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
MICHAEL F.X. RYAN,

DECISION/ORDER

Petitioner(s),

Index Nos:
-against - 19002/07
20187/06
18288/05

THE TOWN OF CORTLANDT, PHILIP M. PLATZ, its Assessor and Board of Assessment Review

Motion Date:
01/19/11

Respondent(s).

For a Review Under Article 7 of RPTL.
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LaCAVA, J.

The following papers were considered in connection with this application by petitioner for an Order granting leave to renew and reargue the Court's Decision and Order dated November 15, 2010, or to vacate said Decision and Order, for failure of respondent to pay the statutory motion fee on all of the pending petitions:

PAPERS	NUMBERED
NOTICE OF MOTION/AFFIDAVIT/EXHIBITS	1
AFFIRMATION IN OPPOSITION/EXHIBIT	2
REPLY AFFIDAVIT	3

In this tax certiorari matter, challenging assessments for tax years 2005 through and including 2007 for the subject premises, respondent (Town) previously settled by way of a Stipulation of

Settlement with petitioner, for assessment reductions of $2,000.00[1] in each of the tax years at issue. In December 2009, and then again in January, 2010, petitioner presented the said Stipulation to the Croton-Harmon School District (District), seeking refunds pursuant to its terms. The District, which was neither served with the original petition, nor involved in the negotiations leading up to the Stipulation, upon such service moved to intervene and, upon intervention, for an order relieving it from the effects of the Stipulation (as relates to those same tax years), for the failure of petitioner to timely serve the said petitions on the Superintendent the School District, as required by R.P.T.L. §708 [3]), or to file proof of said service with the Court, as also required by the same statute.

In a Decision and Order dated November 15, 2010, the Court held:

> Upon the foregoing papers, it is hereby
>
> **ORDERED**, that proposed Intervener's motion granting it leave to intervene, is granted, as unopposed, and, upon intervention, it is further,
>
> **ORDERED**, that the motion by Intervener Croton-Harmon School District to relieve it from the effect of the stipulation of settlement between respondent Town of Cortlandt and petitioner Michael F.X. Ryan, due to improper service upon the Superintendent of the Croton-Harmon School District, of the petitions contesting tax years 2005, 2006, and 2007, in violation of R.P.T.L. §708(3), is granted, and it is further
>
> **ORDERED**, that the motion by Intervener Croton-Harmon School District to likewise relieve it from the effect of the said stipulation of settlement, for failure to file copies of the affidavits of service of the said petitions upon the School Superintendent, with the Court within ten days of such service, is also granted, as unopposed.

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[1] For reasons not disclosed to the Court, petitioner procured two successive and nearly-identical Stipulations, dated March 25, 2009, and December 22, 2009, respectively.

Petitioner now moves to renew and reargue the aforementioned Decision and Order, **solely** under Index #18288/05, asserting that intervenor School District paid the statutory motion fee only on Index #19002/07 (the 2007 petition), and that therefore the motion was a nullity as to the other Index Numbers (namely 18288/05 and 20187/06, the 2005 and 2006 petitions) at issue. Petitioner also moves to vacate the Order pursuant to CPLT §5015.

Petitioner Improperly Moves to Renew or Reargue

According to petitioner's notice of motion, he seeks to renew and reargue the prior motion, pursuant to CPLR §2221, only insofar as it relates to Index #18288/05 (the 2005 petition), due to the fact that the District failed to pay the motion fee required by CPLR 8020 (a)[2] as to the petition filed under that Index Number. CPLR §2221 provides:

CPLR §2221 provides:

> (d) A motion for leave to reargue:
>
> 1. shall be identified specifically as such;
>
> 2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and
>
> 3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals.
>
> (e) A motion for leave to renew:
>
> 1. shall be identified specifically as such;
>
> 2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that

[2] In several places in his moving papers, including twice in the Notice of Motion, petitioner references CPLR § 2080 (a) as the statute requiring payment of the $45.00 motion fee to the County Clerk. It is actually CPLR §8020 (a).

> there has been a change in the law that would change the prior determination; and
>
> 3. shall contain reasonable justification for the failure to present such facts on the prior motion.
>
> (f) A combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought. The court, in determining a combined motion for leave to reargue and leave to renew, shall decide each part of the motion as if it were separately made. If a motion for leave to reargue or leave to renew is granted, the court may adhere to the determination on the original motion or may alter that determination.

CPLR §8020 further provides

> 8020. County clerks as clerks of court. Whenever a county clerk renders a service in his capacity as clerk of the supreme or a county court, in an action pending in such court, he is entitled to the fees specified in this section, payable in advance. (a) ...the county clerk shall be entitled to a fee of forty-five dollars upon the filing of each motion or cross motion in such action....

As an initial matter, the motion for renewal and reargument is defective, as petitioner, while properly denominating it as one for renewal and reargument, then simply failed to identify separately and support separately each item of relief sought as required by the statute. Rather, his numbered arguments merely contain a mixed list of alleged facts, without specification of the relief--renewal or reargument--which those supposed facts support.

Regarding specifically the motion to renew, as set forth above, CPLR §2221(e)(2) clearly requires that such a motion "be based upon new facts not offered on the prior motion that would change the prior determination." Plaintiff has not submitted new evidence or new facts; rather, he has merely submitted a new fact--that the District paid only a single motion fee under the 2007 petition--which he claims to have been unaware of, which he claims the Court was unaware of, and which fact he apparently claims would change the prior determination. While he assumes the Court does not, as a matter of routine, examine moving papers to determine

whether a motion fee was paid, and thus assumes that it did not do so here, he is incorrect in such assumptions; in every case, including the instant matter, of a motion, this Court examines the submitted motion for a receipt or a notation from the Clerk of the Court that the motion fee was paid in the matter. Thus, while petitioner may not have offered the fact (of the motion fee payment on only one petition) to the Court on the prior motion, the Court was well aware of that fact by its review of the papers upon their being submitted (since the motion was brought by way of order to Show Cause, and thus reviewed by the Court initially). Further, as properly argued by the District, petitioner has also failed to present the Court with any citation or authority whatsoever, which supports his argument that a motion made without payment of the motion fee is a nullity. Undoubtedly, that is because there is no such authority. Thus, not only has petitioner failed to offer any new facts not known to the Court at the time of the consideration of the prior motion, but he has also failed to demonstrate that the offered fact, even if unknown previously, would have affected the Court's determination in the matter.

Neither has petitioner submitted "a reasonable justification for the failure to present such facts on the prior motion". Petitioner has offered the court only a single new fact, the lack of payment of the motion fee, which fact he claims he had no reason to discern during the time the motion was under consideration by the Court. This Court is not so persuaded, however, because the information regarding the payment of a single motion fee, on the 2007 petition alone, was available to the petitioner both online and by physical visit to the County Clerk, and petitioner fails to explain why it was not reasonable for him to check those easily available sources to determine if the fee was paid on all three of the petitions prior to the determination of the motion by the Court. Therefore petitioner's motion to renew is defective.

Regarding the motion to reargue, plaintiff has here too failed to base his motion "upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." In support of the motion, he fails to point to a single fact, or issue of law, overlooked or misapprehended by the Court in the prior decision. In fact, the Court had, as set forth above, examined the papers for the presence of a receipt or notation that the motion fee had been paid, and, upon discovery of that receipt or notation, proceeded to render a decision in the matter. Petitioner, as further set forth above, has also failed to point to matters of law misapprehended by the Court, such as his unsupported argument that a motion made without payment of a motion fee is a nullity. Thus, petitioner's motion to renew and reargue is defective and must be denied.

The Matter Was Consolidated Under Index #19002/07

In any event, contrary to petitioner's argument, the instant matter was previously consolidated under Index #19002/07. While the CPLR (particularly CPLR §602 [a]) does require a motion by a party in order to consolidate matters which are properly joinable, in matters pursuant to RPTL Article 7, consolidation is governed instead by RPTL §710, which provides:

> §710. Consolidation of proceedings. A justice before whom separate petitions to review assessments of real property are pending may on his own motion consolidate or order to be tried together two or more proceedings where the same grounds of review are asserted and a common question of law or fact is presented....

Here, upon settlement of the matter to the satisfaction of petitioner and the Town, **petitioner** submitted to the Court a Stipulation of Settlement (or, in this case, two such Stipulations) for the then-pending three proceedings, which were consolidated by petitioner together in **a single Stipulation**, with a caption containing three Index Numbers (representing the petitions for 2007, 2006, and 2005, and under the respective Index Numbers for those years.) The Court approved of the single Stipulation, disposing of the three matters, and it was filed and entered by the Clerk of the Court as a single consolidated action **only** under Index #19002/07, which filing also contained the 2005 and 2006 proceedings and petitions. And, as properly argued by the District, Petitioner himself noted this consolidated status for the actions by filing only a **single** Notice of Entry, under the three Index Numbers (with the 2007 Number first), on the District after the settlement.

As a matter of practice, the Clerk of the Court, upon instances of applications by motions, or upon submissions of stipulations or judgments, involving multiple tax years (and thus multiple Index Numbers) in RPTL Article 7 proceedings, merely consolidates these multi-year (and multi-Index Number) matters, involving the same parties, under the first listed Index Number in the caption. In the instant matter, when petitioner twice submitted stipulations of settlement, those matters were consolidated by the Court as set forth above, and then by the Clerk under a single Index Number, namely the first number that **petitioner** placed on the stipulations, which was 19002/07. The Court has examined the Clerk's file, and in fact as the District points out the stipulation was filed and entered by the Clerk **only** under the 2007 Index Number, and not the other numbers associated

with the matter.

It was not inconsistent, then, for the same Clerk, upon application of the District, to charge only a single motion fee, for the Order to Show Cause subsequently sought in the consolidated action under the 2007 Index Number. (*See* CPLR §8020[a], *supra*, which allows only a single such fee **in each action**.) Thus, when the District moved for the sought relief, it was properly charged a single $45.00 fee for that motion by the County Clerk.

Petitioner's Motion to Vacate For Fraud

Petitioner also moves to vacate the November 15, 2010 Decision and Order pursuant to CPLR §5015(a)(3), alleging that it was obtained by fraud, misrepresentation, or other misconduct. As set forth above, there was no fraud, misrepresentation, or other misconduct, since the only representation that the District made to the Court in its papers, relating to its compliance with CPLR §8020(a), was that it had complied with its duties under that statute, by appending a receipt or notation from the clerk that a fee had been paid under the 2007 Index Number. The Court, as set forth above, reviewed the papers for that proof of payment, and accepted it as compliance with the statute.

The RPTL <u>Requires</u> Dismissal for Improper Service

Irrespective of the supposed error by the District in bringing the prior motion before the Court as regards all of the petitions, the Court would be constrained, upon discovery of petitioner's failure to comply with the notice requirements of R.P.T.L. §708(3), to dismiss the action as a whole pursuant to that statute. R.P.T.L. §708(3) provides:

> ... one copy of the petition and notice shall be mailed within ten days from the date of the date of service thereof as provided to the superintendent of schools of any school district within which any part of the real property on which the assessment to be reviewed is located and, in all instances, to the treasurer of any county in which any part of the real property is located, and to the clerk of a village which has enacted a local law as provided in subdivision three of section fourteen hundred two of this chapter if the assessment to be reviewed is on a parcel located within such village ... Proof of mailing one copy of the petition and notice to the superintendent of schools, the treasurer of the county and the clerk of the

> village which has enacted a local law as provided above shall be filed with the court within ten days of the mailing. Failure to comply with the provisions of this section **shall result in the dismissal of the petition**, unless excused for good cause shown (emphasis added).

Here petitioner failed to comply with the statute in two separate respects. He not only failed entirely to serve the Notice of Petition and Petition upon the School District, in violation of the statute, for three consecutive years, but he also failed to file affidavits of service of such notice within ten days of such mailing, again for three consecutive years. As this Court noted in the November 15, 2010 Decision and Order:

> ...in opposition petitioner fails to even assert lack of prejudice, or some good cause for the failure to properly notice the District, much less provide proof of such lack of prejudice or such good cause.

This Court made abundantly clear in *Matter of Con Edison v. Assessor and Board of Assessment Review for the Town of Pleasant Valley* (Supreme Court, Dutchess County, LaCava, J., September 24, 2009), *aff'd*, 2011 NY Slip Op 01655 (2nd Dept., March 1, 2011), that the failure of a petitioner to properly provide the Notices of Petition to the School District requires dismissal of the action.

While dismissal is the remedy normally provided for such a failure of notice, the District herein chooses only to be relieved from the effects of the settlement due to such failure of notice. This Court, of course, always retains jurisdiction, to

> relieve a party from [its own judgments or orders] upon such terms as may be just, on motion of any interested person with such notice as the court may direct.

(CPLR §5015(a)), and upon disclosure of such failure to comply with RPTL §708(3), as committed by petitioner here, this Court would in any event be constrained to relieve the District from the effect of prior Orders (the Stipulations of Settlement.)

Based upon the foregoing, it is hereby

ORDERED, that the petitioner's motion for renewal and/or reargument, or for vacatur pursuant to CPLR §5015(a)(3) is denied.

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

Dated: White Plains, New York
March 10, 2011

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

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