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 DUTCHESS

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In the Matter of the Application of
CONSOLIDATED EDSON COMPANY OF NEW YORK, INC.,

DECISION/ORDER

Petitioners,

For a Judgment Pursuant to Article 7 of the Real Property Tax Law

Index No:
3442/04
3589/05
4095/06
4172/07
4401/08

-against-

THE ASSESSOR AND THE BOARD OF ASSESSMENT REVIEW FOR THE TOWN OF PLEASANT VALLEY.

Respondents.

Motion Date:
7/10/09

ARLINGTON CENTRAL SCHOOL DISTRICT

Intervenor.

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LaCAVA, J.

The following papers numbered 1 to 9 were considered in connection with this motion by intervenor Arlington Central School District (District) seeking dismissal for improper service:

PAPERS	NUMBERED
NOTICE OF MOTION/AFFIDAVIT/AFFIRMATION/EXHIBITS	1
MEMORANDUM OF LAW	2
AFFIDAVIT IN OPPOSITION/EXHIBITS	3
AFFIRMATION	4
AFFIDAVIT	5
AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS	6
SUR-REPLY AFFIDAVIT/EXHIBITS	7
AFFIRMATION	8
SECOND SUR-REPLY AFFIDAVIT	9

In this Article 7 Tax Certiorari proceeding, intervenor District moves to dismiss all of the instant tax year petitions, alleging that petitioner failed to properly serve the petitions upon intervenor as required by RPTL 708 (3).

As disclosed by a review by the intervenor of the files of the Office of the County Clerk of Dutchess County, in 2004 petitioner mailed the required notice (the Notice of Petition and the Petition) to the District at 96 Dutchess Turnpike; all parties concede that the proper address for the District is 696 Dutchess Turnpike. The notice was nevertheless received at the District Offices, and signed for by a District receptionist, Rhonda Barresi. The 2005 notice was mailed in a similar way the following year, and likewise signed for by Ms. Barresi. In 2006, counsel for petitioner mailed the notice to the Superintendent of the District, at the same erroneous address, but as in prior years, Ms. Barresi received and signed for the papers. In 2007 and 2008, counsel addressed the notices in the same way, to the Superintendent, but delivered them to the proper address, 696 Dutchess Turnpike, where they were received by another District employee, Nora Albert.

Con Ed cross-moved previously for disclosure, alleging that service was properly made upon employees of the intervenor District in all of the tax years at issue. Specifically, Con Ed sought to depose the two District employees, Rhonda Barresi and Nora Albert, to determine whether they are secretaries to the Superintendent of Schools, or persons with similar job responsibilities, and thus proper recipients of the notices.

In a Decision and Order dated February 27, 2009, the Court stated:

> **ORDERED**, that the insofar as petitioner seeks leave of Court pursuant to CPLR § 408 to demand depositions pursuant to CPLR §3107, said relief is granted, solely to the extent that petitioner is granted leave to notice District employees Rhonda Barresi and Nora Albert for depositions of said employees pursuant to CPLR § 3107, within 30 days of the instant Order, and solely to inquire of these employees regarding their job titles, descriptions and duties; and it is further
>
> **ORDERED**, that the original motion by

> intervenor for dismissal for improper service pursuant to RPTL 708 (3) is, on the Court's own motion, adjourned to April 20, 2009, at which time any sur-replies regarding the nature of the employment of District employees Rhonda Barresi and Nora Albert, as disclosed during the aforementioned deposition, may be submitted, and at which time the dismissal motion will be deemed fully submitted.

Subsequently, the parties conducted depositions of the two District employees, and submitted sur-replies based thereon. Notably, Ms. Barresi, the District Receptionist, testified that, based on the mail receipts she had been shown, she had signed for the notices in the instant matter, and, pursuant to District policy, which dictated that mail addressed the District be forwarded to the Business Office, in 2004 and 2005 she directed the notices to that Office. In 2006, however, because the notice was addressed to the Superintendent personally, she directed the notice to the Office of the Superintendent. Ms. Alpert, the former Executive Assistant to the Superintendent/District Clerk, did not recall receiving the notices in 2007 and 2008, but conceded that the description in the Affidavit of Service of the person who served the notices conformed to her appearance. Further, she testified that, pursuant to District practice, she would have accepted notices addressed to the Superintendent, and opened them, but **not** delivered them to the Superintendent; instead, she would have forwarded them to the Business Office for referral by the Deputy Superintendent to District counsel.

Thus, the deposition testimony of Ms. Albert and Ms. Barresi establishes that when tax certiorari petitions were mailed to the Arlington Central School District at its Dutchess Turnpike address, whether addressed to the superintendent and initially forwarded to his office or addressed to the School District, the petitions were uniformly forwarded to the District's Business Office for referral to counsel. Therefore, based on its custom and practice, the Arlington Central School District did not designate the superintendent of schools as the person to receive tax certiorari petitions, but, rather, designated its business office.

It is not contested that intervenor received the notices, referred them to counsel, and timely intervened in this matter. Intervenor argues, however, that the 2004 and 2005 petitions were mailed to the wrong address, and to the District, not the

Superintendent; that in 2006, while the notice was addressed to the Superintendent, it was addressed to him at the same improper address; and that in 2007 and 2008, while the notices were addressed to the Superintendent, at the actual proper office of the District, the notices were never received by him.

The Motion by Intervenor to Dismiss for Improper Service

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 notice of the action to an affected school district, by mailing one copy of the Notice of Petition and Petition to the Superintendent of the District or Districts encompassing the property; failure to so mail, absent good cause shown, results in dismissal of the petition. Notably, RPTL §708(3) is a **notice** statute, **not** a service statute, since by its terms those entities noticed do not become parties to the action simply by that notice. Petitioners here generally argue that, regardless of the manner of mailing or delivery, intervenor actually received the notices, thus suffering

no prejudice from the errors.

It has been held, however, that mere lack of prejudice is not sufficient to excuse improper service under RPTL § 708 (3). 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 mailed the petition to the Poughkeepsie School District, but not the Superintendent of the District directly. Respondents moved to dismiss, and petitioner sought to excuse the improper notice solely by asserting a lack of prejudice. 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).

Notably, on appeal the only argument made to the Court for the existence of good cause was the absence of prejudice, which excuse the Second Department squarely rejected as sufficient cause.

The Court in *Landesman* also cited to errant (i.e. failed) notice cases such as *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. In each case, the trial court dismissed, noting that lack of prejudice was no excuse. On appeal in both, the Court found that mailing to the Clerk of the School District, rather than the Superintendent, was grounds for dismissal, absent good cause shown; that, in each case, the petitioners failed to demonstrate good cause, instead merely alleging lack of prejudice; and that, for that lack of good cause to excuse the mis-notice, dismissal was therefore proper.

The Second Department also cited in *Landesman* this Court's *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, 2006) and *Majaars Realty Assoc. v Town of Poughkeepsie*, 10 Misc 3d 1061(A), 809 N.Y.S.2d 482 (Supreme Court, Dutchess County,

2005); in those cases as well, lack of prejudice was the sole "good cause" plead by petitioners, and each simply held that lack of prejudice **alone** could not excuse improper mail notice.

The 2004 and 2005 Notices

Petitioner specifically argues that, while the 2004 and 2005 petitions were sent to the District rather than the Superintendent, in clear violation of the statute, the intervenor did not suffer prejudice, because the District concedes, once the notices in those years were accepted by Ms. Barresi, they were delivered by the internal mail-handling procedures of the District to the Business Office, which is where they would have been delivered even if they had been properly addressed to the Superintendent. However, under *Landesman*, as set forth above, lack of prejudice alone simply cannot excuse failure to follow the statute; rather, it is only by good cause shown that such errors can be excused.

This is not, of course, a case such as *In the Matter of Harris Bay Yacht Club, Inc., v Town of Queensbury et al.*, 46 A.D.3d 1304 (3rd Dept., 2007), where petitioner erroneously determined which of several districts served the property at issue. The Court there granted leave to petitioner to re-notice the District, and denied dismissal, finding good cause, and excusing the prior lack of notice, for serving the Superintendent of the wrong school district after efforts (though unsuccessful) to identify the correct district. This Court has followed *Harris Bay* in *Commons at Copley Court Condominium v. Town of Ossining*, Supreme Court, Westchester County, LaCava, J., September 10, 2009, and *Wyeth Holdings Corporation v. Town of Orangetown*, Supreme Court, Rockland County, LaCava, J., September 23, 2009, in each case finding good cause to excuse mis-service of the notice from the geographical mistakes made by counsel for petitioners.

Thus, while, *Harris Bay* (and, in fact, *Orchard Heights* and *Premier Self Storage*, notably cited with approval in *Landesman*) hold that a demonstration of good cause could (and in *Harris Bay*, did) excuse service on the wrong party, under *Landesman*, a lack of prejudice alone is simply insufficient to constitute good cause for improper service in violation of RPTL 708 (3), such as that performed by petitioners here in 2004 and 2005.

Petitioner here fails to articulate good cause to excuse the improper service in 2004 and 2005, except to generally argue that the notices, while addressed incorrectly, nevertheless were

delivered to the place designated by intervenor for such notices (the Business Office.) Unlike *Harris Bay*, *Copley Court* and *Wyeth*, *supra*, counsel here did not recognize the dictates of the statute, and inadvertently make a geographical error in choosing which of one or more districts to serve. Neither did counsel re-notice the District upon learning of the mistake (see *Bloomingdale's, Inc. v. City Assessor*, 294 A.D.2d 570 [2nd Dept. 2002]), or upon being served with a motion challenging the notice (*see Wyeth*, *supra*); nor move to permit late service (*see Copley Court*, *supra);* nor move to validate, *nunc pro tunc,* a prior erroneous service (*see Wyeth*, *supra*.)

To be sure, the District here not only received, due to its mail-handling policy, immediate notice of the 2004 and 2005 actions, but they likewise immediately intervened to protect their rights in those actions. Put another way, the undeniable fact here is that the 2004 and 2005 petitions herein, regardless of how addressed, were delivered to the very place which intervenor deemed they should go. This Court can conceive of few cases where prejudice has been more effectively reduced, or better argument that a true lack of prejudice alone should excuse a failure to properly notice. It is nevertheless constrained, under *Landesman*, to hold that, despite the conceded absence of prejudice (evident from the District's intervention upon reception of that first notice), good cause does not exist sufficient to excuse the improper notice, and thus the granting of the motion by the District to dismiss is warranted.

In any event, however, as this Court held in *Wyeth*, *supra*, petitioner, even upon dismissal, may have leave to recommence the action pursuant to CPLR § 205 (a). CPLR 205 (a) provides:

> § 205. Termination of action. (a) New action by plaintiff. If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six

> months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period. Where a dismissal is one for neglect to prosecute the action made pursuant to rule thirty-two hundred sixteen of this chapter or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation.

Clearly, even upon dismissal, in whole or in part, by the Court of claims on the strength of RPTL § 708 (3), such dismissal would not be a "voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits on the merits." In particular, as noted above, notice under RPTL 708 (3) is not intended to and does not constitute service, and/or confer personal jurisdiction over the school district or districts so noticed. This Court has previously, in *Bloomingdale's, Inc. v. City Assessor*, Supreme Court, Westchester County, Rosato, J., February 16, 2001, and *Wyeth*, *supra*, granted leave to petitioners to recommence after an RPTL § 708 (3) dismissal. (The Second Department subsequently reversed to deny the dismissal in *Bloomingdale's*, effectively mooting the leave to resubmit pursuant to.) Should petitioner seek leave to re-commence so much of this action as the Court has dismissed pursuant to CPLR § 205 (a), or should petitioner simply re-commence and seek to defend the re-commencement upon the strength of CPLR § 205 (a), in either event such relief would be granted.

The 2006, 2007, and 2008 Notices

As set forth above, RPTL 708 (3) requires the mailing of the notice to the Superintendent of the School District within which the parcel or parcels at issue are located. It is undisputed that counsel for petitioner herein so mailed or personally delivered the notices; the only contention is that intervenors policy prevented the properly-addressed or -delivered notices from being received by the Superintendent. This is in essence similar to *The Commons at Bon Aire Condominium, v. The Town of Ramapo, et al* 2009 WL 2385382 (TABLE)(Supreme Court, Rockland County, 2009), where this Court

upheld notice directed to the District Business office, based on petitioner's review of information provided by the District to The New York State Office of Real Property Services (ORPS), and placed on the District website, as well as internal District mail handling procedures. There, as here, mail notices sent to the Superintendent were forwarded by the District to its Business Office. There, and here, petitioner fully complied with the statute by directing the notices to the Superintendent. In any event, such actions by the District, there and here, combined with the lack of prejudice set forth above, constitute good cause to excuse any mis-notice.

Based on the foregoing, it is hereby

ORDERED, that the motion by intervenor to dismiss, for lack of notice pursuant to RPTL 708 (3), is granted, solely to the extent that the petitions relating to tax years 2004 and 2005 are dismissed, and in all other respects the motion is denied.

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

Dated: White Plains, New York
September 24, 2009

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

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