SUPREME COURT
STATE OF NEW YORK COUNTY OF WASHINGTON

In the Matter of the Application of

MARY ANNE RICHARD AND DANIEL SMITH,

Petitioners,

-against-

Index No. 16168

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

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.

MEMORANDUM OF LAW

PRELIMINARY STATEMENT

This Memorandum of Law is being submitted in support of the motion by Respondent Audrey Hall to renew and reargue the Court's Decision and Order dated November 10, 2011, in which the Court impliedly dismissed the First and Second Affirmative Defenses set forth in Respondent Audrey Hall's answer, which raised the expiration of the four-month statute

of limitations and a lack of personal jurisdiction over Respondent Audrey Hall as defenses to the Article 78 proceeding.

The motion to renew is based upon the fact that since the return date of the Article 78 proceeding Respondent Audrey Hall has found information (Cambridge Town Board Minutes of January 12, 2009 meeting) showing that the petitioners had actual knowledge of the resolution and deed not later than January 12, 2009.

The motion to renew is based upon the fact that the law, as set forth herein, establishes that the four-month statute of limitations had, in fact, expired long before the commencement of the Article 78 proceeding on December 7, 2009, and also that the petitioners never obtained personal jurisdiction over Respondent Audrey Hall.

STATEMENT OF FACTS

In 2008, and for a number of years before that, Respondent Audrey B. Hall [hereinafter "Audrey Hall"] was the reputed owner of a triangular-shaped parcel on land on Brownell Road in the Town of Cambridge, County of Washington and State of New York. (R-48, R-62)[1] She had

[1] Parenthetical citations are to page numbers of the pleadings – the "Record".

been paying real property taxes on the said parcel for a number of years and the same was shown on the Washington County Tax Maps as Tax Map No. 270.-1-33.6. (R-37, R-48).

In 2008, Audrey Hall entered into an agreement to sell the premises to Respondents Sally J. Whitney and Terry E. Whitney, Sr. [hereinafter "the Whitneys"]. (R-63). In connection with the sale, a question arose as to whether the Town of Cambridge [hereinafter referred to as "the Town"] had an interest or claim to Tax Map No. 270.-1-33.6, and, as a result, contact was made with the Cambridge Town Board. (R-48). On or before September 8, 2008, the Cambridge Town Board [hereinafter referred to as "the Town Board"] adopted a resolution confirming that it had no interest in Tax Map No. 270.-1-33.6 and agreeing to execute a quitclaim deed to evidence the fact that the Town had no claim to the parcel. (R-32). The quitclaim deed was executed on September 8, 2008, and recorded in the Washington County Clerk's Office on September 16, 2008. (R-34-38).

Thereafter, and by deed dated October 3, 2008, and recorded in the Washington County Clerk's Office on October 9, 2008, Audrey Hall sold Tax Map No. 270.-1-33.8 to the Whitneys. (R-40-42).

On January 12, 2009, Petitioner Daniel Smith attended a Town Board meeting at which the resolution and deed were discussed, and

Petitioner Daniel Smith advised that he would be seeking an attorney relating to the matter. (See, Town Board Minutes of January 12, 2009).

Seven months after the January 12, 2009 Town Board meeting, and on August 7, 2009, the attorney for petitioners wrote a letter to the Town Supervisor requesting that the resolution of on or before September 8, 2008 be rescinded (R-44) and then repeated the demand by letter dated September 22, 2009. (R-46).

On December 7, 2009, Petitioners Mary Anne Richard and Daniel B. Smith [hereinafter "petitioners"] filed an Article 78 petition in the Washington County Clerk's Office, along with a proposed Order to Show Cause. The Order to Show Cause was signed by Judge Krogmann on January 12, 2010, and it provided for service upon the Town by serving the Town Attorney, for personal service upon the Whitneys and for service upon John R. Winn, Esq., as attorney for Audrey Hall. (R-13-14). John R. Winn, Esq., was served with a copy of the papers on January 13, 2010. (R-55). The Order to Show Cause provided for a return date of January 26, 2010. (R-13)

Audrey Hall filed and served her Answer dated January 18, 2010. (R-61). The Answer asserted two affirmative defenses. The first affirmative defense was that the four-month statute of limitations for

Article 78 proceedings had expired. The second affirmative defense was that no personal jurisdiction had been obtained over Respondent Audrey B. Hall.

On November 10, 2010, this Court made a Decision and Order which held that, despite the fact that the adoption of the resolution by the Town Board and execution of the deed by the Town Supervisor both occurred on or before September 8, 2008, the four-month statute of limitations' period did not begin to run until August 7, 2009, the date of the letter from Petitioner Daniel Smith's attorney. The Court also found that it was possible, "while perhaps not likely", that the petitioners became aware of the resolution and deed on August 7, 2009. The Court implicitly dismissed the First Affirmative Defense raised by Audrey Hall in her Answer. The Court also opined that since Audrey Hall in her answer did not explain why the Court had no personal jurisdiction over her, the Second Affirmative Defense was implicitly dismissed as well.

ARGUMENT

POINT I

THIS ARTICLE 78 PROCEEDING IS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS

The Article 78 petition seeks a repeal of the resolution adopted by the Town Board on or before September 8, 2008, and cancellation of the quitclaim deed dated September 8, 2008 which was recorded in the Washington County Clerk's Office on September 16, 2008. However, since the first filing that was made by the petitioners was not until December 7, 2009, more than fourteen months after the deed was executed and recorded, it is clear that the proceeding was not commenced within the four-month period prescribed by CPLR §217(1).

This Court, however, apparently determined that the four-month statute of limitations period did not begin to accrue as of the date of the resolution or deed – September 8, 2008 – but, instead, on August 7, 2008, the date that petitioners' attorney wrote to the Town Supervisor asking that the resolution be rescinded. It is respectfully submitted that the Court's determination that the four-month statute of limitations did not begin to run until demand was made for rescission of the resolution is contrary to existing law.

Bullock v. Essex County Board of Supervisors, 246 AD2d 806 (3d Dept. 1998) is a case virtually identical to the case at bar. There, the Board passed a resolution authorizing issuance of a quitclaim deed to a parcel of land and executed the deed on January 5, 1996. Over eight months later, petitioner requested rescission of the quitclaim deed. When the Board

refused to rescind, petitioner commenced an Article 78 proceeding. The lower court held that the proceeding was barred by the four-month statute of limitations and an appeal was taken to the Third Department.

The Third Department affirmed dismissal of the Article 78 petition as untimely. The Third Department in its decision did not specify the exact time that the statute of limitations begins to accrue. It did note that, even assuming that the date that petitioner first became aware of the deed was May 19, 1996, the action was not commenced until more than four months later and was, therefore, barred by the statute of limitations. In the case at bar, it is clear that the petitioners became aware of the resolution and deed on or before January 12, 2009. (See, Town Board Minutes of January 12, 2009). As was the case in *Bullock*, the Article 78 proceeding was not filed within four months and, as a result, the lower court should have determined that it was, in fact, barred by the four-month statute of limitations. In the *Bullock* case, the resolution, deed and knowledge by petitioners all occurred more than four months prior to the commencement of the Article 78 proceeding. The same facts are present in the case at bar. Here, the resolution, deed and knowledge all took place on or before January 12, 2009, and yet the petitioners did not commence their Article 78 proceeding until December 7, 2009, over ten months later.

In the *Bullock* case it did not make any difference whether the Court determined that the four-month statute of limitations began to run on the date of the resolution (December 4, 1995), the date of the quitclaim deed (January 5, 1996), or the date that the petitioners claimed to first become aware of the conveyance (May 16, 1996), since all three dates were more than four months prior to the date that the Article 78 proceeding was filed

(December 30, 1996). Similarly, in the case at bar, the resolution, deed and awareness were all more than four months from the date that the proceeding was filed. It is respectfully submitted, however, that the correct date for determining the accrual of the statute of limitations is the date of the resolution. In this case, the resolution was passed on September 8, 2008. However, even if one were to use the delivery date of the deed as the accrual date, the deed was dated and executed on September 8, 2008 and was delivered sometime between September 8, 2008 and September 16, 2008, when the same was recorded in the Washington County Clerk's Office. Clearly, as of September 16, 2008, the resolution had been made by the Town, the deed had been executed, and it had been recorded in the Washington County Clerk's Office. The matter was complete on September 16, 2008 in all respects. Using the date of recording of September 16, 2008 as the date of delivery, it is clear that the proceeding was not commenced within the four-month period, as it was filed long after January 16, 2009.

In *Atkins v. Town of Rotterdam*, 266 AD2d 631(3d Dept. 1999) the Third Department dealt with the four-month statute of limitations in a claim very similar to the one at bar. There, the appellant claimed that a resolution adopted and subsequent agreement entered into by the town constituted a gift of town property and required a permissive referendum. In determining that the claim of not giving public notice of a permissive referendum was a procedural claim properly brought in the context of an Article 78 proceeding, the Third Department held that the four-month statute of limitations applied. This Court went on to find that since the resolution was adopted in July of 1997 and the agreement was entered into in August of 1997, the action, which was not begun until July of 1998, was untimely and

properly dismissed. In *Atkins,* the Third Department found that, while the claim of not having a permissive referendum was important, it was procedural:

> "However, the import of the permissive referendum and potential consequences for the failure to hold one do not alter the unmistakable and true nature of this procedural challenge to this resolution and agreement."
> 266 AD2d at 633.

In *Atkins*, the Third Department made it clear that procedural objections, including specifically permissive referendum issues, are subject to the four-month statute of limitations, as measured from the date of the resolution. See, also, *Matter of Save the Pine Bush, Inc. v, City of Albany*, 70 NY2d 193 (1987)

In the case at bar, the petitioners assert that the failure to give notice of the right to a permissive referendum gives rise to a mandamus claim and that the statute of limitations does not begin to run until a demand is made. However, as the Third Department noted in *Atkins* the claim is procedural and, therefore, governed by the four-month statute of limitations from the date of the resolution. Here, the resolution was enacted in or before September of 2008 and the deed was executed and recorded in September of 2008. Since the proceeding was not commenced until December of 2009, it was untimely and should have been dismissed by the lower court.

The same result was reached in *Liana v. Town of Pittstown*, 234 AD2d 881 (3d Dept. 1996) where claims relating to the procedure adopted in enacting a resolution were deemed subject to the four-month statute of limitations. The Third Department's position was adopted by the Second

Department in *P & N Tiffany Properties, Inc. v. Village of Tuckahoe*, 33 AD3d 61 at 65 (2d Dept. 2006).

In *Bullock*, it was argued by the petitioner that the four-month period should be measured from September 30, 1996, the date that petitioner first requested rescission. However, the Third Department specifically determined that a request for reconsideration does not constitute a toll of the statute of limitations. 246 AD2d at 807. The Third Department cited *Matter of Lubin v. Board of Education*, 60 NY2d 974 (1983), which held that a demand to reconsider the prior action taken does not operate to extend or toll the four-month statute of limitations:

> [P]etitioner's direction of correspondence
> to respondent, which can be viewed, at most,
> as a request for reconsideration, does not toll
> or revive the Statute of Limitations....
> 60 NY2d at 976.

Following *Matter of Lubin*, the Third Department has repeatedly held that demands for reconsideration or repeal of prior action taken do not have any impact upon the four-month statute of limitations. *See*, *Matter of Properties of New York, Inc. v. Planning Board of Town of Stuyvesant*, 35 AD3d 941 (3d Dept. 2006), where this Court held that:

> [P]etitioner's subsequent demand for an audit
> and return of certain fees paid was plainly
> a request for reconsideration and did not operate
> to extend the statute of limitations.
> 35 AD3d at 943;

and, *Avery v. Aery*, 60 AD3d 1133 (3d Dept. 2009), where this Court held that:

> The four-month statute of limitations for challenging an administrative action commences when the determination becomes final and binding, that is, "when it has an impact upon a party and the party is clearly aggrieved by it". 60 AD3d at 1134 (citing from *Matter of Properties of New York, Inc.*).

As a result, to the extent that this Court believed that the demand for repeal dated August 7, 2009 somehow tolled, revived, or extended the statute of limitations, which had already expired over six months earlier, such is contrary to the rule established by the Court of Appeals in *Matter of Lubin* and the Third Department in the *Bullock* and other cases.

In conclusion to this Point I, while this Court may have believed that the four-month statute of limitations accrued as of the letter of August 7, 2009, such was erroneous as the correct commencement date is the resolution date, such that the statute of limitations expired in January of 2009. To hold otherwise would extend the statute of limitations indefinitely. Accordingly, this Court should not have dismissed the First Affirmative Defense, but, instead, should have dismissed the Article 78 proceeding, brought in December of 2009, as time-barred.

POINT II

RESPONDENT AUDREY B. HALL WAS NEVER SERVED AND, AS A RESULT, THE COURT HAS NO PERSONAL JURISDICTION OVER HER

A basic tenant of civil practice is that the plaintiff or petitioner must obtain personal jurisdiction over the defendants or respondents. In this case, no service was ever made upon Respondent Audrey B. Hall.

The requirements of service are set forth in Article 3 of the Civil Practice Law and Rules. Section 308(1) provides that persons are to be served by personal service. Paragraphs 2 and 4 provide for alternate means of service, although Paragraph 4 is available as a method only if service in accordance with "1" or "2" cannot be made.

CPLR §308(5) allows for service in a manner as directed by the court, but such is authorized only "if service is impractical under paragraphs one, two and four of this section...."

In this case, Petitioners proposed in their Order to Show Cause that the court direct that Respondent Audrey B. Hall be served by delivery to John R. Winn, Esq. On January 12, 2010, the Court signed the Order to Show Cause which was, thereafter, served on John R. Winn, Esq., but never served upon Respondent Hall as required by CLPR §308.

Section 308(5) is available to a petitioner only when personal service cannot be made upon a respondent. In *Corbo v. Stephens*, 272 AD2d 502 (2d Dept. 2000), the Second Department affirmed dismissal of a complaint on the grounds of lack of personal jurisdiction where service had been made pursuant to a court order, but no showing had been made that service under

any of the other paragraphs of Section 308 was impractical. In *Corbo*, the appellate court held that the power court was without power to direct a manner of service under Section 308(5) "absent a showing by the moving party that service is impractical under the other subdivisions". 272 AD2d at 503. Similarly, in *David v. Total Identity Corporation*, 50 AD3d 1484 (4th Dept. 2008) the Fourth Department held that Section 308(5) was available only where the plaintiff has made some showing that service under another paragraph of Section 308 could not be made. There, the Fourth Department noted that the record contained addresses for two of the defendants, but the plaintiff never attempted service at such addresses. 50 AD3d at 1485. In the case at bar, the petitioners' verified petition asserts in Paragraph "3" that Respondent Audrey B. Hall resides at 1858 Meeting House Road, Cambridge, New York (R-15) (an address at which Hall has resided for over forty years), and there is nothing set forth in the papers under which petitioners sought the Order to Show Cause upon which it could be determined that personal service upon Hall would be difficult or impractical. To the contrary, since petitioners' address is listed on their petition as 1793 Meeting House Road, Cambridge, New York (R-15), it is clear that petitioners reside only a short distance from Audrey Hall and could have effected service under either CPLR §308(1) or (2). By reason of the foregoing, it is respectfully submitted that this Court erred by implicitly dismissing the Second Affirmative Defense set forth in Hall's Answer, as the record establishes that personal jurisdiction over Hall was never effected.

When improper service has been made, the respondent has a choice of either making a motion to dismiss the proceeding, or can raise the lack of personal jurisdiction in respondent's answer. As set forth in the Practice Commentaries to CPLR §308:

> "The defendant may, of course, challenge the propriety of plaintiff use of this provision [CPLR §308(5)] by motion to dismiss or by defense in the answer."
> McKinney's Practice Commentary, Vincent C. Alexander C308:6.

Audrey Hall opted to raise the personal jurisdiction defense in her answer and did not waive the absence of proper service by not making a separate motion to dismiss.

In addition, it is not relevant on the matter of personal jurisdiction as to whether Audrey Hall became aware of the action by reason of the manner of service, as actual notice is not sufficient to confer personal jurisdiction. *Markoff v. South Nassau Community Hosp.*, 91 AD2d 1064 (2d Dept. 1983), *aff'd* 61 NY 2d 283 (1984); *David v. Total Identity Corporation*, 50 AD3d 1484, at 1485-6 (4th Dept. 2008); *County of Nassau v. Letosky*, 34 AD3d 414, at 415 (2d Dept. 2006); and *Hillary v. Grace*, 213 AD2d 450, at 452 (2d Dept. 2006). And, even where the proposed expedient service is upon an attorney, the requirement of showing impracticality in serving the party still applies. *Cooper-Fry v. Kolket*, 245 AD2d 846 (3d Dept. 1997).

In conclusion to this Point II, Audrey Hall was never served with process, even though her address was known to the petitioners and she was not unavailable to be served. By seeking expedient service under CPLR §308(5) without proof that service under paragraphs 1, 2 or 4 of Section 308 was impractical, the petitioners failed to obtain personal jurisdiction over Audrey Hall. This Court erred by implicitly dismissing Audrey Hall's Second Affirmative Defense, and should have dismissed the petition as to Audrey Hall, in view of the fact that no personal service has ever been made on her.

CONCLUSION

On this motion for leave to renew and reargue, this Court should determine that, as the petitioners had actual knowledge on or before January 12, 2009, the facts are identical to those in *Bullock v. Essex County Board of Supervisors* where the Third Department determined that the four-month statute of limitation applied and had expired.

In addition, on reargument this Court should determine that petitioner's claims as to the lack of a permissive referendum are procedural in nature and that the four-month statute of limitations applies from the date of the resolution, such that the Article 78 proceeding is time-barred.

The Court should further determine that the letter of August 7, 2009, being in the nature of a request for reconsideration, is ineffective to revive the statute of limitations, which had expired in January of 2009, some seven months earlier.

Finally, the Court should find that no personal jurisdiction was ever obtained over Audrey Hall and that the Article 78 proceeding should be dismissed as to her for failure to effect person service.

Dated February 22, 2011

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