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
----------X
In the Matter of the Application of
OLD POST FARM, INC.,

DECISION/ORDER

Petitioner(s),

Index Nos:
-against - 4178/06

AFLRED B. WHITE, Chairman, RODERICK W. CIFERRI, III and AMEDEO LALLI, Board of Assessors of the Town of Washington, New York,

Motion Date:
3/16/07

Respondent(s).

To Review a certain property assessment for the year 2006 under Article 7 of the Real Property Tax Law.
----------X

LaCAVA, J.

The following papers were considered in connection with this application by petitioner for an Order striking respondent's defense of improper service, and respondent's cross-motion to dismiss for improper service:

PAPERS	NUMBERED
NOTICE OF MOTION/AFFIRMATION/EXHIBIT	1
NOTICE OF CROSS MOTION/AFFIDAVIT/EXHIBITS	2
MEMORANDUM OF LAW	3
AFFIRMATION IN REPLY/EXHIBITS	4
NOTICE OF WITHDRAWAL/EXHIBIT	5
REPLY AFFIDAVIT/EXHIBITS	6

In this tax certiorari matter, petitioner (Post) seeks an order striking the affirmative defense asserted by respondent (Town)-–improper service--based on the Town's failure to timely move to dismiss the petition on those grounds. The Town's answer,

more particularly, contained the affirmative defense that petitioner had failed to serve, failed to timely serve, and failed to timely file proof of service of, the petition, on the Superintendent of Schools of the Millbrook Central School District [relating to service], and the Commissioner of Finance of Dutchess County [relating to proof of service]), as required by R.P.T.L. § 708 [3]).

Respondent Town, in turn, cross-moves, seeking an order dismissing the aforementioned petition, and alleging, as set forth in their answer, that the petitioner failed to serve, failed to timely serve, and failed to timely file proof of service, of the petition, as required by R.P.T.L. § 708(3).

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.

Respondent Town 's Contentions

The Town contends that in reviewing the file in the Dutchess County Clerk's Office in regard to the instant proceeding on or about August 31, 2006, counsel discovered there was no affidavit of service in the file as to service upon the Superintendent of the Millbrook Central School District, or upon the Commissioner of Finance of Dutchess County. The Respondent states that the file

indicated that the petition was received by the Town of Washington on or about July 31, 2006, and that, therefore, the time for service and filing proof of service expired nearly one year ago, in early August 2006.

The Town also contends that, in subsequently reviewing the same file in the Clerk's Office on or about February 8, 2007, respondents' counsel noted that there was at that time an affidavit of service in the file as to service upon the Clerk of the Millbrook Central School District, Ms. Tonya Pulver, and the Commissioner of Finance of Dutchess County, Ms. Pamela Barrack. These affidavits were apparently filed on October 24, 2006, and averred to service on August 1, 2006. Finally, also present in said file, according to the Town, was another affidavit of service, relating to service upon Dr. R. Lloyd Jaeger, Superintendent of the Millbrook Central School District, which indicated that service of the petition upon him had occurred on October 24, 2006, which affidavit was filed on October 25, 2006.

The Town also concedes that, on or about September 18, 2006, it served an untimely Answer upon Post, which answer asserted the affirmative defense that petitioner had failed to serve the Superintendent of the Millbrook Central School District, and that petitioner had also failed to timely file the affidavits of service of the petition upon the Superintendent and upon the Commissioner of Finance of Dutchess County.

Respondent Town therefore now contends that service of the petition by Post upon the Superintendent of the Millbrook Central School District, as required by R.P.T.L. § 708(3), was not effected until October 24, 2006, and that thus service was not timely, while the affidavits of service of the petition upon the Superintendent and the Commissioner of Finance of Dutchess County were not filed until the same date, October 24, 2006, and that thus the filing was likewise untimely.

Post's Contention

Petitioner Post contends as an initial matter, by way of motion to strike the affirmative defense of lack of service under R.P.T.L. § 708(3), that the Town may not maintain its defense that petitioner failed to serve (or failed to timely serve) a copy of the petition on the Superintendent of the Millbrook Central School District, due to the Town's failure to timely move to dismiss the petition based on lack of service. In particular, Post asserts that, pursuant to CPLR § 3211 (e), respondent was required, after asserting said lack of service as an affirmative defense in their answer, to move to dismiss upon that ground, namely improper

service, within sixty days of service of the pleading, or waive its right to so move.

The Town's Response

The Town has not only opposed petitioner's motion to strike on substantive grounds, but has also served upon Post, on or about February 12, 2007, and during the pendency of the instant motion to strike, a notice of withdrawal of its Answer. The Town therein (and herein) asserts that the answer was untimely as it occurred after the return date for the said petition; that therefore, pursuant to RPTL § 712 (1), denials of the allegations contained in the petition were automatically entered on its behalf; and that the subsequently filed answer was both untimely (as an amendment to a pleading) and a nullity, since an answer had already been deemed entered as required by law.

Timeliness of the Town's Motion to Dismiss

Respondent's Answer is Not A Nullity

As an initial matter, prior to addressing the asserted applicability of the 60-day time limit embodied in CPLR § 3211 to the affirmative defense of lack of service under R.P.T.L. § 708(3), as interposed herein by the Town, and the subsequent cross-motion by the Town to dismiss for said lack of service, the Court must address the Town's argument, in opposition to Post's motion to strike, that their answer is a nullity, and that therefore their time to move to dismiss the affirmative defense pursuant to § 3211 (a) 8 for said lack of service has not yet expired. Respondents argue, and Post does not contest, that pursuant to RPTL § 712 (1), the Town's last day to serve their Answer was August 25, 2006. Having failed to do so, respondents further argue, denials to the assertions in the petition were automatically deemed entered on their behalf pursuant to that same section.

When respondents did serve an answer on September 18, 2006, assert respondents, it was both untimely, and also a nullity, since, as set forth above, denials had already been deemed entered. This was particularly true since, they argue, pursuant to CPLR § 3025 (a), this untimely Answer constituted an amendment of the deemed answer, and respondents' time to amend their pleading as of right had already expired. Further, respondents' have since, as set forth above, also noticed the withdrawal of their Answer, which they have asserted was a nullity due to the deemed entry of denials. Consequently, since the Answer was a nullity, and in any event since it has been withdrawn, the Town asserts that their time to move to dismiss the petition for lack of and untimely service,

has not yet run, and that they may therefore now cross-move to dismiss the petition on those grounds.

RPTL § 712, "Answer", provides

> 1. The respondent shall serve a verified answer upon the petitioner at least five days prior to the return day unless the time to serve such answer has been extended by the parties or the court for good cause shown; provided, however, that if the respondent fails to serve such answer within the required time, all allegations of the petition shall be deemed denied. A motion to dismiss the petition shall not be denied merely on the ground that an answer has been deemed made.

CPLR § 3025, "Amended and supplemental pleadings", provides

> (a) Amendments without leave. A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.

Assuming, *arguendo*, that the denials deemed entered for the Town are also deemed their Answer, pursuant to CPLR § 3025 (a), it is indeed true that the time for respondents to amend that "pleading" without leave of court would have expired by the time respondents served their untimely Answer. However, the Court also notes that respondents herein only served their untimely Answer; previously, rather than serving an Answer, denials had been deemed entered for them pursuant to RPTL § 712 (1), but neither that section nor any other authorizes the deeming of entered denials as an answer. Thus, the Town, absent a previously-served pleading, cannot argue that under CPLR § 3025 (a) their only served pleading–-their Answer–was an untimely amendment, and thus a nullity, since there was no previously-served pleading to be amended by the late Answer.

Further, while RPTL § 712 (1) surely provides for a deeming of denials in the event that the respondent fails to serve an answer in a timely fashion, that does not relieve the respondents herein of the duty to answer, even if in an untimely manner, and even despite the deemed entry of denials. In *New York Central Railroad*

Co. v. Donnelly, 8 A.D.2d 65 (4th Dept. 1959), the respondent declined to serve an answer, whereupon denials to the allegations were entered. Petitioner desired an answer, however, and moved to compel one, which motion the trial court denied. The Fourth Department held

> The statute is mandatory in its terms. It provides that the respondent "shall" serve a verified answer. The statute prescribes the time within which the answer must be served and it requires the respondent to obtain a stipulation from the petitioner or an order from the court "for good cause shown" if it desires an extension of the prescribed time. It is true that the statute provides that, in the event of the respondent's failure to serve an answer within the required time, "all allegations of the petition shall be deemed denied" but this provision does not preclude the petitioner from taking further proceedings to compel the respondent to serve an answer in accordance with the preceding sentence of the statute.

The Second Department, soon thereafter, relied on *New York Central* in affirming a duty for respondents to answer, deemed denials notwithstanding; in *Dopfel et al. v. Breslin et al.*, 18 A.D.2d 1098 (2nd Dept. 1963), the Court directed the respondent therein to provide an answer to the petitioner despite the fact that respondents' failure to answer had led to the entry of deemed denials on their behalf. Thus, the Town herein may neither withdraw their Answer herein without leave of Court or agreement among the parties, since RPTL § 712 (1) compels entry of an Answer. Nor may they seek to have it treated as a nullity, since, while it was untimely, it was not an unauthorized amendment and is, as set forth previously, required by statute.

Applicability of CPLR § 3211 to RPTL § 708 Motions

As set forth in greater detail above, RPTL § 708 provides that

> Neither the school district nor any such county or village shall [by service of a copy of the petition] be deemed to have been made a party to the proceeding.

CPLR § 3211 provides

> (a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> *****
>
> 8. the court has not jurisdiction of the person of the defendant; or
>
> *****
>
> (e) Number, time and waiver of objections; motion to plead over....A motion based upon a ground specified in paragraph two, seven or ten of subdivision (a) may be made at any subsequent time or in a later pleading, if one is permitted; an objection that the summons and complaint, summons with notice, or notice of petition and petition was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship. The foregoing sentence shall not apply in any proceeding under subdivision one or two of section seven hundred eleven of the real property actions and proceedings law.

It is clear from even a cursory examination of RPTL § 708 (3) that, at least insofar as relates to the mailing of a copy of the petition to the school district, county, or village, said mailing fails to make the recipient a party to the action, nor is jurisdiction over that entity acquired by said mailing. (*Cf* CPLR §§ 308, 311, 312-a.) Indeed, it is clear from the history of RPTL § 708 (3) that the service provisions were intended solely to put on notice a governmental entity, such as a school district, which, while it may not be the taxing authority, may nevertheless be significantly affected by the attendant Article 7 action (and any tax refunds flowing therefrom), and may therefore need to intervene therein. And, while characterized to the contrary by Post, it cannot reasonably be contested that the affirmative defense asserted by the Town in its Answer, and the instant motion, are interposed pursuant to RPTL § 708 (3) and not CPLR § 3211 (a) 8, not least because the affirmative defense and the instant motion both cite to that very former section, and not the latter.

CPLR § 3211 (a) 8, conversely, by its very terms, simply provides for a motion to dismiss where the court has not acquired jurisdiction over the person of the defendant. Further, while CPLR § 3211 (e) seems broader, in that it appears to relate generally to all types of service, rather than specifically to a motion pursuant to CPLR § 3211 (a) 8, notably all of the other conditions provided-for in § 3211 (e) relate to CPLR § 3211 (a) motions, including in particular § 3211 (a) 8. (See, e.g., 1-21 Weinstein, Korn & Miller *CPLR Manual* § 21.04, which described the relevant clause of CPLR § 3211 (e): "A special requirement, added in 1996, applies to a jurisdictional defense based on improper service of process.) Since, unlike CPLR § 3211 (a) 8, RPTL § 708 (3) does not relate to the alleged failure of the non-movant to acquire jurisdiction of the person of the defendant; and since, in any event, both the affirmative defense and motion arise explicitly under RPTL § 708 (3) and not CPLR § 3211 (a) 8, it would appear inappropriate for the Court to find a waiver of the affirmative defense of failure to serve the School Superintendent pursuant to CPLR § 3211 (e).

The Court also notes that the cases cited by Post are not to the contrary, and in fact two support the Court's conclusion regarding the inapplicability of the 60-day time limit in CPLR § 3211 (e) to RPTL § 708 motions (at least insofar as they relate to the mailing of a copy of the petition to a school district, county, or a village). Post, for example, cites to *Matter of Village Square of Penna, Inc. v. Assessor of the Town of Colonie*, 290 A.D.2d 184 (3rd Dept. 2002), for the proposition that the time limitations of CPLR § 3211 were held by that Court inapplicable to RPTL § 708 motions only where the respondent therein had failed to answer (i.e. denials were deemed asserted after the failure to respondent to interpose a timely answer.) As Post properly argues, while the Court made statements regarding the general inapplicability of CPLR § 3211, *Penna* involved the failure to timely answer, therein deemed to be denials, hence any statements about the inapplicability of the § 3211 time limits to all RPTL § 708 motions were properly *dicta*.

Further, Post clearly mis-characterizes two decisions of this Court, *Majaars v. Town of Poughkeepsie*, 10 Misc.3d 1061 (Supreme Court, Dutchess County, Dickerson, J., 2005) and *Landesman v. Whitton*, 2006 N.Y.Slip Op. 51847 (u) (Supreme Court, Dutchess County, Dickerson, J., 2006). In the former case, respondent moved to dismiss the petition, *inter alia*, for failure of petitioner to serve the Superintendent of Schools (it served the District Clerk in error.) This Court squarely held that

> it is clear that the courts have not required a municipality in a tax

> certiorari proceeding to make a motion to dismiss within the same CPLR §3211(e) 60-day time constraint as in other types of actions. [*See e.g., Village Square of Penna, Inc. v. Semon*, 290 A.D.2d 184, 736 N.Y.S.2d 539, 541 (3d Dept. 2002), *lv.app.dis.*, 98 N.Y.2d 647(2002), where the Appellate Division held that a motion to dismiss under R.P.T.L. § 708(3) is not governed by the 60-day limitation in C.P.L.R. § 3211(e)]. Hence, the Petitioner's contention that Respondent's Notice of Motion is untimely is completely without merit.

See also Landesman, supra, where this Court stated "...the requirements of C.P.L.R. § 3211(e)] to file a timely objection do not apply in tax certiorari proceedings...."

Timeliness Irrespective of Inapplicability of C.P.L.R. § 3211(e)

While this Court has thus previously held that the time limits of C.P.L.R. § 3211(e) are inapplicable to RPTL § 708 motions, that does not conclude the analysis into the timeliness of the motion. As the Third Department explicitly held in *Penna*, irrespective of the inapplicability of § 3211(e), a respondent's motion to dismiss for the petitioner's failure to serve the Superintendent of Schools, must be made in a timely fashion. Here, the proceeding was commenced by petitioner on or about July 31, 2006, and the Town's cross-motion to dismiss was served on or about February 14, 2007, a period of approximately six months and two weeks.

While they did not concern the failure of a petitioner to properly serve a school district, and while unlike here they also involved the failure of respondents to answer, nevertheless the Third Department has assessed the appropriate time period within which a municipality must move to dismiss a petition, and has thus provided guidance to this Court on the proper limitations period for such a motion. In *N. Country Housing, Ltd. Partnership v. Board. of Assessment Review*, 298 A.D.2d 667 (3rd Dept. 2002), the respondent waited not only until after trial, and the entry of a final judgment in the matter, but some four years in total after the commencement of the action, before moving to dismiss one of the several tax petitions on statute of limitations grounds. The trial court held the defense waived, and the Third Department affirmed, holding "that defense can be waived if it is not pursued sufficiently early in the proceeding to prevent prejudice to the petitioner." 298 A.D.2d, 669. Conversely, in *Penna* and two later

cases--*Matter of Abramov v. Board of Assessors, Town of Hurley*, 257 A.D.2d 958 (3rd Dept. 1999), *lv. den*. 93 N.Y.2d 813 (1999) and *Rosen v. Assessor, City of Troy*, 261 A.D.2d 9 (3rd Dept. 1999), the Court found lesser times–-three months, five months, and four months, respectively–-unobjectionable periods of delay. In light of the fact that the delay between the commencement of the instant proceeding and the cross-motion to dismiss was slightly over six months, the Court holds that the defense of lack of service herein was not waived.

The Town's Motion to Dismiss for Improper Service

Addressing, then, the merits of respondent Town's cross-motion to dismiss for failure to serve a copy of the petition upon the Superintendent of the Millbrook Central School District, the Court notes that, as set forth in greater detail above, RPTL § 708(3) clearly requires timely service of a copy of the petition upon the school superintendent. In opposition to the motion, Post initially asserts that the passage of over six months has effected a waiver of the defense of lack of service, pursuant to CPLR 3211 (e). As set forth previously, this Court has held, and here holds, that CPLR § 3211 (e) is inapplicable to a motion to dismiss for a lack of serve upon the superintendent of a school district, and that the passage of six months did not effect a waiver of such defense.

Petitioner's counsel then asserts in opposition to the dismissal motion that his secretary erroneously printed an older Notice of Claim form, which Notice, when completed, respondent's counsel subsequently signed, and which Notice provided for service on Ms. Tonya Pulver, Clerk of the Millbrook Central School District, rather than directly to the Superintendent of Schools. Service was, petitioner concedes, initially performed by mailing the petition to Ms. Pulver as provided-for in the statute. However, upon receipt of respondent's answer denying proper service, Post, on or about October 23, 2006, effected service directly upon the Superintendent of Schools by mailing the petition directly to him.

Post also asserts that, upon information and belief, Tonya Pulver is not only the Clerk of the District but also the personal secretary to the Superintendent. Thus, Post argues, since service was, again on information and belief, both upon the personal secretary of the Superintendent, and subsequently (albeit late) upon the Superintendent personally, service was timely effected.

The Town points to *Landesman, supra, where* the respondent had moved to dismiss several tax year petitions based on the failure of petitioner therein to serve the City of Poughkeepsie School

Superintendent. This Court noted there

> The 2001 Petition is addressed to, among others, the "City of Poughkeepsie School District, Business Office". The affidavit of service by mail on July 31, 2001 is to the " City of Poughkeepsie School District, Administrative Office ". Neither the 2001 Petition nor the affidavit of service are addressed to the Superintendent of Schools and as such the Petition is jurisdictionally defective. The 2001 Petition is dismissed pursuant to R.P.T.L. § 708(3).

(In *Landesman*, in fact, all five tax years suffered from the same defect; *see also Maajars, supra*; *Premier Self Storage of Lancaster v. Fusco*, 12 A.D.3d 1135 [4th Dept. 2004], *lv. ap. den*. 4 N.Y.3d 710 [2005]).

However, this Court had already held, prior to *Landesman*, in *In the Matter of 275 N. Middletown Rd., LLP, v. Kenney*,(Supreme Court, Rockland County, Dickerson, J., January 4, 2006), that

> 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)].

Clearly, here, as in *Middletown*, 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 *Bloomingdales*, 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 forma* allegation that it occurred.

Indeed, the above-cited cases also employ the same analysis in respect to the failure to file copies of the affidavits of service upon the School Superintendent and/or the County Department of Finance, the latter failure as also alleged here. The Court thus concludes that, while petitioner improperly and untimely served

copies of the petition upon the Superintendent of Schools, and untimely filed affidavits of service of the petition upon the Superintendent and the Dutchess County Department of Finance with the Clerk, such improper service and filing did not prejudice respondent, the School District, or Dutchess County, and, in the absence of prejudice, such improper service and filing may be and are excused for good cause shown.

Upon the foregoing papers, it is hereby

ORDERED, that the motion by petitioner for an Order striking respondent's defense of improper service, and respondent's cross-motion to dismiss for improper service and filing, are, accordingly denied.

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

Dated: White Plains, New York
June , 2007

_____

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

Jeffry A. Giardina, Esq.
Attorney for Petitioner
PO Box 481
Millerton, New York 12546

David D. Hagstrom, Esq.
Van DeWater & VanDeWater, LLP
Attorney for Respondents
40 Garden Street
PO Box 112
Poughkeepsie, New York 12602