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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Application of

UNITED STATES POSTAL SERVICE,

DECISION/ORDER

Petitioner,

Index Nos:

- against -

14632/99

14066/00

16418/01

THE ASSESSOR, THE BOARD OF ASSESSORS
AND THE BOARD OF ASSESSMENT REVIEW
OF THE TOWN OF BEDFORD AND THE TOWN
OF BEDFORD,

16945/02

15702/03

14394/04

16420/05

Respondents.

For Review of a Tax Assessment under
Article 7 of the Real Property Tax
Law.

Motion Date:

7/25/07

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LaCAVA, J.

The following papers were considered in connection with this application by respondent for an Order striking petitioner's Notes of Issue in each of the pending tax years, for failure to provide discovery in a timely manner, and upon said striking, to dismiss the petitions relating to tax years 1999 through and including 2002, for failure to timely file Notes of Issue for each of those tax years:

PAPERS

NUMBERED

NOTICE OF MOTION/AFFIRMATION/EXHIBITS

1

MEMORANDUM OF LAW

2

AFFIRMATION IN OPPOSITION/EXHIBITS

3

REPLY AFFIDAVIT

4

REPLY MEMORANDUM OF LAW

5

In this tax certiorari matter, respondent (Town) seeks an order striking the Notes of Issue in each of the pending tax years, for petitioner (Postal)'s alleged failure to comply with its

discovery obligations in a timely manner pursuant to the Rules of Court (22 NYCRR 202.59 [b], [d] 1) and, upon the striking of those Notes for said alleged discovery violation, to dismiss the petitions for each of the tax years 1999 through and including 2003, for failure of petitioner to timely file Notes of Issue for each of those tax years.

Respondent asserts that Postal timely filed petitions challenging tax years 1999, 2000, 2001, and 2002. The petitioner then, in 2003, served upon respondents a document it described as a statement of income and expenses pursuant to 202.59 of the Uniform Rules for the Supreme Court. According to the Town, however, this document merely contained a copy of the lease for the premises to set forth the rental cost; a statement that the actual expenses for the tax years were unavailable; and a further statement that the petitioner would accept "the market expenses as found by the Court plus the reserve for replacements¹." Subsequently, respondent further asserts, Postal timely filed petitions challenging additional tax years 2003, 2004, and 2005; petitioner then, in 2005, served a similarly-described document, again pursuant to 202.59 of the Uniform Rules for the Supreme Court, which document similarly contained only a copy of the lease for the premises, the statement that the actual expenses for the tax years were unavailable; and the statement that the petitioner would accept "the market expenses as found by the Court plus the reserve for replacements²."

Subsequently, in March 2007, respondent filed the instant motion to strike Postal's Notes of Issue, arguing that, the served statements notwithstanding, petitioner had failed to comply with the mandates of the Uniform Rules of Court (22 NYCRR 202.59 [b], and [d] 1), by failing to timely provide proper income and expense statements; and urging that, upon the striking of the Notes for said discovery failures, the petitions for each of the tax years

¹This document, while subscribed and sworn to before a notary public, contains no attestation that the facts contained therein are true, and thus is not a proper verification.

²This document, like that served upon respondent in 2003, while subscribed and sworn to before a notary public, contains no attestation that the facts contained therein are true, and thus also is not a proper verification. Also, only two such documents were filed with the County Clerk, with the Note of Issue for tax year 1999 (purportedly relating to the tax years 1999, 2000, and 2001), and with the Note of Issue for the tax year 2005 (purportedly relating to the tax years 2003, 2004, and 2005.)

1999 through 2002 should be dismissed for failure of petitioner to timely file Notes of Issue for those tax years.

Upon service of the motion, Postal apparently prepared one purported statement pursuant to 202.59 with IRS Schedule "E" forms for the instant tax years except 2004, setting forth several expenses for those years, and a second purported statement pursuant to 202.59 with an IRS Schedule "E" form for the tax year 2004, again setting forth several expenses for that year, and served said documents upon counsel for the respondent³. Petitioner argues both that the prior statements served were proper, or accepted without objection by respondent, and that the untimeliness of the recent statements is a "mere technicality" upon which Notes of Issue should not be stricken and tax certiorari petitions dismissed, citing, *inter alia*, *Syms Corp v. Assessor of the Town of Clarence*, 5 A.D.3d 984 (4th Dept. 2004).

In reply, respondent argues it was not required to reject the earlier statements as insufficient; that compliance with 202.59 is the primary, if not sole, means of discovery in tax certiorari actions involving income-producing property, and thus the lack of said discovery is highly prejudicial; that both the original statements, and now the proffered new statements (containing the IRS Schedule "E" forms) provide insufficient expense data for the property; and that this Court, in *Rose Mount Vernon (Rose Mount Vernon Corp. v. Assessor of the City of Mount Vernon*, 1 Misc.3d 906(A), 781 N.Y.S.2d 628 [Supreme Court, Westchester County, Dickerson, J., December 29, 2003]) and *Midway (Midway Shopping Center v. Town of Greenburgh*, 11 Misc.3d 1071(A), 816 N.Y.S.2d 697 [Supreme Court, Westchester County, Dickerson, J., March 29, 2006]); the Second Department in affirming *Rose Mt. Vernon* (15 A.D.3d 585 [2nd Dept. 2005]); and the Third Department in *Pyramid Crossgates (Pyramid Crossgates Co. v. Board of Assessors of the Town of Guilderland*, 302 A.D.2d 826 [3rd Dept. 2003]) have all held that the failure to timely comply with 202.59 requires the striking of a Note of Issue and, if any petition is in excess of four years old, the dismissal of said petition for untimely filing of the Note

³While these 2007 statements, as provided in the moving papers, and apparently as so served, do include language that the subscriber attests to the truth of the facts contained in those documents, language absent from the previously served- and filed- statements, neither of the 2007 statements is subscribed, or notarized. In addition, and in any event, while it was assertedly served upon respondents, the Court files simply do not contain the 2007 statements, hence there is no proof that it was filed with the County Clerk.

of Issue.

Rule of Court 22 NYCRR 202.59 [b], [d] 1

22 NYCRR 202.59 [b], [c], and [d] 1 provide

§ 202.59 Tax assessment review proceedings in counties outside the City of New York; special rules

(b) Statement of income and expenses. Before the note of issue and certificate of readiness may be filed, the petitioner shall have served on the respondent, in triplicate, a statement that the property is not income-producing or a copy of a verified or certified statement of the income and expenses on the property for each tax year under review. For the purposes of this section, a cooperative or condominium apartment building shall be considered income-producing property; an owner-occupied business property shall be considered income-producing as determined by the amount reasonably allocable for rent, but the petitioner is not required to make an estimate of rental income.

(c) Audit. Within 60 days after the service of the statement of income and expenses, the respondent, for the purpose of substantiating petitioner's statement of income and expenses, may request in writing an audit of the petitioner's books and records for the tax years under review. If requested, the audit must be completed within 120 days after the request has been made unless the court, upon good cause shown, extends the time for the audit. Failure of the respondent to request or complete the audit within the time limits shall be deemed a waiver of such privilege. If an audit is requested and the petitioner fails to furnish its books and records within a reasonable time after receipt of the request, or otherwise unreasonably impedes or delays the audit, the court, on motion of the respondent, may dismiss the petition or petitions or make such other order as the interest of justice requires.

(d) Filing note of issue and certificate of readiness; additional requirements.

(1) A note of issue and certificate of readiness shall not be filed unless all disclosure proceedings have been completed and the statement of income and expenses has been served and filed.

(2) A separate note of issue shall be filed for each property for each tax year.

Thus, prior to the filing of a Note of Issue, a petitioner must have served on the respondent a copy of a verified or certified statement of the income and expenses on the property for each tax year under review.

RPTL § 718 further provides

§718. When proceeding deemed abandoned

1. Where a proceeding is commenced pursuant to this article to review the assessment of a parcel of real property which contains one, two or three family dwelling residential real property... unless a note of issue is filed and the proceeding is placed on the court calendar within four years from the last date provided by law for the commencement of the proceeding, the proceeding thereon shall be deemed to have been abandoned and an order dismissing the petition shall be entered without notice and such order shall constitute a final adjudication of all issues raised in the proceeding, except where the parties otherwise stipulate or a court or judge otherwise orders on good cause shown within such four-year period.

In *Rose Mount Vernon*, this Court was asked to review the alleged mailing--or lack of mailing--of income and expense statements to **counsel** for the respondent, rather than directly to the respondent (the assessor), and the filing of said statements with the County Clerk; the failure of petitioner to provide affidavits of service on the County Clerk and said assessor of the statements; and the service of--or failure to serve--an unverified income and expense statement, again on counsel.

This Court, in *Rose Mount Vernon*, held that 22 NYCRR 202.59 [d] 1, as set forth above, requires that, prior to the filing of a Note of Issue, income and expense statements must be both served on respondent and filed with the County Clerk. Absent proof of filing with the County Clerk, the Notes of Issue therein were deemed defective and stricken. Further, absent the proof of service, in triplicate, upon the respondent directly--not counsel--of a statement for each tax year, the Notes were likewise defective, and stricken on that ground as well. Finally, this Court found that, where the required statements were proffered at the scheduling conference, the respondents were prejudiced by their inability to adequately prepare for trial; by their inability to review the financial status of the property and act accordingly; and in that they incurred litigation costs which might have been avoided with earlier service of the statements.

Citing to *Pyramid Crossgates*, *supra*, this Court held that the failure to properly file or serve the statements was not a mere technicality to be excused due to the importance of the discovery device to respondents and the over four year delay in producing the statements. Further, this Court found no evidence that respondents had stipulated to late service, or waived enforcement of the Rule; and that there was no basis to find equitable estoppel in respondent's failure to previously object to the failure of petitioner to provide the statements. Finally, the Court held that all Notes of Issue filed without prior service and filing of income and expense statements as required by 22 NYCRR 202.59 were jurisdictionally defective and thus null and void; and that any petition relating to a tax year more than four years old, must be dismissed as abandoned pursuant to RPTL § 718 (2) d, upon the striking of that petition's Note of issue.

In affirming, the Second Department merely stated

Contrary to the petitioner's contention, the record supports the Supreme Court's conclusion that the petitioner failed to comply with the requirements for the proper and timely service and filing of the requisite income and expense statements pursuant to 22 NYCRR 202.59.

The Court likewise affirmed the striking of the Notes of Issue, and the dismissal of petitions which were in excess of four years old.

In *Pyramid Crossgates*, like *Rose Mount Vernon*, the Third Department was asked to excuse a failure by a petitioner to serve and file an income and expense statement. The Third Department stressed the importance of the statement to respondents in their preparation for trial, and found the statute clear that such service and filing is a condition precedent to filing a Note of

Issue. They concluded that such failure was a substantive defect which could not be excused.

In *Midway, supra*, this Court was asked to excuse a failure to file and serve income and expense statements prior to filing Notes of Issue, where the petitioner specifically sought to file and serve the statements after the Notes were filed. The statements included general, but not detailed, figures on income and expenses. The Court found

The July 3, 2003 financial documents do not meet the requirements of 22 NYCRR § 202.59 (b) because (1) they are not certified or verified, (2) they were not served and filed in triplicate, (3) they were not served before the filing of the Notes of Issue nor was an affidavit of service of same filed with the Westchester County Clerk, (4) they are not complete with only two pages of each of the three documents being provided [e.g., Note 1 explaining "the basis of accounting" was not provided regarding the 1999, 2000, 2001, 2002 tax years and at oral argument counsel for Petitioners admitted that the 1998 I.R.S. 8825 Form is not complete], (5) they provide insufficient information regarding income and expenses [see e.g., the November 22, 2005 Verification submitted by Midway ("the most recent 2005 filing by Midway with no fewer than one hundred (100) line entries . . . illustrates the type of verified or certified [*24] income and expense statements required in such proceedings")] and (6) the Assessor was not served with the financial documents [citations to, *inter alia*, *Pyramid Crossgates, supra*, and *Rose Mount Vernon, supra*, omitted.]

In addition, and beyond these deficiencies in the statements, this Court also found profound prejudice to respondents due to the untimely filing, as similarly set forth in *Pyramid Crossgates, supra*. Notably, petitioner has failed to distinguish, much less address, these three cases (and four decisions.)

To the contrary, like both *Rose Mount Vernon* and *Midway*, petitioner herein alleges compliance with the statute in the service of the first statements. However, as set forth above, the served documents contain no attestation to their truth, hence they are not properly verified; there is no evidence that such service

was in triplicate; there is no evidence that, except for the tax years 1999 and 2005, the statements were ever filed with the County Clerk⁴, nor evidence whether, if filed, it was filed prior to the several Notes of Issue, nor even evidence that petitioners filed the affidavits of service upon respondent. Further, petitioner in any event filed only one such statement for several years, not one statement for **each** tax year; and there is no evidence that the assessor (as opposed to counsel) was served with the statements. Finally, regarding the substance of the documents, as served they include only a lease as apparent evidence of income, and a statement that expense information is unavailable, neither being adequate to properly set forth the income or expenses of the property for respondents.

Similarly, regarding the recently-proffered statements, while the served documents for the first time contain an attestation to their truth, the Court's copies are neither signed nor notarized, making them clearly insufficient; there is again no evidence that such service was in triplicate; there is no evidence that they too, or affidavits of their service on respondent, were ever filed with the County Clerk⁵; and there is no evidence that the assessor (as

⁴An examination of the Court files relating to the instant tax years discloses no such document present in the file for the years 2000 through and including 2004. However, present in the 1999 and 2005 files are copies of the aforementioned, purported "Statement Pursuant to 202.59 of the Uniform Rules". The former, while dated May 21, 2003, was filed with the County Clerk on September 15, 2003, and purports to apply to tax years 1999, 2000, 2001, and 2002. The latter, while dated October 24, 2005, was filed with the County Clerk on March 16, 2006, and purports to apply to tax years 2003, 2004, and 2005. The Court notes that the Notes of Issue for tax years 1999, 2000, 2001, and 2002 were all filed on September 15, 2003, while the Notes for 2003, 2004 and 2005 were all filed on March 16, 2005; however, it is impossible to tell whether the several Notes of Issue were filed before, simultaneously with, or after the individual statements were filed. In any event, as noted elsewhere, not only is the statement itself defective for failure to set forth income and expense information, but also 202.59 requires one statement for each of the tax years at issue, not one statement for several tax years. Petitioner, as set forth above, apparently filed only two such statements--one for 1999 through 2002 and one for 2003 through 2005. Such filing could thus only be proper for the 1999 and 2005 petitions; in any event, as set forth elsewhere, these statements, even properly filed for tax years 1999 and 2005, were woefully deficient in other respects.

⁵The aforementioned examination of the Court File discloses no evidence that either of the 2007 statements was ever filed

opposed to counsel) was served with the statements. While substantively they for the first time include, as set forth above, an IRS Schedule "E" form for each of the tax years, these forms provide limited evidence of income, and, particularly, almost no expense information. This Court holds such statements untimely, and, even if such service was timely, in any event the 2007 statements are inadequate to properly set forth the income and expenses of the property.

Finally, like *Rose Mount Vernon* and *Midway*, such failures should also be found to have prejudiced respondents. When the matter had finally been set for a Scheduling Conference in the Spring of 2007, respondent, cognizant that the matter was now about to be scheduled for trial, moved to strike the Notes of Issue for petitioner's failure to provide the required income and expense statements. Respondent has averred, and Postal has failed to adequately contest, that the former's ability to prepare for trial has been hindered by the petitioner's default. Petitioner lamely argues that the first statements were adequate, but those statements provided minimal income and absolutely no expense information. The second statements, even if not untimely, were still deficient, providing little in addition to the first.

In addition, the Town could not, and it appears cannot still, conduct a proper audit and prepare a trial appraisal relating to the instant property; they cannot review the financial status of the property to assess the strength of their position regarding the assessments; and they may have incurred litigation costs which might have been reduced or eliminated by the timely providing of disclosure. All these facts were previously found indicative of prejudice by this Court, and are so found here.

Dismissal for Abandonment of Action

As set forth above, RPTL § 718 requires dismissal of any action where a note of issue is not filed within four years from the last date provided by law for the commencement of the proceeding. As this Court held in *Rose Mount Vernon* and *Midway*, the striking of Notes of Issue for failure to properly serve and file income and expense statements, in an action which contains petitions over four years from commencement of the action on that petition, requires the dismissal of those petitions for untimely filing of the Note of Issue relating to that petition. In the instant matter, the striking of the Notes of Issue relating, *inter alia*, to tax years 1999, 2000, 2001, and 2002, for Postal's deficiencies in meeting their discovery responsibilities, leaves those petitions without timely-filed (*i.e.* within four years of

with the County Clerk

commencement) Notes of Issue. Consequently, as in *Rose Mount Vernon* and *Midway*, the petitions relating to those tax years must be dismissed.

Conclusion

Respondent has properly moved for the striking of the Notes of Issue filed in this matter, for failure of petitioner Postal to timely and properly serve and file income and expense statements for the instant premises, for each of the tax years at issue, prior to the filing of said Notes of Issue. Following the striking of the Notes of Issue, respondent also has properly moved for the dismissal of the petitions relating to tax years 1999, 2000, 2001, and 2002, for petitioner's untimely filing of Notes of Issue for those years.

Upon the foregoing papers, it is hereby

ORDERED, that the motion by respondent for an Order striking petitioner's Notes of Issue in each of the pending tax years, for failure to provide discovery--income and expense statements for each of the tax years at issue--in a timely manner, is hereby granted; and it is further

ORDERED, that the said Notes of Issue relating to tax years 1999 through and including 2005 are hereby stricken; and it is further

ORDERED, that the petitions relating to tax years 1999, 2000, 2001, and 2002, are hereby dismissed, for petitioner's failure to file Notes of Issue in a timely manner relating to those years.

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

Dated: White Plains, New York
October , 2007

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

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