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 WESTCHESTER
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MARIANNE SHOECRAFT,

DECISION/ORDER

Plaintiff(s),

Index No:
19463/05
-against - 20437/06
21401/07
23126/08

THE TOWN OF NORTH SALEM, ITS ASSESSOR AND BOARD OF ASSESSMENT REVIEW,

Motion Date:
7/24/09

Defendant(s).
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LaCAVA, J.

The following papers numbered 1 to 3 were considered in connection with respondent Town of North Salem (Town)'s motion to dismiss for lack of standing, and petitioner Marianne Shoecraft 's cross-motion to amend the petition to substitute AKA Realty Partners as petitioner:

PAPERS	NUMBERED
AFFIRMATION IN SUPPORT OF MOTION TO DISMISS	1
MEMORANDUM OF LAW	2
LETTER BRIEF IN OPPOSITION	3

In this Article 7 Tax Certiorari action, respondent, nearly upon the completion of trial, seeks an Order dismissing the petitions filed by petitioner Marianne Shoecraft challenging the assessments for the tax years 2005 through and including 2007, for the property identified on the tax map of the Town of North Salem as Section 13, Block 1689, Lot 224, and known as and located at 218 Titicus Road, North Salem, New York. Petitioner cross-moves to amend the petition, to substitute AKA Realty Partners, the true

owner of the property, as petitioner.

Petitioner and her now-deceased husband (the Shoecrafts) purchased the instant property in 1999 for $2,250,000.00. The premises included not only the house at issue, but additional undeveloped property amounting to a total of 58.039 acres. At the time of purchase, the house, which had been constructed in 1992 but had never been occupied, was in an advanced state of decline, and in 1999 the then assessor had elected to reduce the assessment on the property substantially.

Beginning in 1999, the Shoecrafts performed extensive renovations and upgrades to the home and to the property, while also, the following year, subdividing the property into three parcels (which change lowered the assessment on the subject, now at 20.851 acres). Then in 2003, the three parcels were re-combined to create the current subject parcel (now 33.8 acres) and one other undeveloped parcel (not presently at issue.) Due to both the subdivisions and the work conducted on the home, the assessor had adjusted the assessments yearly between 2000 and 2004, increasing them substantially.

When advised of the final increase in the assessment to over $862,000.00 in 2005 to account for the work performed up to that point, petitioner challenged the assessment, and did likewise in 2006 and 2007 (which latter two years included reductions resulting from settlement negotiations.) Petitioner asserts that she is the victim of selective reassessment, arguing that by the 2005 tax year her assessment substantially exceeded similar housing stock in the Town. Respondent argues that changes in the assessment have accompanied the substantial improvements to the premises and the subdivisions.

During, and indeed very near to the end of the trial of this matter, petitioner was testifying regarding checks used to disburse funds for the improvements and other work on the house. She then testified that a NY Limited Partnership, AKA Realty Partners (AKA), was the true owner of the premises between 2002 and 2007, which accounted for the fact that they had paid the property tax bills, not her. She further asserted that she and Mr. Shoecraft were the sole owners of AKA, that Mr. Shoecraft was the general partner for AKA immediately prior to his death, and that, upon his death, she succeeded to that title. She also testified to an ownership interest in THS Management Corp. (THS), a New York Corporation, by Mr. Shoecraft prior to his death, and likewise by her afterwards.

Respondent now moves to dismiss the instant petitions pursuant to CPLR 3211 (3), asserting that, pursuant to RPTL §§704 and 706,

petitioner does not have the legal capacity to sue (i.e. has no standing) since she is not an "aggrieved party". Thus the petitions, brought in Mrs. Shoecraft's own individual name, and not in the name of the true owner (AKA), were and are defective. Petitioner argues that, for waiting until well after the commencement of trial in this matter, respondent has waived any defect from the misnomer, and, in any event, that the misnomer is subject to cure by motion to amend.

Respondent's Motion to Dismiss Pursuant to CPLR 3211

A defendant who seeks dismissal of a complaint pursuant to CPLR §3211 on the grounds set forth therein bears the initial burden of proving, prima facie, that the condition or status asserted actually exists. (*C.f. Gravel v. Cicola,* 297 A.D.2d 620 [2nd Dept. 2002], *citing Duran v. Mendez*, 277 A.D.2d 348 [2nd Dept. 2000] -- party asserting statute of limitations must demonstrate the expiration of the limitations period.) The burden then shifts to a plaintiff to aver evidentiary facts establishing that their cause of action falls within an exception to the statute, or to raise an issue of fact as to whether such an exception applies. (*Gravel, supra*, at 621, citing *Duran, supra*, regarding the statute of limitations defense).

Here, respondent has argued in essence that petitioner lacked the capacity to bring the 2005, 2006, and 2007 petitions in her personal capacity, since the instant property was actually owned by AKA. Respondent further asserts that, despite her testimony on the subject, petitioner could not even bring the petitions as General Partner of AKA, since the General Partner of AKA was actually THS, of which entity she was President.

As noted above, the burden in the first instance is upon respondent to establish petitioner's lack of capacity to sue. However, respondent's central assertions regarding the status of AKA and THS are not borne out by the record. The only proof before the Court as to who the general Partner of AKA is, was disclosed during the testimony of petitioner, wherein she stated that she succeeded to her husband's status as General Partner of AKA after his death in 2004. Further, the record does not disclose any further information about the status of THS with regard to AKA. Since the only proof in the record is petitioner's testimony that she was the General Partner of AKA when the 2005 to 2007 petitions were filed, in essence respondent's assertion is not that she did not have authority to bring the instant action, but that petitioner has brought the petitions in her own name, rather than as General Partner for AKA.

In any event, and even if respondent's unsupported allegations regarding the status of AKA and THS were correct, the record further discloses that petitioner was the actual owner of the premises between the date of purchase in 1999 and the deeding to AKA in 2002; that she succeeded to her husband's role as President of THS upon his death in 2004; and that she became the titled owner of the premises again in 2007. It appears unchallenged, then, that during the 2005, 2006, and 2007 tax years, petitioner in her status as President of THS (and THS's supposed status as General Partner of AKA) had full authority to act for the corporation and/or partnership, including the filing of Article 7 petitions.

The Court of Appeals dealt with a similar situation in *Miller v. Board of Assessors*, 91 N.Y.2d 82 (1997). In that case, regarding two of the several properties at issue, the Article 7 petitions had inadvertently been filed in the names of two prior owners of the properties, rather than the current owners. The Court simply held

> Similarly, the error in naming the prior owner of the Robinson property in the petition was a technical defect that was corrected when a written authorization from Robinson was filed (*see, Matter of Divi Hotels Marketing. v Board of Assessors*, 207 AD2d 580; *Matter of Rotblit v Board of Assessors*, supra, 121 AD2d 727).

Notably, the Court cited as authority two Appellate Division cases. The first, *Divi Hotels* (4th Dept. 1994), a case in which petitioner's counsel had inadvertently challenged the assessment before the Board of Assessment Review, and commenced the Article 7 action, in the name of a prior owner, held

> Because we conclude that Supreme Court should have granted petitioner's motion to amend the petition and denied respondents' motion to dismiss the petition, we reverse. Adopting a broad and practical view, we see this as a simple matter where a taxpayer engaged counsel to pursue such legal proceedings as may be necessary to effect a reduction of the assessed valuation of the taxpayer's property and, pursuant to the taxpayer's request and authorization, the law firm sought administrative relief and, when unsuccessful, brought the current proceeding for judicial review. The petition in both the administrative and judicial proceedings

> clearly identified the subject realty by tax map section, block and lot number, thereby permitting precise identification of the owner from respondents' own records, and contained allegations to the effect that the respective matters were being pursued on behalf of the owner of the property, a party with undeniable standing, pursuant to authority duly granted. Thus viewed, there can be no reasonable question, first, that we are dealing with a mere misnomer and, second, that no prejudice to respondents resulted. Consequently, the amendment should have been permitted *(see, Matter of Sterling Estates v Board of Assessors,* 66 NY2d 122, 127; *Matter of Rotblit v Board of Assessors,* 121 AD2d 727; *Bergman v Horne,* 100 AD2d 526, 527).

The Court of Appeals also cited to *Rotblit v. Board of Assessors and/or Board of Assessment Review*, 121 A.D.2d 727 (2nd Dept. 1986), another case involving an Article 7 action being brought in the name of a former owner. There, the Court stated

> Under such circumstances, Special Term appropriately deemed the defect in those petitions "technical" rather than "jurisdictional", and permitted the names of the record owners to be substituted for that of Max Rotblit. "'The Tax Law relating to review of assessments is remedial in character and should be liberally construed to the end that the taxpayer's right to have his assessment reviewed should not be defeated by a technicality'" (*Matter of Great Eastern Mall v Condon*, 36 NY2d 544, 548, quoting from *People ex rel. New York Omnibus Corp. v Miller*, 282 NY 5, 9). Like an omitted authorization by the petitioner, a defect with respect to the name of the petitioner, where there is proper authorization by the appropriate individual, is a "technical defect which should not operate to bar the proceedings" *(Bergman v Horne*, 100 AD2d 526, 527). The appellant "received 'adequate notice of the commencement of the proceeding', and * * * [no] substantial right of the [appellant]

> would * * * 'be prejudiced by disregarding the defect'"; and the misnomer may thus be properly cured by amendment of the petitions *(see, National Bank v State Tax Commn.*, 106 AD2d 377, 378).

(*See also EFCO Products v. Cullen*, 161 A.D.2d 44 [2nd Dept., 1990], where error in failing to bring Article 7 action in name of true owner was deemed "not fatal" and correctable by amendment.)

Petitioners, as did the Second Department in *Rotblit*, also properly cite to *Great Eastern Mall, Inc. v. Condon*, 36 N.Y.2d 544, 548 (1975). There, the Court addressed a petition which improperly named several of the respondents against whom the petition had been brought. Respondents sought dismissal as in violation of RPTL § 704 (1); the Court, however, held

> The position taken by respondents is that the failure of petitioners to comply with this technical pleading requirement of subdivision 2 of section 704 renders the petitions jurisdictionally defective and should result in a dismissal. We refuse to adopt such a harsh and outmoded view of pleading and procedure.
>
> The dual legal concepts that mere technical defects in pleadings should not defeat otherwise meritorious claims, and that substance should be preferred over form, are hardly novel. Nor should the fact that this is a proceeding to review a tax assessment require application of a different rule. As we said some years ago, "[the] Tax Law relating to review of assessments is remedial in character and should be liberally construed to the end that the taxpayer's right to have his assessment reviewed should not be defeated by a technicality." *(People ex rel. New York City Omnibus Corp. v Miller*, 282 N Y 5, 9.) Indeed, that view is mandated by CPLR 2001 and 3026, which are applicable to these article 7 proceedings.

(*C.f. Sterling Estates, Inc. v. Board of Assessors*, 66 N.Y.2d 122 [1985], holding that amendment to add previously un-protested properties does **not** involve technical or un-substantial error, and

prejudices respondent.)

Notably, this Court has also previously held that the naming of an improper party in a petition, where that party is a prior owner, is a defect which may be cured by amendment. In *Orange and Rockland Utilities et al. v. Town of Haverstraw*, Supreme Court, Rockland County, Dickerson, J., November 24, 2004, one of the Intervenor-Petitioners was Mirant New York Inc. However, the titled owner of the subject property was Mirant Bowline LLC, of which LLC Mirant New York Inc. was the sole member. The Court cited to *Waldbaum, Inc. v. Finance Administrator of New York*, 74 N.Y.2d 128, 133 (1989), noted that "[the] Tax Law relating to review of assessments is remedial in character and should be liberally construed to the end that the taxpayer's right to have his assessment reviewed should not be defeated by a technicality", and compared the naming of an improper party to a simple misnomer.

The Court in *Orange and Rockland* also noted that in *Rotblit*, the party with the authority to commence the action was, like here, the manager of the entity which was the true owner of the parcel. And, the Court also explained, Mirant New York's position was similar to the corporations in *Arlen Realty and Development Corp. v. Board of Assessors, Town of Smithtown,* 74 A.D.2d 905 (2nd Dept. 1980), where the Second Department held that a parent corporation had the authority to commence an action for its wholly-owned subsidiary. In addition, *Arlen Realty* holds that the liberal amendment rules of CPLR § 3025 authorize amendment of an Article 7 petition to add other persons or entities as aggrieved parties. (*See also Orange and Rockland Utilities et al. v. Town of Stony Point et al.,* Supreme Court, Rockland County, Dickerson, J., May 16, 2005.) Each of these cases note the reasoning behind §§ 704 and 706 -- the prevention of unauthorized initiation of Article 7 proceedings.

At worst, then, petitioner was the former owner of the subject parcel, as well as a general partner of the business entity which was the owner of the subject parcel when the tax certiorari petitions were filed. Here, it would work a manifest injustice to her, were her petitions dismissed for naming herself as petitioner, rather than herself as General Partner of the wholly-owned partnership which she now directs, (or, indeed, as the President of the Corporation which is assertedly the General Partner of that partnership), particularly absent any showing of prejudice whatsoever by respondents. It is abundantly clear as well that the petitions properly named the parcel and the nature of the grievance, and were brought under the name of the actual lessee and

resident of the premises. The above-cited cases treat the failure to name a party as petitioner, where the party named instead is a former owner and/or a manager of the actual owning entity (both applicable to petitioner here), as a technical defect, and thus not only waivable but curable by amendment.

The Court, finally, is also cognizant of the timing of the respondent's motion to dismiss. Respondents assert surprise in discovering, during petitioner's testimony, that she was not the owner of the premises during the tax years at issue, but a lessee, and a General Partner, of the actual owning entity, AKA. However, it appears uncontested that the tax bills for the years at issue were paid to the Town, in a timely fashion, by AKA, not by petitioner individually, and also that the action, since its commencement, was in the name of petitioner in her individual capacity. Having been apprised of the inconsistency (i.e. the apparent disagreement between the tax rolls, the payer of the taxes, and the party challenging the assessment), as early as the filing of the first petition in 2005, it appears that respondent waited until the time of trial to challenge petitioner's status as an aggrieved party; "such waiting suggests gamesmanship, and effected a waiver of their right" to challenge her status and the petitions in any event (*c.f. U.S. Postal Service v. Town of Bedford*, Supreme Court, Westchester County, LaCava, J., March 26, 2008; *Ames Dept. Stores v. Assessor*, 102 A.D.2d 9, 476 N.Y.S.2d 222 [4th Dept. 1984].)

The Cross-Motion to Amend[1]

CPLR §2001 states

> § 2001. Mistakes, omissions, defects and irregularities. At any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, 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

[1]The Court notes that, while petitioner has cross-moved for relief, she has neglected to pay the required filing fee. See CPLR § 8020 (a).

> or irregularity shall be disregarded, provided that any applicable fees shall be paid.

Further, CPLR § 3026 provides

> § 3026. Construction. Pleadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced.

While respondent cites several cases generally on the issues of standing, amendment of pleadings to cure, and subject matter jurisdiction, all are inapposite, particularly this Court's decision in *Midway Shopping Center ex rel. Burlington Coat Factory Warehouse of Scarsdale, Inc.*, 11 Misc.3d 1071(A), 816 N.Y.S.2d 697 (Supreme Court, Westchester County, March 29, 2006). In *Midway*, the true owner--Midway--appears to have been actively opposed to the commencement of an Article 7 action by the named party, Burlington, unlike here, where the true owner's manager not only had full authority, but also desired to, commence the action (which she did, albeit in her own name rather than in her business status.) And, as noted above, not only the two *Orange and Rockland* matters, but several of the other cited cases, approved of motions to amend in like circumstances.

Clearly, and absent any apparent prejudice to respondents, the improper naming of petitioner in her individual capacity as owner of the subject parcel, rather than in her capacity as General Partner or corporate officer, was a misnomer, which may either be ignored, or cured by motion to amend.

Based upon the foregoing motion, it is hereby

ORDERED, that the motion by respondent to dismiss for lack of standing, is denied; and it is further

ORDERED, that the cross-motion by petitioner to amend the petition to substitute AKA Realty Partners as petitioner, is granted, conditioned upon payment by petitioner to the Clerk of this Court the statutory fee for motions provided for in CPLR § 8020 (a), within thirty (30) days of the within Order; and it is further

ORDERED, that petitions are amended to reflect the addition of

AKA Realty Partners as petitioner, and shall appear henceforth as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
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In the Matter of the Application of
MARIANNE SHOECRAFT and AKA REALTY
PARTNERS,

Petitioners,

-against -

Index No:
19463/05
20437/06
21401/07
23126/08

TOWN OF NORTH SALEM,
A Municipal Corporation, its Assessor or
Board of Assessors and Board of Assessment
Review,

Respondents.
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and it is further

ORDERED that the pleadings in the action hereby amended shall stand as the pleadings in the amended action; and it is further

ORDERED that upon service on the Clerk of this Court of a copy of this order with notice of entry and the payment of the appropriate fee, if any, the Clerk shall amend the papers in these actions and shall mark the court records to reflect the amendment; and it is further

ORDERED, that petitioner shall likewise have leave to file , within thirty (30) days of the within ORDER, amended authorizations as set forth in RPTL §706 (2), for each of the tax years at issue, and in conformance with this ORDER.

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

Dated: White Plains, New York
August 10, 2009

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

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