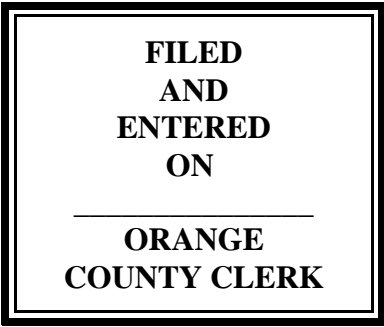


SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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In the Matter of the Application for
Review under Article VII of the Real
Property Tax Law of Tax Assessment



COMMERCE DRIVE ASSOCIATES, LLC

Index No: 5198/05

Petitioner,

DECISION & ORDER

-against-

THE BOARD OF ASSESSMENT REVIEW and/or
THE BOARD OF ASSESSORS of the Town of
Woodbury, Orange County, New York,

Respondents.

-----X

DICKERSON, J.

LOST IN WAYWAYANDA: IMPROPER SERVICE #3

In yet another exploration¹ of the requirements of proper service in tax certiorari proceedings, this Court is called upon by the Respondents, The Town of Woodbury and its Board of Assessment Review [" the Town of Woodbury "], to issue an Order dismissing the Petitioner's Notice of Petition and Petition for Review of Assessment [" the Petition "] because the Petitioner failed to serve the Town of

Woodbury with the Petition within the time limits set forth in Real Property Tax Law [" R.P.T.L. "] § 702(2).

Lost In Waywayanda

The Petition was filed with the Orange County Clerk on July 28, 2005. Having successfully completed this initial task, the Petitioner then served the Petition on the Town Clerk of the Town of Waywayanda. Unfortunately, the Town of Waywayanda is not the Town of Woodbury, the Respondent herein and the proper party to be served.

Town Of Woodbury Was Never Served

In addition to serving the wrong town the Petitioner never served the Town Clerk of the Town of Woodbury [See R.P.T.L § 708(1)("...if the assessment to be reviewed was made by the assessors of an assessing unit, service may be made by delivering three copies of the petition and notice to: (a) the clerk of such assessing unit...")].

According to its Town Clerk, Ms. Desiree Potvin, The Town of Woodbury was never served with the Petition. " I am the Town Clerk of the Town of Woodbury. I have held this position for 6 years...It is my responsibility to accept service of process on behalf of the Town of Woodbury...I was never served with any proceeding brought by Petitioner COMMERCE DRIVE ASSOCIATES, LLC. I have interviewed my assistants, and

none of them were ever served with any proceeding brought by Petitioner COMMERCE DRIVE ASSOCIATES, LLC. Lastly, I have reviewed my office's records and there is no record regarding service on the Town of Woodbury of any proceeding brought by Petitioner COMMERCE DRIVE ASSOCIATES, LLC."² Hence, according to Ms. Potvin, as of the date of the instant motion, August 23, 2005, the Petitioner had still not served the Town Clerk of the Town of Woodbury, as required by statute, within the statutory time period.

Failure To Timely Challenge Assessment Roll

On July 1, 2005, the Town of Woodbury completed its assessment rolls, filed the same in the Office of its Town Clerk and caused notice to be published. Since the last day set by law for the filing of the assessment roll was July 1, 2005, the last day for the Petitioner to serve the Town of Woodbury would have been thirty days later or July 31, 2005 [See R.P.T.L. §§ 702(2)(" Such a proceeding shall be commenced within thirty days after the final completion and filing of the assessment roll containing such assessment. For the purposes of this section an assessment roll shall not be considered finally completed and filed until the last day set by law for the filing of such assessment roll or until notice thereof has been given as required by law, whichever is later ") and 702(3)("...such failure to file or serve and file the petition or petition and notice within such time shall

constitute a complete defense to the petition and the petition must be dismissed ")].

Lastly, the Petition was filed with the Orange County Clerk on July 28, 2005 and then mistakenly served on the Town Clerk of the Town of Waywayanda on August 4, 2005. Even assuming *arguendo* that the Town Clerk of the Town of Waywayanda could somehow be considered an agent of service for the Town Clerk of the Town of Woodbury, the service was still four days late³.

What Happened?

According to Ms. Kristina Polizzi, an employee of the Petitioner's lawfirm, she was asked by a paralegal to serve a Notice of Petition and Petition for the review of tax assessments in several towns. She stated⁴ that she was given a manila folder with three (3) sets of three (3) papers, one of which was to be served upon the Town of Woodbury, one upon the Town of Waywayanda, and one upon the Town of Hamptonburgh. On the face of each of the sets of papers was a Post-It note which stated which town was to be served. Ms. Polizzi stated that she took the set of papers marked for service upon the Town of Woodbury out of the folder and served it upon the person she was instructed to serve, and then she prepared the affidavit of service. At the time she effectuated service upon the Town of Woodbury, she stated that she believed that the papers

that were being served were the appropriate and proper papers for the Town of Woodbury⁵. However, according to the Town of Woodbury, the " Petitioner had until July 31, 2005, to properly commence this proceeding by serving the clerk of the Town of Woodbury...To date, Petitioner has yet to serve the Town Clerk of the Town of Woodbury, as required. Furthermore, the time to do so has elapsed "⁶.

PETITIONER'S CROSS MOTION

Constructive Notice

The Petitioner opposes the Respondent's Motion to Dismiss, claiming that the Town of Woodbury received constructive notice of the Petition. The Petitioner claims that " within the statutory period and prior to August 15, 2005, the last date for service of the papers, the Town of Woodbury had either actual or at least constructive notice of the service of the papers whether properly on itself or through notification from the Town of Waywayanda. Either way, it is reasonable to assume that the Town of Woodbury received its notification of the commencement of this litigation on or before August 23, 2005. "⁷

Extending The Statute Of Limitations

The Petitioner also requests that if the Court finds that service was fatally defective, the Court should consider the applicable provisions of C.P.L.R. § 306(b). The Petitioner asserts that the service on August 3, 2005 was well within the applicable statute of limitations as provided for in C.P.L.R. § 306(b)[" Provided that in an action or proceeding, except a proceeding commenced under the election law, where the applicable statute of limitations is four (4) months or less, service shall be made not later than fifteen (15) days after the date on which the applicable statute of limitations expires. If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice extend the time for service "].

The Petitioner believes that since there is a thirty (30) day statute of limitations as mandated by R.P.T.L. § 702(2), pursuant to C.P.L.R. § 306(b), " effective service within the statutory period may be made fifteen (15) days after July 30, 2005, thus bringing the actual date of service of August 3, 2005 well within the short statutory period...Assuming that the tax roll was filed and published on July 1, 2005 as stated in Respondent's supporting affirmation, the time for service pursuant to CPLR 306-b would be thirty days (July 30, 2005) plus

fifteen days (August 14, 2005) which fell on a Sunday making the outside service date of August 15, 2005."⁸

Balancing The Equities

The Petitioner also asserts that " the balancing of equities are in favor of the Petitioner...the Respondent would be hard pressed to argue that the failure to serve the petition and notice of petition was prejudicial since at the very least, it was aware of the basis for its motion on or prior to August 23, 2005, eight days after the last day for the statute of limitations...a tax assessment review differs from an ordinary litigation because the public interest is directly involved, the governmental unit has a great interest in fair and equitable assessments as does the taxpayer..."⁹.

DISCUSSION

The Respondent moved to dismiss the Petition because the Petitioner failed to serve the Town of Woodbury within the thirty (30) day time limit provided by R.P.T.L. § 702(2). Indeed, the Petitioner mistakenly served the wrong town, and never served the Town of Woodbury.

Constructive Notice Rejected

This Court rejects Petitioner's contention that the Town of Woodbury received constructive notice of the petition. In this case there is a thirty (30) day Statute of Limitations as mandated by R.P.T.L. § 702(2). In conjunction with C.P.L.R § 306(b), effective service within the statutory period could have been made fifteen (15) days after July 31, 2005. The Petitioner had until August 15, 2005 to serve the Town of Woodbury, and it did not.

No Excuses, Please

R.P.T.L. § 702(3) clearly states, " failure to file or serve and file the petition or petition and notice of petition within such time shall constitute a complete defense to the petition and the petition must be dismissed." [emphasis added] The case law is clear that failure to serve will not be excused even if the pleading eventually comes into the possession of the person to be served [See Fashion Page, LTD. v. Zurich Insurance Company, 50 N.Y.2d 265, 428 N.Y.S.2d 890 (1980) (" Delivering the summons to a building receptionist, not employed by the defendant, without any inquiry as to whether she is a company employee, would not be sufficient. Such service cannot be upheld even though the receptionist may later deliver the summons to the proper party. ` To sustain such service would encourage carelessness, or

worse, thus increasing the risk of default by parties who in fact fail to receive the summons ' (McDonald v. Ames Supply Co., 22 N.Y.2d 111, 116, 291 N.Y.S.2d 328 (1968)"); Haak v. Town of Wheatland, 86 A.D.2d 961, 448 N.Y.S.2d 305 (4th Dept. 1982) ("A failed attempt at personal service will not be validated because 'the summons shortly comes into possession of the party to be served' (McDonald v. Ames Supply Co., 22 N.Y.2d 111, 115, 291 N.Y.S.2d 328 (1968)'")].

Jurisdictionally Fatal

The failure to serve the notice on the Town of Woodbury, the proper person pursuant to R.P.T.L. § 708(1), is not a mere irregularity but is jurisdictionally fatal. Mere irregularities in the notice will not defeat otherwise meritorious claims as long as the notice and petition were timely served. Such is not the case here. The required notice was not served at all and, therefore, there is no personal jurisdiction [See e.g., Spodek v. New York State Commissioner of Taxation and Finance, 85 N.Y.2d 760, 766, 628 N.Y.S.2d 256 (1995) (" Finally, while we conclude that the proceeding was timely commenced, the petition should nevertheless be dismissed based on petitioner's failure to properly effect service and acquire personal jurisdiction over respondents."); Rossi v. Town of Colonie Department of Assessment, 13 A.D.3d 683, 785 N.Y.S.2d 779 (3d Dept. 2004) (" In addition to filing the petition to review her real property assessment one day late (see

RPTL 702[2],[3]), petitioner also filed it with the wrong clerk***In fact the petition was not filed with the correct clerk until eight weeks after the statutory deadline had expired. Under these circumstances, dismissal was required...")].

An Absence Of Due Diligence

The cases distinguish and sustain service in those instances in which the process server acted reasonably and with " due diligence " in fulfilling the statutory requirement of personal delivery [See McDonald v. Ames Supply Co., supra, at 22 N.Y.2d 115 (" the process server has acted reasonably and diligently in attempting to fulfill the statutory mandate and under circumstances bringing the questioned process within the purview of the person to be served...upholding service in those cases does not endanger the statutory scheme by encouraging careless service "); Shedlin v. State Tax Commission, 62 A.D.2d 806, 406 N.Y.S.2d 596 (3d Dept. 1978) (due diligence exhibited in serving the respondent)].

Failure To Independently Confirm

In the instant case, there is no evidence of due diligence on the part of Kristina Polizzi whose affidavit¹⁰ demonstrates that the Petitioner's process server did not confirm which papers were to be

served on which town ["On the face of each of the sets was a Post-It note which stated which town was to be served...I did not check each of the three individual copies of the Notice of Petition and Petition to determine whether all three were identical and it is possible that one of the three copies served upon the Town of Woodbury might have been a Notice of Petition and Petition that was supposed to be served upon the Town of Wawayanda "¹¹]. In fact, as can be seen from the affidavit¹² of Desiree Potvin, the Town Clerk of the Town of Woodbury, none of the copies of the Notice of Petition and Petition allegedly served by Ms. Polizzi on the Respondent were actually for the Town of Woodbury. Apparently, Ms. Polizzi did not independently confirm whether the papers she served were being served on the proper town, and as a result of her lack of due diligence, the Petitioner failed to obtain personal jurisdiction over the Respondents.

Request For Extension Of Time

The Petitioner has also cross moved pursuant to C.P.L.R. § 306-b which provides, in part, " If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or *upon good cause shown* or in the *interest of justice* extend the time for service " [emphasis added].

The " upon good cause " and " interest of justice " branches of C.P.L.R. § 306-b contemplate separate grounds and are defined by separate criteria for an extension of time in serving process [See e.g., Leader v. Maroney, Ponzini, and Spencer, 97 N.Y.2d 95, 105-106, 736 N.Y.S.2d 291 (2001) (" Plaintiffs acknowledge that a showing of reasonable diligence is relevant to demonstrating good cause, but contend that it is not a threshold factor that must be established before relief can be granted under the interest of justice standard. They assert that such a construction would render the interest of justice provision meaningless and would, in effect, merge the two standards into one. We agree with plaintiffs and hold that under the interest of justice standard, a showing of reasonable diligence in attempting to effect service is not a ' gatekeeper '. It is simply one of many relevant factors to be considered by the court...The interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to the defendant...The statute empowers a court

faced with the dismissal of a viable claim to consider any factor relevant to the exercise of its discretion. No one factor is determinative - the calculus of the court's decision is dependant on the competing interests of the litigants and a clearly expressed desire by the Legislature that the interests of justice be served "); Beauge v. New York City Transit Authority, 282 A.D.2d 416, 722 N.Y.S.2d 402 (2d Dept. 2001)(Statute of Limitations had expired, defendant had actual notice of claim, and no prejudice demonstrated)].

Good Cause Extension Not Warranted

In the instant matter, the Petitioner has not acted reasonably or with due diligence in attempting to fulfill the statutory requirement of personal service. Hence, the Petitioner has not demonstrated the necessary due diligence required for a good cause extension of time pursuant to C.P.L.R. § 306-b.

Interest Of Justice Extension Warranted

It is the view of this Court, in its discretion, that the Petitioner has met the criteria set forth by the Court of Appeals in Leader, *supra*. Herein, the Town of Woodbury had actual notice of the Petitioner's claim through the service and filing of the grievance day petition. The Town of Woodbury certainly had notice of the claim by

August 23, 2005, the date of the its Motion to Dismiss. The Town of Woodbury would, therefore, be hard pressed to claim that it suffered prejudice by the failure of the Petitioner to serve the Petition. On the other hand, the Petitioner would be severely prejudiced by the dismissal of the Petition since the Statute of Limitations has expired.

Accordingly, the Respondent's Motion to Dismiss is denied and the Petitioner's Cross Motion is granted.

This constitutes the decision and order of this Court.

Dated: White Plains, N.Y.
January 13, 2006

HON. THOMAS A. DICKERSON
JUSTICE SUPREME COURT

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ENDNOTES

1. See Majaars Realty Assoc. v. Town of Poughkeepsie, 10 Misc. 3d 1061(A) (West. Sup. 2005)(petition dismissed for failure to serve superintendent of schools); Matter of 275 N. Middletown Rd. LLP v. Kenney, 2006 WL 26143 (West. Sup. 2005)(dismissal of petition denied for lack of prejudice; good cause shown).

2. Affidavit In Support Of Motion of Desiree Potvin sworn to October 4, 2005 [" Potvin Aff. "].

3. Affirmation In Support Of Motion To Dismiss Petition of Dominic Cordisco dated August 23, 2005 [" Cordisco Aff. "] at paras. 5-8.

4. Affidavit of Kristina Polizzi sworn to September 14, 2005 [" Polizzi Aff. "].

5. Polizzi Aff. at p. 2.

6. Cordisco Aff. at paras. 12-13.

7. Affirmation Opposing Motion And In Support Of Cross Motion Of Michael S. Blustein dated September 14, 2005 at para. 13 [" Blustein Aff. "].

8. Blustein Aff. at paras. 7-10.

9. Blustein Aff. at para. 18.

10. See N. 4, supra.

11. Polizzi Aff. at paras. 2-5.

12. See N. 2, supra.