RPTL
7 708(3) so significantly inconsistent with any kind of
8 recommencement because, on the one hand, the school
9 district, as Your Honor indicates, has no control
10 over the assessment process. They're not the
11 assessing unit. They have no say in it.

12 JUDGE ABDUS-SALAAM: Counsel - - -

13 MR. SHARFF: On the other hand, they are
14 the most vulnerable should there be an over-
15 assessment and should there be a need to refund.
16 That's why it's so important that they be notified.

17 JUDGE ABDUS-SALAAM: Counsel, this was
18 nine, going on ten years, of back - - -

19 MR. SHARFF: Yes.

20 JUDGE ABDUS-SALAAM: - - - taxes but - - -
21 or assessments. What if it were only one or two,
22 would we - - - would we be talking about the same
23 thing here?

24 MR. SHARFF: I don't know if the court
25 would be, but I would be. My position would be

1 exactly the same. If there's no notice, that's the
2 critic - - - critical element of this. The school
3 district needs to be notified so that it can decide
4 what's in its best interests. If its best interests
5 are to intervene, it has the right to do so. And in
6 fact, the legislature made that fairly easy. All
7 that was required of petitioner is to mail a copy to
8 the superintendent. There's no major burden here.

9 JUDGE PIGOTT: Well, you - - - you never
10 intervene, do you?

11 MR. SHARFF: No, not in this - - - in - - -
12 there's nothing in the record in this particular case
13 - - -

14 JUDGE PIGOTT: I don't think anybody does.
15 I mean if you intervene, what would you do?

16 MR. SHARFF: It would depend on the
17 district. I mean - - -

18 JUDGE PIGOTT: No, I mean, just it's an
19 assessment thing. I mean they're going to have an
20 expert saying that the property is worth zero, I
21 think that's what they put in their petition, and the
22 city is going to put in and their assessor's going to
23 say no, it's assessed at whatever we said it was.
24 But I don't know what your interest would be, other
25 than, as you point out, I mean you're the - - -

1 JUDGE RIVERA: - - - or the choice to
2 figure out whether or not to do a fund - - -

3 MR. SHARFF: Both.

4 JUDGE RIVERA: - - - or some other way to
5 protect itself?

6 MR. SHARFF: Both. To be notified and
7 decide what is in its best interests. Should we
8 intervene and participate? Should we create a tax
9 cert reserve fund? Should we just decide at the end
10 of the day to cut a check and hope for the best?

11 JUDGE RIVERA: So - - - so you could very
12 well choose not to create the fund and see what
13 happens in the assessment?

14 MR. SHARFF: Certainly. Certainly.

15 JUDGE RIVERA: And then you pay.

16 MR. SHARFF: That's not what this district
17 did.

18 JUDGE RIVERA: And then you pay if you had
19 - - -

20 MR. SHARFF: Correct.

21 CHIEF JUDGE DIFIORE: Thank you, counsel.

22 MR. SHARFF: Thank you.

23 CHIEF JUDGE DIFIORE: Counsel.

24 MR. CHAFIZADEH: May it please the court,
25 Darius Chafizadeh with the law firm Harris Beach for

1 the assessor of the City of Rye. Good afternoon,
2 Your Honors. 708(3), we believe, is a clear,
3 unequivocal, and the statute that should be followed
4 by this court and based on its previous precedent.
5 There's been discussion about prejudice to the school
6 district and prejudice at all. I think this court in
7 Copley made clear that prejudice is not the only
8 thing to consider, and really, is not to be
9 considered at all. As this - - - as the - - - this
10 court stated in Copley, RPTL 708(3) requires
11 petitioner to show good cause to excuse its failure,
12 to notify the appropriate school district, and not
13 merely to demonstrate the absence of prejudice. This
14 - - - that decision was in 2012 by this court, cited
15 in our brief. They admit they haven't shown good
16 cause. Now the question is is 708(3) then the
17 statute which requires a demonstration of unless
18 excused by good cause? Is that on the merits? Most
19 respectfully, we believe that it is.

20 JUDGE PIGOTT: Well, even - - - to - - - to
21 argue on the merits, you're saying 205 applies?

22 MR. CHAFIZADEH: I don't believe 205
23 applies, Your Honor.

24 JUDGE PIGOTT: So - - - so if it's not on
25 the merits, if - - - if 708 says, you know, it has to

1 be on the merits and they're considering it's not,
2 then the case is over. You - - - your only argument
3 is whether 205 applies, right?

4 MR. CHAFIZADEH: Right.

5 JUDGE PIGOTT: Okay.

6 MR. CHAFIZADEH: Well, that's - - - that's
7 the petitioner's position that 205 does apply.

8 JUDGE PIGOTT: Right.

9 MR. CHAFIZADEH: They've admitted they
10 haven't complied - - -

11 JUDGE PIGOTT: It's the only thing that's
12 before us.

13 MR. CHAFIZADEH: - - - they haven't
14 complied with 708(3).

15 JUDGE PIGOTT: I didn't - - - I didn't see
16 in the briefs. Isn't there - - - isn't there a
17 recent amendment to the law that says the tax certs
18 have to be disposed of within a certain number of
19 years?

20 MR. CHAFIZADEH: I believe it was three or
21 four years, Your Honor.

22 JUDGE PIGOTT: Yeah. Yeah, okay. I - - -
23 I didn't - - -

24 MR. CHAFIZADEH: And - - - and don't quote
25 me on it, but I believe that's true.

1 JUDGE PIGOTT: Yeah, because I know that
2 that's one of the problems here. You got nine years
3 and, you know, the school district is - - - is
4 confronting a pretty good - - -

5 JUDGE STEIN: So - - - so how is this on
6 the merits?

7 MR. CHAFIZADEH: It's on the merits because
8 this court in the Yonkers Contracting case that we've
9 cited discusses what on the merits means. It doesn't
10 mean it goes to the final assessment as petitioner
11 argued. In that case, it was a breach of contract
12 case. This court stated on the merits means - - -
13 doesn't necessarily mean okay, was the contract
14 breached or not. They - - - their indication was is
15 there a final conclusion of the case. Here 708(3)
16 clearly indicates unless good cause is shown meaning
17 that, unless you can show that, this case is
18 dismissed. Now the statute does - - -

19 JUDGE STEIN: But - - - but isn't this more
20 like some of the - - - some of the procedural matters
21 that - - - that come under 205(a)?

22 MR. CHAFIZADEH: I - - - I don't believe
23 so, Your Honor. The reason why is the RPTL, it's a
24 very specific issue, very narrow issue, and the
25 legislature chose to write specifically - - -

1 JUDGE STEIN: But - - -

2 MR. CHAFIZADEH: I'm sorry to interrupt.

3 JUDGE STEIN: But the issue here, right,
4 wasn't whether - - - whether they were entitled to
5 reassessment or anything of that nature. That never
6 happened, right?

7 MR. CHAFIZADEH: Correct.

8 JUDGE STEIN: Or that - - - or that they
9 couldn't sue the school district.

10 MR. CHAFIZADEH: Correct.

11 JUDGE STEIN: I mean I know here that they
12 - - - that they don't directly sue the school
13 district.

14 MR. CHAFIZADEH: Right. Right.

15 JUDGE STEIN: But - - - but - - -

16 MR. CHAFIZADEH: But I - - -

17 JUDGE STEIN: - - - they weren't a proper
18 party or - - - or anything of that nature that - - -
19 that would really go to the heart of - - - of the
20 case. This is you didn't serve notice.

21 MR. CHAFIZADEH: Right, and I - - - and I
22 think that this court in the Yonkers Contracting case
23 when it said did - - - did this - - - is this case a
24 final determination. So the - - - the legislature
25 could have said okay, the matter is dismissed under

1 708(3) - - -

2 JUDGE STEIN: It didn't say final
3 determination. It says final determination on the
4 merits. I mean, obviously, it's a final
5 determination.

6 MR. CHAFIZADEH: Right, but I - - - I think
7 the analysis - - - I mean that's what the Yonkers
8 Contracting case talks about. Okay, it's a breach of
9 contract case, and the argument was to this court
10 well, we never got to whether the contract was
11 breached or not. They dismissed it for some
12 procedural reason, and the court said no, on the
13 merits does not mean determining whether the
14 assessment was proper or not or what the settlement
15 would be.

16 And in corollary with the Yonkers
17 Contracting case, it doesn't matter. They never got
18 to the breach of contract issue, but they still said
19 it's on the merits. And the statute could have
20 turned around and said okay - - - the legislature
21 could have said if good - - - not if good cause is
22 shown but in the interest of justice or if there's
23 prejudice. They didn't say any of that. And since
24 they didn't, they specifically said you must show
25 good cause, and that was not - - - admittedly not

1 shown here, that the case it is dismissed, is on the
2 merits, is final. It was finally adjudicated.

3 JUDGE RIVERA: What would be an example of
4 - - - of it not being on the merits?

5 MR. CHAFIZADEH: I - - - I - - - not being
6 on the merits. I - - - I think there was some - - -
7 there were some procedural cases decided by this
8 court and the Appellate Divisions where - - - where
9 they don't - - - I think there was one case under the
10 Public Authorities Law or where - - - where they
11 weren't noticed - - - not someone wasn't noticed, it
12 was they didn't plead something in the complaint.
13 They didn't wait thirty - - - or thirty days in the
14 complaint or something. I think that they said that
15 that case was an issue on errors.

16 Let me check and see if I can find that
17 case. It had to do with when the - - - when a case
18 is dismissed - - - that was the Morris case in 1987
19 by this court, that the court dismissed the case
20 because it should have been filed by an order to show
21 cause, not a notice of petition. And they said that
22 was not on the merits, and they allowed
23 recommencement, your court did, under 205(a),
24 procedural - - - real procedural issues. Here we
25 have a specific statute with a specific requirement

1 that admittedly wasn't met.

2 JUDGE ABDUS-SALAAM: Well, wouldn't one - -
3 - one of the procedural issues be that the notice was
4 sent to the wrong party, instead of the
5 superintendent of the school district, it was sent to
6 somebody else in the school district? That would be
7 a procedural problem, wouldn't it?

8 MR. CHAFIZADEH: Potentially, yeah. Yeah,
9 but here, admittedly, they never served - - -

10 JUDGE ABDUS-SALAAM: They never sent the
11 notice.

12 MR. CHAFIZADEH: Right.

13 JUDGE ABDUS-SALAAM: That's the big problem
14 here.

15 MR. CHAFIZADEH: Correct.

16 JUDGE ABDUS-SALAAM: I mean they didn't
17 send it to the wrong party. They just didn't send it
18 at all.

19 JUDGE ABDUS-SALAAM: I think they sent it
20 to the - - - to a different school district here.

21 JUDGE FAHEY: You know, in the Yonkers
22 case, I thought that that was making a time limit an
23 element of the cause of action. You got - - - and -
24 - - and that seems to be markedly different than what
25 we have here. Here this isn't - - - the time limit

1 here is when you have to notify a nonparty. It's not
2 an element of the cause of action. That's the Port
3 Authority case, right?

4 MR. CHAFIZADEH: Right.

5 JUDGE FAHEY: Yeah.

6 MR. CHAFIZADEH: Right. Right.

7 JUDGE FAHEY: You see the distinction?

8 MR. CHAFIZADEH: Well, I - - - I see. You
9 know, we've - - - we've labored over that case for
10 some - - -

11 JUDGE FAHEY: Well, everybody cites it and,
12 you know, so it's - - - I'm not sure.

13 MR. CHAFIZADEH: But - - - but I think here
14 the element of the cause of action is you have to
15 notice the school district. You have a cause of
16 action for your assessment purposes. 708(3) says you
17 have to notice the school district.

18 JUDGE FAHEY: Well, no, not only the cause
19 of action, that would have to - - - have something to
20 do with the cause of action against the party that
21 you're talking about, not some nonparty over to the
22 side. That - - - that's a pure notice question.
23 Okay. All right.

24 MR. CHAFIZADEH: Thank you, Your Honors.

25 CHIEF JUDGE DIFIORE: Thank you, counsel.

1 JUDGE FAHEY: Thank you.

2 CHIEF JUDGE DIFIORE: Sir?

3 MR. DAVIS: Just for a moment, just to
4 straighten out the Yonkers Contracting case, there
5 were two reasons it was dismissed on the merits. One
6 thing is, as Your Honor said, the time limit was part
7 of the cause of action because the Thruway Authority
8 had surrendered its immunity, its sovereign immunity.
9 So that was one reason it was dismissed on the
10 merits.

11 But also, another reason was that while the
12 plaintiff there was fooling around with his other
13 actions, not only did he run through the one year,
14 but at the same time, he allowed the trier of the
15 facts, the arbitrator, the chief engineer, to come -
16 - - he had the final authority under the construction
17 contract. He made a decision that was what was owed.
18 So that was the merit - - - that was the second
19 aspect of where it was decided under the merits. Not
20 once but twice it was decided under the merits and it
21 had nothing to do with a procedural slipup.

22 JUDGE PIGOTT: Well, you gave notice to the
23 wrong school district, right?

24 MR. DAVIS: No, I didn't. I didn't give
25 any notice at all.

1 JUDGE PIGOTT: Oh, because I thought
2 counsel said - - -

3 MR. DAVIS: None whatsoever. I slipped up
4 for ten straight years, and there was another case
5 where counsel slipped up for - - - actually, it was
6 seven years in that case, and that was the
7 Bloomingdale's case. He discovered it probably when
8 he was counting his - - - his money while still
9 sitting at the table. He found out that he hadn't
10 served it. This was the Bloomingdale's case. He
11 went ahead and he delivered the papers.

12 JUDGE PIGOTT: But aren't the - - - aren't,
13 you know, the - - - the real property tax law is
14 unique and they have this - - - and - - - and nobody
15 wants to fool around with it. The - - - the
16 assessors don't, you know, they get these and for
17 years they used to stack them up. And then there was
18 a change - - -

19 MR. DAVIS: Right, they'd file it away and
20 nobody would - - -

21 JUDGE PIGOTT: Yeah, and there's a change
22 and a lot of it was inspired by the school districts
23 because they're the - - - they're the big tax
24 receiver, you know, on these things. So they said
25 get them done, and - - - and part of 708(3) is notify

1 them. And if you don't within ten days, you've got
2 an issue. And I thought Judge Abdus-Salaam's
3 question was - - -

4 MR. DAVIS: No, as I said before, you can
5 be sure the second time around on recommencement I
6 will notify them, and then they'll have the
7 opportunity - - - full opportunity to participate
8 just as though they had done it years ago. And in
9 the Bloomingdale's case, it was first granted leave
10 to recommence. And when that panel of the Second
11 Department received the case, they said no, we're
12 going to reverse that because it's silly having a
13 recommencement - - -

14 JUDGE PIGOTT: Let - - - well, let me ask
15 you before your time runs out: let's assume you - -
16 - everybody knows this, and you - - - and you say to
17 the assessor, you know, it's thirty grand a year, you
18 know, for the school district, I'm not going to
19 notice them now. Let's see if we can get this thing
20 settled in about twenty years, and then once we get
21 it settled, we can give a - - - you know, a
22 settlement package to them and we'll see what they
23 do. And if they agree with it, fine. If they don't,
24 well, then we'll let them in, and we'll re - - - you
25 know, we'll recommence the action, you know, as if it

1 started twenty years ago.

2 MR. DAVIS: Well, I think that's got to be
3 cured by the legislature if people are abusing it.

4 JUDGE PIGOTT: Well, there are those that
5 argue 708(3) did that, but we'll see.

6 MR. DAVIS: Yeah. Well - - - but in that
7 Bloomingdale's case, what they did is they said no,
8 we'll pick right up, we'll allow you to preserve nunc
9 pro tunc, we'll accept that, and get on with your
10 litigation because it just doesn't bother us that you
11 haven't given notice yet. You'll have plenty of time
12 to do that and the school district will participate.

13 CHIEF JUDGE DIFIORE: Thank you, counsel.

14 MR. DAVIS: You're welcome.

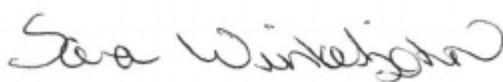
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Westchester Joint Water Works v. Assessor of City of Rye, No. 77 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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