

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 FOR A
REVIEW UNDER ARTICLE 7 OF THE REAL
PROPERTY TAX LAW OF A TAX ASSESSMENT
BY NEWBURGH PLAZA ASSOCIATES, LLC AND
JIM KEMPNER,

Index No: 2005-5132

Petitioners,

-against-

DECISION AND ORDER

THE TOWN OF NEWBURGH, MICHAEL J.
FOGARTY, IAO, AS TOWN ASSESSOR FOR THE
TOWN OF NEWBURGH, and THE BOARD OF
ASSESSMENT REVIEW FOR THE TOWN OF
NEWBURGH, COUNTY OF ORANGE,

Respondents.

-----X

DICKERSON, J.

FAILURE TO PROVIDE A RETURN DATE: JURISDICTIONAL DEFECT

The Respondents, Newburgh Town Assessor, Newburgh Board of
Assessment Review, and the Town of Newburgh, move to dismiss the
Petition on the ground that the Petitioners failed to provide a return
date in the Notice of Petition. It is the contention of the Respondents
that this omission " renders the underlying proceeding jurisdictionally

defective ", and, therefore, this proceeding should be dismissed as a matter of law¹.

Factual Background

On July 27, 2005, Petitioners filed a Notice of Petition and Petition seeking judicial review of its 2005 assessment. The Notice of Petition, which failed to specify a return date, and the Petition were served upon the Respondents on August 4, 2005. On November 8, 2005, Respondents sent a letter to the Petitioners stating that the Notice of Petition " failed to designate a specific return date and, therefore, was jurisdictionally defective "².

The Motion To Dismiss

The Respondents filed the instant motion, pursuant to CPLR § 403(a) and RPTL § 704(1), seeking an order dismissing the Notice of Petition and the Petition for lack of jurisdiction. It is the Petitioner's view, completely unsupported by any statutory authority or case law, that the defect is not jurisdictional and that " the Court is empowered to overlook such defects "³.

DISCUSSION

RPTL § 704(1)

RPTL § 704(1) provides that " 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."

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."

Jurisdictionally Defective

It has been concluded that a failure to include the time and place on a notice of petition in a tax certiorari proceeding is a

jurisdictional defect that warrants dismissal [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, 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."])].

A Jurisdictional Defect Is Not A " Mere Irregularity "

It is important to note that the Court in Lamb v. Mills supra, at 296 A.D.2d 698, stated that "[w]hile we recognized in Matter of Oates

v. Village of Watkins Glen (supra) that a failure to include a return date as an accomodation 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.S.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."

The Petition Must Select A Hearing Date

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."

Petition Is Dismissed

In the instant matter, the 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)⁴. The Court of Appeals has clearly held in Matter of National Gypsum, supra, 4 N.Y.3d at 684, that “[a] notice of petition must comply with the strict statutory mandates for obtaining personal jurisdiction when served.”

Accordingly, the Respondents’ motion is granted and the Petition is dismissed.

The foregoing constitutes the decision and order of this court.

White Plains, N.Y.
May 1, 2006

HON. THOMAS A. DICKERSON
JUSTICE SUPREME COURT

TO: Cathy L. Drobny, Esq.
Hacker & Murphy, LLP
Attorneys for Respondents
7 Airport Park Boulevard
POB 104
Latham, N.Y. 12110-0104

Timothy P. McElduff, Jr., Esq.
Cohen, Estis & Associates, LLP
Attorneys for Petitioners
40 Matthews Street, Ste 203
Goshen, N.Y. 10924

ENDNOTES

1. Respondents' Memorandum of Law dated January 16, 2006 [" R. Memo. "] at p. 1.
2. R. Memo. at p. 2.
3. Affirmation In Opposition of Timothy P. McElduff, Jr. dated February 28, 2006 [" McElduff Aff. I "] at para. 6.
4. Respondents' Notice of Motion dated January 16, 2006 at Ex. A.