

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Application of
BOARD OF MANAGERS OF COPLEY COURT
CONDOMINIUM,

Petitioner(s),

-against -

DECISION/ORDER

Index Nos:
15901/02
16273/03
16487/04
17370/05
19213/06
19447/07

THE TOWN OF OSSINING, A Municipal Corporation, its Assessor and Board of Review

Motion Date:
6/10/09

Respondent(s).

For a Review Under Article 7 of RPTL.

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LaCAVA, J.

The following papers were considered in connection with this application by respondent Town of Ossining (Town) for an Order dismissing several of the petitions for lack of service on the Superintendent of Schools for the Briarcliff Manor Union Free School District, and petitioner's cross-motion to permit such service:

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION/AFFIRMATION/AFFIDAVIT	1
MEMORANDUM OF LAW	2
AFFIRMATION IN SUPPORT	3
NOTICE OF CROSS MOTION/AFFIRMATION	4
MEMORANDUM OF LAW	5

In this tax certiorari matter, challenging assessments for tax years 2002 through and including 2007 for a condominium (the subject premises), respondent Town seeks an order dismissing the several petitions (for those same tax years), for failure of petitioner to timely serve the said petitions on the Superintendent of Schools of the Briarcliff Manor Union Free School District (Briarcliff), as required by RPTL §708 [3]).

Respondent, upon a review of the file of the Westchester County Clerk, noted affidavits of service in the instant matter for tax years 2002 through and including 2007, upon the Ossining School District (OSD) (concededly not a party to this action), while, in 2001 and 2008, service was made on the proper party (Briarcliff). Respondent argues that service in 2002 through and including 2007 was thus not made on the proper School District.

Petitioner asserts that, while it improperly directed service to the Superintendent of Schools of the Ossining School District, rather than Briarcliff, the latter would suffer no prejudice if petitioner were permitted to serve it at this late date, since no substantive steps have been taken since commencement of the proceedings. Petitioner also cites to cases which, it asserts, support its argument that the asserted geographical error (*i.e.* properties in the Town may be in either the Briarcliff or Ossining School Districts, and petitioner inadvertently served the latter instead of the former), and the lack of prejudice, combine to provide sufficient good cause to excuse the timely but erroneous service.

The Motion to Dismiss for Improper Service

R.P.T.L. §708(3) provides

... one copy of the petition and notice shall be mailed within ten days from 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.

Thus, RPTL §708(3) clearly requires timely service of a copy of the petition upon the Superintendent of the District encompassing the property; failure to so serve, absent good cause shown, results in dismissal of the petition. In *Landesman v Whitton*, 13 Misc. 3d 1216A (Supreme Court, Dutchess County, Dickerson, J., October 2, 2006), aff'd. 46 A.D.3d 827 (2nd Dept. 2007), the petitioner had served the Poughkeepsie School District, but not the Superintendent of the District directly. This Court dismissed the petitions for failing to follow RPTL §708(3), and the Second Department affirmed, holding

The failure to mail the notice of petition and the petition to the Superintendent of Schools of the school district mandates dismissal of the proceedings, and the absence of prejudice cannot be considered good cause to excuse the defect (see *Matter of Orchard Heights, Inc. v Yancy*, 15 AD3d 854, 788 N.Y.S.2d 763; *Matter of Premier Self Storage of Lancaster v Fusco*, 12 AD3d 1135, 784 N.Y.S.2d 443).

Notably, on appeal the only argument made to the Court for the existence of good cause, was the absence of prejudice; the Court therein squarely rejected lack of prejudice as sufficient cause, but had before it no other excuse for the improper service.

The Court in *Landesman* also cited to errant (i.e. failed) service cases such as *Orchard Heights, Inc. v. Yancy, supra*, (4th Dept., 2004), and *Premier Self Storage v. Fusco, supra*, (4th Dept., 2004), which both involved service upon the Clerk of the Schools, rather than the Superintendent. Each was dismissed, and lack of prejudice was specifically held to be no excuse. In both, the Court found that service upon the Clerk of the School District, rather than the Superintendent, was grounds for dismissal, absent good cause shown. In each case, the petitioners failed to

demonstrate good cause, and without that showing, dismissal was deemed appropriate.

The Court also noted in *Landesman* that this Court had consistently held similarly (see *Orange & Rockland Utilities, Inc. v Assessor of Town of Orangetown*, 11 Misc 3d 1051[A], 814 N.Y.S.2d 891 [Supreme Court, Rockland County, 2006]; *Majaars Realty Assoc. v Town of Poughkeepsie*, 10 Misc 3d 1061[A], 809 N.Y.S.2d 482 [Supreme Court, Dutchess County, 2005]), but in those cases as well, lack of prejudice alone was held to be inadequate to supply the "good cause shown" required to excuse a lack of service.

Here, while arguing to a lack of prejudice, petitioner has also asserted that it sought to properly serve the proper person (the Superintendent of the school district wherein the property was located) but merely made a geographical error in choosing which of two Superintendents serving the Town to serve. Petitioner properly points to *In the Matter of Harris Bay Yacht Club, Inc., v Town of Queensbury et al.*, 46 A.D.3d 1304 (3rd Dept., 2007), as being directly on point. The Third Department in *Harris Bay* granted leave to re-serve and denied dismissal, and in effect found good cause and excused a lack of service, for exactly the same type of geographical error, i.e., serving the Superintendent of the wrong school district, as in the instant case. Thus, while *Landesman*, as set forth above, primarily held that lack of prejudice alone was insufficient to constitute good cause for improper service on the wrong party, *Harris Bay* (and, in fact, *Orchard Heights* and *Premier Self Storage*) held that a demonstration of good cause could (and in *Harris Bay*, did) excuse service on the wrong party¹.

As the Court held in *Harris Bay*, petitioner here sought to properly serve the superintendent of the school district within which the subject parcel lay, but inadvertently served another superintendent in an adjacent school district. In exercise of its discretion, the Court finds, as did the *Harris Bay* Court, that such constitutes good cause sufficient to excuse the improper service, and to warrant denial of the motion to dismiss.

Petitioner's Motion Seeking Leave to Serve

Based on the aforesaid cases, wherein it is clear that

¹ While this Court's *The Commons at Bon Aire Condominium, v. The Town of Ramapo, et al.*, 2009 2009 NY Slip Op 51737 (U) [Supreme Court, Rockland County, 2009], might appear inopposite, neither was the precise issue presented here argued before the Court, nor, unlike *Harris Bay* and the instant matter, did petitioner in *Bon Aire* seek leave to excuse the improper service and for leave to serve the proper school district.

inadvertently choosing the wrong school district to serve can provide good cause to excuse a failure to serve the proper school district herein (Briarcliff), the Court, in the exercise of its discretion, grants petitioner's cross-motion to permit such service nunc pro tunc upon Briarcliff.

Upon the foregoing papers, it is hereby

ORDERED, that the motion by respondent to dismiss for improper service, is denied; and it is further

ORDERED, that the cross-motion by petitioner for leave to serve the petitions challenging the tax years 2002 through and including 2007, upon the Superintendent of Schools for the Briarcliff Manor Union Free School District, is granted only insofar as such service is effected within 30 days of the date of the instant Decision and Order, and is in all other respects denied.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: White Plains, New York
September 10, 2009

HON. JOHN R. LA CAVA, J.S.C.

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