

<b>Matter of Parker Hannifin Corp. v Town Bd. of Lyons</b>
2009 NY Slip Op 30795(U)
April 3, 2009
Supreme Court, Wayne County
Docket Number: 62585-07
Judge: Dennis M. Kehoe
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STATE OF NEW YORK  
SUPREME COURT COUNTY OF WAYNE

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In the Matter of the Application of  
PARKER HANNIFIN CORPORATION,  
by Huff Wilkes, LLP, Agent

DECISION

Petitioner

-VS-

Index No. 62585-07  
and 65743-08

THE TOWN BOARD OF LYONS, its ASSESSOR,  
and BOARD OF ASSESSMENT REVIEW,

Respondent

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Huff Wilkes, LLP  
David C. Wilkes, Esq. and  
John J. Loveless, Esq., of Counsel  
Attorneys for Petitioner

Anthony J. Villiani, Esq.  
Attorney for Respondent

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This special proceeding has been commenced by the Petitioner Parker Hannifin Corporation pursuant to Article 7 of the Real Property Tax Law, maintaining that the 2008 assessment valuation of real property located at 100 Dunn Road, Lyons, New York is "unequal, unjust, unlawful and excessive by reason of over-valuation assessment." The Complaint filed by the Petitioner with the Board of Assessment Review for the Town

of Lyons states that the assessed value of the property, which is \$2,900,400.00 is unequal and excessive, and that it should be reduced to \$783,108.00. The Respondent has filed an Answer to the Petition, which also sets forth six Objections in Point of Law, together with a motion to dismiss the Petition.

The Petitioner has previously commenced a similar special proceeding, challenging the 2007 assessed valuation of the same parcel. In that proceeding, a Scheduling Order was issued by this Court on October 9, 2007 which, among other directives, ordered the parties to file a Note of Issue within two years of the filing of the RJI, and which further provided for application by either party for an extension of that date. Neither party requested such an extension, and to the best of the Court's knowledge, no discovery has been sought or requested. The Scheduling Order also provides for the completion of discovery within the two year period. Obviously, no Scheduling Order has been issued in the 2008 proceeding.

On December 8, 2008, the Petitioner filed a Note of Issue in both the 2007 and 2008 proceeding. The Respondent has now moved to strike the Note of Issue in the 2008 proceeding, maintaining that discovery has not

been completed. Counsel for the Respondent appeared in person on the return date of the motion, and counsel for the Petitioner submitted on papers with the Court's consent. On the same date, the Respondent renewed its Objections to the 2008 proceeding.

The Court will first consider the Respondent's motion to strike the Note of Issue in the 2008 proceeding, together with the Petitioner's response that the Respondent has failed to seek leave of the court to conduct discovery, in accordance with CPLR §408, and therefore cannot raise the issue now. The Respondent has not moved to strike the Note of Issue in the 2007 proceeding, presumably because that filing was in accordance with the terms of the Court's Scheduling Order. As to the 2008 proceeding, it is clear that the same Petitioner has challenged the assessment valuation of the same premises, which continues to be used for the same purpose. Therefore, the Court finds that it would be inappropriate to strike the Note of Issue and the Respondent's motion is therefore is denied. However, the parties retain the right to proceed with discovery. No formal application for leave to conduct discovery need be made, as the Scheduling Order clearly infers that discovery will take place in the 2007 proceeding, and discovery was stayed in the 2008 proceeding

by the filing of objections. A pre-trial conference will be scheduled in this matter for the purpose of outlining discovery issues and setting a timetable for the exchange of appraisals.

As to the Objections in Point of Law filed by the Respondent in the 2008 proceeding, the Court finds as follows:

1) the identity of the Respondents: While the Board of Assessment Review is not a necessary party to the proceeding, it is not a jurisdictional defect to name it as a Respondent. The Petitioner shall have twenty (20) days from the date of this Decision to amend the caption of the Petition so as to delete the Board as a party and to include the name of the Assessor;

2) the grounds of the Petition: The Respondent is correct in its assertion that, under New York case law, a Petitioner is limited to the grounds set forth in the original application to review the assessment (See, e.g. *Radisson Community Assn, Inc. v Long*, 3 AD3d 135 (4<sup>th</sup> Dept, 2003). In this instance, the application alleged that the assessment is excessive and unequal. The Court has no jurisdiction to consider any other grounds;

3) the alleged absence of any showing of inequality in the original application: The Petition alleges that such an inequality exists - proof of

the existence of such an inequality is a matter for trial;

However, the Court agrees with that portion of the Respondent's Motion to Dismiss that the methodology allegedly used by the Board in its assessment procedure is more the proper subject of an Article 78 proceeding than an Article 7 proceeding.

"[W]here the challenge is based upon the method employed in the assessment of several properties rather than the overvaluation or undervaluation of [a] specific propert[y], a taxpayer may ... mount a collateral attack on the taxing authority's action through either a declaratory judgment action or a proceeding pursuant to CPLR article 78". Here, petitioner's challenge is to the method used in bringing about the assessment, but only one property is involved. The distinction is a critical one [because] a single improperly motivated reassessment, even one of constitutional magnitude, 'cannot be classified as a methodology' " (*Cayuga Grandview Beach Cooperative Corp. v Town Bd of Town of Springport*, (51 AD3d 1364 (4<sup>th</sup> Dept, 2008))).

4) lack of adequate notice regarding date and location: The Notice of Petition initially reflected a fictitious return date and an incorrect location. (The RJI also contained an incorrect date.) The Respondent relies on numerous cases indicating the absence of a return date is jurisdictionally

defective, including Pliant v Town of Macedon, 48 AD3d 1196 (4<sup>th</sup> Dept, 2008) which upheld the decision of this Court in dismissing a tax proceeding, based on the failure of the Petition to set forth any return date. However, in this matter an incorrect date was subsequently replaced by a court clerk with a correct date, and documentation submitted indicates that the corrected Notice of Petition was the one served. It has been held that “a notice of petition filed pursuant to RPTL Article 7 with a return date chosen by petitioner’s attorney, but later changed by the court to accommodate the court’s schedule, is a valid administrative exercise and not one that renders the petition jurisdictionally defective.” (Troy Properties v Dimutriadis, 56 AD3d 1086 (3<sup>rd</sup> Dept, 2008));

5) the amount of the requested reduction in the current assessment: The Petitioner shall be bound by the amount requested in its application before the Board; (See, Radisson, supra).

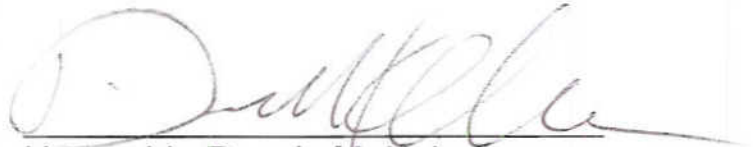
6) the question of standing: While the original verification of the Petition may have been defective, under New York case law the defect was deemed cured when the proper authorization was filed with the Court.

The Respondent’s motion to dismiss is hereby denied. As previously indicated, a preliminary conference in the 2008 proceeding shall

be held concurrently with the conference to be held in the 2007 proceeding.

Counsel for the Petitioner is directed to submit two proposed orders in these matters, denying the motion to Dismiss and denying the motion to strike the Note of Issue, to the Court for signature, subject to the approval of counsel for the Respondent, in accordance with the findings set forth in this Decision..

Dated: April 3, 2009  
Lyons, New York



Honorable Dennis M. Kehoe  
Acting Supreme Court Justice

2009 APR -8 P 2:39  
WAYNE COUNTY  
SUPREME AND COUNTY COURT