WARREN COUNTY BAR ASSOCIATION, INC.

TIPSTAFF

FALL 2023 Volume V Issue 1

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Dear Colleagues,

As the cool fall air sets in, this is a great time to share all the good things that are happening at the Warren County Bar Association! Although in May, it felt like spring/summer would be an opportune time to slow down and enjoy the beautiful weather, the reality was that slowing down was not the case. The WCBA has been very busy.

As you scroll through these pages, you will remember that, in early May, we celebrated Law Day at the impressive Hyde Collection. In this magnificent museum, we shared cocktails, conversations, and camaraderie. We honored both the Greenwich High School Mock Trial team members, who won the regional competition, and Ruth Fish, FNP, this year's Liberty Bell Award recipient. What a night!

Shortly after that night, nearly 50 of us enjoyed a delicious dinner at the Lake George Club at our Annual Meeting. We were fortunate this year to welcome both the outgoing and incoming New York State Bar Association presidents, Sherry Levin Wallach, Esq. and Richard Lewis, Esq. respectively.

Thanks to the continuing work of Maria Nowotny, Chair of the WCBA CLE committee, we shared a luncheon CLE on June 8th at the Log Jam Restaurant. Many thanks to Jason Carusone, Warren County District Attorney, who presented an extremely informative CLE, entitled, *A Look at Justification in New York State*.

And then summer began for us. Over the course of the last few months, the Bar Association office has been very active. Along with day-to-day office work, we have been wrapping up fiscal year finances and preparing for the coming year; collecting dues and updating contact lists; gathering Foundation Scholarship applications; and, most recently, planning the Welcome Back party; the Mannix Dinner, a December CLE, and other upcoming annual events.

Speaking of events, our Welcome Back party at the East Cove in Lake George was a huge success. The appetizers and cocktails were terrific, the venue charming, and the guests, jovial! Please mark your calendar for the ever-popular Mannix Dinner, where our judges cook and serve a delicious chicken parmesan dinner to many hungry attorneys. This year, the dinner will take place on Thursday, November 16th at the Church of the Messiah. And don't forget about the dinner's very competitive dessert contest!

We hope you enjoy this latest edition of the *Tipstaff*. Filled with many photos of our recent events and some very interesting case summaries and articles from several members, it's a great read. Please consider submitting an article in future editions. There's always room for one more!

As always, if you have any questions or concerns, just let us know. Here's to a happy and healthy fall!

Sincerely,

Eric

LAW DAY
The Hyde Collection
May 5, 2023

Law Day


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Law Day

Many thanks to all those who made the evening so special! We were graciously welcomed by John Lefner, CEO of the Hyde Collection and his staff, and we were fed beautifully by Rainer's Gourmet Catering. Over 50 friends gathered in the The Hyde House courtyard to enjoy cocktails and hors d'oeuvres.

Later, we moved to the Helen Froehlick Auditorium, where we were welcomed by Dennis J. Tarantino, Esq., president of the WCBA, and Vanessa A. Hutton, chair of this year's event. Judge Glen T. Bruening introduced us to the Greenwich High School Mock Trial Team, regional winners of this year's competition. Finally, Dennis J. O'Connor, Esq. and Timothy S. Shuler, Esq. introduced Ruth E. Fish, FNP, the WCBA Liberty Bell Award recipient.

by James Cooper, Esq.

James Cooper is a frequent contributor to the *Tipstaff*.

LOCAL BABY HAS OUTSTANDING CAREER

It seems a curious thing that a child born in a locality is somehow claimed as an important community marker. Such is the case with Charles Evans Hughes, born in Glens Falls in 1862, contemporaneous with the Monitor driving off the Virginia at Hampton Roads. The house of his birth is still in flux as the candidates for that honor are in dispute, one having been moved and relocated within the city and another rebuilt in its place. As an infant, his parents moved to Sandy Hill, (Hudson Falls), and established a greater grouping of contacts there for themselves and for him later in life.

Hughes' father was a Methodist minister and immigrant from Wales. His mother resided with her parents, ardent Baptists, near Kingston. When they discussed matrimony, she insisted that Hughes convert to become Baptist, which he did. His first parish was in Glens Falls, but they shortly moved to Sandy Hill and other locations in New York as Hughes followed opportunities. They inculcated little Charles with religious precepts perhaps to excess. His mother home schooled Charles such that he spoke Latin, Greek, German and understood some French early in his life. When he was enroled in public school he quickly requested that his parents allow him to return to home studies as he was bored and far ahead of his classmates and uninspired by his teachers. Public high school was far different than today with entrance exams and strictly structured admissions. As a consequence, when Charles' father ultimately gained a parish in New York, Charles, then a twelve year old boy, had a wait of several months before he could attend school there which time he used to wander the Victorian era city. He told his biographer that he relished rambles in Central Park and noted ubiquitous shanties and shacks on the avenue to the west of it and the heavily Irish immigrant community to the east. He wandered all over the bourgeoning and exciting city, even the dangerous Five Points. He jumped the tailgates of horse drawn lorries for transportation. He witnessed money handouts outside of polling stations. This was the era of policemen with domed helmets, twirling nightsticks, Boss Tweed, crime and corruption.

A few years later Charles ran into a childhood friend from Sandy Hill who persuaded him that, like him, he should attend Madison University, which later became Colgate. Charles persuaded his parents to allow enrollment and to pay his tuition and board, partly because Colgate was then Baptist affiliated and allowed a discount to the children of Baptist clergy. He had tutoring jobs there and other income. At Colgate he actively participated with classmates in structured debates. He was a brilliant student elected to Phi Beta Kappa. He joined a national social fraternity, Delta Upsilon. He began to hit his stride as an individual apart from his childhood indoctrinations. He persuaded his parents to allow him to transfer to Brown University which had a DU chapter. He spent one summer vacationing several weeks on an island just off Bolton Landing in Lake George with his DU brothers, singing in harmony evenings with vacationers boating to the island to listen. Student behavior of that era is foreign to us, like the musical operetta, *The Student Prince.* Debates and intellectual lectures in academic venues were as popular then as sports are today. Hughes thrived in that atmosphere and graduated with high honors from Brown. To the disappointment of his parents he was then free of their wishes that he become clergyman and began to think that the law was the right career for him. He applied to Columbia and was accepted there, spending an intervening period

independently studying law in the law library permitted by the Southern District U.S. attorney. He came to relish dissecting cases to understand them.

When he began at Columbia under the instruction of a nationally renowned professor, Columbia had not adopted the Harvard teaching method of case study, but lectured principles of law with case citations. Hughes studied all the citations from the lectures, thinking that reading cases was essential to finding the law and understanding it. In the course of his studies at law school, Hughes was struck with the massive reality that he had to find employment to support himself and any future family. He approached one of the most prestigious law firms in New York and was rebuffed by a junior associate but literally bumped into the senior partner while leaving. The man took Hughes into his office and interviewed him again. It turned out that the partner was a hobby mentor to young lawyers, sprinkling firm graduates all over the country. He offered Hughes an unpaid internship that summer which Hughes grabbed. Hughes' work was so impressive that the partner promised him a position after he graduated from Columbia.

Hughes was first in his class as he graduated from Columbia Law, awarded a post-graduate tutoring stipend there. The bar exam at that time was local to the City of New York bar and was a pass-fail undisclosed result. Sixty years later he discovered that he passed it with a 99.5% score. He was employed by the Carter firm as promised and as senior partners spun off, quickly rose in status there ultimately becoming a partner in his late twenties.

He worked prodigiously days and nights to the detriment of his health. He had a chronic cough. He had always been slight in his stature, weighing about 125lbs at that time. The senior partner insisted that he take a vacation to the shore, which he did where he met prominent attorneys staying at his hotel. When he became a senior partner at the Carter firm, and on its letterhead as such, he felt free of any stigma marrying the boss's daughter solely for advancement, proposed to her, and began a lifetime of dedicated and deeply affectionate marriage. Although he had moved up the ladder in one of the most prestigious law firms in the city and experienced financial security, he was burned out and surprisingly left the firm to accept a teaching position at Cornell Law. His retrospective in later life was that this was the happiest time for him, but financially he couldn't manage two residences and mortgages on a professor's salary, so after two years he returned to the Carter firm and New York.

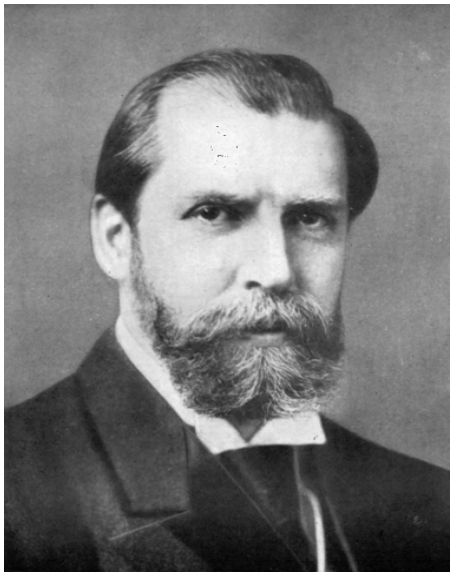
Hughes' stature grew not from his efforts to socialize with other lawyers, but strictly from ability. Gradually the lawyers who came into professional contact with him consulted him. He became a lawyer's lawyer, indicated by a cliche commonly used by the bar at the time to describe complex issues, "...better take it to Hughes." He was involved in a case as counsel to the New York *World*. The editor was asked by its publisher, the nearly blind Joseph Pulitzer, to have Hughes attend a conference about the case. Pulitzer ran his hands over Hughes' face to get an idea of his features before asking him about an issue. Thereafter Pulitzer summarized the facts, strategies and alternatives to a room full of editors, stenographers and secretaries. Hughes was astonished by Pulitzer's comprehensive understanding and organization of thoughts as if he were,"...judge of the earth", an unforgettable demonstration of intellectual power. Pulitzer apparently recognized Hughes' abilities as he named him in his will as directing trustee of the entity that published the *World* with a yearly salary of $100,000. On Pulitzer's death, Hughes renounced the appointment, having become a jurist in the interim.

Hughes' escalation into the class of New York business titans included his appointment as trustee in numerous important ventures. He was asked to be the featured speaker at many

organizations' dinners and conventions. He found time to teach a bible study for adults, among whom was John D. Rockefeller, Jr. The senior Rockefeller was president of the Fifth Avenue Baptist Church where Hughes was a board member. They had a friendly acquaintance, but no retainers with Standard Oil were sought or offered. Hughes never sought business, nor billed according to his abilities or all night efforts. His income was half of other comparable attorneys who had the mansions in New York and opulent vacation residences that he didn't.

It would be a mistake to catagorize Hughes as just a massive intellect. His personality was very complicated but could be separated into two aspects. First was a driven sense of duty to himself to accomplish his work with excellence in its development and if possible in results. His discipline to achieve these outcomes exhausted him and was observed by his mentors, associates and staff who referred to him as, "The Ship", attaching to him on any given day a condition of the sea that reflected his mercurial personality. Previously mentioned, his boss sent him off for a shore vacation, concerned for his health. Hughes was drawn to his family and a deep affection for his wife and to fulfill the joy of experiencing life as he had felt when twelve exploring New York and sneaking rides on the tailgates of wagons. He had tried to accomplish this second passion in the Cornell venture, but unable to maintain or replicate that, he periodically vacationed, hiking and climbing in Switzerland. After a few years his wife and children accompanied him to locations there and to Germany and Italy. Once his twelve year old son and he climbed an interior staircase of a cathedral spire in Germany where the child outstripped Hughes and went out of sight above. Hughes became alarmed when the staircase and steps narrowed and ultimately ended. He found that his son had exited to the exterior of the spire and climbed a ladder as high as it would go. Hughes was terrified for the boy and a possible 650 foot fall, but each came down safely. The balance in his life that he struck for himself worked well enough for him to gain weight to 173lbs. which he maintained on a steady diet and exercise regimen for forty years

Hughes reluctantly accepted appointment as counsel for a state legislative investigation of a gas and electric monopoly and its supply of gas to the city, businesses and residences. His second appointment was to investigate the life insurance industry. He was only well known among the bench and bar of the city and the Court of Appeals where one judge said there was no better advocate before it. The sensationalist newspapers of the time were skeptical of his trial skills and suggested that the hearings were managed by corrupted politicians. He proved that the gas company was mixing air with product to bill by volume, bilking the city and residents. He proved that officers in major life insurance companies headquartered in New York, used questionable proxy authority to perpetuate themselves and cheated their customers by raiding investment income for ridiculous salaries and bonuses that diminished dividends. Hughes went from public goat to hero in the gas hearings, a reputation only enhanced after the second set. Political overtures had been made to him from Republican bosses, (his affiliation) to run for mayor, but he rebuffed them to continue the investigation hearings to conclusion and the embarrassment of the party. With no prior knowledge of the operations of either business or their bookkeeping machinations, he mastered each in a short period of time destroying the arrogant facades of their presidents, directors and trustees by his examinations at the hearings. Dozens were fired by their boards, resigned or fled to Europe, one lost his health and died within weeks. State legislation followed his reports. The legislature created the Public Service Commission on his recommendation. He had established with the major half dozen or so skeptical New York newspapers a reputation for excellence, absolute integrity and honesty as a public officer.



It was 1905. Hughes was forty-three. There was little more to accomplish as a lawyer. Speculation mounted that he was the obvious Republican to run for statewide office, but Hughes' practice had been neglected in his investigations. He said that he had no interest in politics as Republican operatives approached him to consider a run for governor. His response to a suggestion that it would be the springboard to becoming president was that he had no interest in that either, that his one desire was to be left alone in his profession. It was difficult to ignore one strategist however, President Theodore Roosevelt. He invited Hughes to the White House for breakfast and persuasion after which they watched children hunting Easter eggs. Hughes only acceded to being nominated at the Republican convention in Saratoga Springs because he felt that to decline would forever preclude the possibility of public service. The Republican party had suffered in New York, as Hughes' investigations revealed its gratuities from business to kill unfavorable legislation. Even Roosevelt was shown to have received campaign contributions from the insurance industry, considered improper, even if not illegal at the time. He held no grudge but became the primary Hughes supporter for governor. The residual effect of the Civil War was that upstate cities were controlled by Republican machines and bosses who had their noses bloodied by Hughes' investigations. There was correspondence revealed at the insurance hearings from the Republican Barnes machine of Albany complaining that the customary "honorarium" was late. The bosses understood that their only chance to continue to control state government was to have him, the ultimate symbol of integrity and honesty in government, lead their tickets on the ballot. He was nominated unanimously. His response:

I thank you for your confidence...I shall accept the nomination without pledge other than to do my duty according to my conscience. If elected, it will be my ambition to give the state a sane, efficient and honorable administration, free from the taint of bossism or of servitude to any private interest.

(End of chapter one, credits to be listed at the conclusion of the articles)

Jim Cooper
June 28, 2023

From The Judge's Chambers

Martin D. Auffredou, JSC
Warren County Supreme Court
Warren County Municipal Center
1340 State Route 9, Lake George, NY 12845

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WARREN

WEST MOUNTAIN ASSETS LLC,
Plaintiff,

-against-

JAMES DOBKOWSKI and JENNIFER DOBKOWSKI,
Defendants/Third-Party Plaintiffs,

-against-

JONATHAN SZEMANSCO,
Third-Party Defendant.

DECISION AND ORDER

Index No. EF2020-68328
RJI No. 56-1-2020-0333

APPEARANCES:

Fitzgerald Morris Baker Firth P.C., Glens Falls (*Michael Crowe*, of counsel), for plaintiff and third-party defendant.

Bartlett, Pontiff, Stewart & Rhodes, P.C., Glens Falls (*Malcolm B. O'Hara*, of counsel), for defendants/third-party plaintiffs.

AUFFREDOU, J.

Motion by defendants/third-party plaintiffs (hereinafter defendants) for summary judgment on the first and third counterclaims in the answer.

Plaintiff West Mountain Assets LLC (WMA) and defendants (hereinafter, collectively, "the parties") are owners of parcels in a subdivision in the Town of Queensbury, Warren County, New York, that is known as Northwest Village, Section Two. Specifically, the parties own neighboring parcels, each of which is developed with a single-family residence, and each of which abuts a third parcel on which is situated a road that services the properties (hereinafter, "the road parcel"), of which the parties share ownership in cotenancy. The gravel surface of the road runs generally down the center of the roughly rectangular road parcel but does not occupy the full width

thereof. The ends of defendants' horseshoe-shaped blacktop driveway extend beyond the deeded bounds of their property onto the road parcel and intersect the gravel roadway. The unpaved portion of the road parcel lying between and immediately to either side of defendants' blacktop driveway is occupied by defendants.

The parties' titles to these parcels descended from a common grantor, who, when establishing the subdivision, burdened them with restrictions that run with the lands, both in the deeds by which they were first conveyed and in a Declaration of Restrictions. These restrictions appear in all subsequent deeds to the parcels, including those conveying the respective interests of the parties' herein. The restrictions require, among other things, that the properties "shall be used only for single family residential purposes" and shall not be used for commercial activity or any "noxious, dangerous, offensive or unduly noisy activity of any nature" (hereinafter, "nuisance behavior"). WMA's use of its parcel, however, involves ongoing, short-term rentals of its property that appear to range in duration from a weekend to a couple of weeks. The main issue presented on this motion is whether such use is consistent with the restriction to use only for single-family residential purposes. Defendants also assert that the tenants in the short-term rentals have engaged in various nuisance behaviors, in violation of the restrictions.

That said, WMA commenced this action largely in response to issues that are not raised in this motion. It alleges that defendants have interfered with its use of the gravel road; interfered with its tenants' free use of its property, including the roadway and surrounding lands on the road parcel; improperly installed a drainage pipe on the roadway; and defamed it. WMA's complaint asserted four causes of action, one for each of the foregoing. The third cause of action, for defamation, was dismissed on defendants' pre-answer motion, without WMA's opposition, by order of this court entered December 21, 2020.

Thereafter, defendants answered, asserting three counterclaims—the first for a declaration that WMA's use of its property for ongoing short-term rentals to transient tenants, and the attendant conduct of its tenants, violates the restrictions noted above, and an injunction against WMA's continued use of the property for same; the second sounding in trespass and private nuisance, alleging that WMA redirected stormwater runoff onto defendants' property, causing damage; and the third claiming adverse possession of the portion of the road parcel that defendants occupy, namely, the ends of their blacktop driveway that extend onto the road parcel, and the unpaved portions of the road parcel that lie between and immediately to either side of defendants' blacktop driveway (hereinafter, "the disputed area"). Defendants also commenced a third-party action against third-party defendant Jonathan Szemansco, WMA's principal, in which they seek to pierce the corporate veil as to any damages awarded to them under the counterclaims in the answer.

Defendants now move for summary judgment establishing the claims in the first and third counterclaims in the answer only. Neither the remaining causes of action in WMA's complaint, the cause of action in the third-party complaint, nor the second counterclaim in the answer is at issue herein. The parties have asserted, and the court agrees, that the foregoing facts are not in question and the discrete issues presented on the motion are thus ripe for summary disposition.

Accordingly, upon consideration of the affirmation of Michael Crowe, Esq., dated July 28, 2022, with exhibits; the affidavit of James H. Dobkowski, sworn to July 28, 2022, with exhibits; the affirmation of Peter R. Gray, M.D., dated July 28, 2022; defendants' statement of material facts dated July 28, 2022, with exhibits; the affidavit of Malcolm B. O'Hara, Esq. in opposition to the motion, sworn to August 25, 2022, with exhibit; the affidavit of Jonathan Szemansco, sworn to August 25, 2022; WMA's statement of material facts, filed August 25, 2022, with exhibits; the reply affirmation of Michael Crowe, Esq., dated August 31, 2022; WMA's response to defendants'

statement of material facts, filed September 22, 2022; and the surreply affirmation of Michael Crowe, Esq., dated October 7, 2022; oral argument having been held on October 27, 2022; and the court having considered the parties' joint, post-oral-argument submission of a full-sized survey of A portion of Northwest Village, Section Two, decision is hereby rendered as follows.

On a motion for summary judgment, the movant bears the initial burden to demonstrate entitlement to judgment as a matter of law *(see Dibartolomeo v St. Peter's Hosp. of City of Albany*, 73 AD3d 1326, 1326 [3d Dept 2010]). If this burden is met, the burden shifts to the opponent of the motion to demonstrate that a triable issue of fact exists (*see id.*). The court has the authority to search the record and grant summary judgment to a nonmoving party (*see Digesare Mech., Inc. v U.W.Marx, Inc.*, 176 AD3d 1449, 1455 [3d Dept 2019]).

Turning first to whether WMA's use of its property violates the use restrictions that run with the land, it must first be noted that certain of the restrictions that pertain to permissible signage on the properties specifically permit "for rent" signs and it is, thus, specifically contemplated that an owner is permitted to rent out its property. Defendant's argument here, however, is not against the right to rent, per se, but against the right to rent on ongoing, short-term, repetitive bases to transient, vacationing tenants. As to that question, the parties assert, and the court's research confirms, a dearth of authority in New York State on the construction to be given to the phrase "single family residential purposes" when such appears in a deed covenant or restrictive declaration affecting property.

The parties have focused on the distinction between residential and commercial uses. WMA advances the general maxim that "'[t]he law favors free and unencumbered use of real property, and covenants restricting use are strictly construed against those seeking to enforce them,'" and presents a case from Wisconsin in which a deed covenant similar to the one at issue

here was construed to allow short-term rentals as a noncommercial use (*Kumar v Franco*, 211 AD3d 1437, 1439 [3d Dept 2022], quoting *Ernie Otto Corp. v Inland Southeast Thompson Monticello, LLC*, 91 AD3d 1155, 1156 [3d Dept 2012] [internal quotation marks, brackets and citations omitted], *lv denied* 19 NY3d 802 [2012]; *see Forsee v Neuschwander*, 381 Wis 2d 757, 769, 914 NW2d 643, 649 [2018]). This, however, does not determine the issue since, even if short-term rentals are not commercial, they are still not necessarily single-family residential uses.

In that regard, defendants urge analogy to the construction given to the term "residence" in other contexts, such as those involving a person's entitlement to government benefits, applications for licensure, or proper polling place for voting, arguing that WMA's transient tenants can never establish residency in WMA's property and their uses cannot, therefore, be considered residential, but this is not entirely compelling either. Put simply, the determination of a person's residency is distinct from what may constitute a residential use of a property, whether used by a person who has established residency in the property or not. And, as WMA observes, the activities undertaken at its property by its tenants are all quintessentially residential—e.g., cooking, bathing, sleeping and recreating.

As such, in the court's view, the resolution of this dispute does not lie in any construction of the terms "residential" or "commercial," but in the construction of the term "single-family" as used in the covenant. The court is guided in this matter by the Court of Appeals decision in *White Plains v Ferraioli* (34 NY2d 300, 304-306 [1974]), rendered in the context of a restrictive zoning ordinance and, therefore, in the court's view, an analogous context (*see id.* at 305 [like a restrictive covenant in a deed, "[z]oning is intended to control types of housing and living."]). In that case, the Court held that a single-family use is one that "bears the generic character of a family unit as a relatively permanent household" (*id.* at 306). Transient living, the Court held, falls outside the

scope of a single-family residential use (*see id.* at 304-306; *Matter of Northwood Sch., Inc. v Joint Zoning Bd. of Appeals for the Town of N. Elba & Vil. of Lake Placid*, 171 AD3d 1292, 1294 [3d Dept 2019]). Upon this legal determination, the court finds that defendants have carried their initial burden to establish entitlement to judgment as a matter of law by their showing that WMA uses the property for transient, short-term rentals.[1] There being no question of fact that such is how WMA uses the property, defendants are entitled to summary judgment on their first counterclaim.

Turning to defendants' adverse possession claim, the court finds that they have failed to carry their initial burden to establish their entitlement to judgment as a matter of law. "To establish a claim of adverse possession, the occupation of the property must be[,] [among other things,] hostile and under a claim of right (i.e., a reasonable basis for the belief that the subject property belongs to a particular party)" for the duration of the 10-year prescriptive period (*Estate of Becker v Murtagh*, 19 NY3d 75, 81 [2012]). Where, as here, property is held by tenants in common, one "cotentant's possession [of the property is presumed to be] by and for the benefit of all other cotenants" (*Myers v Bartholomew*, 91 NY2d 630, 632-633 [1998]). Thus, for one cotentant's possession to be adverse or hostile to another requires the ouster of the other, which may be express or implied (*see id.* at 633). There is no allegation that an express ouster—which generally requires that the ousting cotenant communicate its "intention to exclude or deny the rights of the [other] cotenants—has taken place here (*id.*). However, per RPAPL 541, an ouster may be implied by 10 years of "continuous exclusive occupancy," after which the "occupying tenant may then commence to hold adversely" to other cotenants (*see Myers*, 91 NY2d at 632-637).

Defendants have established exclusive possession of the disputed area—to the extent that the precise bounds of such may be discerned—by their immediate predecessors in title, a husband

[1] The court notes that defendants' arguments regarding residency, while not found to be determinative, do assert that relative permanency is requisite to a single-family residential use.

and wife of the surname Griffin, through the affirmation of WMA's immediate predecessor in title, Peter R. Gray, M.D. (*see Estate of Becker*, 19 NY3d at 80-81 ["'Where there has been an actual continued occupation of premises under a claim of title, exclusive of any other right, but not founded upon a written instrument or a judgment or decree, the premises so actually occupied, and no others, are deemed to have been held adversely'" (quoting RPAPL former 521)]; *Mentiply v Foster*, 201 AD3d 1051, 1057 [3d Dept 2022]). Dr. Gray establishes that, when he purchased WMA's parcel in 1992 and at all times until he sold to WMA in 2019, the Griffins and defendants exclusively occupied the disputed area. An implied ouster has thus been established under RPAPL 541.

Yet, defendants' proof that the disputed area was possessed hostilely and under a claim of right for any subsequent 10-year period remains lacking. Defendants have certainly established their own claim of right to the disputed area, but they took title to their property in September 2013. Thus, as of the commencement of this action and, indeed, as of the date of this decision and order, they have not occupied the disputed area under that claim of right for the prescriptive period and can prevail on their claim only if they can tack their own hostile possession to that of their predecessors, the Griffins. They have failed to do this. Dr. Gray affirms that the Griffins always held the disputed area out as "their own private yard" but, even reading this as asserting that the Griffins did so under a claim of right, Dr. Gray is not a competent source of proof as to the Griffins' state of mind. Defendants' present no affidavit or deposition testimony from either of the Griffins and, in light of the presumption that the Griffins' possession of the disputed area was also "by and for the benefit of" Dr. Gray, their occupancy of the disputed area, though exclusive, cannot be held to be under a claim of right in the absence of competent proof establishing same (*Myers*, 91 NY2d at 633). As such, defendant's motion for summary judgment on its third counterclaim must fail.

Moreover, upon exercise of this court's authority to search the record and award judgment to a nonmoving party, the court finds it appropriate to dismiss the third counterclaim (*see Digesare Mech., Inc.*, 176 AD3d at 1455). The filing of a note of issue in this case on May 6, 2022 signaled that disclosure was complete and, as noted, the proof before the court fails to establish the Griffins' reasonable basis to believe that the disputed area belonged to them alone. It thus does not appear that defendants can make out a prima facie case for their adverse possession of the disputed area (*see* CPLR 3212 [b]; S*avage v Desantis*, 56 AD3d 1013, 1013-1014 [3d Dept 2008], *lv denied* 12 NY3d 709 [2009]).

Arguments not specifically addressed herein have been examined and determined to be rendered academic by the holdings herein, or have been considered and rejected.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted in part and denied in part, as indicated herein; and it is further

ORDERED that the first counterclaim in the answer is deemed established and it is hereby declared that plaintiff West Mountain Assets LLC's use of the parcel that it owns in fee in Northwest Village, Section Two for ongoing, repeated, short-term rentals to transient tenants is in violation of the restrictive covenants in its deed and the declaration of restrictions that burdens the property; and it is further

ORDERED that plaintiff West Mountain Assets LLC is enjoined against the continued use of such parcel for ongoing, repeated, short-term rentals to transient tenants; and it is further

ORDERED that the third counterclaim in the answer is dismissed, severed and stricken from the answer.

The within constitutes the decision and order of this court.

Signed this 7th day of March 2023, at Lake George, New York.

ENTER:

_____
HON. MARTIN D. AUFFREDOU
JUSTICE OF THE SUPREME COURT

The court is uploading the decision and order to the New York State Courts Electronic Filing System (NYSCEF). Such uploading does not constitute service with notice of entry (*see* 22 NYCRR 202.5-b [h] [2]).

Distribution:
Michael Crowe, Esq.
Malcolm B. O'Hara, Esq.

STATE OF NEW YORK
SUPREME COURT COUNTY OF WARREN

TODD A. ST. LOUIS, as Administrator of the Estate of JANE A. DONIVAN, Deceased,
Plaintiff,
-against-
CAP COM FEDERAL CREDIT UNION,
Defendant.

DECISION AND ORDER

Index No. EF2021-69255
RJI No. 56-1-2022-0529

Appearances:

Romanucci Law Firm, Latham (*Demostene Romanucci*, of counsel), for plaintiff.

Litchfield Cavo LLP, New York City (*Frank L. Lanza*, of counsel), for defendant.

AUFFREDOU, J.

Motion by defendant to enforce a settlement agreement.

As alleged in the amended complaint, plaintiff's decedent, prior to her death, gave a mortgage to defendant upon real property situate in the City of Glens Falls, Warren County. When defendant was notified of decedent's demise in 2019, it caused its agents to enter upon the property, remove decedent's personalty, winterize the property and take other steps ostensibly to preserve it. This was done even though the mortgage never became delinquent after decedent's death and the property was not vacant within the meaning of RPAPL 1309 (2).

Upon these allegations, plaintiff commenced this action, asserting causes of action for violations of RPAPL 1308, trespass to real property, trespass to chattel, and conversion. The parties commenced settlement negotiations immediately. Plaintiff's then-counsel relieved defendant's counsel of the onus to file an answer while the negotiations were ongoing. Demands and responses were exchanged in a series of emails and, ultimately, counsel discussed settling the action for $30,000. Plaintiff amended the complaint by agreement, to correct defendant's name,

and counsel for defendant prepared settlement papers—a hold harmless agreement, and another document labeled a settlement agreement and release of claims. These papers purported to release not only defendant but certain of its agents or representatives, including its counsel, from claims "existing or which may come into existence pertaining to and/or arising out of the claims" in the amended complaint. An agreement having been reached, no answer was ever filed.

Defendant's counsel sent the settlement papers to plaintiff's then-counsel in mid-May 2022. They were not returned for many months, during which time defendant's counsel received no meaningful response from plaintiff's then-counsel in answer to his repeated inquiries on the status of plaintiff's review and execution of the documents. Then, in November 2022, plaintiff somewhat abruptly retained new counsel—his current attorney—who repudiated the purported settlement agreement on his behalf. This motion followed the parties' failed attempts to preserve the settlement agreement.

Now, upon consideration of the affirmation of Frank L. Lanza, Esq., dated December 21, 2022, with exhibits, in support of the motion; the undated affirmation of Demostene Romanucci, Esq., filed January 13, 2023, with exhibits, in opposition to the motion; and the affirmation of Frank L. Lanza, Esq., dated January 18, 2023, in reply; and the court having duly deliberated upon all the foregoing, decision is hereby rendered as follows.[1]

"'Stipulations of settlement are judicially favored, will not lightly be set aside, and are to be enforced with rigor and without a searching examination into their substance as long as they are clear, final and the product of mutual accord'" (*Forcelli v Gelco Corp.*, 109 AD3d 244, 247-248 [2d Dept 2013], quoting *Peralta v All Weather Tire Sales & Serv., Inc.*, 58 AD3d 822, 822

[1] Plaintiff submitted a surreply with neither authorization by statute nor leave of this court (*see* CPLR 2214 [b]; *Matter of Hudson Prop. Owners' Coalition, Inc. v Slocum*, 92 AD3d 1198, 1200-1201 [3d Dept 2012]). As such, the court has not considered it.

[2d Dept 2009] [internal quotation marks omitted]; *accord Bonnette v Long Is. Coll. Hosp.*, 3 NY3d 281, 286 [2004]; *see Hamilton v Murphy*, 79 AD3d 1210, 1212 [3d Dept 2010], citing *Hallock v State of New York*, 64 NY2d 224, 230 [1984]). "Writings between parties to an action or proceeding that discuss the possibility of settlement will be considered to constitute a binding agreement if 'the settlement agreement was adequately described in [such] writings, namely, the agreement was clear, the product of mutual accord and contained all material terms'" (*Matter of George W. & Dacie Clements Agric. Research Inst., Inc. v Green*, 130 AD3d 1422, 1423 [3d Dept 2015], quoting *Palmo v Straub*, 45 AD3d 1090, 1092 [3d Dept 2007]; *see* CPLR 2104; *Forcelli*, 109 AD3d at 247-248; *see also Matter of Phila. Ins. Indem. Co. v Kendall*, 197 AD3d 75, 78-80 [1st Dept 2021]). An email that is purposely subscribed by its sender may constitute such a writing (*see Forcelli*, 109 AD2d at 249-250; *see also Kendall*, 197 AD3d at 78-80). "A party will be bound by the acts of its agent in settlement negotiations and an agreement will be binding where the agent has either actual or apparent authority" (*Forcelli*, 109 AD3d at 248, citing *Hallock*, 64 NY2d at 230-231; *see Buckingham Mfg. Co. v Frank J. Koch, Inc.*, 194 AD2d 886, 888-889 [3d Dept 1993], *lv denied* 82 NY2d 658 [1993]).

Defendant has established, by its provision of apparently every email exchanged on the subject of settlement and the affirmation of the attorney who conducted settlement negotiations on defendant's behalf, that an agreement to settle the action for a payment of $30,000 to plaintiff was reached between defendant's counsel and plaintiff's former counsel, who acted with actual or apparent authority to so agree. The attorney affirms, and the emails confirm, that plaintiff's former counsel made a demand to settle at $30,000 by phone on March 2, 2022. The attorney accepted on defendant's behalf two days later, by an email that memorialized "resol[ution] at $30k" and was subscribed by the attorney. In subsequent emails, plaintiff's former counsel acknowledged the

agreement, amended the complaint as necessary to effectuate the agreement, and even inquired about when the money would be available. These emails were purposely subscribed by him (*see Forcelli*, 109 AD3d at 249-250; *see also Kendall*, 197 AD3d at 78-80). Thereafter, he accepted the settlement documents and forwarded them to plaintiff without objection to any of their contents and, indeed, modified them at defendant's counsel's request to correct a scrivener's error in them. The ongoing exchanges by phone and email of demands and counteroffers that preceded the parties' striking the agreement, and the emails that succeeded same, demonstrate plaintiff's former counsel's authority to settle (*see Hallock*, 64 NY2d at 230-231; *Forcelli*, 109 AD3d at 249).

Curiously, plaintiff does not contest any of the foregoing. Rather, he argues that the settlement documents' purporting to release defendant's nonparty agents as part of the settlement is a material term of the agreement that is not addressed in the emails and to which he did not agree. The court rejects this argument. The essential term of this relatively simple agreement was defendant's payment of $30,000 to plaintiff to resolve the claims raised in the action. Releases and hold-harmless agreements like the ones prepared by defendant's counsel are typical incidents of resolution, and the inclusion of the nonparty agents in the settlement documents is not material to the agreement. Plaintiff claims that the release of the nonparty agents implicates his substantial rights, insofar as the settlement documents would preclude his pursuing them for any claims against them "from the beginning of the world to the day of this [release]," but the release is not so broad as this argument construes it to be. Rather, as noticed above, plaintiff would waive only claims against the nonparty agents that "pertain[ed] to and/or ar[ose] out of the claims" in the amended complaint. Any liability that the nonparty agents might have to plaintiff for such claims could only flow from or through defendant's own liability or, in the case of defendant's counsel,

from improper conduct in litigation. In other words, plaintiff would give up no more by releasing the nonparty agents than he would by releasing only defendant. This is not material.

Accordingly, it is hereby

ORDERED that the motion is granted in its entirety and the agreement to resolve the action for $30,000 is deemed enforceable pursuant to CPLR 2104.

The within constitutes the decision and order of this court.

Signed this ____ day of March 2023, at Lake George, New York.

ENTER:

_____
HON. MARTIN D. AUFFREDOU
JUSTICE OF THE SUPREME COURT

The court is uploading the decision and order to the New York State Courts Electronic Filing System (NYSCEF). Such uploading does not constitute service with notice of entry (*see* 22 NYCRR 202.5-b [h] [2]).

Distribution:
Demostene Romanucci, Esq.
Frank L. Lanza, Esq.

St. Louis v Cap Com
Warren County
Index No: EF2021-69255

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WARREN

TOWN OF THURMAN,
Plaintiff,

-against-

GAIL SEAMAN,
Defendant.

DECISION AND ORDER

Index No. EF2021-69749
RJI No. 56-1-2022-0462

APPEARANCES:

Miller, Mannix, Schachner & Hafner, LLC, Glens Falls (*Mary Elizabeth Kissane*, of counsel), for plaintiff.

Gail Seaman, Athol, defendant pro se.

AUFFREDOU, J.

Motion by plaintiff for summary judgment on the claims in the complaint and to dismiss the counterclaim in the answer.

Defendant held the position of secretary to the supervisor (hereinafter the position) of plaintiff Town of Thurman (the Town) from January 3, 2020 through May 31, 2021. According to the complaint, the position is part-time and, as such, compensation for serving in it does not include health care coverage at the Town's expense. Town employees who do not qualify for health care coverage at the Town's expense may participate in the available health care plan at their own cost. Nonetheless, when defendant enrolled in health care coverage through the Town, the Town erroneously paid $9,602.21 toward defendant's health care premiums during the period of February 1, 2020 through May 31, 2021, in violation of Town policy.

The Town realized the error in April 2021 and, on April 14, 2021, the Town Board for the Town of Thurman (the Board) passed a resolution directing the supervisor to, among other things,

demand that defendant return the money or face litigation, which the supervisor did by letter of April 28, 2021. Defendant had not returned the money to the Town by June 2021, so, on June 9, 2021, the Board passed a second resolution, directing the supervisor to demand that defendant repay it within 30 days of the demand or face litigation, which the supervisor did by letter of June 17, 2021. As of September 2021, defendant had not honored the demand, prompting the Board to pass a third resolution, directing the Town's attorney to demand payment on or before October 14, 2021, after which he would move forward with suit.

When repayment was not forthcoming, the Town commenced this action by the filing of a summons and complaint, alleging two causes of action sounding in unjust enrichment and conversion, respectively. Defendant answered, asserting various defenses and a counterclaim alleging that the Town "violated [her] employee privacy rights by derogatorily discussing [her] by name at public Board meetings, included in the meeting minutes, on YouTube videos, on internet posts discussions given by board members with yellow journalist, and in the Post Star."[1] The Town replied, offering several defenses to the counterclaim, and now moves as aforesaid.

Upon consideration of the affidavit of Debra Runyon, sworn to November 7, 2022, with exhibits; the affirmation of Mary Elizabeth Kissane, Esq., dated November 8, 2022, with exhibits; plaintiff's memorandum of law dated November 8, 2022; plaintiff's statement of material facts, dated November 8, 2022;[2] the affidavit of Gail Seaman, sworn to November 23, 2022, with exhibits; and the reply affirmation of Mary Elizabeth Kissane, Esq., dated November 30, 2022;

[1] The Post Star is a newspaper that services Warren County and surrounding areas.
[2] The court declines to deem the allegations in plaintiff's statement of material facts as having been admitted by defendant based upon her failure to file a responsive statement of material facts (*see* Uniform Rules for Trial Cts [22 NYCRR] § 202.8-g [c]).

and the court having duly deliberated upon all the foregoing, decision is hereby rendered as follows.[3]

On a motion for summary judgment, the movant bears the initial burden to demonstrate entitlement to judgment as a matter of law (*see Dibartolomeo v St. Peter's Hosp. of City of Albany*, 73 AD3d 1326, 1326 [3d Dept 2010]). If this burden is met, the burden shifts to the opponent of the motion to demonstrate that a triable issue of fact exists (*see id.*).

> "To recover under a theory of unjust enrichment, [plaintiff] must show (1) that [defendant] was enriched, (2) at [plaintiff's] expense, and (3) that it is against equity and good conscience to permit [defendant] to retain what is sought to be recovered by [plaintiff]. 'The essence of such a cause of action is that one party is in possession of money or property that rightly belongs to another.' 'Generally, courts will look to see if a benefit has been conferred on the [defendant] under mistake of fact or law, if the benefit still remains with the [defendant], if there has been otherwise a change of position by the [defendant], and whether the [defendant's] conduct was tortious or fraudulent'" (*Schoch v Lake Champlain OB-GYN, P.C.*, 184 AD3d 338, 344 [3d Dept 2020] [citations omitted], *affd sub nom Columbia Mem. Hosp. v. Hinds*, 38 N.Y.3d 253 [2022], quoting *Clifford R. Gray, Inc. v LeChase Constr. Servs., LLC*, 31 AD3d 983, 988 [3d Dept 2006] and *Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421 [1972], *cert denied* 414 US 829 [1973]).

There is no real dispute here that defendant was enriched by the Town's payments toward her health insurance premiums. The Town has established prima facie that such benefit was wrongfully conferred upon her by its submission of Town Resolution # 14 of 2018, in which the position was reduced from full-time to part-time, and the Town's "Operational Policies," which state that a part-time employee's participation in the health plan shall be at no cost to the Town.

Defendant has not met her responsive burden to demonstrate an issue of fact in this regard. Town Resolution # 92 of 2018, which appears to reinstate the position to full-time, gives the court no pause. The court notes that, as a Board member through, as relevant here, 2018 and 2019, defendant appears to have championed the reduction of the position to part-time without benefits

[3] Defendant submitted a surreply with neither authorization by statute nor leave of this court (*see* CPLR 3011). As such, the court has not considered it.

in 2018 and to have resolutely opposed returning it to full-time throughout her remaining tenure on the Board. Town Resolutions # 10 and 25 of 2019, subsequently considered by the Board, which proposed to return the position to full-time with benefits and against which defendant voted, were not adopted, demonstrating that the position was part-time without benefits in 2019, immediately prior to defendant's taking the job. Defendant's comparison of herself to other Town workers to whose health insurance premiums the Town contributes, and her self-kept calendar by which she demonstrates that she actually worked 40 hours per week or more do not rebut the showing that the position was designated by the Board as part-time without benefits.

Nor is the court convinced that the Town would have had to pay defendant's health insurance benefits under the American Rescue Plan Act (ARPA). First, the email from the Town's benefits administrator, upon which defendant bases this argument, is not a source of law. In any event, the email indicates that ARPA benefits would be payable to employees whose benefits were cut due to COVID-19. However, the proof before the court here shows that the position was cut to part-time without benefits in 2018, long before the pandemic, to enable the Town to pay an overdue bond, all notably at defendant's urging.

As to the equities of permitting defendant to retain the monies wrongfully paid by the Town on her behalf, the court notes that the mechanism by which the Town's health insurance payments commenced on defendant's behalf is not entirely clear. The record before the court includes defendant's application for health care coverage, which was signed by the supervisor whom she served, but part-time employees are permitted to participate in the Town's health care plan and nothing on the application specifically authorizes the Town's payment of benefits. However, it is ostensible that such payments were, at best, a mistake, the benefit of which defendant accepted and still retains. In light of defendant's history on the Board as noticed herein, her acceptance of

health insurance benefits at Town expense while serving in the position, while perhaps not rising to the level of a fraud or tort, certainly militates against permitting her to retain the Town's money as a matter of equity.

Turning to the counterclaim, no specific cause of action is discernable therein. To the extent that it sounds in defamation, it lacks the specificity required by CPLR 3016 (a). If construed to assert a violation of some sort of privacy right, the counterclaim does not identify a legal basis for the right claimed (*see DiPalma v Phelan*, 81 NY2d 754, 756 [1992]). To the extent that there is any right to privacy in the fact of whether the Town contributed money to defendant's health care coverage, the Town has demonstrated its entitlement to dismissal of the counterclaim, having argued that such is not of a "highly private or intimate character" (*id.*; *see Lucas v Devlin*, 139 AD3d 1196, 1197 [3d Dept 2016], *lv denied* 28 NY3d 901 [2016]).

In response, defendant has produced no YouTube video, no copy of an article in the Post Star or "yellow journalist," and no Board meeting minutes that substantiate the counterclaim. The social media posting that defendant provides does not reflect any discussion of highly private or intimate subjects and, to the extent that defendant's submission even establishes that the posting was published by the Town, the Town has a legitimate government interest in informing its constituents of the status of litigation that could affect them as taxpayers, and of the Town's position on same (*see DiPalma*, 81 NY2d at 756; *Lucas*, 139 AD3d at 1197-1198). The same analysis applies to the posting of the pleadings in the case, which are a matter of public record in any event. Defendant's showing that copies of the pleadings were emailed to the Warren County Sheriff's Office (WCSO) also does not appear to establish that the email came from the Town. Even if it did, providing the pleadings to WCSO, while ostensibly pointless, cannot be said to have violated defendant's right to privacy, particularly where no such right has been established.

Arguments not specifically addressed herein have been examined and determined to be without merit or rendered academic in light of the foregoing.

Accordingly, it is hereby

ORDERED that the motion is granted to the extent indicated herein; and it is further

ORDERED that plaintiff is granted summary judgment on its first cause of action, its claim for unjust enrichment is deemed established, and it shall have judgment therefore in the amount of $9,602.21, with costs; and it is further

ORDERED that the second cause of action is dismissed as academic; and it is further

ORDERED that plaintiff is awarded summary judgment dismissing the counterclaim in the answer, and such counterclaim is stricken from the answer.

The within constitutes the decision and order of this court.

Signed this ____ day of March 2023, at Lake George, New York.

ENTER:

_____
HON. MARTIN D. AUFFREDOU
JUSTICE OF THE SUPREME COURT

The court is uploading the decision and order to the New York State Courts Electronic Filing System (NYSCEF). Such uploading does not constitute service with notice of entry (*see* 22 NYCRR 202.5-b [h] [2]).

Distribution:
Mary Elizabeth Kissane, Esq.
Gail Seaman

Town of Thurman v Seaman
Warren County
Index No. EF2021-69749

WARREN COUNTY BAR ASSOCIATION
ANNUAL MEETING
LAKE GEORGE CLUB
MAY 16, 2023

Dennis J. Tarantino, Esq.
2022-2023 WCBA President

Hon. Robert J. Muller
2022-2023 WCBF President

Hon. Glen T. Bruening
2022-2023 WCBA Treasurer

Richard C. Lewis, Esq.
2024 NYSBA President

Tucker C. Stanclift, Esq.

Sherry Levin Wallach, Esq.
2023 NYSBA President

Kristine Flower, Esq. Chair Nominating Committee

Karen Judd,Esq. Immediate Past President

Dennis J. Tarantino, Esq. President, receives an appreciation plaque from Karen Judd.

Hon. Eric Schwenker
2023-2024 WCBA President

The Practice Page

Mark C. Dillon is a Justice at the Appellate Division, 2nd Dept., an adjunct professor of New York Practice at Fordham Law School, and an author of CPLR Practice Commentaries in McKinney's.

THE PRACTICE PAGE

AVOID ChatGPT WHEN PREPARING LEGAL PAPERS

Hon. Mark C. Dillon *

ChatGPT is a form of Artificial Intelligence (AI) which became available to the public on November 30, 2022. "Chat" refers to its chat box functionality. The "GPT" stands for Generative Pre-Trained Transformer. The program has many functions, one of which is to compose letters and essays on topics selected by the user. Essays produced by ChatGPT are not based on dedicated search engines such as Westlaw, but are instead based on generally-available information which leaves room for error in the sophisticated and detail-orientated field of law.

This is just my opinion, take it for whatever it is worth: Do not use ChatGPT for writing legal papers that will be served upon parties and filed with a court. Two attorneys learned that lesson the hard way in the case of *Roberto Mata v Avianca, Inc*. The plaintiff, Mata, commenced an action in the Supreme Court, New York County, seeking damages for personal injuries allegedly sustained as a result of having been struck by a metal serving cart during a 2019 airline flight bound for New York's JFK Airport. The action was removed to the federal District Court for the Southern District of New York, under Docket No. 22 CV 1461 (Castel, J.). The defendant, Avianca, Inc., later moved to dismiss the action under F.R.C.P 12(b)(6) (https://storage.courtlistener.com/recap/gov.uscourts.nysd.575368/gov.uscourts.nysd.575368.16.0.pdf), which was opposed by counsel representing the plaintiff. The opposition papers were composed by plaintiff's counsel using ChatGPT. Because of shortcomings with the ChatGPT program, the papers submitted in opposition to dismissal cited to several judicial decisions which did not, in fact, exist (https://www.documentcloud.org/documents/23826751-mata-v-avianca-airlines-affidavit-in-opposition-to-motion). The non-existent cases were accompanied by non-existent quotes from them and contained internal citations which also did not exist. Quick on the uptake, District Judge P. Kevin Castel directed that the plaintiff's attorneys show cause on June 8, 2023 as to why they should not be sanctioned for the submission (Weiser, Benjamin, Here's What Happens When Your Lawyer Used ChatGPT," *New York Times*, May 27, 2023, available at https://www.nytimes.com/2023/05/27/nyregion/avianca-airline-lawsuit-chatgpt.html).

On June 22, 2023, Judge Castel financially sanctioned the two attorneys and their law firm who had submitted the misleading opposition papers the sum of $5,000. The court noted that the attorneys failed in their gatekeeping function to assure the accuracy of their filings. Further, in a separate order, the District Court dismissed plaintiff Mata's personal injury action as untimely (https://www.reuters.com/legal/new-york-lawyers-sanctioned-using-fake-chatgpt-cases-legal-brief-2023-06-22/).

Lawyering is never one-size-fits all. No computer program such as ChatGPT can incorporate the years of experience that an attorney brings to a matter such as in the drafting of legal papers for filing. No computer program can provide human judgment, strategy, nuance, emphasis, and persuasiveness. No computer program can know, like a lawyer, what type of argument may best resonate with the particular judge assigned to the matter. And if composition programs such as ChatGPT do not incorporate proven research platforms like Westlaw, legal research and analysis is rightly suspect.

Some might argue that the problem which came to light in *Mata* was not one of burgeoning technology, but a failure by counsel to double-check ChatGPT's draft to assure that the final product submitted to the court was accurate and complete (Wilkins, Stephanie, "The Problem With the 'Bogus' ChatGPT Legal Brief? It's Not the Tech," *NYLJ*, June 2, 2023, available at https://www.law.com/legaltechnews/2023/06/02/the-problem-with-the-bogus-chatgpt-legal-brief-its-not-the-tech/). But that begs the question. If the technology produces flawed material, should any attorney use it in the first place rather than drafting the papers from scratch using our traditional schooled methods? Do not clients deserve the traditional effort?

Aside from the shortfalls of ChatGPT, ethics rules may be implicated as well. How is counsel to bill a client for the research and drafting of legal papers actually researched and drafted by an Artificial Intelligence, which a non-lawyer could obtain by using the same computer program? How can counsel sign an attorney certification that filed papers are not frivolous, as required by 22 NYCRR 130-1.1a(b) and Federal Rule 11(b), if counsel relies upon ChatGPT research and fails to carefully review the papers to assure that there are not inaccuracies and non-existent citations? May there be disciplinary concerns under the Rules of Professional Conduct, 22 NYCRR 1200.1.1(a)? The answer to all of these questions may be problematic for any attorney caught in a ChatGPT snare. As General Colin Powell once said of the Pottery Barn rule in a different context, "You break it, you own it."

We do not have a crystal ball as whether and to what extent AI might become more accurate and reliable in the future. A law office is not a drive-thru business. For now, nothing beats lawyering the old fashioned way --- knowing the facts, accumulating evidence, performing legal research, drafting papers discussing the facts and law, being persuasive in submissions, attaching relevant exhibits, and filing the papers in an appropriate manner that permits you to sleep well at night.

*Mark C. Dillon is a Justice of the Appellate Division, 2nd Dep't., is an Adjunct Professor of New York Practice at Fordham Law School, and is a contributing author of CPLR Practice Commentaries in McKinney's.

WARREN COUNTY BAR FOUNDATION
REAL LIFE SYMPOSIUM
MAY 2023

(L to R):
Elizabeth E. Little, Esq.;
Hon. Kathleen B. Hogan;
Elizabeth Collins, Assistant Principal Glens Falls School District;
Gregory V. Canale, Esq., Warren County Public Defender;
Jason Carusone, Esq. Warren County District Attorney;
Dr. Krislynn Dengler, Superintendent GFSD

(L to R):
J. Anthony Jordan,Esq. Washington County District Attorney;
Hon. Kathleen B. Hogan;
Gregory V. Canale, Esq. Warren County Public Defender

Torts and Civil Practice: Selected Cases from the Appellate Division, 3rd Department

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Torts and Civil Practice: Selected Cases from the Appellate Division, 3rd Department

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Pre-suit demand for accident video results in favorable jury charge.

Payne v. Sole Di Mare, Inc. (McShan, J., 5/18/23)

Two days after the plaintiff claimed he slipped and fell while attending a wedding reception in Troy, plaintiff's counsel sent a letter to the defendants advising them of potential litigation and requested preservation of relevant video surveillance in its "present form". The wedding venue's general manager saved a 20-second excerpt of the video that included some four seconds of images preceding the plaintiff's fall (the cause of which was alleged to have been oil on the floor, apparently from a piece of tomato that may have fallen from bruschetta that was being offered to reception guests). The remainder of the video from the date of accident was later recorded over in accordance with the facility's general business practice. Plaintiff, having received the 20-second video clip in discovery, moved pursuant to CPLR 3126 to strike the defendants' Answer as a sanction for failure to provide more complete video including the circumstances leading up to the plaintiff's fall. Supreme Court (Buchanan, J., Schenectady Co.) granted plaintiff lesser relief – an adverse inference charge at trial for defendants' failure to preserve video evidence – and the Third Department affirmed, agreeing that deletion of the video "depicting the preparation of the room by defendants' employees in anticipation of guests arriving...clearly has a detrimental effect" on the plaintiff's attempt to establish whether the hazard was created by the defendants.

More tripping and falling.

Osterhoudt v. Acme Markets, Inc. (McShan, J., 3/16/23)

Plaintiff, making a delivery to the receiving area of the defendant's market, was injured in a fall when he tripped over the forks of a pallet jack that protruded into the delivery area. Supreme Court (Gilpatric, J., Ulster Co.) denied the defendant's motion for summary judgment, rejecting the argument that the plaintiff's decision to walk backwards with the loaded cart was the sole proximate cause of his accident, and that the pallet jack was both an "open and obvious"

hazard, but not inherently dangerous. Affirming, the Third Department noted that the plaintiff's familiarity with the presence of pallet jacks in the market, and his decision to enter the receiving area walking backwards, are factors to be considered on the issue of comparative negligence but "do not establish that defendant was free from fault as a matter of law".

Herling v. Callicoon Resort Lodges, Inc. (Egan, J., 3/16/23)

Plaintiff was a guest at the defendant resort, which he left to walk to dinner at a restaurant near the resort's golf course. To reach the restaurant, plaintiff walked up the shoulder of a two-lane highway maintained by the defendant Town of Delaware, stepped from the shoulder onto an adjoining grassy area, and was hurt in a fall on a grated catch basin about four feet off the road shoulder. Supreme Court (Meddaugh, J., Sullivan Co.) granted the defendants' motions for summary judgement and the Appellate Division affirmed, noting an absence of evidence suggesting that "pedestrians regularly walked over the grated catch basin...or that either the Town or the resort defendants had reason to believe that they would do so".

Defending liability claims with the "emergency" and "storm in progress" doctrines.

Ohl v. Smith (Lynch, J., 4/6/22)

Plaintiff was seriously injured when the car in which he was a front seat passenger made a left turn across the northbound travel lane and collided with the defendant Smith's oncoming vehicle. Relying on the "emergency doctrine" – that he acted reasonably when faced with an emergency not of his own making – Smith moved for summary judgment. Supreme Court (McBride, J, Chenango Co.) denied the motion, construing defendant's deposition testimony as an acknowledgment that he had up to 10 seconds to react to the vehicle turning left through his lane of travel, finding a triable issue of fact as to whether defendant applied his brakes in an attempt to avoid the collision. Noting that the driver of the plaintiff's vehicle conceded at deposition that she did not look for oncoming traffic before she turned left, and that she later plead guilty to a traffic ticket charging her with failing to yield the right of way, the Third Department reversed and dismissed the plaintiff's Complaint, agreeing that Smith proved the other driver was the sole proximate cause of the accident.

Marra v. Zaichenko (Pritzker, J., 3/16/23)

Relying on the "storm in progress" doctrine, the defendant auto upholstery shop won summary judgment from Supreme Court (Powers, J., Schenectady Co.) against the plaintiff, who claimed injuries in a parking lot fall. Plaintiff contended

that although it was snowing when he fell, the cause of his fall was ice which he did not notice because of the fresh coat of snow. Both parties submitted expert reports from meteorologists, and the plaintiff also offered an affidavit from a former employee of the auto shop, who avowed personal knowledge that the accident location was prone to accumulation of moisture and precipitation. The Third Department (with two dissenters) reversed the trial court and reinstated the plaintiff's complaint, noting that the meteorologists consulted similar weather data and that "any disagreements between the experts would present credibility determinations appropriate for the finder of fact", making summary judgment improper.

Demolition derby fan saved from summary judgment.

Waite v. County of Clinton (Pritzker, J., 4/6/23)

Plaintiff attended the Defendant's county fair and bought a ticket to the demolition derby that gave him access to the pit - inside the track used by the cars to crash into one another. During the final heat of the day, a vehicle pushed through a perimeter of concrete barriers and entered the spectator area of the pit, striking and injuring the plaintiff. Supreme Court (Lawliss, J., Clinton Co.) awarded the defendant summary judgment, finding plaintiff understood the risks of observing the demolition derby (including his signed waiver) or that such risks should have been obvious. The Appellate Division reversed and reinstated the complaint, noting the plaintiff's expert witness (with credentials in engineering and racing licenses) opinion that the absence of interconnecting braces between the concrete barricades made for "a unique and weak configuration" that was not generally accepted in the demolition derby community.

Labor Law § 240(1).

Barnhardt v. Richard G. Rosetti, LLC (McShan, J., 5/11/23)

Plaintiff, a self-employed contractor, was hired to install surveillance cameras in the ceiling of an office rented by a defendant (Harrell) in a building owned by the defendant Rosetti. Plaintiff testified that as he stepped from the office roof onto an extension ladder (which he owned and had set up), the bottom of the ladder "started to give away", causing the ladder (and him) to fall to the ground. Supreme Court (Powers, J., Schenectady Co.) denied plaintiff's motion for summary judgment under Labor Law § 240(1); which requires a plaintiff to show the statute was violated and that the violation proximately caused the injury. The Third Department reversed, ruling there was no dispute that the ladder did not perform adequately as "no one was holding the ladder...when it suddenly

shifted or wobbled, and that no safety devices were provided to prevent the ladder from slipping or plaintiff from falling if it did".

Insurer's coverage disclaimer letter fails "specificity" test.

Bahnuk v. Countryway Insurance Co. (Ceresia, J., 3/23/23)

The defendant sent its insured (Williams) a 6-page letter explaining why it was disclaiming coverage for the slip-and-fall lawsuit filed against her by the plaintiff, an EMT who was hurt while responding to a call at a residence in Binghamton. Countryway corresponded separately with the plaintiff and his attorney, in two brief letters; the first of which stated in one sentence that there was no liability coverage available for the claim because the property did not constitute an "insured location" under the Williams' policy. Williams then hired her own attorney, and during the litigation, the parties agreed that the property owner would sign a confession of judgment for $100,000 (the limit of the Countrywide insurance policy), and plaintiff would try to execute the judgment (pursuant to Insurance Law § 3420(a)(2)) against the insurer. In that action, Supreme Court (Faughnan, J., Broome Co.) denied both parties' motions for summary judgment, and the Appellate Division affirmed, finding Countrywide's disclaimer to the injured party lacked the required "high degree of specificity (of) the ground or grounds on which the disclaimer is predicated", and that there remained a question of fact whether the confessed judgment agreement between plaintiff and Williams "was the product of collusion" between those parties.

From the Court of Appeals

CPLR § 302(a)(1) "long-arm" jurisdiction.

State of New York v. Vayu, Inc. (Garcia, J., 2/14/23)

CPLR § 302(a)(1) allows a New York court to exercise personal jurisdiction over any non-domiciliary who "transacts any business within the state". Here, the Court of Appeals, reversing the trial court and the Third Department (which had two dissenters), denied the defendant's motion to dismiss and reinstated the plaintiff's breach of contract action against the Michigan corporation from which it bought two allegedly defective unmanned aerial vehicles ("UAVs"). The UAVs (drones) were purchased on behalf of SUNY Stony Brook and were scheduled for use in the delivery of medical supplies to remote areas of the island nation of Madagascar. Noting that courts should analyze a defendant's actions in New York to determine if such activities "were purposeful", the Court of Appeals finds those requirements (and due process) satisfied, given that the defendant "sought, negotiated, and then entered a contractual relationship with a New York State

entity", and furthered that relationship with phone calls, emails and a personal visit to New York by Vayu's CEO for the purpose of negotiating terms of the deal.

Primary assumption of risk in sporting activity cases.

Grady v. Chenango Valley Central School Dist. (Garcia, J., 4/27/23)

Again acknowledging that the assumption of risk doctrine "may not sit comfortably" within New York's comparative fault landscape, the Court of Appeals (Garcia, J.) here considers two cases in which plaintiffs seek to recover for injuries sustained during organized sports practices for high school athletic teams. In *Grady*, the Court reversed the Appellate Division's summary judgment award to the defendant school district, finding the plaintiff had raised triable questions of fact whether a baseball practice drill in which infielders made throws to two first basemen (separated by a protective screen) "was unique and created a dangerous condition over and above the usual dangers that are inherent" in baseball. In *Secky*, the Court affirmed summary judgment for the defendant, concluding the inherent risks of playing basketball were not enhanced by the rebounding drill in which the boundary lines of the court did not apply and only major fouls would be called.

"Reckless disregard" under V&T Law § 1104.

Anderson v. Commack Fire District (Cannataro, J., 4/20/23)

New York Vehicle and Traffic Law § 1104 permits operators of fire trucks and emergency vehicles to pass through intersections against a red light, so long as they do not act recklessly. But General Municipal Law § 205-b makes a fire district vicariously liable for the negligence (a lesser standard than recklessness) of a volunteer firefighter when they operate vehicles in the discharge of their duties. Analyzing the intersection of the two statutes, the Court of Appeals (with two dissenters) concludes that holding a fire district liable for simple negligence in vehicle injury claims "would be contrary to legislative intent, this Court's precedent, and the general principles of negligence law and vicarious liability".

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