

SUPREME COURT
STATE OF NEW YORK COUNTY OF WASHINGTON

In the Matter of the Application of

MARY ANNE RICHARD AND DANIEL SMITH,

Petitioners,

-against-

AFFIDAVIT IN
SUPPORT OF
MOTION FOR
LEAVE TO APPEAL

THE TOWN OF CAMBRIDGE; THE CAMBRIDGE
TOWN BOARD; AUDREY HALL; SALLY J.
WHITNEY; and TERRY E. WHITNEY, SR.,

Index No. 16168
RJI No. 57-1-2009-
0669

Respondents,

For a Judgment Pursuant to Article 78 of the New York
Civil Practice Law and Rules and Declaratory Judgment
Ordering the Town Board to Repeal its Resolution
Authorizing the Conveyance of the Disputed Property and
Declaring the Town of Cambridge the Record Owner of the
Disputed Property.

STATE OF NEW YORK)
COUNTY OF WASHINGTON) ss.:

JOHN R. WINN, being duly sworn, deposes and says:

1. I am the attorney for Respondent Audrey Hall, now Audrey Hall-Seelye
and make this affidavit in support of a motion for leave to appeal to the Appellate
Division, Third Department, from the Decision and Order dated November 10,
2010 of this Court, a copy of which is annexed hereto.

2. This Article 78 proceeding was brought by the petitioners in the Supreme Court, County of Washington, challenging a resolution made by the Cambridge Town Board on or about September 8, 2008, which authorized the issuance by the Town of Cambridge of a quitclaim deed relating to a triangular-shaped parcel of land to Respondent Audrey Hall. The said deed was dated September 8, 2008, and was recorded in the Washington County Clerk's Office on September 16, 2008. The Article 78 proceeding was filed on December 7, 2009, almost fifteen months after the date of the resolution and deed.

3. Respondent Audrey Hall raised two affirmative defenses. The First Affirmative defense was that the four-month statute of limitations applicable to Article 78 proceedings had expired and the second was that the petitioners had not obtained personal jurisdiction over Respondent Audrey Hall.

4. The Decision and Order dated November 10, 2010 impliedly dismissed the two affirmative defenses and at a conference held on January 26, 2011, the Court advised that it considered the two defenses as resolved by the Decision and Order dated November 10, 2010 and did not intend to allow any proof as to the same at the hearing to be scheduled by the Court.

5. The attorney for the petitioners served a copy of the Decision and Order with Notice of Entry on January 27, 2011, and this motion is made within thirty (30) days after that service.

6. On February 1, 2011, I filed a Notice of Appeal and Pre-Calendar Statement in the Washington County Clerk's Office. The proposed Record was

forwarded to the other attorneys involved in the case on February 1, 2011 and, as a result, the Record and Brief could be filed promptly so that the appeal could be decided promptly and there would not be any undue delay in resolution of the Article 78 proceeding. Also, in the event that the appeal is granted by the Appellate Division, Third Department, particularly on the statute of limitations defense, then further proceedings in this court would be unnecessary, as the proceeding would be dismissed for being time barred.

7. After February 1, 2011, the petitioner's attorney pointed out, correctly, that under CPLR §5701(b)(1) an appeal from a non-final order in an Article 78 proceeding is not appealable as of right and requires permission under CPLR §5701(c).

8. CPLR §5701(c) provides that permission to appeal can be granted by the justice who made the Order.

9. I respectfully urge upon the Court that an appeal to the Appellate Division, Third Department, is appropriate in this case.

10. As to the statute of limitations defense, it would appear from a review of the Decision and Order dated November 10, 2010 that the Court was of the opinion that since no posting of notice of a permissive referendum was made, the letter from petitioner's attorney should be considered as a demand in a mandamus proceeding. It is presumably the position of the petitioners that the statute of limitations does not even begin to run until such time as a demand for posting is made. However, in *Atkins v. Town of Rotterdam*, 266 AD2d 631 (3d Dept. 1999),

the Third Department dealt with a similar claim. There, the plaintiffs sought a declaratory judgment that a resolution and agreement were null and void due to the failure to give public notice of a permissive referendum. The Third Department, however, determined that the true nature of the challenge to the resolution was the procedures used by the Town of Rotterdam in adopting the resolution and agreement, and held that the procedures are "the proper subject of a CPLR article 78 proceeding, which is governed by the four-month Statute of Limitations...." 266 AD2d at 632. While the Third Department did not discount the importance of the requirement of a permissive referendum, and suggested that it may have nullified the resolution had a challenge to the same been timely made, the Third Department did not hold that the absence of notice of a permissive referendum indefinitely extended the statute of limitations and, to the contrary, found that:

"While the resolution was passed in July of 1997 and the agreement was executed later that month, plaintiffs did not commence this action until July 1998 and thus their claims are time barred...." 266 AD2d at 633.

11. As a result, it is respectfully submitted that the Decision and Order of November 10, 2010 is contrary to the Third Department's holding in *Atkins*, and Respondent Audrey Hall should be given permission to appeal so that her defense of the expiration of the four-month statute of limitations can be decided by the Third Department prior to the hearing, particularly as this Court has indicated that

it will not accept any evidence at the hearing relating to the statute of limitations defense.

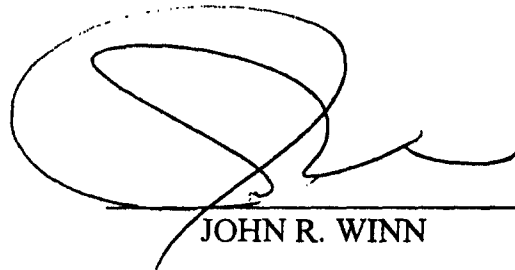
12. As to the lack of personal jurisdiction defense, it is respectfully submitted that the expedient service provided for in CPLR §308(5) is available only "if service is impracticable under paragraphs one, two and four of this section." Since there was no showing by the petitioners that service upon Respondent Audrey Hall could not be made under paragraphs one, two or four of CPLR §308, and the record is clear that the petitioners were aware of said respondent's address, petitioners' attempt to seek expedient service was flawed and failed to effect personal jurisdiction over Respondent Audrey Hall. The Appellate Divisions have uniformly held that Section 308(5) expedient service is simply insufficient to confer jurisdiction in the absence of proof that regular service is not available. *Corbo v. Stephens*, 272 AD2d 502 (2d Dept. 2000) and *Cooper-Fry v. Kolket*, 245 AD2d 846 (3d Dept. 1997). Certainly, all cases involving expedient service involve a court-ordered service, and they all hold that making an improper request for expedient service results in a lack of personal jurisdiction of the defendant or respondent.

13. As a result, it is respectfully submitted that the Decision and Order of November 10, 2010 is contrary to the decisions of all of the Departments of the Appellate Division and Respondent Audrey Hall should be given permission to appeal so that her defense of the lack of personal jurisdiction over her can be decided by the Third Department prior to the hearing, particularly as this Court has

indicated that it will not accept any evidence at the hearing relating to Respondent Audrey Hall's affirmative defenses.

14. No prior application has been made to this, or any other court, for the permission sought herein.

WHEREFORE, it is respectfully requested that leave to appeal be granted to Respondent Audrey Hall to appeal to the Appellate Division, Third Department, the dismissal of her affirmative defenses of the expiration of the four-month statute of limitations and the lack of personal jurisdiction over her, particularly as such defenses are, in my opinion, supported by prior opinions of the Appellate Division, Third Department, and, if either of Respondent Audrey Hall's arguments on appeal is accepted, then the result will be that the proceeding will be dismissed as to all respondents.



JOHN R. WINN

Sworn to before me this
23rd day of February, 2011.



Notary Public

ROBERT M. WINN
Notary Public
State of New York
No. 740585
Washington County
Expires June 30, 2011

Received
County Clerks Office
Jul 18, 2011 04:13P
Washington County
Dona J. Crandall