

FILED AND
ENTERED

DUTCHESS
COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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MAJAARS REALTY ASSOC.,

Petitioner,

Index No. 3278/04

-against-

THE TOWN OF POUGHKEEPSIE and TOWN
ASSESSOR FOR THE TOWN OF POUGHKEEPSIE,

DECISION & ORDER

Respondents,

To review a certain real property
assessment under Article 7 of the
Real Property Tax Law.

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DICKERSON, J.

TAX CERTIORARI PROCEEDINGS: IMPROPER SERVICE

The Respondents seek an order dismissing the tax certiorari petition filed in 2004 by the Petitioner in that " the petitioner failed to serve or failed to make timely service or failed to timely file proof of service as required by R.P.T.L. §708(3) on the Superintendent of Schools of the Hyde Park Central School District and the Commissioner of Finance of Dutchess County..."¹.

The Respondents' Contention

The Respondents contend that the petition should be dismissed for failure to comply with the mailing service requirements of R.P.T.L. § 708(3), which states, "...one copy of the petition and notice shall be mailed within ten days from the date of the date of service thereof as provided to the superintendent of schools of any school district within which any part of the real property on which the assessment to be reviewed is located and, in all instances, to the treasurer of any county in which any part of the real property is located, and to the clerk of a village which has enacted a local law as provided in subdivision three of section fourteen hundred two of this chapter if the assessment to be reviewed is on a parcel located within such village...Proof of mailing one copy of the petition and notice to the superintendent of schools, the treasurer of the county and the clerk of the village which has enacted a local law as provided above shall be filed with the court within ten days of the mailing. Failure to comply with the provisions of this section shall result in the dismissal of the petition, unless excused for good cause shown."

No Affidavit Of Service Found

The Respondents contend that in reviewing the file in the Dutchess County Clerk's Office in regard to the instant tax certiorari

proceeding, there was no affidavit of service in the file as to the Town of Poughkeepsie, the Superintendent of the Hyde Park Central School District, or the Commissioner of Finance of Dutchess County. The Respondent states that the petition was received by the Town of Poughkeepsie on July 23, 2004, and therefore, the time for service and filing proof of service expired more than one year ago.

The Petitioner's Contention

Petitioner contends that on July 23, 2004, it served a copy of the petition on the Town Clerk of the Town of Poughkeepsie by personal delivery. On the same date, Petitioner claims it also served a copy of the petition on the Dutchess County Commissioner of Finance by personal delivery. Five days later, on July 28, 2004, Petitioner states that it served a copy of the petition on the School District by personal delivery on the District Clerk.

Service By Means Other Than Mailing

It is Petitioner's contention that timely personal delivery of the notice of petition and petition on the commissioner of finance and the school district is authorized by R.P.T.L. § 708(4) which states, "Nothing in this subdivision shall affect the right to serve process in any other manner permitted by law." Petitioner states that R.P.T.L. §

708(4) implies that R.P.T.L. § 708(3) is merely one option of service and not the sole option. Petitioner contends that it is therefore necessary to look to CPLR §311 which provides for service of a petition by means other than by mailing.

Service By Personal Delivery Appropriate

Consequently, Petitioner claims that service by personal delivery on the Commissioner of Finance in Dutchess County pursuant to C.P.L.R. § 311(4) and on the District Clerk of the Hyde Park Central School District pursuant to C.P.L.R. § 311(7) was appropriate pursuant to R.P.T.L. § 708(4).

Untimeliness

Petitioner also contends that the Respondent's motion to dismiss is untimely because the motion was made over a year after the School District and the Commissioner of Finance were served by the Petitioner. Additionally, the Petitioner states that it had already commenced a tax certiorari proceeding challenging the assessment for 2005 when the motion to dismiss was made, and the Respondent answered the subsequent petition without raising a jurisdictional objection despite the same manner of service in both instances.

DISCUSSION

This Court need not reach the issue of whether personal service is authorized by R.P.T.L. § 708(4), since the petition is dismissed, in the first instance, for reasons other than non-compliance with the statutory mailing requirement. R.P.T.L. § 708(3) clearly states that " one copy of the petition and notice shall be mailed within ten days from the date of service thereof as above provided to the superintendent of schools..." [Emphasis added]. Petitioner, however, by personal service, served the School District Clerk, Rose Mancuso, and not the Superintendent of Schools of the Hyde Park Central School District, Carole A. Pickering, as required by statute. RPTL §708(3) clearly states that it is the superintendent of schools that must be served. In fact, it is clear from a review of the Laws of New York, Chapter 502, S. 5536-C, p. 1128, that the legislature intended the individual served to be the superintendent and not the clerk, as the word "clerk" is crossed out and it is replaced by the phrase "superintendent of schools". Also, as the language used is "...and, in all instances, to the treasurer.." (emphasis added), it is clear from the statute that both the Commissioner of Finance and the Superintendent of Schools must be served.

The Superintendent Should Have Been Served

Hence, service upon the District Clerk of the School District rather than the Superintendent of Schools is fatal to the petition.

[See e.g., Premier Self Storage of Lancaster v. Fusco, 12 A.D.3d 1135, 784 N.Y.S.2d 443 (4th Dept. 2004), lv. app.den. 4 N.Y.3d 710 (2005)("It is undisputed that petitioner mailed a copy of the petition to the "Clerk" of the District, rather than the Superintendent, and thus failed to comply with R.P.T.L. § 708(3)***citation omitted***. Petitioner's failure to comply with the statute requires dismissal of the petition unless the failure is excused for 'good cause shown' (708[3]), and petitioner failed to make the requisite showing. We reject the contention of petitioner that its non-compliance with the statute should be excused as a mere technicality. We also reject petitioner's contention that the motion should be denied because the District was not prejudiced by petitioner's failure to comply with the statute.")].

The Commissioner Of Finance Was Not Served

The Court also notes that although the Dutchess County Commissioner of Finance was served (by personal service), such service was not made to the correct individual. Rather than serving Ellen Roche, the actual Commissioner of Finance, Rita Brannen was served, with no explanation. ²

Untimeliness Not An Issue

As to the issue of the timeliness of Respondent's Motion to Dismiss, it is clear that the courts have not required a municipality in a tax certiorari proceeding to make a motion to dismiss within the same CPLR §3211(e) 60-day time constraint as in other types of actions. [See e.g., Village Square of Penna, Inc. v. Semon, 290 A.D.2d 184, 736 N.Y.S.2d 539, 541 (3d Dept. 2002), lv.app.dis., 98 N.Y.2d 647(2002), where the Appellate Division held that a motion to dismiss under R.P.T.L. § 708(3) is not governed by the 60-day limitation in C.P.L.R. 3211(e)]. Hence, the Petitioner's contention that Respondent's Notice of Motion is untimely is completely without merit.

Accordingly, Respondent's motion is granted and the petition is dismissed.

This constitutes the decision and order of the Court.

Dated: White Plains, N.Y.
December 19, 2005

HON. THOMAS A. DICKERSON
JUSTICE SUPREME COURT

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ENDNOTES

1. Respondents' Notice Of Motion To Dismiss dated August 12, 2005.
2. See Affidavit of Lynn M. Smookler sworn to September 19, 2005, Exs. A-C.