

Pliant Corp. v Assessor of Town of Macedon

2007 NY Slip Op 31750(U)

March 2, 2007

Supreme Court, Wayne County

Docket Number: 0059873/2006

Judge: Dennis M. Kehoe

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

PLIANT CORP,
Petitioner

DECISION
AND
ORDER

v.

ASSESSOR OF THE TOWN OF MACEDON,
THE BOARD OF ASSESSMENT REVIEW
OF THE TOWN OF MACEDON, VILLAGE OF
MACEDON, COUNTY OF WAYNE, STATE
OF NEW YORK,
Respondents.

Index No. 59873
&
Index No. 59874

ARCHER & GREINER
Jeffrey M. Gradone, Esq.
Attorneys for Petitioner

Anthony J. Villani, Esq.
Attorney for Respondents

The Petitioner Pliant Corp. has commenced two separate special proceedings pursuant to Article 7 of the Real Property Tax Law under the above Index Numbers. In each case, the Respondents have filed an Answer with Objections in Point of Law, together with a Motion to Dismiss. The motions have been opposed by the Petitioner. As the issues and legal arguments are the same in both proceedings, this Court will address them in one Decision.

On July 28, 2006, counsel for the Petitioner filed two separate petitions and notices of petition. The return date of each notice was left blank, allegedly at the instructions of an employee of the Wayne County Clerk's Office, who advised the attorney that a date would be filled in upon the assignment of the matter to a Justice. Counsel then caused copies of the papers to be served on Respondents on July 31, 2006. Counsel subsequently received a copy of the Notices of Petition from the Court Clerk's Office, with a return date filled in by the Clerk. On August 14, 2006, Counsel served copies of the Notice bearing a return date of October 11, 2006 on the Respondents.

The Respondents have moved to dismiss both Petitions, for failure to include a return date on the face of the filed Notices. The Respondents concede that they have suffered no prejudice, but they maintain that the absence of a return date on the notices deprives the Court of both personal and subject matter jurisdiction.

RPTL § 704 (1) provides:

1. Any person claiming to be aggrieved by any assessment of real property upon any assessment roll may commence a proceeding under this article by filing a petition described in section seven hundred six of this chapter in the manner set forth in section three hundred four of the civil practice law and rules together with a notice in writing of an application for review under this article returnable not

less than twenty nor more than ninety days after service of such petition and notice, except that in a city having a population of one million or more, such a proceeding shall be commenced by filing of a petition alone. The petition hereunder, and notice of application for review, where required, may be served upon the officers designated in section seven hundred eight of this chapter or as the law may otherwise provide.

RPTL § 702 (3) provides:

3. If it appears upon the answer that the petition or petition and notice, when such notice is required by section seven hundred four of this chapter, were not filed or served and filed where required pursuant to section seven hundred forty of this chapter, within the time limited therefor, such failure to file or serve and file the petition or petition and notice within such time shall constitute a complete defense to the petition and the petition must be dismissed.

The Respondents rely on a number of decisions holding that the absence of a return date on a filed Notice of Petition constitutes a jurisdictional defect. Most notable is Matter of Niagara Mohawk Power Corporation v. Town Tonawanda Assessor, et al, 309 AD2d 1251 (4th Dept, 2003), in which the Fourth Department unanimously upheld the lower court's decision dismissing an Article 7 tax proceeding, based on the Petitioner's failure to specify the time and place of the hearing on the notice.

Sine the issuance of that decision, the Court of Appeals considered a similar situation in National Gypsum Co, Inc. v. Assessor of Town of

Tonawanda, 4 NY3d 680 (2005). However, in that case, the Petitioner filled in a fictitious date on the Notice of Petition, which was subsequently changed by court personnel once a Justice was assigned. The Court held that the notice was not jurisdictionally defective, in that it was fully completed, distinguishing the Niagara Mohawk decision, in which no date was displayed on the notice.

The Respondents have asked this Court to adopt the reasoning of the Court of Appeals in Matter of Ballard vs. HSBC Bank USA, et al, 6 NY3d 658 (2006), in which, in an analogous situation under Executive Law §298, the Court held that the Petitioner's failure to include a return date in a notice of petition did not deprive the trial court of subject matter jurisdiction. The Court stated that "(w)e have routinely held that technical defects in filings do not fall under the umbrella of subject matter jurisdiction when they do not undermine the constitutional or statutory basis to hear a case." (Id. at 663).

However, the Court did not resolve the issue of whether the absence of a return date constitutes a defect as to personal jurisdiction. In Ballard, the Petitioner actively participated in the proceeding without timely objecting to the defect on personal jurisdiction grounds. In the instant

case, the Respondents promptly raised the issue by a Motion to Dismiss.

While the Court is aware that the Petitioner gave timely notice of the return date to the Respondents upon notification of the date by the Court Clerk, the fact remains that a fully completed Notice of Petition was never filed with the County Clerk. Given the plain language of the statutes, the strict interpretation of the statute by the Fourth Department, and the failure of the Court of Appeals thus far to address the specific issue at hand, this Court has no choice but to grant the Respondents' motions.

Therefore, both special proceedings are hereby dismissed. Counsel for the Respondents is directed to submit the appropriate order for signature.

Dated: March 2, 2007
Lyons, New York

A handwritten signature in black ink, appearing to read 'D. Kehoe', written over a horizontal line.

Honorable Dennis M. Kehoe
Acting Supreme Court Justice