

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

**FILED AND
ENTERED ON
DATE**

**ROCKLAND
COUNTY CLERK**

-----x

In the Matter of 275 N. MIDDLETOWN RD.,
LLP,

Petitioner,

-against-

BRIAN KENNEY, Assessor, and THE BOARD
OF ASSESSMENT REVIEW FOR THE TOWN OF
ORANGETOWN,

Index No: 5447/05

Respondents,

DECISION & ORDER

-and-

PEARL RIVER UNION FREE SCHOOL DISTRICT,

Intervenor

-----x

DICKERSON, J.

TAX CERTIORARI PROCEEDINGS: IMPROPER SERVICE #2

In this most recent exploration¹ of the requirements of proper service, and proof thereof, in tax certiorari proceedings, this Court is called upon by the Intervenor, The Pearl River Union Free School District [" Pearl River School District "] to issue an Order dismissing the tax certiorari petition filed by the Petitioner, 275 N. Middletown Rd., L.L.C. [" the Petitioner "] in 2005, because the

" petitioner failed to timely file proof of service of the petition on the Pearl River Union Free School District or the Commissioner of Finance of Rockland County, and/or failed to serve the Superintendent of Schools of the Pearl River Union Free School District as required by RPTL 708(3) "2.

Intervenor's Contentions

It is the Intervenor's contention that " the Affidavits of Service show that the Town of Orangetown was served on August 2, 2005 and on August 5, 2005, the Notice of Petition and Petition in the instant matter were served by mail on the ' Pearl River School District ' and the ' Rockland County Department of Finance '. The failure to serve the ' Superintendent of Schools ' is a ground for dismissal under RPTL 708(3)"3.

Proof Of Service Untimely

The Intervenor also states that " the proof of service on Pearl River and the Commissioner of Finance was filed twenty-six (26) days after August 5, 2005, to wit: August 31, 2005. The failure to timely file the proof of the mailing of the Petition and Notice of Petition to the Superintendent of Schools and the Commissioner of Finance (within ten days of service) results in the dismissal of the Petition unless

excused for good cause shown. There has been no request for an extension of time nor has any extension of time for compliance with this section been granted. There has been no motion to be excused from the failure to comply with the service and filing requirements under RPTL 708(3) by the petitioner or its attorneys "4.

Petitioner's Contentions

Petitioner contends that by Certified Mail, Return Receipt Requested, it mailed the Notice of Petition and Petition to the " correct address at which the Superintendent of Schools is located for the Pearl River School District "5, although it did not specifically state Superintendent of Schools on the Certified Mailing. The Return Receipt card was received back, signed by June Iamundo, listed among the School District personnel as being employed in " District Administration ". " Ms. Iamundo is in fact the Secretary to the Superintendent of the Pearl River School District - the proper party. "6. " There can be no credible dispute that the service of the Notice of Petition and Petition reached the party described in RPTL 708 and therefore service was made no different than any other mailed service to the Superintendent "7.

Corrective Action Taken

Regarding the R.P.T.L. § 708(3) ten day proof of service requirement, the Petitioner admits that due to " an inadvertent oversight " in the office, the Affidavit of Service was filed sixteen days later than required, on August 31, 2005. " There is no dispute on this point. At the moment I recognized that the filing of the proof of service had not been made within the 10-day period I immediately took the best corrective action I could and promptly filed with the Court " ⁸.

No Prejudice Suffered

Petitioner claims that the matter should not be dismissed because no prejudice has been suffered or alleged by the Intervenor, citing In the Matter of Bloomingdale's Inc. v. City Assessor of White Plains, 294 A.D.2d 570, 571, 742 N.Y.S.2d 881 (2d Dept. 2002) for the proposition that " prejudice is the lynchpin in determining whether the Court should permit late service of the petition on a school district " ⁹.

DISCUSSION

The Superintendent Was Served

R.P.T.L. § 708(3) clearly states that " one copy of the petition and notice shall be mailed within ten days from the date of service thereof as provided to the *superintendent of schools...*" [Emphasis added]. Hence, it is the superintendent of schools that must be served [See, e.g., Majaars Realty Assoc. v. Town of Poughkeepsie, 10 Misc. 3d 1061(A) (West Sup. 2005) (" In fact, it is clear from a review of the Laws of New York, Chapter 502, S. 5536-C, p. 1128, that the legislature intended the individual served to be the superintendent and not the clerk, as the word 'clerk' is crossed out and it is replaced by the phrase 'superintendent of schools' ")].

In the instant matter, June Iamundo, the Secretary to the Superintendent of Schools of the Pearl River School District, 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). It would, of course, have been more prudent for the Petitioner to have served the Superintendent of the Pearl River School District since, had the Petitioner not used Certified mailing, it would have been more difficult to demonstrate that the proper party, the Superintendent of the Pearl River School District, had, in fact, been served.

No Prejudice Demonstrated

R.P.T.L. § 708(3) expressly provides that " failure to comply with the provisions of this section shall result in the dismissal of the petition, unless excused for good cause shown ". The Appellate Division, Second Department has held that the lack of prejudice to the school district requires reversal of a dismissal of the petitions for late notice under R.P.T.L. § 708(3) [See e.g., In the Matter of Bloomingdale's, Inc., *supra* at 294 A.D.2d 571 (" The petitioners admit that the petitions were not mailed to the school district until January 2000, when they learned of their obligation under the statute. However, no action had been taken in any of the proceedings prior to the mailings; no answers had been served, no appraisals had been exchanged, and no negotiations had taken place. Thus the school district was not prejudiced in any way by the late notice...The school district will have the opportunity to contest the petition and receive a full and fair opportunity to be heard on the issue of valuation of the petitioners' properties for assessment purposes...Under these circumstances, the petitions for the 1996 through 1999 assessment years should not have been dismissed"); Compare: Matter of Premier Self Storage of Lancaster v. Christine Fusco, Assessor of the Town of Lancaster, 12 A.D.3d 1135, 784 N.Y.S.2d 443 (4th Dept. 2004) wherein the Court rejected petitioner's contention that the motion to dismiss for a failure to serve the superintendent of schools should be denied because the

District was not prejudiced by petitioner's failure to comply with the statute)].

Good Cause Shown

In the instant matter, the Intervenor has not suffered any prejudice, nor has it alleged such, by the Petitioner's sixteen day late filing of proof of service. Pursuant to the Second Department's decision in Matter of Bloomingdale's, Inc., *supra*, this lack of prejudice is sufficient good cause to excuse the Petitioner's failure to comply with the ten day filing mandate of R.P.T.L. § 708(3).

The excusal for good cause due to a lack of prejudice relates to the failure to comply with the method of service, but not to the failure to serve the proper person, since the former is purely ministerial while the latter is clearly jurisdictional. The instant case involves the ministerial act of filing proof of service with the court within ten days of service of the Petition and Notice of Petition. Hence, the Petitioner's failure to timely file proof of service, by filing it 16 days late, can be excused for good cause due to the lack of prejudice on the School District, as the Appellate Division, Second Department held in Matter of Bloomingdale's Inc., *supra*. This is unlike the situation in Premier Self Storage of Lancaster, *supra* [and Majaars Realty Assoc., *supra*], which involved the failure to serve the proper person, the superintendent of schools, which is a jurisdictional defect.

Accordingly, the Intervenor's motion is denied in its entirety.

This constitutes the decision and order of this Court.

Dated: White Plains, N.Y.
January 4, 2006

HON. THOMAS A. DICKERSON
JUSTICE SUPREME COURT

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ENDNOTES

1. See Majaars Realty Assoc. v. The Town of Poughkeepsie, 10 Misc. 3d 1061(A) (West Sup. 2005).
2. Notice Of Motion To Dismiss dated October 18, 2005, p. 1-2.
3. Intervenor's Memorandum of Law in Support of Motion to Dismiss dated August 8, 2003, p. 2 [" Pearl River Memo. "].
4. Pearl River Memo. p. 2.
5. Affirmation in Opposition of Eric A. Gess undated, p. 1 [" Gess Aff. "].
6. Gess Aff., p. 2.
7. Petitioner's Memorandum of Law in Opposition to Motion to Dismiss dated October 26, 2005, p. 2-3 [" Petitioner's Memo. "].
8. Gess Aff., p. 2.
9. Further Affirmation in Opposition of Thomas A. McTigue, undated, p. 2 [" McTigue Aff. "].