

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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ORANGE AND ROCKLAND UTILITIES, INC.,

Petitioner,

-against-

THE ASSESSOR AND THE BOARD OF
ASSESSMENT REVIEW OF THE TOWN OF
ORANGETOWN AND THE TOWN OF
ORANGETOWN,

Index No. 5343/05

Respondents,

-and-

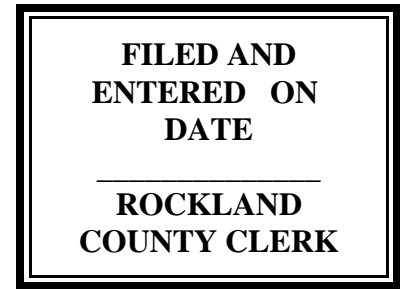
PEARL RIVER UNION FREE SCHOOL
DISTRICT and SOUTH ORANGETOWN
CENTRAL SCHOOL DISTRICT,

Intervenors.

For Review, Under Article 7 of the
Real Property Tax Law, of the Assessment
of certain Real Property in the said
Town of Orangetown, New York.

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DICKERSON, J.



TAX CERTIORARI PROCEEDINGS: IMPROPER SERVICE #4

In this latest exploration¹ of the requirements of proper service
in tax certiorari proceedings, this Court is called upon by the
Intervenors, The Pearl River Union Free School District [" Pearl River

School District "], and The South Orangetown Central School District [" South Orangetown School District "] to issue an Order dismissing the Notice of Petition and Verified Petition [" the Petition "] filed by the Petitioner, Orange and Rockland Utilities, Inc. [" Orange and Rockland "] in 2005, because the " petitioner failed to serve the Superintendent of Schools of Pearl River Union Free School District and the Superintendent of Schools of the South Orangetown Central School District and further failed to timely file proof of service of the petition on the Superintendents of Schools of the Pearl River Union Free School District and the South Orangetown Central School District and the Commissioner of Finance of Rockland County as required by RPTL 708(3)." ²

Factual Background

Orange & Rockland filed and served a Real Property Tax Law [" R.P.T.L. "] Article 7 tax certiorari petition on the Town of Orangetown on July 26, 2005 as to tax parcels having identification numbers 640-666-11 in the Pearl River School District and 74.20-3-21, 645-666-52 and 660-666-18 in the South Orangetown School District.

Intervenors' Contentions

It is the contention of the Intervenors that the Affidavits of Service show that the Town of Orangetown was served with the Petition on

July 26, 2005 and on July 27, 2005 the Petition was served by mail on the " Commissioner of Finance ", the " Pearl River School District ", and the " South Orangetown Central School District ". A review of a copy of the envelope containing the Petition reveals that it was addressed to " Pearl River School District ". The Intervenor's contend that " [n]either the Petition and Notice of Petition were mailed to the Superintendent of Schools of either the Pearl River Union Free School District or the South Orangetown School District, as required by RPTL 708(3)."³

Filed Five Days Too Late

The Intervenor's state that the Affidavit of Service was filed with the Rockland County Clerk on August 11, 2005, fifteen (15) days after the mailing of the Petition to the school districts and the Commissioner of Finance, and five (5) days later than the ten (10) day filing requirement mandated by R.P.T.L. § 708(3).

No Request For Extension Of Time

The Intervenor's state that " [t]here 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 requirements under RPTL 708(3) by the petitioner or its attorneys. "4

Petition Must Be Dismissed

Hence, the Intervenors contend that the Petition must be dismissed since it was not mailed to the Superintendent of Schools, and was not filed within ten (10) days of service of the Petition as required by R.P.T.L. § 708(3).

Petitioner's Contentions

The Petitioner filed a Notice of Cross-Motion requesting that this Court deem the proof of mailing of the Petition to the Commissioner of Finance and the School Districts to have been timely filed *nunc pro tunc*.

Con Edison Severely Short Staffed?

Charles J. Gallagher, the Manager of the Litigation Support Unit (" Unit ") in the law department of the Consolidated Edison Company of New York, Inc. (" Con Edison ") filed an affidavit with this Court explaining the late filings of the Affidavits of Service in the instant matter. Mr. Gallagher stated that during the time period when the Unit

was asked to have the Proof of Service of the Petition filed with the Rockland County Clerk's Office, the Unit was "severely short staffed due to personnel being out on vacation or sick leave. I myself was on vacation during this time period and the person who regularly handles these filings was and is out on sick leave. Therefore, the Unit was greatly short staffed. Accordingly, due to understaffing and a high volume of work, the Proof of Service in question was inadvertently filed with the Rockland County Clerk's Office beyond the 10-day time period required by the RPTL."⁵

A Remedial Statute

The Petitioner, citing Matter of Great Eastern Mall v. Condon, 36 N.Y.2d 544, 369 N.Y.S.2d 672 (1978), states that the R.P.T.L. is a remedial statute that is to be liberally construed. The Petitioner contends that " the purpose of mailing a copy of the notice of petition and verified petition to the school district is to put the district on notice that a proceeding has been commenced that might eventually lead to a refund of taxes...[t]here is no question that copies of the notice of petition and verified petition were timely mailed to and received by the school districts. The fact that the mailings were simply to the school districts and not specifically addressed to the superintendent would be an overly technical basis for dismissal of the proceeding..."⁶

Good Cause Excusal

The Petitioner states that the R.P.T.L. permits the court to excuse untimely filing for good cause. The Petitioner contends that " the circumstances described in the accompanying affidavit of Charles J. Gallagher, the manager of the litigation support unit at the Consolidated Edison law department, should be recognized as good cause to excuse the late filing "7

C.P.L.R. § 2001

The Petitioner submits that the five (5) day delay in filing proof of mailing can be excused under C.P.L.R. § 2001, which provides that " [a]t any stage of an action, the court may permit a mistake, omission, defect or irregularity to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded."

DISCUSSION

The Superintendent Must Be 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) (Dutchess 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' ")].

The Secretary Of The Superintendent

In Matter of 275 N. Middletown Road, LLP. v. Brian Kenney, 10 Misc. 3d 1067(A) (Rockland Sup. 2006), this Court held that there was service of the Petition and Notice of Petition on the Superintendent of Schools pursuant to R.P.T.L. § 708(3). In that case, the Petitioner provided evidence to the Court that the Secretary to the Superintendent of Schools, June Iamundo, 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.

The Superintendent Was Not Served

In the instant matter, the Court has not been presented with any proof, whatsoever, that the Superintendent of Schools was served with

the Petition. The Affidavits of Service show only that the Petition was served on the " Pearl River School District " and on the " South Orangetown Central School District ", and the envelope which contained the Petition was addressed only to the " Pearl River School District ". There was no attempt by the Petitioner to serve the Superintendent of Schools of either the Pearl River School District or the South Orangetown School District as required by R.P.T.L. § 708(3).

C.P.L.R. § 2001 Not Applicable

Contrary to the Petitioner's assertion C.P.L.R. § 2001 does not apply in this case [See e.g., Younan v. City of Rome Assessor, 256 A.D.2d 1122, 684 N.Y.S.2d 804 (4th Dept. 1998) (" We reject petitioners' contention that the failure to file proof of mailing is a procedural irregularity that may be excused pursuant to CPLR 2001 without a showing of good cause. The application of CPLR 2001 to excuse such failure would nullify the requirement of RPTL 708(3) that good cause be shown ")].

The Excusal For Good Cause

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., 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 petitioners admit that the petitions were not mailed to the school district until January 2000, when they learned of their obligations 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)].

Ministerial v. Jurisdictional

" As is apparent from an examination of the aforementioned Second and Fourth Department decisions, 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 " (Matter of 275 N. Middletown Rd., LLP., supra).

No Prejudice Suffered

In the instant case, 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) filing requirement. Pursuant to 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 (10) day filing mandate of R.P.T.L. § 708(3).

Jurisdictionally Fatal

However, like the situation in Premier Self Storage of Lancaster, supra, and Majaars Realty Assoc., supra, the instant matter involves the jurisdictional defect of failing to serve the proper persons, the Superintendents of Schools, of which the excusal for good cause due to

a lack of prejudice does not relate. Hence, the Petitioner's failure to serve the Superintendents of Schools is fatal to the Petition.

Accordingly, the Intervenors' motion is granted and the Petitioner's cross-motion is denied.

This constitutes the decision and order of this court.

Dated: White Plains, N.Y.
February 8, 2006

HON. THOMAS A. DICKERSON
JUSTICE SUPREME COURT

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ENDNOTES

1. Majaars Realty Assoc. v. Town of Poughkeepsie, 10 Misc. 3d 1061(A) (Dutchess Sup. 2005)(petition dismissed for failure to serve superintendent of schools); Matter of 275 N. Middletown Rd. LLP v. Kenney, 2006 WL 26143 (Rockland Sup. 2005) (dismissal of petition denied for lack of prejudice; good cause shown); Matter of Commerce Drive Associates LLC v. Board of Assessment Review, 2006 WL 83517 (Orange Sup. 2006)(dismissal of petition denied; no prejudice shown)
2. Intervenor's Notice of Motion dated October 13, 2005 to Dismiss [" Notice of Motion "] at p. 1-2.
3. Notice of Motion at p. 2.
4. South Orangetown's Memorandum of Law in Support of Motion to Dismiss [" South Orangetown Memo. "] at p. 2-3.
5. Affidavit of Charles J. Gallagher sworn to November 3, 2005 [" Gallagher Aff. "] at p. 2-3.
6. Petitioner's Memorandum of Law dated November 7, 2005 [" Petitioner's Memo. "] at pp. 2-3.
7. Petitioner's Memo. at p. 2.