

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

**FILED
AND
ENTERED
ON**

**ORANGE
COUNTY CLERK**

-----x
In the Matter of the Application of
ALLSTATE EQUITIES, LLC,

Petitioner,

-against-

Index No. 4759/05

THE TOWN OF NEWBURGH, THE ASSESSOR OF
THE TOWN OF NEWBURGH, THE BOARD OF
ASSESSMENT REVIEW OF THE TOWN OF
NEWBURGH, THE BOARD OF EDUCATION OF
THE NEWBURGH ENLARGED CITY SCHOOL
DISTRICT, THE COUNTY OF ORANGE,

DECISION AND ORDER

Respondents.

For review of the assessment of certain
real property in the said Town of
Newburgh.

-----x

DICKERSON, J.

FAILURE TO PROVIDE A COMPLETE RETURN DATE: JURISDICTIONAL DEFECT

The Petitioner, Allstate Equities, LLC, has made a motion seeking an Order " assigning a return date to the petition filed on July 18, 2005...which petition was originally returnable in September 2005 "1. The Respondents have made a cross motion seeking to dismiss the petition " on the grounds that Petitioner has failed to comply with the mandatory

requirements of RPTL § 704 and CPLR § 403(a) "2. The Respondents contend that by not specifying a particular day, and, therefore, failing to designate a specific return date, the Notice of Petition is jurisdictionally defective.

Factual Background

On July 18, 2005, the Petitioner filed a Notice of Petition and Petition seeking judicial review of its 2005 assessment. The Notice of Petition and Petition were served upon the Respondents on July 20, 2005 but failed to specify a return date, stating only " September 2005 ". On November 4, 2005 and November 10, 2005, the Respondents sent letters to the Petitioner stating that the Notice of Petition failed to designate a specific return date and, therefore, was jurisdictionally defective³.

The Motion And Cross Motion

The Petitioner now moves to amend its Notice of Petition requesting that the Court assign it a return date. It is Petitioner's position that the omission of a specific return date is a mere irregularity and not a jurisdictional defect. The Respondents oppose and cross-move for an order dismissing the Notice of Petition and Petition for lack of jurisdiction.

DISCUSSION

CPLR § 403(a)

CPLR § 403(a) provides that "[a] notice of petition shall specify the time and place of the hearing on the petition and the supporting affidavits, if any, accompanying the petition."

RPTL § 704(1)

RPTL § 704(1) provides, in pertinent part,: "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...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."

Jurisdictionally Defective

It is has been consistently held that a failure to include the time and place on the notice of petition in a tax certiorari proceeding is a jurisdictional defect which warrants dismissal of the petition [See e.g., Matter of Niagara Mohawk Power Corp. v. Town of Tonawanda Assessor 309 A.D.2d 1251, 765 N.Y.S.2d 547 (4th Dept. 2003) (" Supreme Court properly granted respondents' motion to dismiss the petition in this proceeding pursuant to RPTL article 7 based upon petitioner's failure to 'specify the time and place of the hearing on the petition' in the notice of petition (CPLR 403(a)). [T]he filing and service of a notice of petition lacking a return date is "jurisdictionally defective"...We reject petitioner's contention that CPLR 403(a) does not apply to an RPTL Article 7 proceeding. The requirement that a notice of petition include a return date is not inconsistent with the commencement requirements of RPTL 704, and thus CPLR 403(a) is applicable to the instant proceeding "); Lamb v. Mills, 296 A.D.2d 697,698, 745 N.Y.S.2d 245 (3d Dept. 2002)(" We have ` repeatedly held that the filing and service of a notice of petition lacking a return date is " jurisdictionally defective " ' [Matter of Oates v. Village of Watkins Glen, 290 A.D.2d 758, 736 N.Y.S.2d 478, quoting Matter of Vetrone v. Mackin, 216 A.D.2d 839,840, 628 N.Y.S.2d 866.]...[w]hile we recognized in Matter of Oates v. Village of Watkins Glen (supra) that a failure to include a return date as an accommodation to the court is wholly

understandable, 'controlling authority constrains the conclusion that the filing and service were ineffective to confer personal jurisdiction' (*id.* at 759, 736 N.Y.2d 478). Thus, Supreme Court's characterization of the defect as a 'mere irregularity', even in the absence of prejudice***citation omitted***cannot be condoned by us nor corrected pursuant to CPLR 2001, since personal jurisdiction is a prerequisite to the court's exercise of its discretionary authority ")].

A Time And Place For The Hearing

In National Gypsum Company, Inc. v. Assessor of the Town of Tonawanda, 4 N.Y.3d 680, 797 N.Y.S.2d 809 (2005), the Court of Appeals held that the petitioner fully complied with CPLR 403(a) " because in its notice of petition, it inserted a time and place for the hearing which conformed with the applicable statutory notice requirements (see RPTL 704[1]). [FN4. RPTL 704(1) provides the statutory notice requirements for the purpose of the instant tax certiorari proceeding. Further, RPTL 704(1) clearly implies that the petitioner is to select a return date.] The hearing date fell on a Tuesday during business hours, not on the weekend or a holiday."

Absence Of A Return Date Is A Jurisdictional Defect

This Court has recently held in Newburgh Plaza Associates, LLC v. The Town of Newburgh, 2006 WL 1152598 (West. Sup. 2006), that the failure of the Petitioner to comply with CPLR § 403(a) and RPTL § 704(1) by not putting a return date on the Notice of Petition was a jurisdictional defect ("[t]he Petitioner failed to put a return date on the original Notice of Petition that was filed with the Court, and was therefore not in compliance with CPLR § 403(a) and RPTL § 704(1)...The Court of Appeals has clearly held in Matter of National Gypsum, supra, 4 N.Y.3d at 684 that '[a] a notice of petition must comply with the strict statutory mandates for obtaining personal jurisdiction when served.'").

Failure To Specify Complete Return Date

In the instant matter, the Notice of Petition failed to specify a return date, stating only September 2005, without an indication of a particular date. The Court of Appeals in National Gypsum, supra, made it absolutely clear, that the petitioner fully complied with CPLR 403(a) in that case " because in its notice of petition, it inserted a time and place for the hearing which conformed with the applicable statutory notice requirements (see RPTL 704[1])...[t]he hearing date fell on a Tuesday during business hours, not on the weekend or a holiday."

This Court is bound by the decision in National Gypsum, supra, and must abide by it. In so doing, it is clear that the date set forth in the instant Notice of Petition of September 2005 is insufficient. Without stating a specific return date in the Notice of Petition so that it can be determined whether the return date is appropriately set for a weekday, during business hours, and not on the weekend or a holiday, as required by National Gypsum, supra, this Court must find that the Notice of Petition is not in compliance with CPLR 403(a) and RPTL 704(1) and is therefore jurisdictionally defective.

Accordingly, the Respondents' cross motion is granted and the Petition is dismissed.

The foregoing shall constitute the Decision and Order of this Court.

Dated: White Plains, N.Y.
May 11, 2006

HON. THOMAS A. DICKERSON
JUSTICE SUPREME COURT

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ENDNOTES

1. Notice of Motion dated December 7, 2005 at p. 1.
2. Notice of Cross Motion dated December 30, 2005 at p. 1.
3. Respondents' Memorandum of Law dated December 30, 2005 [" R. Memo. "] at p. 2.