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Trials & TRIBULATIONS

No more second chances

'Tis the season to file tax certiorari Petitions in New York State. The filing deadline for seeking judicial review of assessments (July 31, 2016, in most jurisdictions) has recently passed. Yet your job is not over. Another deadline looms large, and according to a recent decision by the Court of Appeals, ignoring this deadline is fatal.

A tax certiorari Petition must be mailed within ten days of filing to the superintendent of the school district. Failure to provide this notice, without good cause shown, results in dismissal of the Petition. It is now clear that the savings clause of CPLR § 205(a) cannot rescue the Petitioner's claim.

In New York, a petitioner that commences a tax certiorari matter is required to mail a copy of the Petition to the superintendent of "any school district within which any part of the real property on which the assessment to be reviewed is located." RPTL § 708(3). Failure to do so, without "good cause", warrants dismissal of the proceeding.

Last month, the New York State Court of Appeals affirmed the dismissal of a real property tax assessment matter where the petitioner taxpayer failed to provide notice as required by RPTL § 708(3), and prohibited the recommencement of the action. Pursuant to CPLR § 205(a). *Westchester Joint Water Works v. Assessor of City of Rye*, ___ NY3d ___, 2016 NY Slip. Op. 04438 (June 9, 2016).

Prior to the Westchester decision, the Appellate Divisions within New York were split with respect to whether a Petition dismissed for failure to comply with RPTL § 708(3) may be recommenced pursuant to CPLR § 205(a). Westchester ended that



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split and determined that recommencement was unavailable.

Facts

Over a period of nine years, Petitioner Westchester Joint Water Works commenced nine separate tax certiorari proceedings against the Assessor of the City of Rye, challenging real property tax assessments

for each tax year from 2002 through 2010. Slip. Op. at p. 1.

Within 10 days of the service of the petitions, Westchester Joint Water Works was required to mail a copy of the documents on the superintendent of the district. See RPTL § 708(3). There was no dispute that the Petitioner did not comply with this mandate. However, the petitioner and the City of Rye had reached an agreement in principle resolving the underlying proceedings. *Id.* at p. 2.

Nevertheless, prior to the tentative settlement being finalized, petitioner recognized its error. It notified the school district of the mistake by mailing to the district superintendent copies of the Petitions and then sought the district's consent to the proposed settlement for each of the proceedings. *Id.*

Not surprisingly, the district did not accommodate this request and, instead, moved to dismiss. The Supreme Court permitted the district to intervene and granted the motion to dismiss the petitions, with prejudice, for failure to comply with the mailing requirements of RPTL § 708(3). The Supreme Court

subsequently denied petitioner's cross motion for leave to recommence the proceedings pursuant to CPLR § 205(a). Pursuant to CPLR § 205(a), when an action is timely commenced, but terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over a defendant, a dismissal of the complaint for neglect to prosecute, or a final judgment upon the merits, the petitioner may commence a new action upon the "same transaction or occurrence" within six months after the termination.

The Second Department affirmed the dismissal because of petitioner's concession that "it failed to give notice of the proceedings to the superintendent of the District" and lacked good cause for "its noncompliance." *Id.* at p. 3. Since a "dismissal pursuant to RPTL § 708(3) operates as a dismissal upon the merits," the relief afforded by CPLR § 205(a) was unavailable.

Legal Analysis

Prior to *Westchester*, there was a split amongst the Appellate Divisions as to whether a proceeding dismissed pursuant to RPTL § 708(3) may be recommenced. The Appellate Division, Fourth Department, in *Matter of MMI, LLC v. La Vancher*, 72 AD3d 1497 (4th Dep't 2010), found that failure to mail a copy of the Petition to the local school district was not excused for good cause. However, the failure to mail this notice was not a jurisdictional defect, since the local school district was not a party, and the RPTL mailing requirement was not "service." The Court then affirmed the Supreme Court's decision to grant leave to commence a new

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proceeding pursuant to CPLR § 205(a). *Id.* at 1498.

The Second Department took a similar approach in *Matter of Consolidated Edison Co. of N. Y., Inc. v. Assessor & Bd. of Assessment Review for the Town of Pleasant Val.*, 82 AD3d 761 (2d Dep't 2011). The Court affirmed an order allowing the Petitioner to recommence in part, because the respondents suffered no prejudice as a result of the petitioner's failure to comply with the notice provisions of RPTL § 708(3).

Just two and a half months later, a different panel in the Second Department reached the opposite conclusion. That panel held that a "dismissal pursuant to RPTL 708(3) operates as a dismissal upon the merits," thereby rendering "the relief afforded by CPLR 205(a) . . . unavailable." *Matter of Wyeth Holdings Corp. v. Assessor of the Town of Orangetown*, 84 AD3d 1104, 1107 (2d Dep't 2011).

This discord amongst Appellate Divisions was answered once and for all by the Court of Appeals.

Decision

The Court of Appeals determined that commencement of a proceeding pursuant to CPLR 205(a) is unavailable where the proceeding is dismissed for an unexcused failure to comply with the mailing requirements of RPTL § 708(3).

The Court specifically noted that its determination was "based not upon petitioner's failure to meet the requirements of CPLR 205(a), but upon our conclusion that RPTL 708(3) does not permit resort to the commencement largess of the CPLR." *Westchester Joint Water Works*, 2016 NY Slip. Op. at p. 3.

The Court of Appeals cited three reasons for its conclusion. First, because RPTL § 708(3) comprehensively addresses the result where a proceeding is dismissed for failure to comply with the mailing requirements of that section, "a

petitioner may not reach outside of the RPTL to recommence such a proceeding. The language of RPTL 708(3) providing that the dismissal for failure to comply with the mailing provisions of that statute shall be excused only for good cause shown, reflects an intent to permit a petitioner who has ignored the subject mailing requirements to proceed only where the error is found to be excusable." *Id.*

Citing to prior precedent, the Court determined that, as a general rule, "there should be no resort to the provisions of the CPLR in instances where the [RPTL] expressly covers the point in issue." *W. T. Grant Co. v. Srogi*, 52 NY2d 496, 514 (1981). Since RPTL § 708(3) expressly addressed the failure to comply with the mailing requirements of the statute, regarding dismissal except where good cause is shown for the error, the Court determined that the commencement remedy of CPLR § 205(a) is unavailable.

Second, the Court noted that its conclusion was required by the rules of statutory construction. Specifically, "effect and meaning must, if possible, be given to [all parts of a] statute."

Westchester Joint Water Works, 2016 NY Slip. Op. at p. 4. Again, RPTL § 708(3) requires that where there is no "good cause" to avoid dismissal of a proceeding, the proceeding is finally and conclusively dismissed. Allowing commencement pursuant to CPLR § 205(a) would render the "good cause" language ineffective. *Id.*

Finally, the comprehensive reach of RPTL § 708(3) is consistent with the legislative intent of the statute. The current version of the statute was structured to allow school districts to avoid the expense of participating in every tax certiorari proceeding. To further that aim, the legislature included the provision that a superintendent of an affected school district must be timely notified of the commencement of the proceeding. *Id.*

This mailing requirement ensures that

an affected school district is properly notified of the tax certiorari proceeding so that it may determine whether to participate and whether to reserve certain monies to satisfy an adverse ruling. Education Law § 365(1-a), authorizes the creation of reserve funds by a school district to pay judgments or claims in tax certiorari proceedings, and the total of the "monies held in such reserve funds shall not exceed that amount which might reasonably be deemed necessary to meet anticipated judgments and claims arising out of such tax certiorari proceedings." Education Law § 365(1-a). Therefore, the legislature, by amending RPTL § 708(3), provided school districts with the requisite notice to reserve funds to satisfy such judgments.

Of course, a school district must know of a tax certiorari proceeding in order to estimate the amount of reserve to set aside. *Westchester Joint Water Works*, 2016 NY Slip. Op. at p. 4. The notice requirements that the legislature included in RPTL § 708(3) act to balance the structures of the Education Law.

The procedural requirements of RPTL can be rigorous. Keen attention to these rules is critical. Petitioners who ignore the mailing requirements of RPTL § 708(3) and deny the school districts the statutory right to notice do so at their own peril.

As the Court of Appeals made clear, if dismissal results, they will not be permitted to recommence the proceeding based on CPLR § 205(a). To do so would undermine the aims of fairness and efficiency that prompted the amendments to RPTL § 708(3). Since the clock is ticking to mail the 2016 Petitions on the school district's superintendent, one should immediately stop reading this paper and mail out those tax certiorari Petitions.

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