

**STATE OF NEW YORK
SUPREME COURT : COUNTY OF TOMPKINS**

In the Matter of the Application of CAYUGA LAKE ENVIRONMENTAL ACTION NOW (CLEAN), an unincorporated association, by its President JOHN V. DENNIS, LOUISE BUCK, BURKE CARSON, JOHN V. DENNIS, WILLIAM HECHT, HILARY LAMBERT, ELIZABETH and ROBERT THOMAS, and KEN ZESERSON,

Petitioners,

**MEMORANDUM OF LAW
IN SUPPORT OF MOTION
TO DISMISS**

For a Judgment pursuant to Article 78 of the New York Civil Practice Law and Rules

Index No. EF2021-0422

vs.

THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and CARGILL INCORPORATED,

Respondents.

PRELIMINARY STATEMENT

Respondent Cargill, Incorporated (“Cargill”) respectfully submits this memorandum of law in support of its motion to dismiss this article 78 proceeding pursuant CPLR 3211(a)(8) on the grounds that the Court lacks personal jurisdiction over Cargill because process was not served on Cargill within the time permitted by statute.

STATEMENT OF FACTS

The facts upon which this motion is based are set forth in the Affirmation of Patricia S. Naughton, dated July 22, 2021 (Naughton Affirmation) and in the exhibits thereto. In consideration of the Court’s time, Cargill respectfully refers the Court to these documents for a full recitation of the underlying facts.

ARGUMENT

*Point I***The Court Lacks Personal Jurisdiction Over Cargill Because Petitioners Failed to Serve Cargill Within the Time Permitted by CPLR 306-B; Petitioners' Belated Service Attempt is Insufficient to Confer Personal Jurisdiction over Cargill.**

The rules governing the permissible time for effectuating service of process in New York are clear. Under CPLR 306-b, where the applicable statute of limitations is “four months or less,” service must be made “not later than fifteen days after the date on which the applicable statute of limitations expired” (*see* CPLR 306-b). In this case, the applicable four-month limitations period provided in CPLR 217 for “proceedings against a body or officer” accrued on February 12, 2021, the date of final permit modification issuance, and expired four months later on June 12, 2021 (*see* Naughton Affirmation, ¶ 5). When the fifteen-day service period of CPLR 306-b is added on, the final permissible day for service technically fell on Sunday, June 27, 2021. The service period is extended to June 28, 2021 due to General Construction Law § 25-a, because the statutory deadline fell on a Sunday.¹

Petitioners did not attempt service on Cargill until nearly three weeks after the expiration of this mandatory service deadline (*see* Naughton Affirmation, ¶ 9). Such untimely service, however, is ineffectual under New York law (*see Komanicky v Contractor*, 146 AD3d 1042, 1043 [3d Dept 2017] [service made outside the 306-b time period without benefit of court order is “ineffectual”]) and, consequently, insufficient to confer personal jurisdiction over the defendant (*see e.g., Deb v Hayut*, 171 AD3d 862, 863 [2d Dept 2019] [holding that a defendant, served outside the CPLR 306-b timeframe, was not “properly served” and that motion to dismiss “for lack

¹ General Construction Law § 25-a provides, in relevant part, that “[w]hen any period of time, computed from a certain day, within which or after which or before which an act is authorized or required to be done, ends on a Saturday, Sunday or a public holiday, such act may be done on the next succeeding business day.”

of personal jurisdiction should have been granted”]; *see also* Vincent C. Alexander, Practice Commentaries, McKinney’s Cons. Laws of NY, Book 7B, CPLR C306-b:1 [“If service of process is not made within the prescribed period of CPLR 306-b, the action is subject to dismissal upon motion of the defendant.”]).

It is axiomatic that a failure to effectuate proper service leaves the court without personal jurisdiction over the defendant or respondent (*see Lakeside Concrete Corp. v Pine Hollow Bldg. Corp.*, 65 NY2d 865 [1985]; *see also Flannery v GMC*, 86 NY2d 771, 773 [failure to serve defendant in accordance with the requirements of BCL § 307(c)(2) divested Supreme Court of jurisdiction over defendant]; *in accord, Matter of Exxon Mobil Corp. v New York City Dept. of Env’tl. Protection*, 178 AD3d 696 [2d Dept 2019] [failure to effectuate service on City in strict compliance with CPLR 311(a)(2) divested court of jurisdiction, requiring vacatur of judgment and dismissal of petition]). The same result pertains when a petitioner fails to serve an article 78 proceeding within the time permitted by CPLR 306-b (*see Parrino v New York City Bd. Of Stds. & Appeals*, 90 AD3d 931 [2d Dept 2011] [failure to serve article 78 proceeding within the required 15-day period mandated dismissal of the proceeding for lack of personal jurisdiction]).

For these reasons as well as those set forth in Naughton Affirmation, Cargill respectfully requests that this Court grant its motion to dismiss under CPLR 3211(a)(8).

Dated: July 22, 2021
Syracuse, New York

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