

To commence the 30 day statutory time
period for appeals as of right
(CPLR 5513[a]), you are advised to
serve a copy of this order, with notice
of entry, upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Application of
AMERICAN INDEPENDENT PAPER MILLS SUPPLY
CO., INC.,

Petitioner(s),

-against -

DECISION/ORDER

Index Nos:
7943/2007

THE ASSESSOR OF THE VILLAGE OF TARRYTOWN,
THE BOARD OF REVIEW OF THE VILLAGE OF
TARRYTOWN,

Motion Date:
3/28/12

Respondent(s) .

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LaCAVA, J.

The following papers were considered in connection with these
applications by petitioner for an Order compelling specific
performance of a settlement agreement and Consent Judgement,
pursuant to CPLR § 2104; or, in the alternative, for an Order *nunc
pro tunc* extending the time within which to file a note of issue
pursuant to RPTL 718 (1):

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION	1
NOTICE OF MOTION	2
AFFIRMATION IN SUPPORT/EXHIBITS	3
AFFIRMATION IN SUPPORT/EXHIBITS	4
AFFIRMATION	5
AFFIRMATION IN OPPOSITION/EXHIBITS	6
AFFIRMATION	7
REPLY AFFIRMATION	8
SUR REPLY AFFIRMATION/EXHIBITS	9
AFFIRMATION	10

In this tax certiorari matter, pertaining to tax years 2003 and 2004, and 2006 through and including 2008, but limited specifically to the petition filed on April 30, 2007 challenging assessments relating to tax year 2007, petitioner seeks an Order which would compel adherence by respondent (Village) with a Consent Judgment negotiated by prior counsel representing petitioner. In the alternative, petitioner seeks an Order, pursuant to RPTL 718(1), extending the time, *nunc pro tunc*, within which it may file a note of issue (never filed in this case) as to tax year 2007, in excess of four years having elapsed since the inception of the matter.

Petitioner asserts that, during the pendency of this matter in 2008, 2009, and 2010, prior counsel for petitioner, and counsel for the Village, negotiated a settlement agreement with respect to some of the tax years at issue, including tax year 2007. Specifically, at a pretrial conference in July, 2010, an oral agreement was reached, and certain terms were set forth, with regard to tax years 2004, 2007, and 2008. In October, 2010, in order to effect the settlement, petitioner sent a draft stipulation of settlement or proposed "Consent Judgement" to counsel for the Village, which latter counsel rejected as not consistent with his understanding of the agreement as related to tax year 2007. In December, 2010, a new draft stipulation/Consent Judgement incorporating the Village's proposed changes to tax year 2007 was forwarded to respondent's counsel. The Village's counsel amended the new draft stipulation/Consent Judgement to change the assessment for yet a different tax year, 2008, again in conformity with his understanding of the agreement. He then signed the now revised draft stipulation/Consent Judgement, and delivered it to prior counsel for petitioner. The latter, however, declined to sign it, and inquired, by letter dated several days later, why the changes were made¹. In February 2011, petitioner's prior counsel then sent an appraisal to the Village, and by letter invited a conversation regarding a revised settlement in light of this new appraisal. Subsequently, petitioner also sought to have the matter restored to the trial calendar, but neglected to file a Note of Issue relating to tax year 2007 on or before April 30, 2011, the last date of the four year period within which a note of issue must be filed.

EXTENDING, *Nunc Pro Tunc*, THE TIME TO FILE THE NOTE OF ISSUE

RPTL § 718 provides:

¹ The Court notes that the changes made by counsel for the Village to the ORDER were to assessed values, and assessed value reductions, for each of the three parcels for the tax year 2008.

§718. When proceeding deemed abandoned

1. Where a proceeding is commenced pursuant to this article to review the assessment of a parcel of real property which contains one, two or three family dwelling residential real property... unless a note of issue is filed and the proceeding is placed on the court calendar within four years from the last date provided by law for the commencement of the proceeding, the proceeding thereon shall be deemed to have been abandoned and an order dismissing the petition shall be entered without notice and such order shall constitute a final adjudication of all issues raised in the proceeding, except where the parties otherwise stipulate or a court or judge otherwise orders on good cause shown within such four-year period.

Petitioner has failed to contest respondent's allegation as to its failure to file the Note of Issue and place the matter on the trial calendar. Rather, petitioner seeks to have the Court, *nunc pro tunc*, extend the four-year time period within which the Note of Issue is to be filed, arguing that prior counsel for petitioner relied on the reaching of a stipulated settlement of the matter in declining to file the aforementioned Note of Issue in a timely manner.

Respondent, to the contrary, points to the specific language of §718 which provides that the failure to file a Note of Issue and to place the matter on the court calendar, within the four year period, shall be deemed to have been an abandonment of the action; that an order dismissing the petition must be entered without notice; and that such order will be a final adjudication on the merits of the issues raised in the petition. The sole exception to such an "abandonment", respondent concedes, is triggered only:

where the parties otherwise stipulate or a court or judge otherwise orders on good cause shown within such four-year period.

As respondent points out, however, while the parties did stipulate to a settlement of the matter, the parties did not stipulate to, nor did this Court order, on good cause shown, an extension of the four year time period within which a note of issue was required to be filed. As the Court of Appeals stated in *Waldbaum's #122, Inc. v. Board of Assessors of the City of Mt.*

Vernon, 58 N.Y.2d 818, 819 (1983):

Petitioner's failure to file a note of issue within four years from service of the 1977 petition or to obtain a stipulation or court order within the four-year period extending its time for filing required dismissal of that petition.

The Court additionally went on to note that dismissal pursuant to RPTL § 718 is mandatory. Similarly, in *LaFarge v. Town of Mamakating*, 94 N.Y.2d 802, 804 (1999), the Court described the plain language of RPTL § 718 as mandatory, to be applied in "...any and all circumstances [except] when the parties otherwise stipulate or obtain a court order based on good cause within the four-year period." (See also, *Pherbo Realty Corp. v. Board of Assessors, Town of Fishkill*, 104 A.D.2d 1037 (2nd Dept. 1984), *ap. den.* 65 N.Y.2d 602 [1985] - failure to file Note, or to stipulate specifically to extend Note filing period, fatal to petition.)

Here, within the four-year period following the commencement of the action, the parties did not stipulate to extend the period, nor was there any application to the Court for an Order granting, on good cause shown, an extension of the time period. Nor, as set forth in greater detail below, is there any evidence of reliance by petitioner's prior counsel upon the stipulated settlement in her determining not to timely file the Note of Issue for tax year 2007. Consequently, this matter must be, and is in fact deemed to have been abandoned at the conclusion of the aforementioned four-year period.

ENFORCEMENT OF THE SETTLEMENT AGREEMENT/CONSENT JUDGMENT

Petitioner, even if the Court should deem itself unable to extend the four-year period *nunc pro tunc*, seeks an Order that respondent Village must adhere to the amended stipulation/Consent Judgment which, as set forth above, the Village amended in December, 2010, and mailed, soon thereafter, to prior counsel representing petitioner. Petitioner argues that CPLR § 2104 compels such adherence.

CPLR § 2104 provides:

An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his

attorney or reduced to the form of an order and entered.

Petitioner does not suggest that the stipulation/Consent Judgement returned by counsel for respondent in December, 2010 was in open court, but argues that it was a writing subscribed by counsel for the respondent, and thus is binding on respondent. However, it is abundantly clear that petitioner's prior attorney rejected the corrections made by respondent's counsel to her proposed Consent Judgement. Such corrections were, in effect, a counter offer by respondent to the draft stipulation/Consent Judgement submitted by her.

Again, on December 22, 2010, prior counsel for petitioner inquired by letter as to why additional changes were made to her signed and returned Consent Judgement, indicating that she did not understand why revisions were made, and requesting a discussion as to the reason for the changes.

In February, 2011, petitioner followed-up this inquiry into the reason for the changes, by sending a letter in which she objected to the alteration as having unilaterally been made by the Village, without petitioner's consent. An appraisal was attached to the letter, in which counsel further suggested that petitioner contact her to discuss a revised settlement based on this new appraisal. Then, one month after that letter, she requested that the court restore the case to the trial calendar. Such actions were clearly a rejection of the counter-offer by respondent's attorney, made, again, by his changes to the 2008 assessment in the December proposed stipulation/Consent Judgement.

Even if, as petitioner argues, oral agreement on the terms of settlement as it relates to tax year 2007 was achieved in the earlier negotiations, tax year 2007 was clearly bundled and discussed as one of three tax years (2004, 2007, and 2008) negotiated jointly. Respondent's counsel had already, in October, 2010, rejected a proposed stipulation for incorporating a different amount for the 2007 assessment than was the subject of their agreement. In December, 2010, respondent's counsel altered the 2008 assessment contained in petitioner's new revised draft stipulation/Consent Judgement, again in conformity with his understanding of their agreement, and returned the altered document to petitioner. This was followed by the acts of rejection by petitioner noted above. Thus, on the facts of this case, no writing subscribed to by respondent incorporates an agreement between the parties on all three of the tax years at issue. (*C.f. Greenridge v. City of New York.*, 179 A.D.2d 386 [1st Dept. 1992] - oral offer which was clearly accepted by party but not memorialized

before withdrawal by other party is not enforceable.)

It is simply too late now for petitioner to argue that the Court should ignore those several acts of rejection by respondent, the objection by petitioner to the changes, the sending of a new appraisal, the request for renewed negotiations based on this appraisal, and the request that the matter be scheduled for trial, and, instead, compel respondent to adhere to the rejected December counter-offer. Unlike *Ameropan Realty Corporation v. Rangely Lakes Corp.*, 282 A.D.2d 414 (2nd Dept., 2001), where the acceptance of an offer by the specification of payment terms is a proper acceptance, and not a rejection or counter-offer, here, respondent changed an essential term of the stipulation - the 2008 assessment - because, he believed that the figure set forth in the stipulation for 2008 differed from the agreement arrived at several months previously. No agreement between the parties existed until this proposed change was ratified by petitioner, and it never was. Finally, any suggestion that the petitioner somehow relied on the stipulated settlement in neglecting to file the Note of Issue in a timely manner, is thoroughly belied by the abovementioned acts, which together signaled, not acceptance of and reliance on the settlement by petitioner, but, instead, its complete rejection.

Upon the foregoing, unopposed papers, it is hereby

ORDERED, that the motions by respondent to compel specific performance of a consent judgement and/or settlement agreement, pursuant to CPLR §2104; or, in the alternative, for an Order *nunc pro tunc* extending the time within which to file a note of issue as to tax year 2007 pursuant to RPTL 718(1), are denied.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: White Plains, New York
May 3, 2012

HON. JOHN R. LA CAVA, J.S.C.

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