WARREN COUNTY BAR ASSOCIATION, INC.

TIPSTAFF

SUMMER 2022

Volume III Issue 3

IN THIS ISSUE

Greetings!

Welcome to the Summer edition of Tipstaff and my last letter to the members. As the 2021-2022 year closes, it has been a pleasure and honor to serve as the President over the past year.

I want to extend a sincere thank you to the Board and Executive Director, Kate Fowler, for all the hard work and dedication to the members. Thanks, also, to the members who chaired committees and projects, as well as to those who participated in the events planned.

Looking back, we have had a very busy year with many gatherings and educational events.

We kicked off the year in September with a welcome back gathering at Springbrook Distillery in Queensbury.

In October, Maria Nowotny, Esq. and Kate organized a CLE for all members. The Bar hosted a box lunch and CLE at the Warren County Historical Society. The program was skillfully presented by Jessica Hugabone Vinson, Esq., Honorable Glen T. Bruening, Thomas Lynch, Vice President of the Warren County Historical Society, and Claudia K. Braymer, Esq.

In November, the popular Mannix Dinner was held, carrying on the tradition of camaraderie among all members of the Bar Association.

The holiday gathering held at the Glens Falls Country Club in December was a success with donations of winter gear being made to Warren County Head Start.

On February 17, 2022, we sponsored the annual real estate CLE via ZOOM, and nearly 40 attorneys attended.

In May, we presented the Liberty Bell Award to Daniel Hall, former Mayor of Glens Falls, and the Mock Trial Award to the Greenwich High School Mock Trial team at our 2022 Law Day Reception, held at the Glens Falls Country Club. It was a beautiful evening with great food and conversation.

It was great to be able to return to the Lake George Club for the annual dinner in May.

In June, a very informative CLE was presented on the Court of Claims via ZOOM. Many thanks to the presenters: Honorable Glen T. Bruening, Honorable Kathleen B. Hogan, Jeffrey K. Anderson, Esq. and Brett R. Eby, Esq. and to Maria Nowotny, Esq. and Kate for organizing.

As we head into the 2022-2023 year, I look forward to the leadership of our new president, Dennis Tarantino, Esq.

Best wishes for a wonderful summer. Make sure to take some time off this summer and relax with friends and family; we all deserve it!

Best wishes,
Karen Judd

INTRODUCING THE DIRECTORS OF THE 2022-2023 WARREN COUNTY BAR ASSOCIATION!

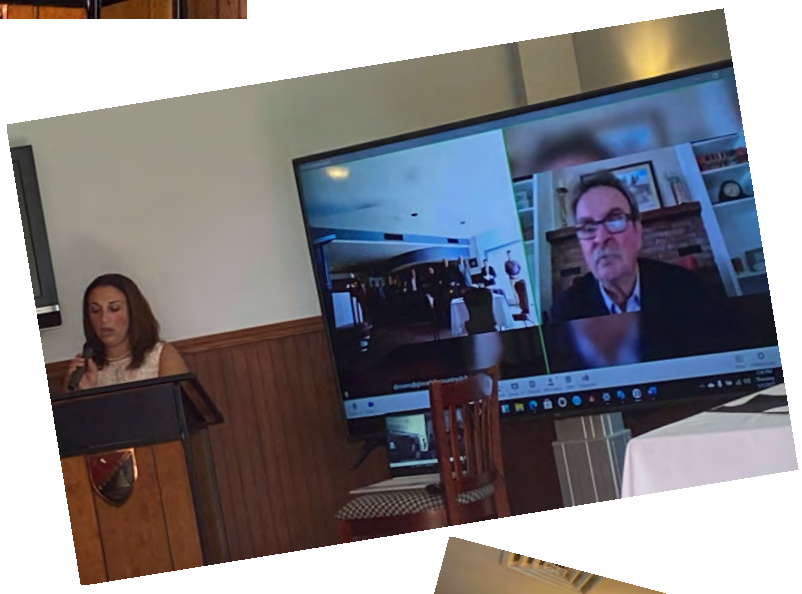
Left to Right (Back Row): Hon. Glen T. Bruening, Treasurer; Lawrence Elmen, Esq; Dennis J. Tarantino Esq., President; Benjamin Botelho, Esq.; Hon. Martin D. Auffredou, JSC; Victoria M. Craft, Esq., Secretary. (Front Row): Nicole C. Fish, Esq., Vice President; Karen Judd, Esq., Immediate Past President; Gordon W. Eddy, Esq.

Absent when photo was taken:
Hon. Eric C. Schwenker, President Elect; Jeffrey R. Meyer, Esq., Delegate NYSBA; Vanessa A. Hutton, Esq. Brian Pilatzke, Esq.

WCBA LAW DAY RECEPTION
GLENS FALLS COUNTRY CLUB
MAY 5, 2022

In recent years, COVID-19 made hosting our Law Day Reception a very challenging task. We were finally able to meet inside this year! But, as luck would have it, the virus was not done with us yet! Our 2022 Liberty Bell recipient, Daniel Hall, came down with the illness right before the event honoring him.

Luckily, through the good work of Vanessa Hutton, Law Day Chair, the committee, and the staff of the Glens Falls Country Club, along with some great technology, we were able to ZOOM Dan Hall into the party!



(Left) NYS Senator Daniel Stec presents the 2022 Warren County Law Day Proclamation.

(Below) On behalf of her team, Greenwich High School senior, Faith Ingber, accepts the trophy for 1st Place finish in the 2022 Warren Washington County Mock Trial Tournament from Judge Glen Bruening, Chairperson.

TRIAL OF THE CENTURY

by James Cooper, Esq.

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

TRIAL OF THE CENTURY

Sometimes history never ripens into something like consensus as inquisitive minds and revisionists delight in expounding new theories. Weighing criminal intent is circumstantial without a confession and corroborating evidence. Subjective factors influence conclusions. Even with the years of hindsight available, there is unresolved speculation about the issues of this case.

Many of us still measure 'the century' as the twentieth century while lawyers of this one are nearing completion of their studies and admission to the bar. For purposes of this article, and as a nod to lawyers of our generation, this article concerns the twentieth century. It is not the O.J. Simpson trial but another murder that captured national public interest to a degree that justifies the label "trial of the century."

Tabloids and the serious press were aflame with coverage. A renowned author penned a massive novel as a permanent contribution to American literature using the factual framework of the case. Two feature-length Hollywood movies were created and released featuring top stars of the time, Elizabeth Taylor, Shelly Winters and Montgomery Clift. A song was written and was temporarily popular. An opera was written and performed at the Met. On the occasion of the hundred year anniversary of events, at the instigation of the late Court of Appeals Chief Judge, Judith Kay, and cosponsored by the Historical Society of the Courts of the State of New York, the case was presented in a lecture at the Court of Appeals Hall by professor Susan Herman.[1] The reason the facts are of unique interest for our association is that, like the first New York State Police manhunt, the crime happened here in the Adirondacks.

The basic facts of the case are superficially simple. Chester Gillette worked in his wealthy uncle's factory that manufactured skirts in Cortland, NY. In 1906 he had an affair with a seamstress there, Grace Brown. She became pregnant and was persistent in her demands that he marry her to save her from disgrace. They went away together to Big Moose Lake in upper Herkimer county. While boating together on the lake in the late afternoon Grace died, either accidentally or by intent. Her body sank.

My paternal grandmother was a young woman at the time working for the Wickwire family of Cortland as an *au pair*. When I asked her about the case sixty years later, her response typified the values of that age when she told me, "After he had his way with her, he killed her."

Gillette's parents had been well off but experienced a religious conversion, joining the Salvation Army. As a result, Gillette had experienced comfort as a child, but lost that, never forgetting the good life. He aspired to climb the social ladder because of the example of his uncle who was very wealthy and whose success was a persistent contrast in Gillette's eyes. He insinuated himself into activities with wealthier acquaintances. Quite clearly, marriage to Grace Brown, a garment worker, would sidetrack the goals he had. He testified that he refused to marry Grace. It appears that regardless, she was dogged in her persistence that he do the right thing.

When Grace's body was recovered, she had bruising on her face. Gillette gave various

[1] This article is a partial summary of points raised in the lecture which was comprehensive and brilliant. Comments and conclusions are added. A copy of the lecture transcript may possibly be available through the Historical Society of the Courts of the State of New York.

explanations for events and the manner of her death, many of which were clearly lies. It came to be believed that he had struck her with either an oar or with a heavy tennis racket of that era. Why one would go boating with a tennis racket is just one of the anomalies never explained.

When questioned about what happened, Gillette offered up confusing and contradictory lies and changed stories, for instance that it must have been someone else out in the lake with her, admitting later that it was indeed him, that the boat had overturned, but he didn't report it. In a pre-Miranda era, he spewed out so many versions of the facts that the jury probably discounted any version of events he recounted. Without a motion to suppress evidence as involuntarily or unlawfully obtained, there is no transcript to explain whether he was subjected to duress or sleep deprivation that would have mitigated the inculpatory effects of his statements.

The District Attorney was a candidate for County Court Judge. He maximized his trial preparation by finding 83 prosecution witnesses who had seen or known Grace and Gillette before the incident. He submitted 101 exhibits. In addition to the multiple exculpatory lies by Gillette, DA Ward had Gillette's behavior to circumstantially and convincingly prove that Gillette went to the lake with premeditation to kill his problem. He had used false names to register at a lodge. His suitcase was later examined and found packed with the necessaries that indicated no intention to return to his room there. It is quite clear that he was thinking about killing her. What sounds like there would have been a fifteen minute jury deliberation, however, was not. The issue of guilt wasn't whether Gillette was a knave, cad, or villain, it was whether, notwithstanding his intentions, he followed through with them or whether it was a homicide after all. The jury determined that after five hours.

Gillette's actual lawyer was not as portrayed in the various fictional works created after the trial. He was assigned counsel, not a renowned trial lawyer hired by his uncle in those fictions. In fact his lawyer had been a state senator, but Atticus Finch would have been hard pressed to present a viable defense. To his credit, counsel raised the issue to the jury that even if Gillette had gone to Big Moose Lake with premeditation of killing Grace Brown, did he change his mind? Was there was a genuine accidental drowning or did Grace commit suicide, a possibility given the evidence of her desperation and suggestions of that thinking in letters to Gillette?

One gets the sense that the trial wandered from limited focus on the known evidence to speculation about the psychology of Gillette's mind. Like every era, people living then felt that modernity had opened up truths that had been hidden in the antiquated beliefs of the past, as if psychiatry's recent revelations of the complexity of thinking made them wiser and needed to be given consideration. Transitory social truisms are sometimes difficult to understand in retrospect. After all, in the nineteenth century the defense of temporary insanity was widely believed and pleaded until it lost its *cache* with the public and the courts.

Gillette testified in his own behalf that he never thought about killing Grace, but the jury and counsel seemed to discount that as another self serving lie, instead focusing on whether Gillette actually carried out his plan. His last version of events was that Grace had became agitated in the rowboat, declared intention to kill herself, stood up and came toward him when she stumbled and struck her face against a camera he was holding, causing the boat to overturn. At some point the judge instructed the jury that they could not find murder in Gillette's failure to try to save Grace, that he might have been morally obliged to have tried, but had no legal duty to

do so.[2] The ambiguity of the event without witnesses or Gillette's confession gave rise later to a song with the verse, "Nobody knows the truth but God and Gillette." Gillette's explanation upon judgment day before an all seeing God is irrelevant to lawyers. After accepting that the facts were as found by the jury in its verdict, we ask, did he get a fair trial?

Judge Kay introduced the speaker for the lecture by reviewing the proceedings in her court in 1908 and the rhetorical flourishes in Judge Frank Hiscock's Court of Appeals opinion. He commented that Grace Brown's predicament, "... only could be relieved in a legitimate way by marriage." He continued, "No controversy throws the shadow of any doubt or speculation around the primary fact that at about 6 o'clock in the afternoon of July 11, 1906, while she was alone with the defendant, Grace Brown met an unnatural death and her body sank to the bottom of Big Moose Lake." Judge Kay reminded that the court unanimously upheld Gillette's conviction.

There were legitimate appellate issues from the perspective of our time. All of the letters Grace had sent to Gillette he had saved and were found without benefit of a search warrant in his residence in his desk. The prosecution was chargeable with prosecutorial excess by, *inter alia*, introducing in evidence Grace's uterus and a three month fetus. All of Grace's plaintive love letters were introduced by the DA, some of which probably would have been excluded in our time because the probative value did not outweigh the prejudice created. They framed her as a saint, Gillette as, ... In his closing argument, the DA asserted to the jury without evidentiary support that Gillette had raped Grace, part of an emotional flourish probably unnecessary to inflame the passions of the jury. Judge Hiscock denied this as reversible error as follows, "Human nature has its limitations and it is difficult for counsel, who for weeks have been engaged in such a struggle as was this case, tending to arouse to the uttermost degree their zeal and anxiety at all times to avoid transgression."

The forensic evidence was arguably equivocal. Grace's lungs contained air and water, not definitively indicating the moment of her death. Her body had been embalmed before an autopsy was performed. Upon cross examination one of the physicians who participated in it admitted that the other doctors and he had colluded to give the same testimony to avoid creating inconsistent evidence.

DA Ward's trial strategy was obvious, to portray Grace as an innocent farm girl seduced or raped by Gillette. Gillette came from his uncle's industrialist, wealthy class. Ward knew that his jury consisted of farmers with daughters who worked in the factories of the upper class and were viewed as prey by their sons.

Evidence was developed that Gillette had traveled with Grace first to Tupper Lake where they had planned to boat, but inclement weather prevented that after which they traveled to Big Moose Lake where they registered in a lodge under assumed names. There was the suggestion that Grace believed that there would be a marriage elopement during the travels. His suitcase was packed without picnic implements proving the lie that they used it for a picnic that day. When the overturned floating rowboat was found, a search was made for two bodies in the lake. Gillette had traveled to Inlet near Blue Mountain Lake where he registered under his true name

[2] The judge was ahead of his time also instructing them that they were not to read newspaper accounts about the trial as it unfolded.

and was arrested.

His arrest, trial and execution were accomplished in about two years as the courts on motion rushed priority. Governor Charles Evan Hughes, born in Glens Falls and later Chief Justice of the United States Supreme Court, denied the application for clemency. Gillette was electrocuted.

Years after Gillette's execution, a man came forward to recount that as a boy he had participated with the search party who probed the lake with a long pole looking for Gillette and Grace's bodies. It offered an explanation for Grace's facial bruises that never came out at the trial.

Gillette and Grace Brown's story has lived on through the twentieth century and into this one as a documentary crime investigation on cable TV.

Theodore Dreiser wrote *An American Tragedy* taking artistic license with some of the facts of the case. He changed the names of the characters, but dwelt on the psycho-dynamics and societal issues that communicated his purposes. His prior work, *Sister Carrie*, and this novel of over eight hundred pages were the products of an era of emergent, and justified, criticism of rapacious capitalism and a class obsessed society. This was the era of 'the muckrakers', Upton Sinclair's *The Jungle*, and, Teddy Roosevelt's trust busting. Chester Gillette's venality and cowardliness was an allegory for Dreiser's societal narrative. He was outraged that the first movie that was created about what happened failed to capture his perceptions. The second, *A Place In the Sun,* was slightly more nuanced.

Grace Brown's family sued Paramount Pictures Studio for libel as they were portrayed as poor trash in the movie's development of Grace's background. Remarkably, Paramount settled.

Whether there was reasonable doubt about Gillette's guilt is an intellectual exercise now. A beautiful young woman died as did a nasty example of manhood. Only the most generous analysis of Gillette's story rescues him from the great weight of his lies and behavior.

After he had his way with her, he killed her.

Jim Cooper

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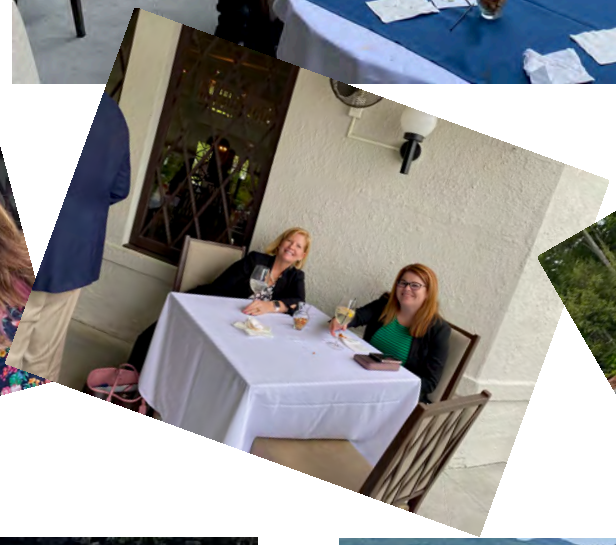
"Dreiser's American Tragedy" 'The Law and the Arts' Susan N. Herman, Centennial Professor of Law, Brooklyn Law School, Court of Appeals of the State of New York Inaugural Lecture Series, March 23, 2006; Wikipedia: 'Chester Gillette', 'Theodore Dreiser.'

2022 WCBA ANNUAL DINNER MEETING

Friends and colleagues gathered on May 18, 2022, a warm spring evening, to share a delicious dinner and to conclude this year's Bar Association business.

The Lake George Club, once again, provided a most beautiful backdrop for our annual meeting.



Karen Judd, outgoing President of the Warren County Bar Association, welcomes everyone. Nicole Fish, Secretary, presents minutes from the 2021 Annual Meeting; Judge Glen Bruening, Treasurer, presents the 2021-2022 Financial Report.

Judge Robert Muller, President of the Warren County Bar Foundation, reports on Foundation activities during 2021-2022 and, before concluding, Dennis Tarantino, incoming president of the Association, discusses his vision for the coming year.

(Left) On display...the plaque, dedicated to the memory of the departed members of the WCBA, which was donated by the WCBF and hangs in the halls of the Warren County Courthouse.

From The Judge's Chambers

Robert J. Muller, JSC
Warren County Supreme Court
Chair, Bench Book for Trial Judges – New York
Warren County Municipal Center
1340 State Route 9, Lake George, NY 12845

2022 WL 817363
Unreported Disposition
Only the Westlaw citation
is currently available.
NOTE: THIS OPINION WILL
NOT APPEAR IN A PRINTED
VOLUME. THE DISPOSITION
WILL APPEAR IN THE REPORTER.
This opinion is uncorrected
and will not be published in
the printed Official Reports.
Supreme Court, New York,
Warren County.

T.C. Murphy Lumber Co., Inc., Plaintiff,
v.
Top Ridge, LLC and "John Doe
No.1" through "John Doe #12" the
last twelve names being fictitious
and unknown to plaintiff, the
persons or parties intended being
the tenants, occupants, persons or
corporations, if any, having or claiming
an interest in or lien upon the premises
described in the complaint, Defendant.
Top Ridge, LLC, Third-Party Plaintiff,
George R. Van Voorhis, III
and T.C. Murphy Lumber Co.,
Inc., Third-Party Defendant.

Index No. EF2019-67594
|
Decided on March 15, 2022

Attorneys and Law Firms

Hodgson Russ LLP, Albany (Sarah N. Miller and Christian J. Soller of counsel)

Law Office of Newell & Klingebiel, Glens Falls (David C. Klingebiel of counsel), for defendant/third-party plaintiff.

Opinion

Robert J. Muller, J.

Plaintiff/third-party defendant T.C. Murphy Lumber, Co., Inc. (hereinafter T.C. Murphy)—with a principal place of business at 3911 New York State Route 8 in the hamlet of Wevertown, Warren County—sells products to contractors and homeowners in the Adirondack region, including lumber, building materials, tools, and hardware. T.C. Murphy also offers equipment rentals, as well as plumbing, electric, masonry and other services to its clients. Third-party defendant George Van Voorhis, III is the president and sole shareholder of T.C. Murphy.

Defendant/third-party plaintiff Top Ridge, LLC (hereinafter Top Ridge)—also with a principal place of business at 3911 New York State Route 8 in Wevertown—owns certain real property in the Town of Johnsburg, Warren County. Eric Piper and Van Voorhis formed the company in 2004, with each having a 50% interest. In October 2007, Top Ridge obtained two loans from Manufacturers and Traders Trust Company (hereinafter M & T Bank)—one in the amount of $2,500,000.00 and the other in the amount of $1,400,000.00—for the purpose of building a residential development on the property. The loans were evidenced by promissory notes and secured by mortgages on the property, as well as by guaranties executed by Piper, Van Voorhis and T.C. Murphy.

Top Ridge entered into a loan modification agreement with M & T Bank in October 2010, at which time it executed restated and amended notes in the amounts of $919,333.00 and $695,000.00, respectively. Top Ridge then signed a forbearance agreement with M & T Bank in November 2012. Piper, Van Voorhis and T.C. Murphy countersigned both the loan modification and forbearance agreements, with each reaffirming their respective guaranties. Top Ridge subsequently failed to make certain payments and, in January 2015, M & T Bank commenced an action against Top Ridge, T.C. Murphy, Van Voorhis and Piper to collect the indebtedness due under the loan documents.

On September 23, 2015, Van Voorhis loaned $600,000.00 to T.C. Murphy. This loan was evidenced by a promissory note—signed by Van Voorhis as president of T.C. Murphy—which stated, in pertinent part:

"This is a demand note and all amounts due hereunder shall become immediately due and payable upon demand by [Van Voorhis.] Notwithstanding the foregoing, the amount of $210,000.00 shall become due and payable upon the sale of each Unit in the Top Ridge Development . . . ." [1]

T.C. Murphy then executed a loan sale agreement on that same date whereby it purchased the loan documents executed by Top Ridge—in conjunction with Piper, Van Voorhis and itself—from M & T Bank for $675,000.00. The mortgages were assigned to T.C. Murphy by assignments dated March 9, 2015 and recorded September 29, 2015. [2] A stipulation of discontinuance was then filed on October 6, 2015 in the M & T Bank action.

On October 14, 2015, T.C. Murphy commenced a foreclosure action against Top Ridge. The action was subsequently settled with T.C. Murphy agreeing to "complete and/or fund the completion of Unit No's. [sic] 15, 16 and 17 in the Top Ridge Subdivision subject to reimbursement . . . of the costs incurred," and Top Ridge agreeing to pay, *inter alia*, $210,000.00 to T.C. Murphy upon the sale of each unit in order "to satisfy the debt [T.C. Murphy] incurred to payoff the debt owed by Top Ridge . . . to M & T Bank." A stipulation of discontinuance was filed in that action on January 4, 2016.

T.C. Murphy commenced the instant foreclosure action on December 23, 2019. T.C. Murphy alleges that, as of December 23, 2019, Top Ridges owes (1) $379,991.47 in principal and $65,681.27 in interest on the first note; and (2) $99,362.89 in principal and $17,174.81 in interest on the second note. Issue has now been joined with Top Ridge serving a "verified answer with affirmative defenses and counterclaims and third-party complaint" (hereinafter the answer/third-party complaint) naming T.C. Murphy and Van Voorhis as third-party defendants. The answer/third-party complaint sets forth nine "affirmative defense[s] and counterclaim[s] and third party complaint[s]":

(1) T.C. Murphy and Van Voorhis acted in bad faith;

(2) T.C. Murphy and Van Voorhis acted in collusion with M & T Bank to defraud Top Ridge;

(3) T.C. Murphy and Van Voorhis defrauded Top Ridge;

(4) Van Voorhis breached his fiduciary duty to Top Ridge;

(5) the conduct of Van Voorhis and M & T Bank was collusive in nature and defrauded Top Ridge;

(6) Piper's signature was forged on the October 2010 loan modification agreement and corresponding restated and amended notes;

(7) Van Voorhis converted certain property belonging to Top Ridge, namely a Skid Steer, Loader Bucket, and two Steel Containers;

(8) Van Voorhis prevented Piper from inspecting the books and records of Top Ridge; and

(9) Van Voorhis breached his duty to deal fairly with Piper and act in the best interest of Top Ridge.

Presently before the Court is T.C. Murphy's motion for an Order (1) granting summary judgment for the relief requested in the complaint; (2) dismissing Top Ridge's affirmative defenses and striking its answer; (3) dismissing Top Ridge's counterclaims or, alternatively, severing the counterclaims; (4) appointing a referee to compute the amount due and owing; and (5) amending the caption to remove all "John Doe" defendants.[3] Each aspect of the motion will be addressed *ad seriatim*.

Turning first to that aspect of the motion which seeks summary judgment, in a foreclosure action "[a] plaintiff can establish entitlement to summary judgment by producing evidence of the mortgage, the unpaid note and the [borrower's] default" (*Wells Fargo Bank, N.A. v Walker*, 141 AD3d 986, 987 [2016]; *see Deutsche Bank Natl. Trust Co. v Monica*, 131 AD3d 737, 738 [2015]; *Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375, 1376 [2015]).

Here, T.C. Murphy has provided copies of all the loan documents, as well as proof of Top Ridge's default. The Court thus finds that it has established its prima facie entitlement to judgment. Indeed, Top Ridge "agrees that [T.C. Murphy] has made a *prima facie* showing of the elements of [a] foreclosure action." That being said, Top Ridge contends that it "has stated *bona fide* defenses to the foreclosure claim, namely bad faith, including breach of fiduciary duty and breach of the implied covenant of good faith and fair dealing, and there are genuine issues of material fact with respect to these defenses and claims."

In support of this contention, Piper has submitted an affidavit stating as follows:

"At no time prior to entering into the Loan Sale Agreement with M & T Bank did Van Voorhis, a 50% member of Top Ridge, make any effort to cure the default with M & T Bank.

"At no time prior to entering into the Loan Sale Agreement with M & T Bank did Van Voorhis, [as] guarantor of Top Ridge's obligations to M & T Bank, or as the sole shareholder of guarantor T.C. Murphy, make any effort to satisfy the obligations of Top Ridge to M & T Bank. . . .

"On or about November 26, 2014, when Top Ridge was in default of the M & T Bank notes, mortgages and forbearance agreement, but prior to the foreclosure action, I negotiated a second forbearance agreement . . . with M & T Bank whereby M & T would agree to forbear acting on the defaults under certain terms and conditions.

"Said terms and conditions included M & T Bank making an additional $300,000.00 loan to Top Ridge for the purpose of creating a model condominium unit to show prospective purchasers to attempt to increase sales, and to finish two additional condominium units which units would be sold and the net proceeds of which would be paid over to M & T [B]ank to be applied against Top Ridge's indebtedness.

"When I presented the forbearance agreement to Van Voorhis, he refused to sign without explanation."

"It is well established that a mortgagor is bound by the terms of the mortgage and cannot be relieved from a default in the absence of waiver by the mortgagee, estoppel, bad faith, fraud, or oppressive or unconscionable conduct by the mortgagee" (*River Bank Am. v Daniel Equities Corp.*, 213 AD2d 929, 930 [1995]; *see* *Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 183 [1982]). "It is also well established that implicit in all contracts is an implied covenant of fair dealing and good faith" (*River Bank Am. v Daniel Equities Corp.*, 213 AD2d at 930; *see* *Van Valkenburgh, Nooger & Neville v Hayden Publ. Co.*, 30 NY2d 34, 45 [1972], *cert. denied* 409 US 875 [1972]).

Typically in a foreclosure the Court would look first to the language of the loan documents. This, however, is not a typical foreclosure. This is a dispute between the members of Top Ridge that has culminated in a foreclosure. With that in mind, the Court begins its analysis with the language of the operating agreement for Top Ridge. This agreement—signed by both Piper and Van Voorhis—provides, in pertinent part:

"4.4 *Liability for Certain Acts.* The Members shall perform their duties in good faith, in a manner he or she reasonably believes to be in the best interests of the Company and with such care as an ordinarily prudent person in a similar position would use under similar circumstances. A Member who so performs such duties shall not have any liability by reason [of] being or having been a Member. The Member shall not be liable to the Company or any Member for any loss or damage sustained by the Company or any Member unless the loss or damage shall have been the result of gross negligence or willful misconduct of the Member. Without limiting the generality of the preceding sentence, a Member does not in any way guaranty the return of any capital contribution to a Member or a profit for the Members from the operations of the Company.

"4.5 *No Exclusive Duty to Company.* The Members shall not be required to manage the Company as their sole and exclusive function and they may have other business interests and may engage in other activities in addition to those relating to the Company. Neither the Company nor any Member shall have any right pursuant to this Agreement to share or participate in such other business interests or activities or to the income or proceeds derived

therefrom. The Member shall incur no liability to the Company or any Member as a result of engaging in any other business interests or activities."

Turning now to the loan documents, both the 2007 guaranty signed by Van Voorhis individually and that signed by him as president and sole shareholder of T.C. Murphy provide that the "[g]uarantor, intending to be legally bound, . . . unconditionally guarantees the full and prompt payment and performance of any and all of [the b]orrower's obligations . . . to the [b]ank when due." They further provide that the "[g]uarantor shall not transfer, reinvest or otherwise dispose of his or her assets in a manner or to an extent that would or might impair [g]uarantor's ability to perform his or her obligations under this [g]uaranty." As noted above, these 2007 guaranties were reaffirmed in both the loan modification and the forbearance agreements.

Under the circumstances, the Court finds that Top Ridge has succeeded in raising triable issues of fact as to whether Van Voorhis and T.C. Murphy acted in bad faith and breached the implied covenant of good faith and fair dealing, as well as to whether Van Voorhis breached his fiduciary duty to Top Ridge.

The express terms of the operating agreement for Top Ridge provide that the members—namely, Piper and Van Voorhis—must perform their duties in good faith and in a manner they reasonably believe to be in the best interest of the company. Here, Van Voorhis readily admits that his conduct was not in the best interest of Top Ridge but, rather, in the best interest of T.C. Murphy. Specifically, Van Voorhis states as follows:

"Since 2014 Eric Piper and I have been at odds over the operation of Top Ridge such that without the intervention of our respective counsel, we cannot agree on anything.

"The disagreements between Eric Piper and I stem from the fact that . . . to keep the Top Ridge Development moving forward an infusion of capital was required and Eric Piper was unable to make a capital contribution.

"Additionally, Top Ridge owed T.C. Murphy over $363,000.00 and Eric Piper owed T.C. Murphy over $87,000.00. This indebtedness was in addition to the indebtedness at issue in this action.

"On account of Piper's inability to make further capital contributions and the substantial debt owed by Top Ridge to T.C. Murphy, I decided not to invest any further funds in Top Ridge. . . .

"Based on the above, I, as a member of Top Ridge and a guarantor of the M & T Bank loans, did not cure the default with M & T Bank, satisfy the obligations of Top Ridge to M & T Bank, or agree to further funding from M & T Bank. . . .

"With T.C. Murphy being sued by M & T Bank for $890,641.44 together with per diem interest and reasonable attorney's fees and expenses of collection, Top Ridge owing T.C. Murphy more than $363,000.00, and the members of Top Ridge being deadlocked, the only appropriate response for T.C. Murphy to the M & T [Bank a]ction was for T.C. Murphy to purchase the loan from M & T Bank.

"And that is exactly what T.C. Murphy did . . . ."

T.C. Murphy's purchase of the loans from M & T Bank and subsequent foreclosure on Top Ridge was not "the only appropriate response." Indeed, if Van Voorhis was able to loan $600,000.00 to T.C. Murphy to purchase the loans from M & T Bank, he presumably could have settled the M & T Bank action by paying $600,000.00 in full satisfaction of the loans. He could then have commenced a dissolution action to address his remaining concerns. Such response would have conformed with his duties under both the operating agreement and the guaranties. Instead, he chose to protect T.C. Murphy at the expense of Top Ridge, which is sufficient to at least raise a question of fact as to whether he acted in bad faith. Indeed, § 4.4 of the operating agreement expressly provides that the members of Top Ridge are in no way guaranteed a profit or even a return on their capital contributions.

There likewise exist questions of fact as to whether Van Voorhis and T.C. Murphy acted in contravention of their respective guaranties, which prohibited them from transferring or otherwise disposing of their assets in a manner that might impair their ability to perform under the guaranties.

Before proceeding to the next aspect of the motion, several arguments made by T.C. Murphy in support of summary judgment warrant discussion. At the outset, T.C. Murphy contends that Van Voorhis was permitted to undertake his course of action under § 4.5 of the operating agreement, which authorizes him to pursue other business ventures simultaneous with Top Ridge. This contention, however, is without merit. § 4.5 of the operating agreement does permit the members of Top Ridge to pursue outside business ventures — but nowhere does it say that in doing so they may disregard the good faith requirements of § 4.4 of the agreement. Indeed, the rules of contractual interpretation require these two provisions to be read in harmony (*see* *Beal Sav. Bank v Sommer*, 8 NY3d 318, 324-325 [2007]; *Mid-State Indus., Ltd. v State of New York*, 117 AD3d 1255, 1257 [2014]).

T.C. Murphy next contends that it is separate and distinct from Van Voorhis, and that its purchase of the loan documents from M & T Bank is unrelated to Van Voorhis and his obligations to Top Ridge. In opposition, Top Ridge contends that "T.C. Murphy is the alter ego of Van Voorhis" and, as such, "Van Voorhis cannot circumvent his fiduciary duty and covenant of good faith and fair dealing to Top Ridge by the use of T.C. Murphy and his efforts to do so constitute further bad faith toward Top Ridge."

"An alter ego will be established 'when either (1) there is complete domination of a corporation by an individual . . . with respect to the transaction being attacked that resulted in a fraud or wrong against the complaining party, or (2) when a corporation has been so dominated by an individual . . . that it primarily transacts the dominator's business instead of its own" (*Piller v Princeton Realty Assoc. LLC*, 173 AD3d 1298, 1300 [2019], quoting *Belair Care Ctr., Inc. v Cool Insuring Agency, Inc.*, 161 AD3d 1263, 1270, 77 N.Y.S.3d 171 [2018] [internal quotation marks and citation omitted]).

Here, T.C. Murphy states that "[o]n September 23, 2015, while the M & T Bank [a]ction

was pending, the Board of Directors and Shareholders of T.C. Murphy held a special meeting at which Van Voorhis was present in his capacity as its President and sole shareholder[, and b]y motions duly made, T.C. Murphy approved two resolutions" with respect to the purchase of the loan documents. T.C. Murphy then attaches the minutes from this meeting, which provide as follows:

"The President . . . called the meeting to order and stated the object of the meeting.

"The Secretary called the roll and . . . presented and read to the meeting a Waiver of Notice of Meeting, subscribed by all of the Shareholders and the Directors of the Corporation, ...

"The President then stated that a quorum was present and the meeting was ready to transact business."

Notwithstanding this elaborate language, a careful reading of the minutes reveals that only one person is present—"George R. Van Voorhis III." He is the President who calls the meeting to order. He is the Secretary who calls the roll. He is the sole Shareholder and Director, and the Waiver of Notice of Meeting bares only his signature. He is the quorum. Indeed, he has signed every single loan document on behalf of T.C. Murphy. Under the circumstances, there is certainly a question of fact as to whether Van Voorhis exerted complete domination over T.C. Murphy such that it can be deemed his alter ego —at least with respect to the transactions under consideration here.

T.C. Murphy next contends that *Christopher's Partner, LLC v Christopher's of Colonie, LLC* (69 AD3d 1275 [2010]) (hereinafter *Christopher's of Colonie*) stands for the proposition that—even if T.C. Murphy is deemed the alter ego of Van Voorhis—Van Voorhis' status as a secured creditor is not inconsistent with any fiduciary obligation he might have owed Top Ridge as a member of the company. The Court, however, is not persuaded.

In *Christopher's of Colonie*, defendant limited liability company—which operated a men's clothing store—was owned by two members, plaintiff and another individual. In October 2007, plaintiff loaned $125,000.00 to defendant and, in return, received a promissory note. The terms of the note provided, *inter alia*, "that plaintiff had a floating interest in defendant's inventory, accounts receivables, cash, chattel paper, equipment and general intangibles. Asserting that defendant failed to make payments required by the note, plaintiff commenced [an] action in July 2008 seeking the amount due on the note and a judgment awarding it possession of defendant's assets" (*id*. at 1275). Plaintiff's motion to seize these assets was subsequently granted and an appeal ensued, with the Court stating as follows:

"[D]efendant argues that plaintiff's application for an order to seize its assets should have been denied because such action is at odds with a provision in the company's operating agreement that bars any member from performing any act that would make it impossible [for defendant] to carry on [its] ordinary business. However, this agreement does allow members of the company to loan it money and defendant, in accepting the loan, agreed to a provision that allowed plaintiff

to unilaterally accelerate all that was due and owing on the promissory note upon the occurrence of a default. Moreover, any member of a limited liability company who becomes a creditor has the same rights and obligations with respect thereto as a person who is not a member. Given plaintiff's status as a secured creditor, it had the legal right under its agreement to seize defendant's assets to protect its financial interest and such action was not inconsistent with any fiduciary obligation it might have owed defendant as a member of the company (*Christopher's Partner, LLC v Christopher's of Colonie, LLC*, 69 AD3d at 1276-1277; *see* Limited Liability Company Law § 611 [internal quotation marks and citations omitted]).

That being said, contrary to T.C. Murphy's contentions *Christopher's of Colonie* stands for the proposition that, where defendant limited liability company accepts a loan from a member—and executes a promissory note relative thereto—then a subsequent action by that member to enforce the note is not inconsistent with his fiduciary obligations to the company. Here, however, Top Ridge never executed a promissory note to either T.C. Murphy or Van Voorhis. Rather, Top Ridge executed promissory notes to M & T Bank and T.C. Murphy then purchased these notes, unbeknownst to Top Ridge. The Court thus finds *Christopher's of Colonie* to be inapposite. [4]

In its opposition Top Ridge relies heavily on the case of *192 Sheridan Corp. v O'Brien* (252 AD2d 934 [1998]) (hereinafter *192 Sheridan*). There, five individuals—Michael O'Brien, Daniel O'Brien, Bruce MacAffer, Bruce Backer and Ronald Backer—formed a partnership for the purpose of owning and managing real estate. In December 1988, the partners executed a note in the amount of $120,000.00 to Home and City Savings Bank, which note was secured by a mortgage on the partnership property. The Backers then commenced an action against the O'Briens and MacAffer in January 1995, alleging that the partnership had experienced an operating loss with respect to its property and defendants had failed to contribute their *pro rata* share of the loss. In February 1996, the note and mortgage was assigned to 192 Sheridan Corp. —a shell corporation whose sole officer was Bruce Backer's wife—and 192 Sheridan Corp. commenced a foreclosure action against the partnership in March 1996.

192 Sheridan Corp. moved for summary judgment in the foreclosure action, and the O'Briens and MacAffer opposed the motion and cross-moved for consolidation with the partnership action. Summary judgment was denied and this was affirmed on appeal, with the Court finding that "[w]hile plaintiff accurately contends that it presented a prima facie case of entitlement to summary judgment by establishing existence of the unpaid note and mortgage and default thereon, defendants clearly established the existence of triable issues of fact to vitiate plaintiff's entitlement to the relief sought" (*id.* at 935-936). In this regard, the Court quoted the same rule quoted above that "bad faith, fraud, or oppressive or unconscionable conduct by the mortgagee" will operate to relieve a default (*id.* at 936, quoting *River Bank Am. v Daniel Equities Corp.*, 213 AD2d at 930). Top Ridge contends that the instant case is very much like that

before the Court in *192 Sheridan* and summary judgment must therefore be denied.

T.C. Murphy, on the other hand, contends that *192 Sheridan* is inapposite because it involved a shell corporation "serving only to facilitate the Backers' plan to oust defendants from the partnership and acquire their interest in its real property by acquiring and foreclosing upon the mortgage whose default the Backers precipitated for that purpose" (*192 Sheridan Corp. v O'Brien*, 252 AD2d at 936). Indeed, T.C. Murphy is not a shell corporation—there is no dispute in this regard. There is, however, a dispute with respect to whether Van Voorhis and T.C. Murphy acted in bad faith, thus relieving Top Ridge's default under the loan documents. The Court therefore finds that—while the facts in *192 Sheridan* are somewhat distinguishable from the facts in this case—it is nonetheless instructive.

Finally, T.C. Murphy contends that Top Ridge is barred from disputing the default under the terms of the forbearance agreement, which provides as follows:

"Borrower has no defense, offset, or counterclaim against Lender or the exercise of remedies by Lender with respect to the Indebtedness. Borrower and each Guarantor hereby waives and releases, to the extent that any such defense, offset, or counterclaim may exist, each and every such defense, offset, and counterclaim."

To the extent that the lender in the forbearance agreement was M & T Bank, and the actions complained of had not yet occurred, the Court declines to find that this provision bars Top Ridge from disputing the default alleged here.

Under the circumstances, the first aspect of the motion seeking summary judgment for the relief requested in the complaint is denied.

Turning now to that aspect of the motion which seeks to dismiss Top Ridge's affirmative defenses and strike its answer, Top Ridge has agreed to withdraw its second, third, fifth and sixth affirmative defenses—leaving only the first, fourth, seventh, eighth and ninth for consideration.

The first, fourth and ninth affirmative defenses allege bad faith, breach of fiduciary duty and breach of the implied covenant of good faith and fair dealing, respectively. In accordance with the discussion set forth above, the Court finds triable issues of fact relative to these defenses and declines to dismiss them.

The seventh and eighth affirmative defenses are more akin to counterclaims. Specifically, in the seventh affirmative defense Top Ridge alleges conversion as against Van Voorhis and in the eighth it alleges that Van Voorhis has prevented Piper from inspecting the books and records of Top Ridge. T.C. Murphy contends that these defenses must be dismissed because they are irrelevant to this action. The Court finds, however, that their irrelevance is immaterial. It is well settled that "a counterclaim may be any cause of action in favor of a defendant, 'even if such claims do not arise out of the transaction or occurrence from which [the] plaintiff's claim arises' " (*Crawford v Burkey*, 93 AD3d 1134, 1135 [2012], quoting *W. Joseph McPhillips,*

Inc. v Ellis, 278 AD2d 682, 683 [2000]; *see* CPLR 3019 [a]).

Accordingly, the second aspect of the motion seeking to dismiss Top Ridge's affirmative defenses and strike its answer is granted to the extent that the second, third, fifth and sixth affirmative defenses are dismissed—on consent—and this aspect of the motion is otherwise denied.

Turning now to the third aspect of the motion and in accordance with the discussion set forth above, T.C. Murphy is not entitled to dismissal of Top Ridge's counterclaims nor is it necessary to sever the counterclaims.

With respect to the fourth aspect of the motion, to the extent that T.C. Murphy has failed to demonstrate its entitlement to summary judgment, it is not entitled to the appointment of a referee.

Finally, Top Ridge has not opposed the last aspect of the motion seeking to remove all "John Doe" defendants. Indeed, it appears that all necessary parties have been named. This aspect of the motion is thus granted, and the caption amended accordingly.

Based on the foregoing, T.C. Murphy's motion is granted to the extent that (1) Top Ridge's second, third, fifth and sixth affirmative defenses are dismissed, on consent; and (2) the caption is amended to remove all "John Doe" defendants. The motion otherwise be denied.

To the extent not specifically addressed herein, the parties' remaining contentions have been examined and are either academic or without merit.

Counsel for the parties are hereby directed to appear for a conference on **April 15, 2022 at 11:00 A.M.** at the Warren County Courthouse.

Therefore, having considered NYSCEF document Nos. 94 through 132, and 137 through 140, and oral argument having been heard on March 3, 2022 with Christian J. Soller, Esq. appearing on behalf of plaintiff/third-party defendants and David C. Klingebiel, Esq. appearing on behalf of defendant/third-party plaintiff, it is hereby

ORDERED that T.C. Murphy's motion is granted to the extent that (1) Top Ridge's second, third, fifth and sixth affirmative defenses are dismissed, on consent; and (2) the caption is amended to remove all "John Doe" defendants; and it is further

ORDERED that the caption shall hereinafter appear as follows:

STATE OF NEW YORK

SUPREME COURT WARREN COUNTY

Index No. EF2019-67594

RJI No. 56-1-2020-0113

T.C. MURPHY LUMBER CO., INC.

Plaintiff,

v.

TOP RIDGE, LLC,

Defendant.

TOP RIDGE, LLC,

Third-Party Plaintiff,

v.

GEORGE R. VAN VOORHIS, III AND T.C. MURPHY LUMBER CO., INC.,

Third-Party Defendant.

; and it is further

ORDERED that T.C. Murphy's motion is otherwise denied.

The original of this Decision and Order has been e-filed by the Court. Counsel for Top Ridge is hereby directed to serve a copy of the Decision and Order with notice of entry in accordance with CPLR 5513.

Dated: March 15, 2022

Lake George, New York

ROBERT J. MULLER, J.S.C.

All Citations

Slip Copy, 2022 WL 817363 (Table)

Footnotes

1 To the extent that Piper—the other member of Top Ridge—did not countersign this promissory note or otherwise agree to its terms, the requirement that Top Ridge pay $210,000.00 upon the sale of each unit is likely unenforceable. Indeed, § 4.3 of the operating agreement provides that "[u]nless authorized to do so . . . , no person shall have any power or authority to bind the [c]ompany." This is likely irrelevant, however, as Piper agreed to such payments in settlement of a later action, as set forth hereinbelow.

2 It is unclear why these assignments was executed on March 9, 2015, six months prior to execution of the loan sale agreement.

3 This is the second motion filed by T.C. Murphy seeking this relief. The first motion was filed on May 12, 2020. At that time the case was assigned to the Hon. Paulette M. Kershko, A.J.S.C., and her Chambers inexplicably sent correspondence to counsel for T.C. Murphy on November 17, 2020 advising that the motion had been marked "off" — notwithstanding that it had never been entertained. Counsel for T.C. Murphy subsequently inquired how to proceed and Judge Kershko directed that the motion be re-filed, which it was on May 4, 2021. She then recused in September 2021 because counsel for one of the parties represented her in a real

estate transaction. Incidentally, the same law firms have been involved in this action since it was commenced. The case was re-assigned to this Court in early October 2021 and, after ensuring compliance with the COVID-19 Protect Our Small Business Act of 2021, as extended by Chapter 147 of the Laws of 2021, argument on the motion was scheduled.

4 The Court does not discount the possibility that Top Ridge ratified the purchase of the loan documents from M & T Bank in settling the first foreclosure action brought by T.C. Murphy. That being said, the terms of this settlement agreement are not presently before the Court.

End of Document

2022 WL 842128
Unreported Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
This opinion is uncorrected and will not be published in the printed Official Reports.
Supreme Court, New York, Warren County.

Trustco Realty Corporation, Plaintiff,
v.
Mark W. Petrie, S R K 50 WILTON REVERSE COURSE ASSOCIATES, LLC, LINDA VENTOLA AND RE/MAX PROPERTIES, LTD, RE/MAX OF NEW YORK, INC., "JOHN DOE" (said name being fictitious, it being the intention of the plaintiff to designate any and all persons in possession of the mortgaged premises), BANK OF THE WEST, BARBARA SPELLMAN and CHAD PERKINS, Defendants.

Index No. 56469
|
Decided on March 21, 2022

Attorneys and Law Firms

Overton, Russell, Duerr & Donovan, LLP, Clifton Park (Linda L. Donovan of counsel), for plaintiff.

Fairbanks Fletcher Law PLLC, Saratoga Springs (Elizabeth Fairbanks-Fletcher of counsel), for defendant Mark W. Petrie.

Opinion

Robert J. Muller, J.

***1** On November 5, 2004, defendant Mark W. Petrie (hereinafter defendant) executed a promissory note in favor of Trustco Bank in the amount of $300,000.00. The note was secured by a mortgage on certain real property located at 13 Honey Hollow Road in the Town of Queensbury, Warren County, which mortgage was recorded on November 10, 2004. The mortgage was subsequently assigned to plaintiff by assignment recorded on August 16, 2011.

Plaintiff commenced this foreclosure action on October 20, 2011 based upon defendant's failure "to comply with the conditions of the note . . . and mortgage by failing to pay items of principal and interest, taxes, assessments, water rates, insurance premiums, escrow and/or other charges." Issue was joined by defendant, with plaintiff thereafter moving for summary judgment for the relief requested in the complaint and the appointment of a referee. This motion was granted by Order entered on October 17, 2012. A Judgment of Foreclosure and Sale was then entered on July 9, 2013 — finding that defendant owed plaintiff $344,478.23 under the terms of the note and mortgage — and the sale of the property was scheduled for August 27, 2013.

On August 15, 2013, defendant filed for Chapter 13 bankruptcy, thereby giving rise to an automatic stay preventing the sale of the property from going forward (*see* 11 USC 362). Defendant's Chapter 13 plan — submitted simultaneous with the bankruptcy filing —

included, *inter alia*, repayment of the arrears due under the mortgage. To that end, plaintiff filed a proof of claim with the bankruptcy court on October 3, 2013, which proof of claim sought $116,138.80 in arrears from May 5, 2011 to August 15, 2013. The bankruptcy court thereafter issued an Order confirming the plan. The Order provided, *inter alia*, that each creditor was to be paid the amount set forth in its proof of claim.

On October 9, 2018, a notice of final cure payment was filed by the Chapter 13 trustee indicating that the full $116,138.80 in arrears had been paid to plaintiff. The notice — which was served upon plaintiff — further stated as follows:

"Within 21 days of the service of this [n]otice of [f]inal [c]ure [p]ayment, the creditor MUST file and serve a [s]tatement as a supplement to the holder's proof of claim on the [d]ebtor, [d]ebtor's [c]ounsel and the [c]hapter 13 [t]rustee, pursuant to [Fed Rules Bankr Pro rule 3002.1 (g)], indicating 1) whether it agrees that the [d]ebtor has paid in full the amount required to cure the default on the claim; and 2) whether the [d]ebtor is otherwise current on all payments consistent with [11 USC 1322 (b) (5)]."

This notwithstanding, plaintiff failed to file a statement as required under the Federal Rules of Bankruptcy Procedure rule 3002.1 (g). [1] The Chapter 13 trustee subsequently filed a final report and accounting on July 9, 2019 and, on September 20, 2019, the bankruptcy court entered an Order discharging all debts covered under the Chapter 13 plan. The bankruptcy court then closed the case on October 7, 2019.

Presently before the Court is plaintiff's motion to amend the Judgment of Foreclosure and Sale. [2]

***2** In support of the motion, plaintiff has submitted an affidavit of "the Executive Vice President of Trustco Bank, an agent of [plaintiff], and Assistant Treasurer of [plaintiff]." This affiant indicates that, after deducting the $116,138.80 in arrears which were paid in the context of the bankruptcy, $234,717.81 remains due and owing under the note and mortgage. Plaintiff contends that — with defendant's Chapter 13 bankruptcy concluded and the sale now able to proceed — it is entitled to an amended Judgment of Foreclosure and Sale which reflects this revised amount.

In opposition, defendant contends that plaintiff is not entitled to amend the Judgment of Foreclosure and Sale — and must instead commence a new foreclosure to recover the amount due and owing.

Indeed, in the verified complaint plaintiff alleged that defendant defaulted in his payments under the note and mortgage and "elected to call due the entire principal amount" thereby accelerating the mortgage. "In New York the rule is that an affirmative exercise by a mortgagee of an option to accelerate upon defendant's default has the effect of maturing the mortgage since the debt has been changed from one payable in the future and in installments to one payable immediately" (*Federal Natl. Mtge. Assn. v Miller*, 123 Misc 2d 431, 432 [Sup Ct, Nassau County 1984] [citation omitted]; *see*

Kilpatrick v Germania Life Ins. Co., 183 NY 163, 168 [1905]).

That being said, under a Chapter 13 plan a debtor may cure a default and "de-accelerate" the mortgage, thus reinstating the original payment plan (*In re Taddeo*, 685 F2d 24, 28 [1982]; *see also Grubbs v Houston First Am. Sav. Assn.*, 730 F2d 236, 237 [1984]; *Federal Natl. Mtge. Assn. v Miller*, 123 Misc 2d at 432). Under those circumstances, "the event of default is remedied and the consequences are nullified" (*In re Taddeo*, 685 F2d at 29; *see Federal Natl. Mtge. Assn. v Miller*, 123 Misc 2d at 433).

This issue was first decided by the Second Circuit in *In re Taddeo* (*supra*). There, the Second Circuit considered certain sections of 11 USC 1322, entitled "Contents of [a Chapter 13] plan." Specifically, it analyzed 11 USC 1322 (b), which provides in pertinent part:

"[T]he plan may . . .

(2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, . . .;

(3) provide for the curing or waiving of any default; . . .

(5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due."

The mortgagee in *In re Taddeo* — who had a pending foreclosure against the mortgagors and was seeking to lift the automatic stay resulting from their Chapter 13 bankruptcy — "argued that the [mortgagors could not] use [11 USC] 1322 (b) (5) to cure their default and maintain payments on her mortgage because (b) (5) applies only to claims whose last payment is due after the last payment under the plan is due. [She] maintain[ed] her acceleration of the mortgage [made] all payments due now" (*In re Taddeo*, 685 F2d at 28). The mortgagee further argued that 11 USC 1322 (b) (2) precludes any modification of her rights as a mortgagee.

The Second Circuit disagreed, however, "hold[ing] that the concept of 'cure' in [11 USC] 1322 (b) (5) contain[ed] the power to de-accelerate[, and t]herefore the application of that section de-accelerates the mortgage and returns it to its [original] maturity" (*id.*). The Second Circuit further found "that the power to 'cure any default' granted in [11 UCS] 1322 (b) (3) and (b) (5) is not limited by the ban against 'modifying' home mortgages in [11 USC] 1322 (b) (2) because . . . 'curing defaults' under (b) (3) or 'curing defaults and maintaining payments' under (b) (5) [does not constitute the] modification of claims" (*id.* at 27). The Second Circuit thus concluded that the mortgagors' default could be cured and their mortgage de-accelerated by the completion of payments under their Chapter 13 plan (*see id.* at 29).

***3** Here, the Court finds that the payments made by defendant under his Chapter 13 plan

cured the default alleged by plaintiff in its complaint and de-accelerated the mortgage. In this regard, the complaint alleges that defendant is "in default for failure to pay the installment of principal and interest on May 5, 2011, and all subsequent installments," as well as for "fail[ure] to pay taxes on the mortgaged premises as required by the terms of the loan documents." The proof of claim filed by plaintiff with the bankruptcy court then directly addresses this default, including (1) $47,795.16 in unpaid installments from May 5, 2011 to August 15, 2013; (2) $3,597.73 in late charges; (3) $2,435.00 in attorney's fees incurred in the instant action; (4) $1,505.00 in filing fees incurred in the instant action; and (5) $60,805.91 in taxes paid by plaintiff — for a total of $116,138.80. It is undisputed that defendant has paid this entire amount. As a result, he has cured the default alleged in the complaint and de-accelerated the mortgage. [3]

Briefly, in its reply in further support of the motion plaintiff contends that "[e]ven if [defendant's] argument regarding deceleration has basis, his loan would never have been decelerated because [he] never cured the pre-petition default in regard to the real property taxes." This contention, however, is belied by plaintiff's proof of claim. As set forth above, it expressly includes $60,805.91 in "TAXES PAID BY TRUSTCO" from May 5, 2011 to August 15, 2013. [4]

Finally, while defendant contends that plaintiff must commence a new action, at least one case dealing with this issue has permitted the action to continue with the filing of an amended complaint (*see Federal Natl. Mtge. Assn. v Miller*, 123 Misc 2d at 434). That being said, there is no motion before the Court in this regard.Plaintiff's motion to amend the Judgment of Foreclosure and Sale is denied in its entirety.

To the extent not specifically addressed herein, the parties' remaining contentions have been examined and are either academic or without merit.

Therefore, having considered the Supplemental Affidavit of Amount Due of Kevin Curley with exhibits attached thereto, sworn to August 14, 2020, submitted in support of the motion; Affirmation of Elizabeth Fairbanks-Fletcher, Esq. with exhibits attached thereto, dated April 29, 2021, submitted in opposition to the motion; and the Affidavit of Linda L. Donovan, Esq. with exhibit attached thereto, sworn to May 4, 2021, submitted in further support of the motion, and oral argument having been heard on December 10, 2021 with Linda Donovan, Esq. appearing on behalf of plaintiff and Elizabeth Fairbanks-Fletcher, Esq. appearing on behalf of defendant, it is hereby

ORDERED that plaintiff's motion to amend the Judgment of Foreclosure and Sale is denied in its entirety.

The original of this Decision and Order has been filed by the Court together with the Notice of Motion dated August 21, 2020 and the submissions enumerated above. Counsel for defendant is hereby directed to serve a copy of the Decision and Order with notice of entry in accordance with CPLR 5513.

***4** Dated: March 21, 2022

Lake George, New York

_____s/_____

ROBERT J. MULLER, J.S.C.

ENTER:

All Citations

Slip Copy, 2022 WL 842128 (Table), 2022 N.Y. Slip Op. 50214(U)

Footnotes

1 Federal Rules of Bankruptcy Procedure rule 3002.1 (i) provides for certain sanctions in the event a creditor fails to file a statement in accordance with 3002.1 (g). It does not appear, however, that any such sanctions were sought against plaintiff in the bankruptcy.

2 The Court notes that this motion was filed on August 27, 2020 and originally returnable on September 16, 2020. That being said, it could not be entertained until certain administrative and legislative requirements were satisfied. Specifically, the Court was required to conduct a conference in accordance with Administrative Order AO/157/20 and then send a hardship declaration in accordance with the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020. The return date was thus adjourned for several months.

3 In his opposition, defendant references a second mortgage on the property — also in favor of plaintiff and executed on November 5, 2004 — which secures a home equity line of credit with a limit of $200,000.00. $15,298.11 in arrears on this second mortgage were included in the Chapter 13 plan and defendant appears to be under the misapprehension that it too is being foreclosed in the instant action — it is not. The instant action involves only the mortgage securing the promissory note in the amount of $300,000.00.

4 The Court must also note that plaintiff seeks to include in the proposed Amended Judgment of Foreclosure and Sale the $2,435.00 in attorney's fees and $1,505.00 in filing fees included in the original Judgment of Foreclosure and Sale. These amounts, however, were also included in the proof of claim and paid in the context of the bankruptcy — so their inclusion in the Amended Judgment of Foreclosure and Sale would result in a double recovery.

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 FULTON

In the Matter of
ROGER M. PUTMAN and JOHN B. CANARY,
Petitioner-Plaintiffs,

DECISION, ORDER AND JUDGMENT

For Judgment Pursuant to CPLR article 78 and
Declaratory Judgment Pursuant to CPLR 3001

Index No. EF2021-09063
RJI No. 17-1-2021-0160

-against-

TOWN OF MAYFIELD, TOWN BOARD OF THE TOWN OF MAYFIELD, and RICH ARGOTSINGER, As Supervisor of the Town of Mayfield Town Board,
Respondent-Defendants.

APPEARANCES:

Whiteman Osterman & Hanna LLP, Albany (*John J. Privitera* and *Anna V. Pinchuk*, of counsel), for petitioner-plaintiffs.

Johnson & Laws, LLC, Clifton Park (*April J. Laws* and *Hanna Hage*, of counsel), for respondent-defendants.

AUFFREDOU, J.

Motion to dismiss a combined petition pursuant to CPLR article 78 for a writ in the nature of certiorari to review the adoption of a local law and complaint seeking declaratory judgment annulling such local law.

Petitioner-plaintiffs are landowners in the respondent-defendant Town of Mayfield (hereinafter the Town) who have contracted to lease portions of their land in the Town to a solar farm developer— petitioner-plaintiff John B. Canary having entered into a lease for approximately 40 acres on April 16, 2020, and petitioner-plaintiff Roger M. Putman having entered into a lease for approximately 25 acres on July 2, 2020. Memoranda of both leases were recorded in the Office of the Fulton County Clerk, on May 12, 2020 and August 6, 2020, respectively. Both leases were

entered into during a six-month moratorium on solar development that respondent-defendant Town Board of the Town of Mayfield (hereinafter the Board) put in place sometime in July 2019. No development of the solar farms contemplated under the leases has begun.

In September 2019, the Board began exploring ways to amend the Town's zoning laws to address the potential negative impacts of solar farm development. Over the ensuing months, the Board sought recommendations from the Town's planning board, reviewed the existing zoning laws, discussed approaches to accommodate solar development while maintaining the Town's visual aesthetics, and ultimately passed legislation addressing those and related concerns, known as local law 1 of 2021. This law, filed with the Department of State on January 22, 2021, requires, as relevant here, that all solar energy system components be located at least 500 feet from roads and 800 feet from property lines (hereinafter the setback provisions).

Petitioner-plaintiffs' contemplated developments are precluded by the setback provisions, even though, they claim, the developments will have no significant visual impact on adjacent homeowners or travelers along the adjacent roads. They therefore brought this combined proceeding pursuant to CPLR art 78 and action for declaratory judgment annulling local law 1 of 2021. Their petition/complaint alleges six causes of action: (1) that respondent-defendants failed to comply with the State Environmental Quality Review Act (SEQRA) when enacting local law 1 of 2021, rendering it illegal, irrational, arbitrary and capricious; (2) that local law 1 of 2021 is inconsistent with the Town's comprehensive plan and is therefore invalid, arbitrary and capricious; (3) that the enactment of local law 1 of 2021 was arbitrary and capricious because it bears no substantial relation to the health, welfare or safety of the community; (4) that the enactment of local law 1 of 2021 constituted unconstitutional reverse spot zoning; (5) that the enactment of local law 1 of 2021 constituted an unconstitutional taking; and (6) for declaratory judgment annulling

local law 1 of 2021. Respondent-defendants have moved, pre-answer, to dismiss the petition/complaint, claiming, among other things, that relief under CPLR art 78 is unavailable because petitioner-plaintiffs did not exhaust their administrative remedies before commencing this proceeding, and that petitioner-plaintiffs' first cause of action fails to state a claim because respondent-defendants "substantively complied" with the requirements of SEQRA and local law 1 of 2021 should therefore not be annulled.

This court may annul an act of a body or officer—such as, as here, a town, town board or town official—if such act was, among other things, taken in violation of lawful procedure or affected by an error of law (*see* CPLR 7803 [3]; 7806). Where a petition challenges the procedures followed in the enactment of a local law, as opposed to such law's substance, the challenge may be maintained in a CPLR article 78 proceeding (*see Save the Pine Bush, Inc. v City of Albany*, 70 NY2d 193, 202 [1987]). To be ripe for judicial review, the challenged act must be final and binding, and inflict actual injury that cannot be ameliorated by further administrative proceedings (*see Matter of Village of Kiryas Joel v County of Orange*, 181 AD3d 681, 685 [2d Dept 2020]).

Respondent-defendants do not assert that local law 1 of 2021 was not final and binding upon petitioner-plaintiffs upon its filing with the Department of State. Nor do they identify further administrative avenues to challenge its enactment, as opposed to its substance or application. Rather, they assert that petitioner-plaintiffs were required to seek a special use permit or a variance from the application of local law 1 of 2021 as a prerequisite to maintaining the CPLR article 78 proceeding herein. That argument implicates the court's authority to review administrative zoning action taken within the context of the new law, not its authority to review the procedures employed

in the Board's legislative act, itself, and is therefore unavailing (*see Save the Pine Bush*, 70 NY2d at 202; *Village of Kiryas Joel*, 181 AD3d at 685).[1]

Nor does the court agree that petitioner-plaintiffs' first cause of action fails to state a claim. "'On a motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a claim, [this court] must afford the [challenged pleading] a liberal construction, accept the facts as alleged in the pleading as true, confer on the nonmoving party the benefit of every possible inference and determine whether the facts as alleged fit within any cognizable legal theory'" (*Hilgreen v Pollard Excavating, Inc.*, 193 AD3d 1134, 1136 [3d Dept 2021], quoting *Graven v Children's Home R.T.F., Inc.*, 152 AD3d 1152, 1153 [3d Dept 2017] [internal quotation marks and citations omitted]).

Petitioner-plaintiffs have pleaded that the Board's enactment of local law 1 of 2021 is a Type I action under SEQRA, which presumptively requires the preparation of an environmental impact statement (EIS); that SEQRA therefore required respondent-defendants to classify the action, designate a lead agency for environmental impact review, study the long- and short-term effects of the proposed legislation and, presumably, take a hard look at the enactment's potential environmental impacts in the preparation of an EIS (*see* ECL 8-0109 [2], [4]; 6 NYCRR §§ 617.1 [c]; 617.4 [b] [2]; 617.6 [a] [1] [iii], [iv]; [b]; *Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 232 [2007]; *Matter of New York City Coalition to End Lead Poisoning, Inc. v Vallone*, 100 NY2d 337, 347-348 [2003] *Matter of Merson v McNally*, 90 NY2d 742, 750 [1997]; *Matter of Defreestville Area Neighborhoods Assn., Inc. v Town Bd. of Town of N. Greenbush*, 299 AD2d 631, 632 [3d Dept 2002]. They have provided legal authority to show that

[1] The court does not find that petitioner-plaintiffs' having entered into their leases during the Town's solar development moratorium violated the moratorium, as contracting for development does not equate to actual development.

strict compliance with SEQRA is required and asserted that respondent-defendants did not strictly comply (*see Coalition*, 100 NY2d at 348; *Merson*, 90 NY2d at 750). Accordingly, the court finds that petitioner-plaintiff's first cause of action adequately pleads that the enactment of local law 1 of 2021 was in violation of lawful procedure or affected by an error of law.

Respondent-defendants have essentially admitted that they failed to strictly comply with the dictates of SEQRA. Their allegations that they "substantively complied" with SEQRA by "extensively analyzing the zoning maps, wetlands, prime agricultural soils, and steep topography [and] analyzing resource hub, commercial zone development, and municipal investment plans," among other things, do not establish that they strictly complied with SEQRA. To the extent that the Board's meeting minutes that are attached to the petition/complaint bear out that the Board undertook these actions with the intensity that is apparently suggested in respondent-defendants' motion papers, they yet do not reflect that there was any formal designation of a lead agency, classification of the proposed enactment, or specific determination of whether an EIS was necessary; and respondent-defendants present no other Board meeting minutes or other proof to establish that these things were accomplished. Finally, *Matter of Nash Metalware Co. v Council of N.Y.* (14 Misc 3d 1211 [A], 2006 NY Slip Op 52485 [U], *12-14 [Sup Ct, NY County 2006]), a decision of a court of coordinate jurisdiction with this court, cited by respondent-defendants for the proposition that strict compliance with SEQRA is not required, is not compelling in light of the pronouncements of the high courts of this state, as cited herein and in petitioner-plaintiffs' papers.

The parties' positions on the issue of strict compliance with SEQRA having been fully set forth in the record, and it being clear that no factual dispute as to that issue is presented herein, the court deems it appropriate to reach the merits of the petition and grant judgment thereon without

giving respondent-defendants a further opportunity to answer (*see Matter of Kuzma v City of Buffalo*, 45 AD3d 1308, 1311 [4th Dept 2007]). Respondent-defendants' failure to strictly comply with the mandates of SEQRA rendered the enactment of local law 1 of 2021 in violation of lawful procedure and/or affected it with an error of law. It must therefore be invalidated.

This determination renders the claims in petitioner-plaintiffs' remaining causes of action, and respondent-defendants' arguments in opposition to those claims, academic. Thus, and noting that this court should not address constitutional issues when a decision can be reached on other grounds, the court declines to address the remaining claims (*see Syquia v Board of Educ. of Harpursville Cent. School Dist.*, 80 NY2d 531, 535 [1992]).

Accordingly, it is hereby

ORDERED AND ADJUDGED that respondent-defendants motion to dismiss is denied; and it is further

ORDERED AND ADJUDGED that the petition/complaint is granted to the extent that local law 1 of 2021 of the Town of Mayfield (filed with the Department of State on January 22, 2021) is invalidated and of no force or effect.

The within constitutes the decision, order and judgment of this court.

Signed this 18th day of February 2022, at Lake George, New York.

ENTER:

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

Papers considered:
Notice of Petition and Verified Petition and Complaint, with exhibits, filed May 20, 2021
Affidavit of Roger M. Putman, sworn to May 11, 2021, with exhibit
Affidavit of John B. Canary, sworn to May 11, 2021, with exhibit

Petitioner-Plaintiffs' Memorandum of Law in Support of the Verified Petition and Complaint, dated May 20, 2021
The Memorandum of Law in Support of Respondent-Defendants' Motion to Dismiss, dated September 22, 2021
Petitioner-Plaintiffs' Memorandum of Law in Opposition to Respondent-Defendants' Motion to Dismiss, dated October 29, 2021
Reply Memorandum of Law in Further Support of Respondent-Defendants' Motion to Dismiss

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:
John J. Privitera, Esq. and Anna V. Pinchuk, Esq.
April J. Laws, Esq. and Hanna Hage, Esq.

Matter of Putman, et al. v Town of Mayfield, et al.
Fulton County
Index No. EF2021-09063

STATE OF NEW YORK SUPREME COURT
COUNTY OF WARREN

In the Matter of

COUNTIES OF WARREN AND WASHINGTON INDUSTRIAL DEVELOPMENT AGENCY, BAY ROAD DEVELOPMENT LLC, and FOWLER SQUARE LLC,
Petitioners,

-against-

TOWN OF QUEENSBURY, ASSESSOR OF THE TOWN OF QUEENSBURY, and BOARD OF ASSESSMENT REVIEW OF THE TOWN OF QUEENSBURY,
Respondents.

DECISION, ORDER AND JUDGMENT

Index No.: EF2021-69307

APPEARANCES:

Fitzgerald Morris Baker Firth P.C., Glens Falls (*John D. Aspland* and *Michael Crowe*, of counsel), for petitioners.

Miller, Mannix, Schachner & Hafner, LLC, Glens Falls (*Jacquelyn P. White* and *Mark Schachner*, of counsel), for respondents.

AUFFREDOU, J.

Combined action for declaratory judgment; and proceedings pursuant to RPTL 706 (1) seeking reclassification of tax status under RPTL 720 (1) (a), and CPLR article 78 for a writ in the nature of mandamus to compel respondent Assessor of the Town of Queensbury to strike the real property that is the subject of this proceeding from the taxable section of the tax roll of respondent Town of Queensbury and record such real property on such tax roll as wholly exempt from real estate tax.[1]

Petitioner Bay Road Development, LLC (BRD) is the owner of a certain approximatey-34-

[1] Respondents shall hereinafter be referred to collectively as "the Town."

acre parcel in the Town of Queensbury, Warren County, New York (hereinafter, "the property"). In late 2020, petitioner Fowler Square LLC (Fowler) sought to develop the property for mixed use—5000 square feet to be developed as professional office space and the remainder to be residential apartments (hereinafter, "the project"). After obtaining the necessary approvals from the Town of Queensbury Planning Board, Fowler applied to petitioner Counties of Warren and Washington Industrial Development Agency (WWIDA), a municipal industrial development agency duly established by General Municipal Law § 890-c, for financial assistance for the project in the form of various tax exemptions, including a payment in lieu of tax (PILOT) agreement, as allowed by General Municipal Law § 874 (1) (*see* General Municipal Law § 874 [3], [4]).

WWIDA provided notice to the Town of a public hearing upon Fowler's application, to be held January 6, 2021. The Town did not appear at the hearing and did not submit any comment or objection to Fowler's application outside of the hearing. WWIDA thus resolved to grant the application on that day, and thereafter entered into a series of agreements with Fowler, including a PILOT agreement that exempted the property from all real estate taxes, for development of the project under WWIDA's jurisdiction. Under those agreements, BRD leased the property to Fowler, who then leased it to WWIDA, which, in turn, leased it back to Fowler. WWIDA's lease back to Fowler designated Fowler as WWIDA's agent for development of the project. On February 25, 2021, WWIDA filed for tax exemption on the property pursuant to RPTL 412-a. On May 2, 2021, the Town partially granted the exemption, denying it to that portion of the property that was to be developed into residential apartments.

After unsuccessfully grieving the determination to respondent Board of Assessment Review of the Town of Queensbury, petitioners commenced this combined action and proceeding, seeking a

declaration that the property is exempt in full and to compel the Town to so enter it on the tax roll. The Town joined issue by the filing of an answer and the certified administrative record. The court has accepted memoranda of law and other submissions from the parties. Oral argument was held on December 8, 2021, and the matter is now submitted for decision.

Upon the verified petition dated July 28, 2021, with exhibits; the verified answer dated September 3, 2021; the administrative record certified September 3, 2021; the affidavit of David O'Brien sworn to September 21, 2021; the affidavit of Christopher Falvey sworn to September 21, 2021, with exhibits; petitioners' memorandum of law filed September 22, 2021; the affirmation of Jacquelyn P. White dated October 18, 2021, with exhibits; the affidavit of Teri Ross sworn to October 18, 2021, with exhibit; respondents' revised memorandum of law dated October 18, 2021, with exhibits; and petitioners' reply memorandum of law dated November 5, 2021; and the court having considered the oral arguments of the parties, decision is hereby rendered as follows.

Upon a showing that an administrative act was in violation of lawful procedure or affected by an error of law, this court "may direct or prohibit specified action by the respondent" CPLR 7806; *see* CPLR 7803 [3]; *Matter of Dugan v Liggan*, 121 AD3d 1471, 1473 [3d Dept 2014]).[2] An argument not raised before an agency in an administrative hearing is unpreserved for review under CPLR art 78, and a court's review of an administrative action is thus limited to the grounds asserted by the agency for the action (*see Matter of Khan v New York State Dept. of Health*, 96 NY2d 879, 880 [2001]; *Matter of Stasack v New York State Dept. of Envtl. Conservation*, 176 AD3d 1456, 1459-1460 [3d Dept 2019]).

The Town's reason for partially denying tax exemption to the property as stated on its notice

[2] Similar relief is available under RPTL 720 (1) (a) in the tax status classification context (*see* RPTL 706 [1]).

of partial denial was that the portion of the property that was to be developed as residential apartments did not qualify for the exemptions available to an industrial development agency (IDA) because that portion of the project did not further the purposes for which such agencies are created, as detailed in General Municipal Law § 858.

Petitioners assert that the Town's partial denial of WWIDA's tax exemption application was legally erroneous, as in violation of RPTL 412-a (1), which states, in pertinent part, that "[r]eal property . . . under the jurisdiction, supervision or control of [an] industrial development agenc[y] enumerated in the [G]eneral [M]unicipal [L]aw shall be entitled to such exemption as may be provided for therein." General Municipal Law § 874 (1) states, in pertinent part, that an IDA "shall be required to pay no taxes or assessments upon any of the property acquired by it or under its jurisdiction or control or supervision."[3] Thus, petitioners' argument goes, RPTL 412-a (1) reserves no discretion to the Town to deny any part of the exemption to which the property is entitled under General Municipal Law § 874 (1).

In answer, the Town asserts that the partial denial of tax exemption to the property was proper because the construction of apartments is not a project that is eligible for IDA benefits, WWIDA does not exercise the requisite level of ownership or control over the property, and the PILOT agreement is null and void because WWIDA failed to obtain certain approvals thereof from the Town that, the Town asserts, were required under WWIDA's uniform tax exemption policy. Underpinning each of these claims is the Town's position that RPTL 412-a (1) affords it discretion to deny an IDA's application for tax exemption on the foregoing grounds.

[3] "It is well settled that although 'the statute[s] explicitly confer[ ] this exemption only on the [IDA], private developers who act as the agency's agent for project purposes may also enjoy this tax benefit'" (*Matter of Regeneron Pharms., Inc. v McCarthy*, 77 AD3d 1246, 1247 [3d Dept 2010], *lv denied* 16 NY3d 704 [2011], quoting *Matter of Fagliarone, Grimaldi & Assoc. v Tax Appeals Trib.*, 167 AD2d 767, 768 [3d Dept 1990]).

Although a town assessor generally bears a duty under RPTL 102 (2) to determine the tax status of the properties within the town, the exemptions available to IDA projects and properties do not derive from the RPTL, but rather from the General Municipal Law (*see* General Municipal Law § 874 [1]). Notably, General Municipal Law § 888 expressly provides that the provisions of General Municipal Law art 18-A (Industrial Development) supersede other inconsistent statutory provisions.[4] Thus, when "an exemption derives from the agreements of an IDA, the assessor is required to record the property as exempt on the tax assessment roll in a manner consistent with the PILOT. It is not the assessor's function to second guess the propriety of the exemption authorized by the IDA" (*Matter of Regeneron Pharms., Inc. v McCarthy*, 26 Misc 3d 1203 [A], 2009 NY Slip Op 52638 [U], *4 [Sup Ct, Rensselaer County 2009], *affd* 77 AD3d 1246 [3d Dept 2010], *supra*). It follows that the Town was without discretion to partially deny the exemptions that the IDA had granted to the project, notwithstanding the potential merit of its concerns about the propriety of the IDA's assumption of jurisdiction over the project. Notably, most of these concerns were not invoked by the Town when partially denying the exemptions, and others—such as the claim that WWIDA lacks the requisite degree of control over the project—are inconsistent with the Town's determination to partially grant the claimed tax exemptions (*see Khan*, 96 NY2d at 880; *Stasack*, 176 AD3d at 1459-1460).

As to those concerns, the court agrees with petitioners that the appropriate vehicle by which to advance these claims was a proceeding under CPLR article 78 to challenge WWIDA's January 6, 2021 resolution to enter into the PILOT and other agreements for development of the project. The court notes that the details of the project—including details about the relative sizes of its commercial and residential portions—were provided to the Town with WWIDA's application for exemption,

[4] General Municipal Law § 888 makes one exception for inconsistency with the Indian Law that is not at issue here.

which occurred within the four-month statute of limitations that applies to proceedings pursuant to CPLR article 78, and the Town was thus well-positioned to mount these challenges in the proper procedural context (*see* CPLR 217 [1]). While the court is certainly sensitive to the tax impacts that this holding will likely have to other real estate taxpayers within the Town, the fact remains that the Town failed to act appropriately to vindicate this interest. Therefore, constrained by the law, the court directs judgment in favor of petitioners.

Based upon the foregoing, it is hereby

ORDERED AND ADJUDGED that the petition is granted; and it is further

ORDERED AND ADJUDGED that the property is declared to be entirely exempt from real estate taxes pursuant to the payment in lieu of taxes agreement herein; and it is further

ORDERED AND ADJUDGED that respondent Assessor of the Town of Queensbury is ordered pursuant to CPLR 7806 and RPTL 720 (1) to strike the taxable portion of the property from the town tax roll and enter the entire property on the exempt portion of the roll.

The within constitutes the decision, order and judgment of this court.

Signed this 25th day of March 2021, 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.
Jacqueline P. White, Esq.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WARREN

JOSEPH MIHINDU, M.D., and ELAINE MIHINDU,

Plaintiffs,

DECISION AND ORDER

-against-

Index No. EF2019-66473
RJI No. 56-1-2019-0210

GLENS FALLS HOSPITAL,

Defendant.

APPEARANCES:

Fitzgerald Morris Baker Firth P.C., Glens Falls (*Joshua D. Lindy*, of counsel), for plaintiffs.

McPhillips, Fitzfgerald & Cullum L.L.P., Glens Falls (*Courtney M. Haskins*, of counsel), for defendant.

AUFFREDOU, J.

Motion by defendant for summary judgment dismissing the complaint, and cross-motion by plaintiffs for judgment upon their two causes of action.

Plaintiff Joseph Mihindu, M.D. is a nephrologist with privileges at defendant Glens Falls Hospital. While conducting his rounds on January 23, 2018, Dr. Mihindu walked briskly into a certain hospital room and, two steps within it, slipped on a wet floor, fell and suffered injuries. The slippery condition on the floor was the result of a coffee spill that had occurred in the area of Dr. Mihindu's patient's bed. Hospital cleaning staff had mopped up the spill and placed a wet floor sign in the area of the spill. Dr. Mihindu did not notice that the floor was wet or see the sign until after he had fallen.

Dr. Mihindu and his wife, plaintiff Elaine Mihindu, thereafter commenced this action seeking to recover for Dr. Mihindu's injuries on a theory of premises liability, and for Mrs. Mihindu's loss of Dr. Mihindu's consortium. Defendant joined issue by the filing of its answer, and

now moves for summary judgment dismissing the complaint, arguing, as relevant here, that defendant's agents provided adequate warning of the slippery area on the floor by placing a wet floor sign in the slippery area. Plaintiffs oppose the motion and cross-move for summary judgment on their causes of action, arguing, as relevant here, that no question of fact exists that defendant's agents failed to adequately warn Dr. Mihindu of the slippery area because the placement of the wet floor sign was not in conformance with hospital policy.

In rendering decision herein, the court has considered the following papers: the affirmation of Courtney M. Haskins, Esq. in support of motion for summary judgment, dated September 2, 2021, with exhibits; defendant's memorandum of law dated September 2, 2021; the affidavit of James Morris, Jr., sworn to September 2, 2021; the affidavit of Joshua D. Lindy, Esq. in opposition to motion to strike pursuant to CPLR 3116 (a), sworn to October 7, 2021, with exhibits; the affirmation of Joshua D. Lindy, Esq. in opposition to motion for summary judgment and in support of cross-motion for summary judgment and in opposition to motion to strike, dated October 7, 2021; plaintiffs' memorandum of law dated October 7, 2021; plaintiffs' statement of material facts dated September 28, 2021, with exhibits; defendant's statement of material facts dated October 13, 2021; the affirmation of Courtney M. Haskins, Esq. in reply to plaintiffs' opposition to defendant's summary judgment motion and motion to strike and in opposition to plaintiffs' cross-motion for summary judgment, dated October 26, 2021; defendant's response to plaintiff's statement of material facts dated October 26, 2021; and the affirmation of Joshua D. Lindy, Esq. in reply and in further support of cross-motion for summary judgment dated November 2, 2021. Oral argument having been held on December 22, 2021, decision is hereby rendered as follows.

The disposition of these motions requires the court to address two preliminarily issues that the parties have raised. First, plaintiffs assert that defendant's motion should be dismissed due to

its failure to submit a statement of material facts with its motion papers, as required by Uniform Rules for Trial Courts (22 NYCRR) § 202.8-g (a). Uniform Rules for Trial Courts (22 NYCRR) § 202.8-g (a) is a rule of procedure designed to promote judicial economy, the violation of which may be disregarded in the absence of prejudice to a substantial right of another party (*see* CPLR 2001; Uniform Rules for Trial Cts [22 NYCRR] § 202.1 [b]; *Disarli v TEFAF N.Y., LLC*, 2022 NY Slip Op 30029 [U], *4-5 [Sup Ct, Kings County 2022]; *Medallion Bank v Chopper Taxi Inc.*, 2021 NY Slip Op 32645 [U], *2-4 [Sup Ct, NY County 2021]; *Mackins v City of New York*, 2021 NY Slip Op 32440 [U], *7-9 [Sup Ct, NY County 2021]; *cf. Amos Fin. LLC v Crapanzano*, 73 Misc 3d 448, 453 [Sup Ct, Rockland County 2021]).

Noting the strong public policy in favor of deciding cases on their merits, the court finds that disregarding defendant's failure to file a statement of material facts when filing its motion is warranted here (*see Dinstber v Allstate Ins. Co.*, 96 AD3d 1198, 1199-1200 [3d Dept 2012]). The affirmation in support of defendants' counsel recites the facts that are material to this motion in substantially the same form as they would appear in a statement of material facts—in numbered paragraphs with pinpoint citations to the exhibits that are attached to it (*see Disarli*, 2022 NY Slip Op 30029 [U], *5). The evidentiary bases for the factual allegations in the motion papers are not buried within a voluminous record (*compare Amos Fin.*, 73 Misc 3d at 453). The court had no trouble accessing the materials to which defendants referred and, notably, plaintiffs complained of no prejudice. Moreover, as is more fully discussed below, the papers now before the court, which include defendant's belatedly filed statement of material facts, which it asks this court to accept nunc pro tunc, are sufficient to focus this litigation on those issues that are truly in dispute.[1] Thus,

[1] The court accepts and has considered defendant's statement of material facts but declines to accept it nunc pro tunc. Rather, the court will simply overlook the filing deficiency as explained above. Further, though plaintiffs have not provided the court with a statement in response to defendant's belated filing, under these circumstances, this will not

denying the motion in favor of further, redundant motion practice would thwart, not advance, the interests of judicial economy for which Uniform Rules for Trial Courts (22 NYCRR) § 202.8-g (a) was implemented.

Second, defendant contends that the errata sheet submitted with Dr. Mihindu's signed deposition transcript should be stricken because the changes were not proffered within 60 days of his receipt of the transcript and did not contain adequate explanations for the changes presented, both as required by CPLR 3116 (a). Plaintiffs counter that Dr. Mihindu's failure to submit the errata sheet and signed deposition within 60 days should be excused because errors in the numbering of the lines of text within the transcript frustrated his ability to respond. They also appear to argue that CPLR 3116 (a) allows changes to be made for any reason, so long as the reason is stated, and thus the adequacy of Dr. Mihindu's explanations for the changes is not at issue.

The court rejects this latter argument. The inadequacy of a reason for the submission of an errata is clearly a ground to reject it (*see Torres v Board of Educ. of City of N.Y.*, 137 AD3d 1256, 1257 [2d Dept 2016] ["A correction [to a deposition transcript] will be rejected where the proffered reason is inadequate."]). To hold otherwise would allow material, substantive changes such as those proffered by Dr. Mihindu for any stated reason, which is tantamount to allowing them for no reason at all or for improper reasons. "[M]aterial or critical changes to testimony through the use of an errata sheet is . . . prohibited" (*id.*). Dr. Mihindu's errata are of matters addressed in his deposition that go directly to the substantive issues before the court and are ostensibly presented to strengthen his position on the motion and cross-motion. The reason provided for each change—"to conform to the facts"—is inadequate to explain why Dr. Mihindu's original substantive

be held against them (*see* Uniform Rules for Trial Cts [22NYCRR] § 202.8-g [b], [c]; *Mackins*, 2021 NY Slip Op 32440 [U], *9).

responses were inaccurate. Accordingly, Dr. Mihindu's errata sheet should be stricken (*see id.*). The court will not consider his amended responses on this motion or cross-motion. As such, the court needs not decide whether the erroneous line numbering should preclude striking the errata sheet on the ground that it was not timely submitted.

Turning to substance, "[o]n a motion for summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Friends of Thayer Lake LLC v Brown*, 27 NY3d 1039, 1043 [2016], quoting *Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 49 [2015]). "A property owner has a duty to maintain its property in a reasonably safe condition, which 'may include the duty to warn of a dangerous condition'" (*Rivero v Spillane Enters., Corp.*, 95 AD3d 984, 984 [2d Dept 2012], quoting *Cupo v Karfunkel*, 1 AD3d 48, 51 [2d Dept 2003]).

The facts recited above are not in dispute. There is no evidence that an agent of defendant spilled the coffee that created the dangerous condition in the first instance. However, it is incontrovertible that defendant's staff had actual notice of the spill and addressed it. It cannot be seriously argued that mopping up a spill is an unreasonable response to remedy such dangerous condition, and there is no allegation that defendant's cleaning staff's mopping was inadequate in this case (*see e.g. McMullin v Martin's Food of S. Burlington, Inc.*, 122 AD3d 1103, 1105 [3d Dept 2014]). The dispute in this case centers upon whether defendant satisfied its duty to warn plaintiff of the slippery floor left behind after the mopping by placing a wet floor sign in the area of the spill.

The court finds that material questions of fact pertaining to this issue preclude a finding that either party carried their initial burden on the motion and cross-motion and, thus, the granting

of summary judgment to either of them. The testimony of the housekeeper who mopped up the spill was that the spill occurred near the bed of Dr. Mihindu's patient, at whom he was looking when he entered the room. The wet floor sign was of a character with which most people are familiar—approximately two feet high, sandwich board style and colored bright yellow—and it may be inferred that a person looking in the direction of the patient when entering the room would see the sign if it were visible when one entered. Thus, Dr. Mihindu's testimony that he did not see the sign until after he had fallen does not establish that the sign was visible to him before his fall in the context of a summary judgment motion, where all facts and reasonable inferences must be viewed in a light most favorable to the nonmoving party, but only serves to highlight the factual issue in play here (*see Davis v Zeh*, 200 AD3d 1275, 1278 [3d Dept 2021]). The presence of a warning sign does not entitle a defendant to summary judgment when there is a question of fact as to the adequacy of the warning (*see Firment v Dick's Sporting Goods, Inc.*, 160 AD3d 1259, 1260 [3d Dept 2018]).

Additionally, there is a factual question as to whether the housekeeper complied with hospital policy when she placed the wet floor sign inside the room. Indeed, there is a question of fact as to what, exactly, that policy is. Proof that defendant's staff failed to follow hospital policy may constitute evidence of a breach of defendant's duty of reasonable care, insofar as it may be inferred that satisfying that duty required observance of the policy (*see Sniatecki v Violet Realty, Inc.*, 98 AD3d 1316, 1318 [4th Dept 2012]).

The housekeeper who mopped the spill testified that hospital policy was to place a wet floor sign outside the room when conducting a general room cleaning—which includes mopping the entire room floor—but to place the wet floor sign in the specific area that is mopped when spot mopping, as in the case of a coffee spill. However, defendant's director of environmental services

and another of defendant's housekeepers both testified that hospital policy required that a wet floor sign be placed outside a room whether the mopping to be done within it was general clean up or spot mopping; and that the only time a wet floor sign might properly be found within a room is when nursing staff places one over a spill until cleaning staff can get to the room to clean it up.[2]

This conflicting testimony precludes a determination as a matter of law of what the policy is. Thus, it cannot be determined as a matter of law whether the housekeeper's placing the sign in the area that she mopped conformed with defendant's policy. Moreover, even if the wet floor sign's placement deviated from hospital policy, such is not conclusive evidence of negligence and the factual question as to whether such placement was adequate to warn Dr. Mihindu of the slippery floor and prevent his fall remains extant (*see Firment*, 160 AD3d at 1260).

As such, neither party is entitled to summary judgment on the issue of defendant's negligence. Mrs. Mihindu's claim for loss of consortium is derived from and dependent upon defendant's direct liability to Dr. Mihindu and summary judgment is thus precluded on that claim as well (*see Maidman v Stagg*, 82 AD2d 299, 305 [2d Dept 1981]).

The parties remaining arguments, to the extent not specifically addressed herein, are either rendered academic by the holding herein or have been considered and rejected.

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is denied.

[2] The affidavit of the director of environmental services that defendant submitted in support of its motion, in which the director details a spot mopping policy wherein a wet floor sign is placed in the area that was mopped—and which is notably unsupported with any written proof that such policy existed at the time of Dr. Mihindu's fall—has been disregarded as contradictory to the fair import of his deposition testimony (*see McLaughlin v Malone & Tate Bldrs., Inc.*, 13 AD3d 859, 860 [3d Dept 2004]).

The court directs that a conference via Microsoft Teams be conducted on Tuesday, April 19, 2022 at 9:00 A.M. for the purpose of scheduling a jury trial.

The within constitutes the decision and order of this court.

Signed this 10th day of March 2022, 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:
Joshua D. Lindy, Esq.
Courtney M. Haskins, Esq.

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

ASSUMPTION OF THE RISK

Hon. Mark C. Dillon *

A new sports season is upon us, raising the connection between baseball practice on the fields and New York Practice in the courts.

Until 1975, a plaintiff's assumption of risk was a bar to the recovery of damages. CPLR 1411, effective on September 1, 1975, directed that in actions for personal injury, injury to property, or wrongful death, the plaintiff's assumption of risk no longer barred the recovery of damages, but merely diminished the damages proportionally in relation to all culpable conduct. The statute was part of the legislative reforms triggered at that time after the 1972 Court of Appeals' decision in *Dole v Dow Chemical Co.* (30 NY2d 143), which collectively transitioned New York to the pure comparative negligence state we know today.

Notwithstanding the broadly-worded language of CPLR 1411, assumption of the risk continues to bar the recovery of damages in many actions involving sporting and recreational activities. That bar is a creature of decisional law, not statute. The reason given by the Court of Appeals for this carve-out from the general rule is that "by freely assuming a known risk, a plaintiff commensurately negates any duty on the part of the defendant to safeguard him or her from the risk" (*Trupia v Lake George Cent. School Dist*., 14 NY3d 392). In other words, a property owner's duty that would otherwise exist is limited by the plaintiff's prior implied consent to engage in activities that have known and inherent risks (*Turcotte v Fell*, 68 NY2d 432). In that sense, sports-related assumption of the risk is not so much a defense based on the nature of the particular plaintiff's conduct, but on the suspension of any *duty* owed by the defendant toward the plaintiff when the conduct is undertaken (*Morgan v State of New York*, 90 NY2d 471).

"Primary" assumption of the risk applies in the classic context of sporting events. A baseball player who is injured by tripping on the bag at second base has consented to that risk, as it is comprehended or obvious at all times, and is implicitly assumed by the athlete's election to play in the game at the outset. Spectators assume the risk of being struck and injured by foul baseballs, subject to the defendant's compliance with screening regulations (*Akins v Glens Falls City School Dist*., 53 NY2d 325). A football player assumes the risk that there may be natural bumpiness to the ground (*Ninivaggi v County of Nassau*, 177 AD3d 981). The property owner's duty is to merely make conditions as safe as they appear to be for the sporting purpose intended to be conducted there (*Turcotte v Fell*, 68 NY2d at 439). These principles are applied

universally to all sporting and recreational activities, including hockey, basketball, soccer, skiing, ice skating, canoeing, gymnastics, and even skydiving where there is an assumed risk that the parachute may fail to open (*Nutley v SkyDive the Ranch*, 65 AD3d 443.

The owners and operators of sports facilities may still be liable for injuries where the conditions caused by their own negligence are "unique and create[ ] a dangerous condition over and above the usual dangers that are inherent in the sport" (*Owen v R.J.S. Safety Equip*., 79 NY2d 967). Those unique conditions must themselves be actually or constructively known to the defendant, and must be assessed against the background and skill of the particular plaintiff (*Maddox v City of New York*, 66 NY2d 270). Thus, a defendant whose negligent maintenance of a playing facility creates risks and conditions that are not ordinarily associated with the sporting activity, or which are latent, may be found liable despite the athlete's decision to play there (*e.g. Wyzykowski v State of New York*, 162 AD3d 1705; *Herman v Lifeplex*, *LLC*, 106 AD3d 1050).

Outside the context of sporting or recreational activities, plaintiffs' general risk-assuming conduct is treated as a factor of comparative negligence which does not bar the recovery of damages, but which proportionally reduces the damages in relation to the percentage of negligence assessed to all parties culpable (CPLR 1411).

Go Yankees! (…unless you are scheduled to be in court).

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

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

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Jury will decide whether psychiatrist breached patient confidentiality.

Bonner v. Lynott (McShan, J., 3/31/22)

Plaintiff, a veterinary medicine resident at Cornell University, was placed on probation due to concerns with her performance, and later took a leave of absence on the recommendation of her treating psychiatrist. Upon returning to classes, a professor concerned about the plaintiff's behavior spoke to a faculty psychologist who, in turn, contacted the defendant psychiatrist and later documented the psychiatrist's disclosures about his patient in an email to two members of the veterinary medicine program. Plaintiff, after being denied reappointment to year two of the residency program, filed a complaint with the State Division of Human Rights for unlawful discrimination based upon her claimed mental disability. The complaint was dismissed and an Article 78 challenge failed, after which plaintiff sued her psychiatrist for medical malpractice and breach of physician-patient confidentiality. Supreme Court (McBride, J., Tompkins Co.) granted defendant's motion for summary judgment but the Third Department reversed, reinstating the confidentiality breach claim – concluding that while Cornell administrators may have been aware the plaintiff was struggling, "they were not aware that (the psychiatrist) was of the professional opinion that plaintiff's mental health condition was deteriorating".

Dismissal of slip-and-fall action reversed.

Carpenter v. Nigro Cos., Inc. (Garry, P.J., 3/17/22)

Defendant, sued by the plaintiff who claimed she was hurt after slipping and falling on ice in the parking lot of their commercial property, commenced a third-party action against its snow and ice removal contractor, seeking contractual and common law indemnification. Supreme Court (Weinstein, J., Albany Co.) resolved various motions and cross-motions by, among other things, dismissing the plaintiff's complaint, finding insufficient evidence to prove the property owner had constructive notice of an allegedly dangerous condition. Citing plaintiff's expert (meteorologist) report that opined precipitation in the parking lot ended

2 ½ hours before the time of the accident, the Third Department found the trial court's conclusion was in error, and reinstated the plaintiff's action. As for the third-party action, the Appellate Division noted that "a landowner has a nondelegable duty to provide the public with a reasonably safe premises", even if the property owner enters into a comprehensive and exclusive agreement with a contractor to perform snow and ice removal.

Rebutting statutory "presumptive consent" to drive vehicle.

Matter of Progressive Specialty Ins. Co. (Colangelo, J., 12/30/21)

After a car-truck accident, Travelers (which insured the truck) disclaimed coverage; contending the driver didn't have permission from his employer (the insured) to use the truck. An injured claimant from the car then brought an uninsured motorist claim against her insurer, Progressive, which objected to the Travelers' disclaimer and brought a proceeding to permanently stay (CPLR 7503) an uninsurance arbitration. Supreme Court (Buchanan, J., Schenectady Co.) granted Progressive's application, finding that the truck driver had his employer's presumptive consent (V&T Law § 388) to operate the vehicle. The Third Department reversed, finding that Travelers had offered the necessary "substantial evidence" rebutting the presumption of consent, including the truck driver's written statement acknowledging that he was permitted to drive the vehicle only on "company time", and evidence that the employer had previously taken specific action to prevent unauthorized use of the vehicle (including removal of a fuel pump fuse to make the truck inoperable).

State's governmental immunity defense fails.

P.R.B. v. State of New York (Colangelo, J., 1/20/22)

The claimant was sexually assaulted in her SUNY Albany dorm room by a recent parolee who had no authority to be in the building, and alleged in her suit that defendants failed to install proper security devices and failed to take security measures needed to prevent non-students from accessing the dorms. The Court of Claims (Hard, J.) denied defendants' motion for summary judgment, finding that the State's non-police negligent acts were undertaken in a proprietary, not governmental, capacity - and thus were not immune from liability. Claimant's security expert found that the claimant's suite door could be set to an unlocked position, which he found improper given that the lobby of the building was not staffed with a person to screen visitors. Focusing on the defendants' actions in the role of landlord, the Third Department agreed with the trial court and affirmed, noting that "the types of safety measures that [landlords] are reasonably required to provide is almost always a question of fact for the jury".

Jury's defense verdict survives post-trial motion and appeal.

Wright v. O'Leary (Egan, Jr., J.P., 1/27/22)

The 16-year old plaintiff was hurt when a John Deere utility vehicle ("Gator") in which he was a passenger – operated by his 14-year old friend – tipped over. The accident happened as the operator turned left; the Gator eventually tipping over on its right side and pinning the plaintiff's ankle underneath it. A jury concluded the teen operator was not negligent and his defendant father was not negligent in allowing him to drive the Gator. Supreme Court (Mott, J., Columbia Co.) denied plaintiff's motion to set the verdict aside, and the Third Department affirmed, noting conflicting versions of the accident in trial testimony from the two teenagers that created a factual dispute that was proper for jury resolution. Two dissenting justices thought otherwise, finding that there was "simply no fair interpretation" of the defendant operator's testimony – that he knew the Gator was not intended as a recreational vehicle, and that he disregarded the manufacturer's safety warnings on speed and seat belt usage – that could have led to the verdict that defendant was not negligent.

Plaintiffs' actions reinstated.

Bodden v. Holiday Mtn. Fun Park, Inc. (Lynch, J., 12/23/21)

The plaintiff, age 16 on the date of accident, was a first-time skier who paid for a private, 1-hour lesson from the defendant's ski instructor. After the lesson (conducted on a 'bunny hill' slope), the instructor took the plaintiff to an intermediate level trail - on which the plaintiff gained too much speed, lost control and was injured after crashing into a safety fence. Relying on the assumption of risk doctrine, defendant successfully moved for summary judgment, with Supreme Court (Schreibman, J., Sullivan Co.) finding that this type of injury was inherent to skiing "and should have been comprehended even by a novice". The Third Department reversed, concluding there were still factual disputes to be resolved, including whether the plaintiff had expressed reservations whether she was ready to progress to the intermediate trail and whether the instructor had taught the plaintiff how to safely fall if she couldn't remain "in the pizza wedge formation".

Duvernoy v. CNY Fertility, PLLC (Lynch, J.P., 2/17/21)

Plaintiff's medical malpractice action was commenced in April 2015, but 25 months later, no depositions had been taken and plaintiff's BOP and discovery responses remained outstanding. Defendant served plaintiff with a 90-day demand to file a note of issue (CPLR 3216), after which discovery responses were served and plaintiff's counsel proposed dates for inclusion in a scheduling

order for the completion of discovery. Defendant did not respond to the proposed scheduling order; and 2+ years later, Supreme Court (Muller, J., Washington Co.) granted the defendant's motion to dismiss the complaint for failure to prosecute. With guidance from the Court of Appeals that CPLR 3216 "is extremely forgiving of litigation delay", the Third Department reversed and reinstated the complaint, noting that a "party that fails to cooperate in completing discovery should not be entitled to rely on CPLR 3216 for relief".

BONUS: COURT OF APPEALS ON LABOR LAW § 240(1)

Healy v. EST Downtown, LLC (4/28/22)

To qualify for the protections afforded by Labor Law § 240(1), a plaintiff must show they were engaged in any of the statute's enumerated activities, one of which is "cleaning". Courts use a four-factor analysis to define cleaning, the first step of which is determining whether the work is "routine"; which the Court says "asks whether the type of work would be expected to recur with relative frequency as part of the ordinary maintenance and care of a commercial property". Here, the answer is "yes", which weighs against plaintiff's attempt to show he was cleaning. Plaintiff's partial summary judgment on his § 240(1) cause of action, which had been affirmed by the Appellate Division, is reversed and the claim dismissed.

Cutaia v. Bd. of Mgrs. of 160/170 Varick St. Condominium (4/28/22)

This plaintiff, a plumber relocating sinks in a bathroom, had to lean an A-frame ladder against a wall to reach and cut pipes in the ceiling. He received a shock after touching an exposed electrical wire, fell to the ground and was injured. Plaintiff had no memory of the fall, including whether the ladder fell to the ground. His motion for partial summary judgment under Labor Law § 240(1) was affirmed by the Appellate Division but reversed by a split (4-3) Court of Appeals, which noted an "accident alone" is not sufficient to prove a violation of § 240(1) or proximate cause. The dissenters called the electric shock "a red herring" that did not rule out the inadequate ladder as a proximate cause of the plaintiff's fall, and that was not an "independent intervening act that became a superseding cause" of the accident.

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