

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 ROCKLAND

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In the Matter of the Application of
THE COMMONS AT BON AIRE CONDOMINIUM,
by Huff Wilkes, LLP, Agent,

Petitioner(s),

-against -

DECISION/ORDER

Index Nos:

10773/03

10518/04

12393/05

13320/06

12711/07

15674/08

THE TOWN OF RAMAPO, its Assessor and
Board of Assessment Review

Motion Date:

5/18/09

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 respondent for an Order dismissing the several petitions for lack of service on the Ramapo Central School District Superintendent of Schools:

PAPERS

NOTICE OF MOTION/AFFIRMATION/EXHIBITS

AFFIRMATION IN OPPOSITION/EXHIBITS

AFFIRMATION IN REPLY/EXHIBIT

NUMBERED

1

2

3

In this tax certiorari matter, challenging assessments for tax years 2003 through and including 2008 for a condominium (the subject premises), respondent (Town) seeks an order dismissing the several petitions (for those same tax years), for failure of petitioner to timely serve the said petitions on the Superintendent

of Schools of the Ramapo Central School District, as required by R.P.T.L. §708 [3]).

Respondent, upon a review of the file of the Westchester County Clerk, noted affidavits of service in the instant matter for tax years 2003 through and including 2005, upon the East Ramapo School District (ERSD), 105 South Madison Avenue, Spring Valley, New York (concededly not a party to this action); in 2006, on the Ramapo Central School District (RCSD), also at 105 South Madison Avenue, Spring Valley, New York (the address, as set forth previously, for ERSD), and in 2007 and 2008, on RCSD's Superintendent at 45 Mountain Avenue, Hillburn, New York. Respondent argues that service in 2003 through and including 2005 was thus not made on the proper School District (service on ERSD, rather than RCSD); that service in 2006 was also not made on the proper School District (service on RCSD at ERSD's address); and that service in 2007 and 2008, while on the proper School District (RCSD), was not made personally on the Superintendent of said district, since it was received in the District Business Office.

Petitioner asserts that, from tax year 2003 through and including tax year 2005, while it improperly directed service to the Superintendent of Schools of the East Ramapo School District, rather than the Ramapo Central School District, upon information and belief (from a source not stated in its answering papers), said improper service must have been upon oral (and erroneous) information provided by the Town's Assessor that the subject property was located in ERSD. Further, while petitioner fails to explain the service of the petition on RCSD at ERSD's address in 2006, it argues that the address upon which service was made in 2007 and 2008 was the address listed in the website for the New York State Office of Real Property Services (ORPS) for the Superintendent, and on the District's website as the only address for the District.

The Town's Motion to Dismiss for Improper Service

Tax Years 2003, 2004, 2005, and 2006

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.

Thus, RPTL §708(3) clearly requires timely service of a copy of the petition upon the Superintendent of the District encompassing the property; failure to so serve, absent good cause shown, results in dismissal of the petition. In *Landesman v Whitton*, 13 Misc. 3d 1216A (Supreme Court, Dutchess County, Dickerson, J., October 2, 2006), *aff'd*, 46 A.D.3d 827 (2nd Dept. 2007), the petitioner had served the Poughkeepsie School District, but not the Superintendent of the District directly. This Court dismissed the petitions for failing to follow RPTL §708(3), and the Second Department affirmed, holding

The failure to mail the notice of petition and the petition to the Superintendent of Schools of the school district mandates dismissal of the proceedings, and the absence of prejudice cannot be considered good cause to excuse the defect (see *Matter of Orchard Heights, Inc. v Yancy*, 15 AD3d 854, 788 N.Y.S.2d 763; *Matter of Premier Self Storage of Lancaster v Fusco*, 12 AD3d 1135, 784 N.Y.S.2d 443).

In an unauthorized *sur-reply*, petitioner has sought to address respondent's Reply argument, that petitioner's reliance on *Bloomington's, Inc. v. City Assessor*, 294 A.D.2d 570 (2nd Dept 2002) to oppose the motion, rather than the more recent *Landesman*, is misplaced. In its initial opposition to the motion, petitioner's counsel, who stated that he filed papers for a respondent in the *Bloomington's* matter, had asserted that *Bloomington's* involved a total lack of service as well, and that the Second Department had then conditioned dismissal on a finding

of actual prejudice to the school district from the late service. Respondent's Reply papers argued in response that *Bloomingtondale's* actually involved **late** service, and not the failure to serve, which justified excuse for good cause shown. The unauthorized *sur-reply* by Petitioner then asserted that petitioner's counsel

was, in fact, directly involved in that case (on behalf of the School District), and is familiar with the record; in *Bloomingtondale's, Inc.*, Petitioner's counsel did *not* serve petitions in any form upon the School District for some five years, and only did so once a motion to dismiss was in play.

However, this latter argument by petitioner's counsel as to the facts in *Bloomingtondale's* is **completely** belied by the record in that case. The decision itself states

By notices of petition and petitions dated March 29, 1995, March 29, 1996, March 31, 1997, March 20, 1998, and March 10, 1999, respectively, *Bloomingtondale's, Inc.*, commenced Proceeding No. 1 and *Macy's East, Inc.*, commenced Proceeding No. 2 against the City Assessor of the City of White Plains, the Board of Assessment Review of the City of White Plains, and the City of White Plains (hereinafter the municipal respondents), challenging the assessment of parcels they owned in that city.

On January 13, 2000, copies of the petitions were mailed to the City of White Plains School District (hereinafter the school district). Thereafter, by notice of motion in Proceeding No. 2 dated March 15, 2000, the school district moved, *inter alia*, for leave to intervene and to dismiss the consolidated petitions in that proceeding for failure to comply with RPTL 708 (3).

294 A.D.2d, 570-1. Thus, *Bloomingtondale's*, contrary to petitioner's counter-factual assertions, involved not a **failure** to serve the school district, but merely **late service** on the district, and thus has minimal applicability to the case at bar, where service was **never** made on the proper School District in the tax years 2003 through and including 2006.

Indeed, petitioner apparently fails to recognize that the Second Department cited *Bloomington's* in *Landesman*, noting that the former case involved **late** service, and thus was "inapposite" to a case of failed service such as *Landesman*. Notably, the *Landesman* Court also cited to errant (i.e. failed) service cases (rather than late service)--*Orchard Heights, Inc. v. Yancy, supra*, (4th Dept., 2004), and *Premier Self Storage v. Fusco, supra*, (4th Dept., 2004), which both involved service upon the Clerk of the Schools, rather than the Superintendent. Each was dismissed, and in the latter lack of prejudice was specifically held to be no excuse. And, as the Court noted in *Landesman*, this Court has consistently held similarly (see *Orange & Rockland Utilities, Inc. v. Assessor of Town of Orangetown*, 11 Misc 3d 1051[A], 814 N.Y.S.2d 891 [Supreme Court, Rockland County, Dickerson, J., February 8, 2006]; *Majaars Realty Assoc. v. Town of Poughkeepsie*, 10 Misc 3d 1061[A], 809 N.Y.S.2d 482 [Supreme Court, Dutchess County, Dickerson, J., December 19, 2005].) Put simply, lack of prejudice simply cannot supply the "good cause shown" to excuse a **lack** of service, as here in tax years 2003 through 2006, as opposed to untimely or otherwise improper service.

Tax Years 2007 and 2008

As noted above, R.P.T.L. §708(3) in pertinent part 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....

Petitioner has supplied Affidavits of Service for the petitions relating to these tax years, both of which note mail service upon the Superintendent of Schools at the RCSD, 45 Mountain Avenue, Hillburn, New York. Respondent does not deny that this is the proper address of the Superintendent, nor does the Superintendent himself deny this in his affidavit; the latter also asserts that petitioner failed to mail the petitions to him at his office, though failing to identify where that office is located, and that service (as opposed to receipt of the petitions) was made on the Business Office for the District. Based on the Affidavits of Service, the latter assertion would appear to be false--the petitions were clearly addressed, as RPTL § 708(3) requires, to the Superintendent, and **not** the Business Office.

Notably, petitioner asserts, and respondent does not deny, that both the RCSD's own website, <http://www.ramapocentral.org/>, and the ORPS website, list 45 Mountain Avenue, Hillburn, New York, as the sole address for the District offices, without further differentiation regarding the Superintendent's personal office¹. Combined with the mailing of the petitions to the Superintendent, to the addresses provided to the public (via website) and to the New York State governmental agency responsible for real property tax matters, the Court finds that petitioner was in full compliance with R.P.T.L. §708(3) regarding tax years 2007 and 2008. (Cf CPLR §308 [2] [service proper where it includes a mailing to a party's last known address.])

In any event, the Court may also excuse a lack of compliance with R.P.T.L. §708(3) for good cause shown. In *Old Post Farm v. Alfred B. White et al.*, (Supreme Court, Dutchess County, LaCava, J., June 26, 2007), this Court held that

what occurred was a failure by petitioner to **properly** serve the Superintendent, namely such service being (1) timely but initially addressed to someone other than the Superintendent, and (2) untimely but properly addressed to the Superintendent. In contrast, the defect in *Landesman* was the failure of the petitioner there to serve the Superintendent **at all**.

Consequently, in *Middletown*, and in the case at bar, the failure to **properly** serve (rather than the failure to serve **at all**) was and may be excused for good cause shown, in particular by the absence of prejudice. As was the case in *Bloomingtondale's*, substantially no action has been taken in the proceeding prior to the untimely service: while denials have been entered, and an answer (albeit untimely) has been served, "no appraisals had been exchanged, and no negotiations had taken place." 294 A.D.2d, 571. In addition, respondent here has made no showing of prejudice, but, instead, merely makes a *pro*

¹The Court also notes, but does not rely upon, the fact that petitioner's counsel alleges in his unauthorized *sur-reply* that a recent telephone call to the District offices inquiring as to the mail address for the Superintendent elicited the response that mail should be sent to him at 45 Mountain Avenue, Hillburn, New York.

forma allegation that it occurred.

Here, at worst, and clearly inadvertently due to the public information available, petitioner may have improperly served the Superintendent by mailing the petitions in such a manner that it was received not by him but by the District Business Office. Respondent has failed to articulate any prejudice from the improper service, and, as with the cases cited immediately above, no substantial action has taken place in the case. The Court thus, and in the alternative, finds that, in the absence of prejudice, and for good cause shown (the public dissemination of an address for the District that may not accurately reflect the location of the Superintendent's office), the failure to properly serve the Superintendent with the tax year 2007 and 2008 petitions is excused.

Upon the foregoing papers, it is hereby

ORDERED, that the motion by respondent to dismiss for improper service, is granted, solely to the extent that it is

ORDERED, that for failure to serve the Superintendent of the Ramapo Central School District, as provided-for in R.P.T.L. §708(3), the petitions for tax years 2003 through and including 2006 are hereby dismissed, and it is further

ORDERED, that the motion is in all other respects denied.

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

Dated: White Plains, New York
August 3, 2009

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

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