

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

FILED AND
ENTERED

DUTCHESS
COUNTY CLERK

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In the Matter of the Application of

ARTHUR L. LANDESMAN, Trustee by Corbally,
Gartland & Rappleyea, Esq., as Agents,

Petitioner,

-against-

Index Nos. 3393/1999
3402/2000
3508/2001
3727/2002
3831/2003
3458/2004

DECISION & ORDER

DEBORAH A. WHITTON, Assessor, City of
Poughkeepsie, Dutchess County, New York
and CITY OF POUGHKEEPSIE SCHOOL DISTRICT,

Respondents.

To Review Certain Real Property Assessment
for the year 2000 under Article 7 of the
Real Property Tax Law.

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TAX CERTIORARI PROCEEDINGS: IMPROPER SERVICE #5

In this latest exploration¹ of the requirements of proper service
in tax certiorari proceedings, this Court is called upon by the
Respondent, the City of Poughkeepsie [" the City "] to issue an Order

pursuant to Real Property Tax Law [" R.P.T.L. "] §§ 708(3) and 718 dismissing the Petitioner's " tax certiorari petitions filed for 1999, 2000, 2001, 2002, 2003 and 2004 in that the Petitioner failed to timely file Trial Notes of Issue in regard to the 2000 and 2001 petitions, the Petitioner failed to serve the Superintendent of Schools of the Poughkeepsie City School District in 1999, 2000, 2001, 2002, 2003 and 2004 and the Petitioner failed to timely file proof of service of the Petition on the Superintendent of Schools in 2001 "2.

After careful consideration of the Respondent's Notice of Motion To Dismiss together with the supporting Affidavit³ and Reply Affidavit⁴ of David D. Hagstrom and Memorandum of Law⁵ and Reply Memorandum of Law⁶ and the Petitioner's opposition papers including the Affirmation⁷ of J. Joseph McGowan and Memorandum of Law⁸, the Court hereby grants the Respondent's Motion and dismisses the Petitioner's 1999, 2000, 2001, 2002, 2003 and 2004 Petitions.

FACTUAL BACKGROUND

The Property & Its Assessed Values

The Petitioner is the owner of property located at 183 Smith Street, City of Poughkeepsie, New York with tax map number of 6162-73-557223 [" the subject property "] with the following assessed values⁹ for each of the tax years in dispute, 1999 [\$118,900.00], 2000

[\$118,900.00], 2001 [\$118,900.00], 2002 [\$118,900.00], 2003 [\$114,900.00] and 2004 [\$104,600.00]. The Petitioner has challenged each of these assessments in Notices and Verified Petitions dated July 28, 1999 [" 1999 Petition "], July 20, 2000 [" 2000 Petition "], July 25, 2001 [" 2001 Petition "], July 25, 2002 [" 2002 Petition "], July 29, 2003 [" 2003 Petition "] and July 28, 2004 [" 2004 Petition "]¹⁰.

Service & Filing Issues Regarding Each Petition

Each of the Petitions must be dismissed because of Petitioner's failure to comply with the filing requirements of R.P.T.L. § 718(1) [2000 and 2001 Petitions] [See e.g., Rose Mount Vernon Corp. v. Assessor of the City of Mount Vernon, 1 Misc. 3d 906 (West. Sup. 2003)(failure to file Notes of Issue within four years of service requires dismissal of Petitions), aff'd 15 A.D. 3d 585, 791 N.Y.S. 2d 572 (2d Dept. 2005)] and service requirements of R.P.T.L. § 708(3) [1999, 2000, 2001, 2002, 2003 and 2004 Petitions][See e.g., Orange And Rockland Utilities, Inc., 11 Misc. 3d 1051 (Rockland Sup. 2006)(petitions dismissed for failure to serve Superintendent of Schools; jurisdictional defect); Majaars Realty Assoc. v. Town of Poughkeepsie, 10 Misc. 3d 1061 (Dutchess Sup. 2005)(petitions dismissed for failure to serve Superintendent of Schools; jurisdictional defect)]. However, the Petitioner's failure to timely file [within 10 days] the proof of

service of the mailing of the 2001 Petition as required by R.P.T.L. § 708(3) is excusable in the absence of proof of prejudice [See e.g., Orange And Rockland Utilities, Inc., 11 Misc. 3d 1051 (Rockland Sup. 2006)(late filing of proof of service ministerial act and excusable if no prejudice shown)].

The 1999 Petition

The 1999 Petition is addressed to, among others, the " City of Poughkeepsie School District, Business Office "¹¹. The affidavit of service by mail on July 30, 1999 is to the " City of Poughkeepsie School District, Administrative Office "¹². Although the 1999 Petition is addressed to the School District's Administrative Office¹³ it is not addressed to the Superintendent of Schools of the City of Poughkeepsie School District and as such is jurisdictionally defective. No credible evidence has been introduced by Petitioner¹⁴ to demonstrate that the Superintendent of Schools or an authorized agent [See e.g., Matter of 275 N. Middletown Rd. LLP v. Kenney, 10 Misc. 3d 1067 (Rockland Sup. 2005)(" June Iamundo, the Secretary to the Superintendent of Schools...signed the Return Receipt card on behalf of the Superintendent of Schools, thereby resulting in service of the Petition and Notice of Petition on the Superintendent of Schools pursuant to R.P.T.L. § 708(3) ")] was served with the 1999 Petition. In addition, the requirements of C.P.L.R. § 3211(e)¹⁵ to file a timely objection do not apply¹⁶ in tax

certiorari proceedings [See e.g., Majaars Realty Assoc. v. Town of Poughkeepsie, 10 Misc. 3d 1061(A) (Dutchess Sup. 2005)(" As to the issue of the timeliness of Respondent's Motion to Dismiss, it is clear that the courts have not required a municipality in a tax certiorari proceeding to make a motion to dismiss within the same CPLR § 3211(e) 60-day time constraint as in other types of actions [See e.g., Village Square of Penna, Inc. v. Semon, 290 A.D. 2d 184, 736 N.Y.S. 2d 539, 541 (3d Dept. 2002), lv. app. dis. 98 N.Y. 2d 647 (2002)...")]. And lastly, the absence of a showing of prejudice¹⁷ [or the application of the doctrines of good cause shown¹⁸ and substantial compliance¹⁹] does not apply to jurisdictional defects such as a failure to serve the Superintendent of Schools [See e.g., Orange And Rockland Utilities, Inc., 11 Misc. 3d 1051 (Rockland Sup. 2006) (" However, like the situation in Premier Self Storage of Lancaster v. Fusco (12 A.D. 3d 1135, 784 N.Y.S. 2d 443 (4TH Dept. 2004)) and Majaars Realty Assoc. v. Town of Poughkeepsie (10 Misc. 3d 1061 (Dutchess Sup. 2005)) the instant matter involves a jurisdictional defect of failing to serve the proper persons, the Superintendent of Schools, of which the excusal for good cause due to a lack of prejudice does not relate ")].

The 2000 Petition

The 2000 Petition is addressed to, among others, the " City of Poughkeepsie School District, Business Office "²⁰. The affidavit of

service²¹ by mail on August 1, 2000 is to the " Poughkeepsie City School District, Business Office ". Neither the 2000 Petition nor the affidavit of service are addressed to the Superintendent of Schools and as such the Petition is jurisdictionally defective. The 2000 Petition is dismissed pursuant to R.P.T.L. § 708(3).

In addition, the Note of Issue for the 2000 Petition [dated July 27, 2000] is dated January 31, 2006 and the affidavit of service upon Stephen J. Wing, Corporation Counsel, City of Poughkeepsie is dated January 31, 2006²², five and one half (5 ½) years after commencement of the 2000 tax certiorari proceeding. The 2000 Petition was abandoned and is dismissed pursuant to R.P.T.L. § 718(2)(d) [See e.g., Rose Mount Vernon Corp. v. Assessor of the City of Mount Vernon, 1 Misc. 3d 906 (West. Sup. 2003) (failure to file Notes of Issue within four years of service requires dismissal of Petitions " as having been abandoned pursuant to R.P.T.L. § 718(2)(d) [' Should the respondent fail to demand that the petitioner file a note of issue...within four years from the date of commencement of the proceedings, and a note of issue has not otherwise been filed, the proceeding shall be deemed abandoned and order shall constitute a final adjudication of all issues raised in the proceeding] [See e.g., Matter of Waldbuams # 122 v. Board of Assessors, 58 N.Y. 2d 818, 819-820, 459 N.Y.S. 2d 263, 445 N.E. 2d 646 (1983)...Matter of Pyramid Crossgates Company v. Board of Assessors, 302 A.D. 3d 826, 827-828, 756 N.Y.S. 2d 316 (3d Dept. 2004)...Matter of LaFarge v. Town of Makakating, 257 A.D. 2d 752, 753, 683 N.Y.S. 2d

344 (3d Dept. 1999); Matter of Pherbo Realty Corp. v. Town of Fishkill, 104 A.D. 2d 1037, 1038, 481 N.Y.S. 2d 110 (2d Dept. 1984)), aff'd 15 A.D. 3d 585, 791 N.Y.S. 2d 572 (2d Dept. 2005)].

The 2001 Petition

The 2001 Petition is addressed to, among others, the " City of Poughkeepsie School District, Business Office "²³. The affidavit of service²⁴ by mail on July 31, 2001 is to the " City of Poughkeepsie School District, Administrative Office ". Neither the 2001 Petition nor the affidavit of service are addressed to the Superintendent of Schools and as such the Petition is jurisdictionally defective. The 2001 Petition is dismissed pursuant to R.P.T.L. § 708(3).

In addition, the Note of Issue for the 2001 Petition [dated July 25, 2001] is dated January 31, 2006 and the affidavit of service upon Stephen J. Wing, Corporation Counsel, City of Poughkeepsie is dated January 31, 2006²⁵, four and one half (4 ½) years after commencement of the 2001 tax certiorari proceeding. The 2001 Petition was abandoned and is dismissed pursuant to R.P.T.L. § 718(2)(d).

Lastly, the proof of service of mailing of the 2001 Petition was not filed within ten (10) days of service by mail as required by R.P.T.L. § 708(3)²⁶. However, since such service is a ministerial act and does not constitute a jurisdictional defect it is excused since Respondents have failed to demonstrate any prejudice [See e.g., Orange

And Rockland Utilities, Inc., 11 Misc. 3d 1051 (Rockland Sup. 2006)(" the Intervenors have not suffered any prejudice by the Petitioner's ministerial act of filing proof of service with the court five (5) days later than the ten (10)(day) filing requirement. ...Matter of Bloomingdale's, Inc. (v. City Assessor of White Plains, 294 A.D. 2d 570, 742 N.Y.S. 2d 881 (2d Dept. 2002) ")].

The 2002 Petition

The 2002 Petition is addressed to, among others, the " City of Poughkeepsie School District, Business Office "²⁷. The affidavit of service²⁸ by mail on August 6, 2002 is to the " City of Poughkeepsie School District, Administrative Office ". Neither the 2002 Petition nor the affidavit of service are addressed to the Superintendent of Schools and as such the Petition is jurisdictionally defective. The 2002 Petition is dismissed pursuant to R.P.T.L. § 708(3).

The 2003 Petition

The 2003 Petition is addressed to, among others, the " City of Poughkeepsie School District, Business Office "²⁹. The affidavit of service³⁰ by mail on July 31, 2003 is to the " City of Poughkeepsie School District, Business Office ". Neither the 2003 Petition nor the affidavit of service are addressed to the Superintendent of Schools and

as such the Petition is jurisdictionally defective. The 2003 Petition is dismissed pursuant to R.P.T.L. § 708(3).

The 2004 Petition

The 2004 Petition is addressed to, among others, the " City of Poughkeepsie School District, Business Office "³¹. The affidavit of service³² by mail on July 28, 2004 is to the " City of Poughkeepsie School District, Business Office ". Neither the 2004 Petition nor the affidavit of service are addressed to the Superintendent of Schools and as such the Petition is jurisdictionally defective. The 2004 Petition is dismissed pursuant to R.P.T.L. § 708(3).

Based on the foregoing the Respondent's Motion is granted and the Petitioner's 1999, 2000, 2001, 2002, 2003 and 2004 Petitions are dismissed.

Dated: October 2, 2006
White Plains, N.Y.

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 (Dutchess Sup. 2005)(petitions dismissed for failure to serve Superintendent of Schools; jurisdictional defect); Matter of 275 N. Middletown Rd. LLP v. Kenney, 10 Misc. 3d 1067 (Rockland Sup. 2005)(service of Petition upon Secretary for Superintendent of Schools adequate service; late filing of proof of service ministerial act and excusable if no prejudice shown) ; Matter of Commerce Drive Associates LLC v. Board of Assessment Review, 10 Misc. 3d 1071 (Orange Sup. 2006)(failure to serve proper party is jurisdictional defect; cross motion to extend time of service in the interests of justice granted); Orange And Rockland Utilities, Inc., 11 Misc. 3d 1051 (Rockland Sup. 2006)(petitions dismissed for failure to serve Superintendent of Schools; late filing of proof of service ministerial act and excusable if no prejudice shown).
2. Notice Of Motion To Dismiss dated June 12, 2006 at p. 1.
3. Affidavit of David D. Hagstrom sworn to June 12, 2006 [" Hagstrom Aff. "].
4. Reply Affidavit of David D. Hagstrom sworn to August 4, 2006 [" Hagstrom Reply Aff. "].
5. Respondent's Memorandum of Law dated June 12, 2006 [" R. Memo. "].
6. Respondent's Reply Memorandum of Law dated August 4, 2006 [" R. Reply Memo. "].
7. Affirmation In Opposition To Respondent's Motion To Dismiss of J. Joseph McGowan dated July 28, 2006 [" McGowan Aff. "]
8. Petitioner's Memorandum of Law in Opposition to Motion To Dismiss dated July 28, 2006 [" P. Memo. "].
9. Hagstrom Reply Aff. at Ex. A.
10. Hagstrom Aff. At Exs. A-I; Hagstrom Reply Aff. At Ex. A; McGowan Aff. at Exs. A-F.
11. Hagstrom Aff. at para. 4 & Ex. A.

12. Hagstrom Aff. at para. 4 & Ex. B.

13. P. Memo. at p. 2 (" The ` Administrative Office ` of the City School District includes the Superintendent's Office, Building and Grounds, the Business Office, Curriculum Instruction Office, Health Benefits, Payroll, Personnel Office, Tax Collector and Transportation Office ").

14. Hagstrom Reply Aff. at para. 6. Contrary to the assertions at McGowan Aff. at para. 7 it is the Petitioner and not the Respondent that has the burden of proof of proper service, i.e., Petitioner must demonstrate that the Superintendent of Schools or an authorized agent was served with the Petition [See e.g., Matter of 275 N. Middletown Rd. LLP v. Kenney, 10 Misc. 3d 1067 (Rockland Sup. 2005)(Secretary of Superintendent of Schools signed a return receipt requested form; " It would, of course, have been more prudent for the Petitioner to have served the Superintendent...since, had the Petitioner not used Certified mailing, it would have been more difficult to demonstrate that the proper party...had been served "); Orange And Rockland Utilities, Inc., 11 Misc. 3d 1051 (Rockland Sup. 2006)(" the Court has not been presented with any proof, whatsoever, that the Superintendent of Schools was served with the Petition...There was no attempt by the Petitioner to serve the Superintendent of Schools...")].

15. McGowan Aff. at pp. 3-4; P. Memo. at pp. 1-3.

16. Hagstrom Reply Aff. at para. 8; R. Reply Memo. at pp. 2-3.

17. McGowan Aff. at pp. 4-5; P. Memo. at pp. 5-6.

18. R. Memo. at pp. 6-7.

19. McGowan Aff. at paras. 20-21; P. Memo. at pp. 4-5.

20. Hagstrom Aff. at para. 5 & Ex. C; Hagstrom Reply Aff. at Ex. A.

21. Hagstrom Aff. at Ex. D.

22. Hagstrom Aff. at para. 5 & Ex. C.

23. Hagstrom Reply Aff. at Ex. A.

24. Hagstrom Aff. at para. 9 & Ex. F.

25. Hagstrom Aff. at para. 8 & Ex. E.
26. Hagstrom Aff. at para. 9 & Ex. F; McGowan Aff. at para. 6.
27. Hagstrom Reply Aff. at Ex. A.
28. Hagstrom Aff. at para. 10 & Ex. G.
29. Hagstrom Reply Aff. at Ex. A.
30. Hagstrom Aff. at para. 10 & Ex. H.
31. Hagstrom Reply Aff. at Ex. A.
32. Hagstrom Aff. at para. 10 & Ex. I.