WARREN COUNTY BAR ASSOCIATION, INC.

TIPSTAFF

WINTER/SPRING 2022

Volume III Issue 2

IN THIS ISSUE

Greetings!

Welcome to the late Winter and early Spring edition of Tipstaff. While the ground hog may have seen his shadow, warmer weather is just around the corner.

Since the Fall edition, the Bar Association hosted a lovely holiday gathering at the Glens Falls Country Club on December 16, 2021. It was a smaller group than usual, but it was good to see those who were able to attend. The cocktail hour, light fare, and friendly conversation were enjoyed by all. Once again, we were able to collect mittens, gloves, hats, and scarves for the annual donation to Warren County Head Start. A big thanks to all who donated and attended. Check out the next few pages and our website for the photos.

On February 17, 2022, we sponsored the annual *Real Property Update* CLE. The CLE was attended by 35 members of the Bar, via Zoom. The feedback about this CLE was that it was very well received. A big "thank you" to Maria Nowotny, Esq. for planning and arranging the informative CLEs and to *Chicago Title* and *Fidelity National Title* for supplying travel mugs to attendees.

The board is in the process of planning our Law Day event. The festivities will take place on Thursday, May 5, 2022 after work. Many thanks to Vanessa Hutton for chairing this committee and to the committee members for their hard work.

Judge Glen Bruening has, once again, taken the leadership role for the Mock Trial. This year's Mock Trial competition is being held at the Queensbury Town Court, historic Salem Courthouse, Warren County Courthouse, and Washington County Courthouse. Although only four schools have participated, due to COVID, the students are doing a great job and the competition is as lively as ever.

I am looking forward to seeing everyone at the annual dinner in May! More information will be coming soon!

I have enjoyed my term as President and look forward to welcoming the new board and officers later this Spring. Thank you to Kate Fowler and the present board for all their hard work and participation.

Best regards,

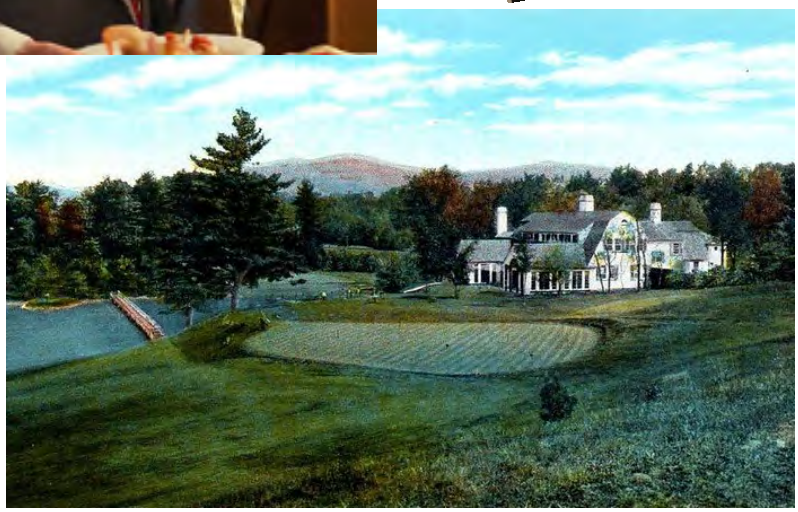
Karen Judd

2021 WCBA HOLIDAY PARTY

Despite COVID-19 worries still haunting us, we were able to gather a small group of colleagues and friends to celebrate the season at the Glens Falls Country Club on a cold December night. It was great to see each other and to offer a warm toast to the New Year!

Karen Judd, WCBA President, delivers a check and a box of warm mittens, hats and scarves from the members to Shari Marci, Director of Warren County Head Start.

2021 WCBA HOLIDAY PARTY



COLONIAL LAW and ORDER

by James Cooper, Esq.

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

COLONIAL LAW AND ORDER

Law and organization of government mirror the conditions of the age. Colonial New York was unique from other royal provinces and colonies in America. No other province in America overlaid another European culture. Three wars with the Dutch finally ended in 1674 consolidating English rule over the province. The decline of Dutch power was supplanted by England as a rising superpower of its age and the realization that its new rival in the new world was France.[1] English governors had been appointed since 1664 to administer New York, and continued after the Dutch short lived reoccupation in 1674. They all had the same problem. The province consisted of the city, Long Island, the corridor of the Hudson River to Albany, islands off Massachusetts and parts of Maine. Governors had to figure out how to defend the frontiers and the city with minimal revenue. They felt constricted between Connecticut, Massachusetts and New Jersey. To the north, the Iroquois Confederacy claimed independence at the same time they accepted dominion of 'Charles across the great water.' West of the Hudson was howling wilderness. Appointed governors were presented with intractable problems to manage.

The **Articles of Capitulation** agreed between the English and Dutch by treaty provided that the law of the province would be in accord with Dutch customs and that there would be no interference in the existing contract and property rights of the Dutch, which included slavery. The first English governor, Richard Nicolls, seemed to sense that handling the Dutch had to be done with some finesse and with a light touch. Effectively, there was no change in the character of the province for a full generation after capitulation. Large tracts were characterized by perpetual rents imposed on farmers by grantees which would have violated the English rule against perpetuities (1682) but apparently not Dutch precedents that continued.

New York was largely peopled by Dutch in the Hudson valley and the city, which also had the most diverse ethnicity of any English colony and province. Cross cultural integrations evolved slowly. Dutch language use diminished up to the 1790s when sermons in Dutch Reformed churches became predominantly delivered in English. Dutch immigration stopped in 1664 immediately after which English, Scots and Huguenots became the primary immigrants. Tension between the Dutch and these groups is remembered now in English epithets: Dutch courage, Dutch treat, to go Dutch, Dutch Uncle, get in Dutch, Dutch leave, (to run away). Fortunately, the cruelest appellation has not survived: Dutch widow, (prostitute). Dutch place names from the early province are common: Brooklyn, Bronx, Staten Island, Nassau, Harlem, The Bowery. Albany continued almost exclusively to be Dutch.

Governing and law making were rendered difficult because there was no printing press in the province until 1693. Laws and proclamations had to read aloud to the populace gathered by the sheriff to hear them. That was not as difficult as first might appear, as the population north of

[1] International law then provided that a country could claim sovereignty over all lands drained by the watercourse first discovered by that country's explorer. The French claimed northern New York because of the explorations of Champlain. The English claimed northern New York by right of conquest of the Dutch claims arising from Henry Hudson's exploration. Neither country had a firm grasp of the Hudson's watershed or that of the St. Lawrence and Lake Champlain. This was the ostensible pretext for land claims and warfare between England and France in New York, masking the reality of strategic motivations of each nation.

New York city in all towns and cities in the Hudson corridor might have been as small as 3,800 in the 1660s. The city itself was smaller than Glens Falls is today until well into the 1700s. The populous was at best semi-literate. Consequently, oral oaths, promises, and contracts were taken extremely seriously. With no newspapers, news traveled by hearsay and rumor.

Commerce was stagnant without the growth experienced in other colonies for reasons economists speculate about, but perhaps due to the dependence on the fur trade in upper portions of the province, land policies perpetuated from the Dutch or other effects resulting in a predominance of food processing, (flour milling, e.g.) in the city, rather than the manufacture of hard goods. Monopolies granted by governors for revenues stifled competition. The English had to build roads that the Dutch had not seen as important, as their transport needs had been fulfilled by navigable access to the Hudson river and harbor.

European and English politics affected New York's laws and government. The Duke of York and Albany became King James II, but in neither capacity ever set foot in New York. As a prince, he had fled to France when Oliver Cromwell assumed dictatorial power in England. In exile, royalists formed an English regiment to fight for the French and Spanish in their wars against other continental states. Many of these English officers were associates of or known to James. Several were later appointed by him to be Governors of New York. After the restoration of the monarchy in 1660, Charles II became king and his brother, James, succeeded to the throne.

The Duke and King was Roman Catholic, a Scottish Stuart. Although co-religionists with the French, he and the many Catholic governors he appointed for New York, were loyal English nationalists. Governor Dongan, Irish and a peer, complained to the Governor of New France about Jesuit missionaries in Iroquoia propagandizing the Indians to switch their loyalty to the French king. Although Dongan was Catholic, he took steps to push the Jesuits out of northern New York. More than other colonies, New York had a population of mixed religious practices, Anglican, Dutch Reformed, Quaker, Lutheran, Anabaptist, Roman Catholic, Calvinist, Jewish and others. The climate of religious tolerance was a heritage of Dutch culture and law in Holland.

New York's first governor, Richard Nicolls created a governing body of himself and councillors to administer the province, something like a modern cabinet. New York did not have a legislative assembly like all the other colonies. That created the first rumblings complaining of taxation without representation. Nicolls and his council authored and promulgated **The Duke's Law**. It borrowed sections of English, Dutch and colonial laws, including **Magna Carta**.

The Duke's Law, (1665), was an attempt to comprehensively organize government and society. It outlined in great detail the organization of courts, fees, fines for non-compliance, the frequency of court and etc. In the realm of civil law, it required arbitration of claims less than five pounds, assessed a financial penalty for frivolous actions and awarded treble damages to the defendant in such cases. It authorized parties to settle before a matter went before a jury. It assessed costs to the losing litigant. There were time limits for filing claims that appear much like those in summary proceeding evictions in our time. A litigant could request that the sheriff subpoena witnesses. No writ or process could issue or be served on royal holidays or on the Sabbath day. Rights to and the process of appeal were spelled out in detail. All arrests, writs and warrants were to be issued in the name of the King, (thus today- People of the State of New York v.____). In case of indigence or ignorance of procedure, a litigant could ask a judge to appoint

the sheriff to plead for him. A Christian could not be enslaved except by voluntary bondage, (indentured servants) or by a child's apprenticeship for a fixed term of years.

Other civil matters included detailed provisions for maintenance of fences and fields, state taxation to support, construct and maintain churches to service 200 in attendance, provided they were of "the true faith", prohibitions on the disturbance of worship services or prayer assembly. Ministers or the equivalent titles could not preach disturbance of the peace or sedition. Persons attending the sick were to exercise the skills known for treatment, the neglect of same called for severe punishment at the discretion of the magistrate. All deeds were required to be in writing and the language of grant therein was specified. We would recognize them in modern deeds. A wife who unjustly left her husband and refused to live with him forfeited her dower.

In estate matters, the local constable was to visit the residence of the deceased and demand to see his last will and testament, search for it if necessary, and declare intestacy if none was found. Death without heirs resulted in escheat to the King. Estate administrators were required to post security. Birth, marriage and burials were required to be registered.

The Duke's Law criminal aspects were harsh. These convictions required capital punishments: blasphemy; murder; death caused by sword or dagger where the deceased had no weapon to defend himself, [sic]; murder by ambush or poison, [sic]; bestiality; homosexual acts; kidnaping; bearing false witness intended to cause the accused to be convicted and executed; treason; conspiracy to attack a government structure; assault of a parent by a child older than 16 years upon complaint by the parent; a married person who committed adultery with another married person. A single person and a married person committing adultery were to be heavily punished short of death or dismemberment. The penalty for fornication by a single woman was that the couple must marry, be fined, or face corporal punishment according to the discretion of the court. Forgery was to be punished by not more than three days in the pillory with restitution to the injured party. The Duke's Law continued at length as a penal statute to define and describe crimes and punishment. The Duke's Law had to be read aloud to groups of compulsorily gathered citizenry for its entire length in the Early Modern English rendition[2] and not as summarized herein.

A rapid succession of governors followed Nicolls. Col. Francis Lovelace first succeeded him. He was instructed by the Duke to continue Nicolls' policies but expanded them to introduce English institutions to the mid Hudson area. He allowed the Van Rensselaers to continue their prerogatives in the Rensselaerwyck land grant, what are now Albany and Rensselaer counties, except judges were to be appointed by the Governor rather than the Patroons. Lovelace introduced twelve man juries as modification of Dutch court practice. Lovelace was recalled to England over unpaid debts, imprisoned in the Tower of London and died there. He was replaced by Edmund Andros in 1674.

Andros more specifically decreed the free exercise of religion provided that practices not disturb the public peace. Rituals could be used or omitted as could be the Book of Common Prayer. Freeholders, (land owners), free of scandals and profanity could vote to elect civil and military officers. He perpetuated women's rights under Dutch law to own property, make contracts, participate in their own businesses and to make bequests and devises.

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[2] (ca. 1485-1690), works of Shakespeare, King James bible

Thomas Dongan, a soldier, royalist, and Roman Catholic as had been all his predecessors, was appointed Governor of New York in 1683. Dongan was instructed by the Duke to form a legislative assembly, whose laws were promised to gain the Duke's assent and confirmation provided they were for the good of New York and not prejudicial to the Duke's rule. The Assembly first met in October 1683. They enacted almost immediately **The Charter of Liberties and Privileges** to protect colonists' liberty, property and ability to assent to laws and taxes; that freeholders and freemen have the right to vote; that all Christians have liberty of conscience; from the **Magna Carta**, that personal liberty be protected, i.e., no punishment for crime except on lawful judgment of one's peers. From the English **Petition of Right**, (1628), they adopted a paragraph against taxation without representation. The Charter contained comprehensive provisions on all forms of personal transactions and societal issues from land rights to Indian relations, support of the poor, naturalization provisions that all Christians then living in the province were deemed citizens thereof, regulating surgery and the practice of medicine, details from cattle to cornfields. Some details must have been to flesh out provisions of the Duke's Law. This heady expression of democracy was too much for the Duke who, when he became King in 1685, revoked the Charter of Liberties and Privileges.

Dongan had been an active governor. He had issued charters to New York City, Kingston and Albany. The Albany charter pushed the Van Rensselaer Patroons out of city administration. His grant of monopolies caused frictions and discontent as for instance, Albany merchants' furs had to be transferred to New York City merchants for shipment to Europe. In 1688 The King consolidated New York and New England as a royal colony which further caused discontent. Riots at Long Island, Westchester and Queens resulted in some deaths. Andros was appointed to be governor of the consolidated dominion.

European politics again drastically reshaped New York when in 1689 Parliament bloodlessly deposed the Catholic King James II and installed Protestants William and Charles II's daughter, Mary, as replacements. Andros was arrested, and the restive counties of Long island, Westchester and Queens turned out the royal appointees and elected their own. Parliament declared the consolidated Dominion of New England defunct. Quickly, in May 1689, the New York militia seized the primary military structure of the city, Fort James, and elected Jacob Leisler, their captain, as commander. In a putsch-like action, Leisler declared himself to be Commander in Chief of all New York two months later. His justification was the parliamentary directive to the Dominion of New England to dissolve and reorganize. It was risky to choose sides at a time when it was not entirely certain whether James would regain the throne with the aid of France. Leisler proclaimed that William and Mary were sovereign and had the proclamation read in Dutch and English in New York, Kingston and Albany. Leisler's populist agenda enacted by the Assembly was to revoke longstanding monopolies that had been granted, revoke some taxes, and revoke restrictions on some personal liberties. His most fervent supporters and associates were upper society Dutch. The Albany Dutch had established a reputation for being focused on business with the Iroquois and not provincial politics. They resisted Leisler's authority. He tried militarily to force them but was unsuccessful. They came around when in the Beaver Wars a French and Indian war party attacked Schenectady in retaliation for an Iroquois murder raid, killed 62 residents and captured and hauled off 27 others to Canada. Leisler was a commoner, tactless, and hot headed. Regardless, in retrospect, he

efficiently organized and operated government for two years.

King William's appointed new governor, Col. Henry Sloughter, arrived in 1691. Leisler refused to recognize his appointment and surrender Fort James to him until the weight of documented authority and public support forced him to. Leisler's refusals became the basis for charges against him notwithstanding his early support for William and Mary. He was arrested, charged with high treason, imprisoned and later convicted. He had represented himself offering a confused defense ignorant of English common law court procedures. He was sentenced to the punishment prescribed for high treason, to be hanged, drawn and quartered. At that time hanging was deemed to fulfill the spirit of the law.[3] When Parliament voted to lift the attaint on Leisler, restoring his property and estates to his family, his body was disinterred from under the scaffold, (required by The Duke's Law), and buried in a Dutch Reformed churchyard.

The New York Assembly reenacted **The Charter of Liberties and Privileges,** (1691).

James' and his heirs' efforts to regain the throne with the help of the French and Scots was fought off in the Jacobean wars. The seventeenth century was finished off in New York by the inconclusive King William's War with the French. The Colony's attempt to invade Canada via the Champlain valley foundered at what is now Fort Ann as smallpox swept through the staging encampment.

Jim Cooper

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The Historical Society of New York Courts, (transcript of The Duke's Law); Colonial New York, a history, Michael Kammen, 1975, Charles Scribner's Sons; A Fractious People, politics and society in colonial New York, Patricia U. Bonomi, 1971, Columbia University Press; Exploring Historic Dutch New York, Gajus Scheltema and Heleen Westerhuijs, eds., 2011, Museum of the City of New York, Dover Press; The Van Benschoten family in America, W.H. Van Benschoten, 1907,1987, Gateway Press Inc., Baltimore; Wikipedia

[3] In Great Britain the Forfeiture Act of 1870 abolished the traditional punishment and substituted hanging as adequate, but the monarch could insist upon beheading. The last beheading having occurred in 1747, it was abolished completely in 1973. The death sentence for treason was abolished in the Crime and Disorder Act of 1998. The barbaric punishment was only officially carried out once in America in the Narragansett war in New England.

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 176387
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.

Kriston Rodriguez, Plaintiff,
v.
Rafael Richards, Defendant.

Index No. EF2020-68542
|
Decided on January 19, 2022

Attorneys and Law Firms

Bartlett, Pontiff, Stewart & Rhodes, P.C., Glens Falls (Paula Nadeau Berube of counsel), for plaintiff.

Meyer, Fuller & Stockwell PLLC, Lake George (Jeffrey R. Meyer of counsel), for defendant.

Opinion

Robert J. Muller, J.

***1** Plaintiff is the former owner of certain real property located at 302 East Shore Drive in the Town of Adirondack, Warren County, which property is located on Schroon Lake. On August 29, 2020, plaintiff contracted to sell this property to defendant for $655,000.00 cash. The contract required defendant to make an initial deposit of $10,000.00, followed by an additional deposit of $40,000.00 on September 18, 2020. The remaining balance of $615,000.00 was to be paid at the closing. The contract further provided, in pertinent part:

"[Plaintiff] shall convey and [defendant] shall accept the property subject to all covenants, conditions, restrictions and easements of record and zoning and environmental protection laws so long as the property is not in violation thereof and any of the foregoing does not prevent the intended use of the property for the purpose of [a] *personal residence*, also subject to any existing tenancies, any unpaid installments of street and other improvement assessments payable after the date of the transfer of title to the property, and any state of facts which an inspections and/or accurate survey may show, provided that nothing in this paragraph renders the title to the property unmarketable."

On August 22, 2020, plaintiff executed a Property Condition Disclosure Statement. In this Statement plaintiff responded "Yes" to question No. 4, which inquired whether "anybody other than [plaintiff had] a lease, easement or any other right to use or occupy any part of [the] property." [1] Question No. 7 then inquired if "there [were] any features of the property shared in common with adjoining landowners" and plaintiff responded, "Yes[, s]ection of the north driveway entrance." Defendant countersigned this Statement on August 27, 2020 to acknowledge receipt.

Defendant made the initial deposit of $10,000.00 and the additional deposit of $40,000.00, with both deposits held in escrow by Najer Realty, the listing broker. On

September 2, 2020, counsel for defendant sent correspondence to counsel for plaintiff advising that he had "reviewed the contract with his client and approve[d] the same subject to and conditioned upon" ten enumerated items, with item No. 9 stating as follows:

"If the premises are sold subject to easements, covenants, conditions or restrictions, these must be disclosed in detail and approved by [defendant], through our office. This qualification of approval shall continue up to ten (10) days following the issuance of the title report by the . . . title company, unless objection to same are communicated in the interim."

***2** On September 8, 2020, counsel for plaintiff emailed counsel for defendant, attaching "copies of [plaintiff's] deed and title policy, the driveway easement referenced in these documents and a filed map." She advised that "the driveway easement was made very clear to [defendant] prior to him signing the contract[, and c]onsequently [she] excluded [it] from item [No.] 9" in counsel for defendant's September 2, 2020 correspondence. Counsel for plaintiff then countersigned the September 2, 2020 correspondence and attached it to the email, with item No. 9 revised to state as follows:

"If the premises are sold subject to easements other than the driveway easement provided with the return of this letter, covenants, conditions or restrictions, these must be disclosed in detail and approved by [defendant], through our office. This qualification of approval shall continue up to ten (10) days following the issuance of the title report by the . . . title company, unless objection to same are communicated in the interim."

The title report was thereafter completed on September 12, 2020 and noted the easement over the driveway, as well as a restriction on commercial use of the property. In this regard, the "Map of a Survey for Gary Garstens" annexed to plaintiff's deed provides that "[n]o commercial use shall be permitted" on the property.

On October 28, 2020, counsel for defendant sent an email to counsel for plaintiff with a proposed Affidavit of Historic Use attached thereto, requesting that she have her client execute the same. The proposed Affidavit stated, *inter alia*, that "[t]he premises has been used as a commercial use, having been continuously used as a vacation rental property since 1996." Counsel for plaintiff's assistant thereafter responded as follows:

"We provided your Affidavit to our client for review and he will not sign it as it is not accurate. He has only owned the property since 2013 and did not continuously rent it during his ownership — it has been his primary residence for the past 3 years."

The closing was scheduled for November 5, 2020. On November 4, 2020, counsel for defendant sent correspondence to counsel for plaintiff advising that the closing had to be postponed because his client "still [had] concerns regarding the easements that encumber the property and the prohibition on commercial use from both a covenant and restriction standpoint." Counsel for plaintiff then responded on November 5, 2020, advising that — as per the terms of counsel for defendant's September 2, 2020 correspondence — defendant had ten (10) days from issuance of the title report to enter his objections, with

those ten (10) days having expired. Counsel for plaintiff further stated as follows: "If this transaction has not closed by the end of the day today then I will send a law day letter."

On November 6, 2020, counsel for defendant sent correspondence to counsel for plaintiff advising that "[plaintiff] is unable to deliver marketable title to the premises[and, a]s a result, [defendant] is . . . terminating the contract." Counsel for plaintiff then sent correspondence that same date "to give notification . . . that TIME IS OF THE ESSENCE with respect to closing [the subject] transaction." Counsel for plaintiff further stated as follows: "[W]e hereby declare a law day closing for November 20, 2020, at 10:00 A.M. at my office[. Defendant's] failure to close on November 20, 2020, at 10:00 AP.M [sic] will be deemed a default under the terms of the contract resulting in the forfeiture of the contract deposits."

Defendant did not appear for the closing on November 20 and, on December 10, 2020, plaintiff commenced the instant action alleging breach of contract and seeking to recover the $50,000.00 deposit still held in escrow. Issue was joined with defendant asserting a counterclaim demanding return of the $50,000.00 deposit because of plaintiff's alleged inability to perform under the contract. Presently before the Court is (1) plaintiff's motion for summary judgment granting the relief requested in the complaint and dismissing the counterclaim; and (2) defendant's cross motion for summary judgment dismissing the complaint and granting the relief requested in his counterclaim. The motion and cross motion will be addressed *ad seriatim*.

***3** "The movant seeking summary judgment has the initial burden to 'establish its prima facie entitlement to judgment as a matter of law by presenting competent evidence that demonstrates the absence of any material issue of fact' " (*Hope v Hadley-Luzerne Pub. Lib.*, 169 AD3d 1276, 1277 [2019], quoting *Aretakis v Cole's Collision*, 165 AD3d 1458, 1459 [2018] [internal quotation marks and citations omitted]). "Upon this showing, the burden then shifts to the opposing party to [submit] 'evidence demonstrating the existence of a triable issue of fact' " (*Hope v Hadley-Luzerne Pub. Lib.*, 169 AD3d at 1277, quoting *Aretakis v Cole's Collision*, 165 AD3d at 1459 [internal quotation marks and citation omitted]; *see* CPLR 3212 [b]).

Turning first to plaintiff's motion for summary judgment, plaintiff contends that defendant breached the contract by failing to close on the established law date and that he is therefore entitled to keep the $50,000.00 deposit. In support of these contentions plaintiff has submitted both his affidavit and that of his counsel. These affidavits detail the real estate transaction and attach copies of the contract, the title report — with deeds to the property annexed thereto — and all relevant communications between the parties.

At the outset, the Court finds that plaintiff has succeeded in demonstrating defendant's breach of the contract as a matter of law. "It is settled . . . that when a contract requires that written notice be given within a specified time, the notice is ineffective unless the writing is actually received within the time

prescribed" (*Maxton Bldrs. v Lo Galbo*, 68 NY2d 373, 378 [1986]).

Here, the contract included an "Attorney Approval" provision stating, in pertinent part:

"This agreement is contingent upon [p]urchaser and [s]eller obtaining approval of this agreement by their attorney as to all matters, without limitation. This contingency shall be deemed waived unless [p]urchaser's or [s]eller's attorney on behalf of their client notifies agents and attorneys in writing . . . of their disapproval of the agreement no later than *09/02/2020*."

Indeed, counsel for defendant's September 2, 2020 correspondence was sent pursuant to this provision, advising that he approved the contract contingent upon, *inter alia*, his client having ten (10) days from issuance of the title report to object to any easements, covenants, conditions or restrictions of record relative to the property. To the extent that this report was issued on September 12, 2020, the ten (10) days expired on September 22, 2020 — with no objections made. Indeed, it was not until October 28, 2020 that counsel for defendant sent the proposed Affidavit of Historic Use to counsel for plaintiff, and not until November 4, 2020 that he postponed the closing on defendant's behalf. [2]

Additionally, the contract itself provides that "[t]he [s]eller shall convey and the [p]urchaser shall accept the property subject to all covenants, conditions, restrictions and easements of record . . . so long as the property is not in violation thereof and any of the foregoing does not prevent the intended use of the property for the purpose of *personal residence*" [Contract, at ¶10]. Counsel for defendant did not express any objections to this provision in his September 2, 2020 correspondence, with September 2 being the deadline for the parties' attorneys to express their disapproval of the agreement. It certainly cannot be argued that either the easement over the driveway or the prohibition on commercial use prevented the property from being used as a personal residence.

***4** The Court further finds that plaintiff has demonstrated his entitlement to the $50,000.00 deposit as a matter of law. It is well settled that a buyer "who defaults on a real estate contract without lawful excuse, cannot recover the down payment,' . . . where . . . that down payment represents 10% or less of the contract price" (*Pizzurro v Guarino*, 147 AD3d 879, 880 [2017], quoting *Maxton Bldrs. v Lo Galbo*, 68 NY2d at 378; *see Cipriano v Glen Cove Lodge No.1458, B.P.O.E.*, 1 NY3d 53, 62 [2003]; *Lawrence v Miller*, 86 NY 131, 140 [1881]; *Gillette v Meyers*, 42 AD3d 654, 655 [2007]). Here, the $50,000.00 deposit constitutes less than 10% of the $655,000.00 contract price.

With plaintiff having established his entitlement to summary judgment, the burden now shifts to defendant to raise a triable issue of fact. In this regard, defendant contends that plaintiff breached the contract because he was unable to transfer marketable title. Specifically, defendant contends that "[m]arketable title is defined as 'good title, one that is free and clear of encumbrances or material defects, one reasonably certain not to be called into question' " (*Khanal v Sheldon*, 35 Misc 3d 1225[A], 2012 NY Slip Op 50897[U], *5 [Sup

Ct, Queens County 2012], quoting 91 NY Jur 29, Real Property Sales and Exchanges § 71) and, further, that an easement is an encumbrance and a purchaser need not accept title subject thereto (*see Rhodes v Astro-Pac, Inc.*, 41 NY2d 919, 920 [1977]).

Indeed, "[i]t is settled that an easement is an encumbrance and obviously a purchaser need not accept title subject to an encumbrance *if the contract specifies conveyance of title free of all encumbrances*" (*id.* [emphasis added]). Here, the contract did not specify a conveyance of title free of all encumbrances. Rather, the contract expressly indicated that the property was being conveyed subject to all covenants, conditions, restrictions and easements of record, so long as none prevented use of the property as a personal residence. Again, neither the easement over the driveway nor the prohibition on commercial use prevented the property from being used as a personal residence. The Court thus finds defendant's contention to be without merit.

Briefly, the Court must note that defendant sent plaintiff a letter on August 28, 2020 — the day before the contract was signed — wherein he stated as follows:

"I plan to live in the home as my residence year-round and invest in preserving its tradition and beauty. I work full time for the Veterans Health Administration as a physician in charge of national programs to improve access and quality of healthcare for Veterans nationwide. My work for the VA is telework, which means [I] will be living and working from home. This will provide me both the time and resources to maintain its beauty and integrity. I plan on having my family here year-round, and extended family and friends here as much as possible and during holidays."

The letter then concluded with a photograph of defendant and a woman — presumably his wife — standing happily in front of the home. Under the circumstances, defendant certainly knew that the property was being sold for use as a personal residence, and he seemingly exploited this knowledge for his own purposes. Indeed, given his subsequent actions, the contents of this letter appear less than genuine.

Defendant next contends that plaintiff is not entitled to keep the $50,000.00 deposit because the contract does not include a liquidated damages provision and is otherwise silent as to what happens in the event of a default. According to defendant, plaintiff sold the property to third parties Shane and Erin Maltbie for $655,000.00 on March 5, 2021 and, as such, incurred no actual damages. In support of this contention, defendant quotes the following language from the Court of Appeals decision in *Maxton Bldrs. v Lo Galbo* (*supra*) (hereinafter *Maxton*):

***5** "In cases, as here, where the property is sold to another after the breach, the buyer's ability to recover the down payment would depend initially on whether the agreement expressly provides that the seller could retain it upon default. If it did, the provision would probably be upheld as a valid liquidated damages clause in view of the recognized difficulty of estimating actual damages and the general acceptance of the traditional 10% down payment as a reasonable amount" (*id.* at 382).

That being said, defendant has taken this quote entirely out of context. *Maxton* involves a

case very similar to that presently before the Court where the defendants canceled a real estate contract after the deadline for doing so expired and the plaintiff then "commenced [an] action against [them] to recover the amount of the down payment claiming that the defendants breached the contract" (*id.* at 508). [3] The defendants in *Maxton* argued "that the Appellate Division erred in permitting the plaintiff to recover the entire down payment, and should instead have limited recover to actual damages" (*id.* at 509). The Court of Appeals thus considered whether the rule established in *Lawrence v Miller* (*supra*) in 1881 "that a vendee who defaults on a real estate contract without lawful excuse, cannot recover the down payment" (*Maxton Bldrs. v Lo Galbo*, 68 NY2d at 509) should be continued or, alternatively, abandoned in favor of traditional contractual rules which "permit[ ] a party in default to seek restitution for part performance" (*id.* at 511).

The language quoted by defendant is taken from a portion of the decision analyzing how this latter approach would operate in the context of a real estate transaction. After this analysis, however, the Court of Appeals proceeded to uphold the rule in *Lawrence v Miller*. Specifically, the Court stated as follows:

"[R]eal estate contracts are probably the best examples of arm's length transactions. Except in cases where there is a real risk of overreaching, there should be no need for the courts to relieve the parties of the consequences of their contract. If the parties are dissatisfied with the rule in *Lawrence v Miller* (*supra*), the time to say so is at the bargaining table" (*id.* at 512).

It must also be noted that more recent case law has found that the rule established in *Lawrence v Miller* (*supra*) applies even in the absence of a liquidated damages clause (*Pizzurro v Guarino*, 147 AD3d at 880).

Under the circumstances, defendant has failed to raise any triable issues of fact. Plaintiff's motion for summary judgment granting the relief requested in the complaint and dismissing the counterclaim is therefore granted, and defendant's cross motion is denied.

The $50,000.00 deposit being held in escrow shall be paid to plaintiff within **thirty (30)** days of the date of this Decision and Order.

Therefore, having considered NYSCEF documents 13 through 33 and 35 through 62, and oral argument having been heard on December 2, 2021 with Paula Nadeau Berube, Esq. appearing on behalf of plaintiff and Jeffrey R. Meyer, Esq. appearing on behalf of defendant, it is hereby

ORDERED that plaintiff's motion for summary judgment granting the relief requested in the complaint and dismissing the counterclaim is granted; and it is further

ORDERED that defendant's cross motion is denied; and it is further

***6 ORDERED** that the $50,000.00 deposit being held in escrow shall be paid to plaintiff within **thirty (30)** days of the date of this Decision and Order; and it is further

ORDERED that any relief not specifically addressed has nonetheless been considered and is expressly denied.

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

Dated: January 19, 2022

Lake George, New York

_____s_____

ROBERT J. MULLER, J.S.C.

ENTER:

All Citations

Slip Copy, 2022 WL 176387 (Table), 2022 N.Y. Slip Op. 50026(U)

Footnotes

1 Defendant contends that plaintiff's response to this question is unclear because he initially placed an "X" next to "No," and then crossed it out and placed an "X" next to "Yes." It is submitted, however, that this contention is unavailing. Plaintiff placed his initials above the crossed out "X" next to "No" and then circled the "X" next to "Yes." It is thus clear that plaintiff intended to respond "Yes" to the question.

2 Plaintiff contends that the easement over the driveway was excepted from this contingency, given the modifications made by his counsel to item No. 9 of the September 2, 2020 correspondence. Defendant, on the other hand, contends that he never agreed to this modification and that his silence did not constitute acquiescence. That being said, the Court finds these contentions to be largely irrelevant. The prohibition on commercial use is covered under the contingency in any event.

3 Incidentally, in *Maxton* the plaintiff also "sold the house to another purchaser for the same amount the defendants had agreed to pay" (*id.*).

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

STATE OF NEW YORK SUPREME COURT
COUNTY OF HAMILTON

In the Matter of
JOSEPH COTAZINO, JR., and JOY COTAZINO,
Petitioners,

For Judgment Pursuant to CPLR art 78

-against-

NEW YORK STATE ADIRONDACK PARK AGENCY,
Respondent.

DECISION, ORDER AND JUDGMENT

Index No.: EH2021-7628

APPEARANCES:

Maynard, O'Connor, Smith & Catalinotto, LLP, Albany (*Justin W. Gray*, of counsel), for petitioners.

Letitia James, New York State Attorney General, Albany (*Joshua Tallent*, of counsel), for respondent.

AUFFREDOU, J.

Petition pursuant to CPLR art 78 for a writ in the nature of certiorari to review a determination of respondent Adirondack Park Agency (hereinafter APA), dated February 22, 2021, which found petitioners to be in violation of Executive Law § 806, required remediation and imposed penalties (*see* CPLR 408, 409 [b]; 410, 7804 [a], [g], [h]).

Petitioners are the owners of a certain 0.24-acre parcel of land that is located in the Hamlet land use area on Kibler Point Road in the Town of Wells, Hamilton County, New York. The parcel has shoreline on Lake Algonquin and is thus subject to the shoreline restrictions of Executive Law § 806. Thereunder, a variance from the APA is required for construction of a structure greater than 100 square feet within 50 feet of the mean high-water mark, referred to as the shoreline setback (*see* Executive Law § 806 [1] [a] [2]).

In July 2017 petitioners submitted a jurisdictional inquiry form to the APA seeking a

determination of whether their proposed construction of a single-family home on the parcel would require a variance or permit. As the proposed structure did not encroach on the shoreline setback, the APA determined that no variance or permit was required. Thereafter, petitioners' surveyor staked out a footprint for the proposed structure, and petitioners applied for a building permit. Although willing to issue the building permit, the Town of Wells expressed concern to petitioners about the proximity of the proposed structure to Kibler Point Road and urged them to relocate it, if possible.

In an effort to do so, petitioners contacted the APA to inquire about applying for a variance allowing them to locate the structure partially within the setback. This prompted a pre-application site visit in which the APA sent an engineer and enforcement officer to inspect the site and see if the footprint of the structure could be relocated to move it further from the road without encroaching on the shoreline setback.

The APA states that staff arrived at the site to find that petitioners had staked out a footprint for the structure that was partially within the setback, measured the dimensions of the footprint and staked out a new location for the structure, of the same dimensions, that would remove it from the setback and keep it further from Kibler Point Road. The APA further states that staff then advised petitioners that building entirely within the footprint that they had flagged, which bordered on the setback line, would not require a variance, but warned them that any deck to be built on the shoreline side of the structure would encroach on the setback and require a variance.

Petitioners claim that APA staff staked out locations for both the single-family home and deck portions of the structure, the deck encroached upon the setback as staked by APA staff, and

APA staff knew this because they had also determined the mean high-water mark and flagged the setback line 50 feet beyond that. Petitioners further claim that APA staff told them that there was "leeway" with the deck encroachment such that, as flagged, the project would not require a variance notwithstanding the encroachment, but nonetheless asked petitioners to reduce the size of the deck to reduce the encroachment, which they did. Petitioners then obtained their building permit and commenced construction.

The APA thereafter received a complaint alleging that petitioners were building a single-family home within the shoreline setback. Staff therefore conducted a second visit to the site to investigate the complaint. They found that construction of a foundation for the single-family home had begun approximately within the footprint that staff had staked out in the prior visit. Thus, no violation was found and the matter was closed. The APA claims that staff again reminded petitioners that attaching a deck to the shoreline side of the structure would require a variance. Petitioners claim that APA staff said nothing of a need for a variance for the construction of a deck, even though footings for the deck were already in place within the setback, consistent with the location that petitioners claim staff had staked out in the prior visit.

The APA later received a second complaint regarding petitioners' property, in which it was alleged that they were building a deck within the shoreline setback. Upon APA staff's ensuing third visit to the site, they found that a deck approximately 336 square feet in size had been attached to the shoreline side of the single-family home, located mostly within the shoreline setback. Petitioners had not obtained a variance.

The parties thereafter discussed the APA's proposed settlement of the apparent violation, but such was ultimately not acceptable to petitioners. The APA therefore referred the matter to

its enforcement committee (hereinafter "the committee") and petitioners were served with a notice of apparent violation (*see* 9 NYCRR 581-2.1, 581-2.6 [b]). Petitioners filed a response in which they claimed, among other things, that the APA should be estopped from enforcing Executive Law § 806 because petitioners detrimentally relied on the representations that petitioners claim the APA staff members made to them regarding the location of the deck and the need for a variance.

The matter proceeded to enforcement proceedings that were attended by counsel for the APA, petitioner Jay Cotazino, Jr. (hereinafter Cotazino when referred to individually) and petitioners' counsel, in which they each offered presentations to the committee that submitted their respective positions as summarized above. The committee determined that petitioners had violated the shoreline setback restriction of Executive Law § 806, ordered petitioners to remove the deck and imposed a civil penalty.

Petitioners then commenced this proceeding pursuant to CPLR art 78 for review of the APA's determination, seeking a declaration that the APA's actions and determination were in violation of lawful procedure, and arbitrary and capricious. Specifically, they claim that APA staff was not legally authorized to re-site petitioners' house and deck, the enforcement proceedings should have been in the form of an evidentiary hearing and petitioners' rights to due process of law were therefore violated, the APA's determination was irrational for failing to credit Cotazino's statements over those presented in the affidavits of the APA staff members that were submitted in support of the violation, and the APA should be equitably estopped from enforcing the shoreline setback provision against petitioners because they were the sole cause of the violation. They alternatively seek vacatur of the APA's determination and remittal to the

committee for a full evidentiary hearing. The APA joined issue by the filing of an answer, a memorandum of law, and a certified administrative record comprised of 299 pages of documents and an audio/video recording of the entire enforcement committee proceeding. This court thereafter denied petitioners subsequent motion for full discovery pursuant to CPLR 408 and a plenary trial of the issues presented herein. Oral argument on the petition was held on September 21, 2021.

Upon the court's review of the verified petition and the exhibits attached thereto; the verified answer and the exhibits attached thereto; the affirmation of petitioners' counsel in support of the motion; the affirmation of the APA's counsel in opposition to the motion; a memorandum of law in opposition to the petition; and the certified administrative record, including the audio/video recording of the APA enforcement committee proceedings; and a reply memorandum of law in further support of the petition; the court having heard oral argument on the petition; and the court having duly deliberated upon all the foregoing, decision is hereby rendered as follows.

The only issues that may be raised in a CPLR art 78 proceeding are, as relevant here, "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803 [3]; *see Matter of Dugan v Liggan*, 121 AD3d 1471, 1473 [3d Dept 2014]). Thus, petitioners' claims here distill to whether APA staff's re-siting petitioners' planned structure was in violation of lawful procedure; whether the enforcement proceedings were conducted in violation of lawful procedure; and whether the APA's determination that a violation of Executive Law § 806 occurred—which necessarily entailed crediting the APA staff affidavits over Cotazino's affidavit and statement

and rejecting petitioners' equitable estoppel defense—was irrational.

Petitioners assert that APA staff's re-siting was a violation of lawful procedure in the absence of any statute, regulation or written policy authorizing the agency to so act. The APA observes that this argument was not presented to the committee and claims that it is therefore unpreserved. It also points to information contained in its shoreline restriction variance application as its written statement of policy. Petitioners counter that this information is not properly before the court since it was presented for the first time, not at the enforcement proceeding, but in an affidavit from one of the APA staff members who re-sited petitioners' proposed building footprint that was filed with the APA's answer. Indeed, petitioners assert that this and another such answering affidavit should not be considered by the court because they contain information that was relevant to the issues presented for the committee's consideration but not submitted to the committee during the enforcement proceeding.

Initially, the court agrees that, to the extent that the facts recited in the answering affidavits go beyond the mere illumination of the materials that are contained within the certified administrative record, they should not be considered. However, the court has considered the affidavits to the extent that they serve this proper purpose, and in response to the petitioners' argument against the legality of APA staff's re-siting, as such was also not presented to the committee.

An argument not raised before an agency in an administrative hearing is unpreserved for review under CPLR art 78 (*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]). As such, petitioners' argument that the lack of a written policy

governing APA staff's re-siting petitioners' building footprint is unpreserved. Were the court to reach this issue, it would find that the re-siting was not in violation of lawful procedure. The policy statements in the variance application—which include that a variance application should demonstrate that "the application requests the minimum relief necessary" and "[w]hether the difficulty [that occasions the application] can be obviated by a feasible method other than a variance"; and the requirement of a pre-application site visit or meeting that "provides an opportunity for initial analysis of the proposal and potential alternatives that may eliminate the need for a variance"—demonstrate the propriety of the APA's actions. The re-siting, which was undertaken with petitioners' consent, was a reasonable and proper step, taken pursuant to these policies and in an effort to further their purposes.

Nor can it be said that the enforcement proceedings were in violation of lawful procedure. Regulations governing APA enforcement proceedings do not provide for the full, plenary hearing to which petitioners claim they were entitled. Rather, all that is required is notice of the apparent violation, an opportunity to respond the allegations therein and the ability to appear at proceedings before the committee with counsel to be heard concerning "any disputed matter of fact or law or with respect to the nature of any proposed resolution" (9 NYCRR 581-2.6 [b], [c]). Petitioner was afforded these due process rights and meaningful review in the proceedings herein.

Finally, the committee's determination was neither arbitrary and capricious nor affected by an error of law. "'An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts. If [an] agency's determination has a rational basis, it will be sustained, even if a different result would not be unreasonable" (*Matter of Adirondack Wild:*

Friends of The Forest Preserve v New York State Adirondack Park Agency, 161 AD3d 169, 176 [3d Dept 2018], *affd* 34 NY3d 184 [2019], quoting *Matter of Fuller v New York State Dept. of Health*, 127 AD3d 1447, 1448 [3d Dept 2015]). It is not the role of this court to substitute its judgment for that of the APA (*see Adirondack Wild*, 161 AD3d at 176).

There is no dispute as to the APA's jurisdiction in this matter or that a portion of the deck was constructed in the shoreline setback. The material issue here is whether the committee's determination that APA staff "identified where the dwelling, absent the deck, could be located without needing a variance" lacks a rational basis—in other words, whether it was arbitrary and capricious for the committee to credit the affidavits of APA staff over Cotazino's affidavit and statement. The court answers this question in the negative. The affidavits from APA staff in the certified administrative record support the APA's position that staff merely relocated a building footprint that petitioners had laid out to a position further from Kibler Point Road that still did not violate the shoreline restriction, while maintaining the dimensions of the original footprint. Upon the first report of a violation, staff found no violation but observed that a foundation had been built in the approximate dimensions of the re-sited footprint and warned petitioners that a deck on the shoreline side of the structure would require a variance. And, upon the second report of a violation, staff returned to find the deck constructed within the setback, notwithstanding the APA's prior warnings that construction within the shoreline setback was not permitted. Cotazino's factual allegations to the contrary—i.e., that APA staff sited his proposed house and deck such that the deck would encroach on the setback but still advised that a variance would not be necessary due to "leeway"—do not undermine this finding. It was rational for the committee to credit the APA's allegations over Cotazino's, notwithstanding that reasonable minds may differ

over which set of allegations was the more believable (*see Supkis v Town of Sand Lake Zoning Bd. of Appeals*, 227 AD2d 779, 781 [3d Dept 1996]).

Turning to petitioners' equitable estoppel argument, the court first notes that their assertion at oral argument that the committee did not address the argument is not supported in the record. Concededly, the committee did not specifically discuss this defense in its written determination. However, it was addressed at length during the enforcement proceedings and the committee's rejection of the defense is implicit in its findings and determination. Thus, the record reflects that the defense was considered.

The equitable estoppel argument is unavailing to petitioners in any event. The doctrine of equitable estoppel may not be invoked against a government entity except in "'exceptional cases in which there has been a showing of fraud, misrepresentation, deception or similar affirmative misconduct, along with reasonable reliance thereon'" (*see Matter of Atlantic States Legal Found., Inc. v New York State Dept. of Envtl. Conservation*, 119 AD3d 1172, 1173 [3d Dept 2014], quoting *Stone Bridge Farms, Inc. v County of Columbia*, 88 AD3d 1209, 1212 [3d Dept 2011] [internal quotation marks and citations omitted]). The court initially notes that granting relief to petitioners upon this defense would require the committee to have credited Cotazino's allegations over those of APA staff, which it ostensibly did not do. However, even crediting those allegations, the defense is unavailable here since APA staff's alleged conduct did not rise to the level of misconduct akin to fraud or deception (*see id.* at 1173-1174).

Based upon the foregoing, it is hereby

ORDERED AND ADJUDGED that the petition is denied, the determination fo the APA is confirmed and this proceeding is dismissed.

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

Signed this 17th day of December 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:

Justin W. Gray, Esq.
Joshua Tallent, Esq.

STATE OF NEW YORK SUPREME COURT
COUNTY OF WARREN

DIANE BEAUDETTE,
Plaintiff,

-against-

FLORENCE J. INFANTINO and JANE D. INFANTINO,
Defendants.

DECISION AND ORDER

Index No.: 60039

APPEARANCES:

LaFave, Wein & Frament, PLLC, Guilderland (Paul H. Wein, of counsel), for plaintiff.

Santacrose & Frary, Albany (Keith M. Frary, of counsel), for defendants.

Maguire Cardona, P.C., (Donald P. Ford, Jr., of counsel), for nonparty experts.

AUFFREDOU, J.

Motion by nonparty medical examiners to quash, modify and fix conditions upon plaintiff's subpoenas for certain records, and cross-motion by plaintiff to compel compliance with said subpoenas. Plaintiff commenced this action against defendants for damages arising from a personal injury that she sustained in an automobile accident. Defendants have joined issue and conceded liability. Plaintiff has agreed to cap damages at the limits of defendants' automobile insurance policy. The remaining issue in the case is whether plaintiff's injuries qualify as serious injuries under Insurance Law § 5102 (d). Nonparties Robert McCaffrey, Ph.D., a neuropsychologist, and Daniel Silverman, M.D., a neurologist, were retained by defendants to perform examinations of plaintiff in exploration of this remaining issue.

Plaintiff thereafter served each nonparty with a subpoena duces tecum directing production of three classes of documents:

(1) All billing records, invoices, payment records, checks and 1099 statements for independent medical examination (IME) services performed on behalf of insurance companies and defense attorneys for the years 2014 through 2020;

(2) All reports, expert disclosures, and written memoranda for each examination or record review for which they received payment as reported in item (1), i.e., for IMEs in years 2014 through 2020; and

(3) The title and location of the court and the docket number of each case for which they received payment as reported in item (1), i.e., for years 2014 through 2020.

The nonparties now move pursuant to CPLR 2304 to quash, modify and fix conditions upon the subpoenas and for protective orders pursuant to CPLR 3103. They seek to modify the subpoena as to item (1) by limiting the disclosure to the requested documents from the period of 2016 through 2020. They seek to quash the subpoena to the extent of its demands in items (2) and (3) or, alternatively, to limit the disclosure thereunder to the period of 2016 through 2020. They seek a protective order permitting redaction of identifying information from any material disclosed, deeming such materials confidential, directing their destruction at the conclusion of this litigation without redisclosure, and directing plaintiff's counsel to file an affirmation attesting to such destruction and nondisclosure at the conclusion of litigation. They also seek reimbursement for costs of production in response to the subpoena.

Plaintiff opposes the nonparties' motion and cross-moves to compel compliance with the subpoena or, alternatively, for an order striking the nonparties' expert disclosures and precluding their testimony at trial (*see* CPLR 2308 [b]). The nonparties replied and opposed the cross-motion and plaintiff replied to the nonparties' opposition to the cross-motion. Counsel for defendants was heard at oral argument on the motion, as his clients have an interest in the outcome.

Upon the court's reading of the affidavit of Donald P. Ford, Jr., Esq. sworn to March 18,

2021 and the exhibits attached thereto; the affidavit of Daniel J. Silverman, M.D. sworn to March 12, 2021 and the exhibits attached thereto; the affidavit of Robert J. McCaffery, Ph.D. sworn to March 22, 2021 and the exhibits attached thereto; the nonparties' memorandum of law dated March 19, 2021; the affirmation of Paul H. Wein, Esq. sworn to June 21, 2021; plaintiff's memorandum of law dated June 21, 2021; the affidavit of Donald P. Ford, Jr. in reply and opposition to cross-motion sworn to June 29, 2021; the affidavit of Robert J. McCaffery, M.D. in reply and opposition to cross-motion sworn to June 22, 2021; and the affirmation of Paul H. Wein, Esq. in reply to the opposition to the cross-motion sworn to August 3, 2021; oral argument on the motion having been held August 6, 2021; and the court having duly deliberated upon all the foregoing, decision is hereby rendered as follows.

"There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action" (CPLR 3101 [a]). "'[M]aterial and necessary' as used in [CPLR 3101 (a)] must 'be interpreted liberally to require disclosure . . . of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity'" (*Matter of Kapon v Koch*, 23 NY3d 32, 38 [2014], quoting *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). Thus, "'[a]n application to quash a subpoena should be granted only where the futility of the process to uncover anything legitimate is inevitable or obvious . . . or where the information sought is utterly irrelevant to any proper inquiry'" (*Matter of Kapon*, 23 NY3d at 38, quoting *Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327, 331-332 [1998]; *accord Matter of Dairymen's League Coop. Assn., Inc. v Murtagh*, 274 App Div 591, 595 [1948]). The burden to establish that a subpoena should be vacated, modified or conditioned is on the proponent of the motion to quash (*see Matter of Kapon*, 23 NY3d at 39). "The test is one of

usefulness and reason" (*Allen*, 21 NY2d at 406).

On the authority of *Loiselle v Progressive Cas. Ins. Co.* (190 AD3d 17 [3d Dept 2020]), the nonparties concede that the financial documents that plaintiff seeks in its first demand, to the extent that they exist and are under their control, are discoverable and the proper subject of the subpoenas duces tecum with which they were served. In *Loiselle*, the Third Department held that such documents "may reveal a financial incentive that the [nonparties] have in testifying [and such] incentive is a relevant consideration in 'ascertain[ing] any possible bias or interest on the part of [the nonparties]'" (at 20, quoting *Porcha v Binette*, 155 AD3d 1676, 1677 [4th Dept 2017]). The nonparties have sought to limit the disclosure of the financial documents to a five-year period (i.e., 2016 through 2020, not 2014 through 2020 as demanded). Though they purported in their papers to ground their request for this relief in *Porcha*, at oral argument, they conceded that the basis for the request was their arbitrary preference. They have not set forth an adequate basis to explain why the disclosure of financial records for the additional two-year period would present an undue burden or otherwise be abusive (see CPLR 3103 [a]), when producing five years of records is apparently not. As such, the nonparties' motion to quash must be denied as to the first class of documents identified in the subpoenas, and plaintiff's motion to compel must commensurately be granted.

The court turns now to the second class of documents sought by the subpoenas—examination reports from prior IMEs that the nonparties had conducted on behalf of insurance companies or defense attorneys. In seeking to quash, the nonparties aver that the purpose for which these reports and memoranda are sought is to impeach their general credibility—i.e., a defense-oriented disposition—which has been held to be improper (*see Fazio v Federal Express*

Corp., 272 AD2d 259, 260 [1st Dept 2000]). They conclude, therefore, that the material sought is irrelevant and not discoverable under CPLR art 31. Plaintiff, on the other hand, insists that the contents of the reports are likely to reveal the very same bias that the financial information would, which has been ruled a proper subject of inquiry and, therefore, discovery (*see Loiselle*, 190 AD3d at 20).[1]

The nonparties argue that the reports would not be probative of bias, noting that their assessments are based upon standardized testing, some of which is administered and scored by computer, and that plaintiff fails to identify any erroneous interpretation or assessment of the raw data gleaned from such testing on the parts of the nonparties, such as would indicate their bias. They further assert that a mere difference of opinion between two physicians (i.e., a treating physician and a physician performing an IME) does not indicate a bias in either one of them. In response, plaintiff once again insists that a review of the examination reports will reveal that the nonparties' medical opinions are overwhelmingly unfavorable to personal injury plaintiffs and moreover, drafted in boilerplate or, as plaintiff's counsel put it, "cookie cutter" language. This assertion is reportedly based upon plaintiff's counsel's "briefcase full of transcripts" of the nonparties' prior testimony, none of which has been provided to the court. Plaintiff further asserts that insurance "carriers are paying [the nonparties] . . . to come into court and say this guy isn't hurt" and that to believe otherwise is "silly" (Aug. 6, 2021 tr at 39). She further asserts that, since examination reports are discoverable under Federal Rules of Civil Procedure rule 26 (a) (2) (b), such reports must be considered material and necessary under New York law.

The nonparties and defendants respond to these assertions by observing that counsel—not

[1] Notably, this question was ruled unpreserved in *Loiselle* and it appears that this dispute has not been resolved by the high courts.

insurance carriers—select physicians for medical examinations and do so for the purpose of obtaining an honest medical opinion in furtherance of accurately assessing the strength and value of their clients' cases; and that plaintiff's counsel's perspective on the nonparties' bias is skewed because cases in which their reports are favorable to plaintiffs never reach litigation and would be unknown to him. They also note, in answer to plaintiff's "cookie cutter" assertion, that the nonparties' examination reports, like most medical reports, follow the patterns of their examinations. Thus, the fact that the reports may have common structures or use common language is not indicative of bias or a predetermined conclusion. They further poignantly observe that this issue presents larger policy considerations involving the role of medical examinations in litigation that are best addressed by a deliberative rulemaking body, as was apparently the case in the federal system, rather than on a case-by-case basis by the state's trial courts.

The court notes that plaintiff's arguments are largely conjecture, ostensibly borne of cynicism arising from plaintiff's counsel's palpable animus toward the nonparties; his "guarantees" about the contents of the examination reports are based on no more than that opinion. The court is also constrained to note that, though the nonparties and defendants have provided good reasons to doubt whether release of the examination reports would actually indicate any bias or be otherwise useful in the prosecution of this action, the standard clearly favors disclosure, the burden of proof is on the nonparties and they may yet have failed to establish that the examination reports are utterly irrelevant (*see Matter of Kapon*, 23 NY3d at 38-39; *Melfe v R.C. Diocese of Albany*, 196 AD3d 811, 813-814 [3d Dept 2021] [deliberate and repetitive practice]; *Loiselle*, 90 AD3d at 20). However, cognizant of the nonparties' policy argument, the court declines to decide this question since the disposition of these motions may be

reached upon nonparties' alternative argument.

Even a subpoena that seeks material and necessary facts may be subject to quashing or limitation "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (CPLR 3103 [a]). "'[L]itigants are not without protection against unnecessarily onerous application of the discovery statutes. Under our discovery statutes and case law, competing interests must always be balanced; the need for discovery must be weighed against any special burden to be borne by [the target of the subpoena]'" (*Forman v Henkin*, 30 NY3d 656, 662 [2018]; *see Perez v Fleischer*, 122 AD3d 1157, 1158 [3d Dept 2014], *lv dismissed* 25 NY3d 985 [2015]; *Tener v Cremer*, 89 AD3d 75, 79-82 [1st Dept 2011]).

The nonparties submit that compliance with the subpoenas would present undue burdens on them, their prior examinees and the court. They claim that the time and expense necessary to identify, review and redact the requested information would be onerous, and would likely necessitate their hiring additional staff or retaining third-party vendors to assist them with compliance. They estimate the costs of compliance to be in excess of $30,000 each. Plaintiff counters that production of the reports would not be as costly or time consuming as the nonparties claim—that compliance is as simple as pressing a button on a computer. The nonparties and defendants contest this conclusory assertion, noting that many of the records sought are stored in paper form, in boxes that someone would have to manually search, at considerable time and expense.

The nonparties also plead the privileges of their prior examinees and their duties of confidentiality to them, and assert privacy protections for them in state and federal law. They aver that the prior examinees' waivers of privilege and confidentiality operated only within their

own litigation and do not extend to extraneous matters. They state that the prior examinees are both implicitly and explicitly assured of the privacy of their health information outside of the litigation in which they are involved. Plaintiff counters that the prior examinees enjoy no privilege because their relationships with the nonparties are not for the purpose of obtaining medical treatment, and that the information in their reports is not confidential because much of it has been laid upon the public record in the courses of their own litigation. At oral argument, defendants vigorously contested that examination reports are ever laid upon the public record. While neither party has provided the court with any authority to support their position on this question, the parties do seem to agree that an examination report would only reach the court's trial record as an exhibit, which would be returned to the proponent of the evidence and be accessible to the public only in those cases that went to appeal.

The nonparties also assert that disclosure of the reports would constitute an undue burden within the litigation and present the danger that the litigation would become unnecessarily prolix. Specifically, they claim that the preparation necessary to discuss the myriad reports and memoranda that they have authored over the seven years of their practices that are subject to subpoena would be both incredibly time-consuming for them and costly for defendants. Moreover, inquiry at trial into each of these many reports would present a series of minitrials that would unduly prolong the trial. Their burden would also include the time and expense necessary to inform prior examinees that their health information is being disclosed in unrelated litigation, as, they claim, is consistent with their professional obligations. Plaintiff counters that minitrials are inevitable in the cross-examination of any medical examiner and, citing her counsel's "briefcase full of transcripts" with which he already intends to cross-examine the nonparties, the

use of the reports sought for that purpose would present no additional burden on them and no delay in trial beyond what would be attendant to such cross-examination.

The court finds that the nonparties have established that it is appropriate to quash the subpoenas as to the second class of documents that they seek, "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice" to the nonparties, their prior examinees and the court (CPLR 3101 [d]). The nonparties' allegations as to the time and expense that they would incur by complying with the subpoenas are particularized, detail an unquestionably burdensome onus, and are not meaningfully controverted by plaintiff's wholly speculative claim that the examination reports are available at the push of a button.

Notwithstanding plaintiff's intent to cross-examine the nonparties with the many transcripts that are already in her counsel's possession, disclosure of the reports and memoranda sought presents the dangers of delay and prolixity within this litigation. Even adopting plaintiff's somewhat tenuous assertion that the time and cost associated with the nonparties' preparation for trial would not be unduly burdened by the need to prepare to address each of the potentially hundreds of reports to be disclosed, and that the number of minitrials attendant to their cross-examinations would not be meaningfully increased, this court is presented with the very likely prospect of dozens of prior examinees, upon receiving notice of the disclosure of the reports that reveal their health information, filing motions to quash or for in limine relief with respect to the reports, especially from those whose litigation remains pending.

Relatedly, even if plaintiff's assertion that prior examinees enjoy no privilege or confidentiality in the health information included within or attached to their reports were true, it misses the mark. Disclosure of the health information in the reports would nonetheless be likely

to cause "embarrassment . . . to [such] person[s]" (CPLR 3103 [a]; *see Perez*, 122 AD3d at 1158-1159). It is apparent from the comments at oral argument from counsel for both parties that the vast majority of examination reports are not available for public consumption, and the proposition that prior examinees, many of whom may have shared secret and intimate details of their mental and medical histories with the nonparties, forfeit all privacy in these matters when they avail themselves of the courts to vindicate an injury that they have wrongfully received is anathema to common notions of fundamental fairness and justice.

Finally, plaintiff's need for the examination reports is not compelling enough to justify the foregoing substantial burdens that compliance with the subpoenas would present to the nonparties, the prior examinees and this court—the "cost/benefit analysis" weighs in favor of the nonparties (*Tener*, 89 AD3d at 81; *see Forman*, 30 NY3d at 662; *Perez*, 122 AD3d at 1158). For the nonparties' reasons stated above, it is questionable whether the contents of the reports will be as plaintiff speculates and, even if they are, whether that would be probative of bias. Further, as plaintiff tacitly concedes, the same inference of bias that may arise from the examination reports' contents may also arise from the contents of the financial reports that are subject to disclosure and plaintiff's counsel's "briefcase full of transcripts" which contain much of the same information that is sought in the reports. Thus, it may fairly be said that the subpoenas are directed at minimally relevant information. As such, the motion to quash the subpoenas as to the second class of documents should be granted and the cross-motion to compel compliance should be denied.

The third class of documents sought by the subpoenas—the title and location of the court and the docket number of each case for which the nonparties received payment for medical

examination services performed on behalf of insurance companies and defense attorneys for the years 2014 through 2020—received little treatment in the papers before the court or at oral argument. It appears that plaintiff seeks this information so as to obtain examination reports from counsel for prior examinees in the event that she cannot obtain them directly from the nonparties, which, in the court's view, raises many of the same concerns that lead it to quash the subpoena as to the second class of documents. It further appears that the nonparties claim that identifying and producing this information would present many of the same burdens that would be attendant to identifying and producing the examination reports. As such, the court deems it appropriate to quash the subpoena as to the third class of documents sought, except to the extent that such information may appear in the financial documents that are to be disclosed.

Turning, finally, to the nonparties' application for a protective order, the court directs the redaction of any personal identifying information of any natural person that appears within any record to be disclosed, including but not limited to such person's name, address, telephone number, date of birth, social security number, and any information that would reveal such person's medical or mental health condition. The court declines to order the parties to enter into a confidentiality or nondisclosure agreement with respect to the records to be disclosed, as redacted, but noting plaintiff's willingness to enter into such agreement, the parties and nonparties are free to explore that issue between themselves. In light of the foregoing, the court declines to impose the costs of compliance with the subpoenas upon plaintiff.

Any arguments not specifically addressed herein have been examined and determined to be without merit, or academic in light of the decision herein.

Based upon the foregoing, it is hereby

ORDERED that the motion of nonparties Robert McCaffrey, Ph.D. and Daniel Silverman, M.D., is granted to the extent stated herein and otherwise denied; and it is further

ORDERED that plaintiff's cross-motion is granted to the extent stated herein and otherwise denied.

The within constitutes the Decision and Order of this Court.

Signed this 18th day of October 2021, at Lake George, New York.

ENTER:

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

The court is filing the original decision and order, together with the original papers listed below, in the Warren County Clerk's Office. The court is also providing counsel for both parties with a copy of the decision and order; such delivery does not constitute service with notice of entry.

Distribution:

Donald P. Ford, Jr., Esq.
Paul H. Wein, Esq.
Keith M. Frary, Esq.

Beaudette v Infantino
Warren County
Index No. 60039

STATE OF NEW YORK SUPREME COURT
COUNTY OF WARREN

In the Matter of the Application of

VALENTINE PARK ASSOCIATION, INC.,

Petitioner,

For Judgment Pursuant to CPLR art 78

-against-

TOWN OF CHESTER ZONING BOARD OF APPEALS,

and

0 VALENTINE PARK, LLC,

Respondents.

DECISION AND ORDER

Index No.: EF2021-68873

APPEARANCES:

Bartlett, Pontiff, Stewart & Rhodes, P.C., Glens Falls (John D. Wright, of counsel), for petitioner.

Miller, Mannix, Schachner & Hafner, LLC, Glens Falls (Mark Schachner, of counsel), for respondent Town of Chester Zoning Board of Appeals.

Stockli Slevin, LLP, Albany (Mary Elizabeth Slevin, of counsel) for respondent 0 Valentine Park, LLC.

AUFFREDOU, J.

Petitioner Valentine Park Association, Inc. (hereinafter petitioner) brings this special proceeding pursuant to CPLR art 78 to review a determination of respondent Town of Chester Zoning Board of Appeals (hereinafter ZBA), rendered March 2, 2021, which granted certain setback and area variances to respondent 0 Valentine Park, LLC (hereinafter respondent) for the construction of a single-family residence on a certain parcel in the Town of Chester, Warren County.

Upon the court's review of the verified petition and the exhibits attached thereto; respondents' verified answers and the exhibits attached thereto; respondents' memoranda of law in opposition to the petition; and petitioner's reply memorandum of law in support of the petition; and the certified

administrative record; and the court having duly deliberated upon all the foregoing, decision is hereby rendered as follows.

Respondent owns a vacant parcel of real property approximately .46 acres in size, that is situated on a road known as Valentine Park Road in the Friends Lake area of the Town of Chester. Petitioner owns the road, which is used by its members—the other property owners in the Valentine Park development—to access their properties and Friends Lake. In an effort to construct a single-family home with a septic system and a well on the subject property, respondent sought a variance from zoning requirements that structures be set back 100 feet from the road frontage (the front yard setback) and 50 feet from the side boundaries of the parcel (the side yard setbacks)—specifically, it sought approval for a 50-foot front yard setback (50 feet of relief), a 23.9-foot side yard setback on the northeast sideline (26.1 feet of relief), and a 44.4-foot side yard setback on the southwest sideline (5.6 feet of relief). Respondent asserted to the ZBA that, absent the variance, the lot was not buildable and, thus, the variances were necessary to alleviate such hardship.

Petitioner presented the ZBA with arguments and evidence in opposition to granting the variance, claiming, in sum, that the high water table on the parcel—which it described as swampy wetlands (though not subject to regulation by the Adirondack Park Agency or the New York State Department of Environmental Conservation)—resulted in periods during any given year where there was standing water and surface water runoff. Petitioner asserted that the proposed structure would decrease the permeable surface area of the parcel, causing increased stormwater and high groundwater runoff to neighboring parcels, which could be contaminated upon placement of respondent's septic leach field within the saturated soils.

The ZBA thereafter referred the project to an engineer retained by the Town of Chester. The engineer's report contradicted petitioner's contentions to a degree, but made three recommendations in keeping with respondent's concerns regarding the high water table—that (1) the site plan be amended to show the location of a reserve area for the septic system; (2) additional soil percolation testing be done in the months of May or June, when the water table was highest (respondent's soil percolation test had been conducted in the month of January) and additional test pits be excavated in the primary and reserve septic absorption areas; and (3) stormwater be reevaluated to ensure that overland flow to adjacent areas was not an issue.

The application proceeded to a public hearing, after which the ZBA granted the application. The ZBA's determination is a two-page document in which it recited the balancing test required under Town Law § 267-b (3), purported to address the five factors enumerated therein and granted the variance that respondent requested. The determination adopted the second of the three recommendations of the town's engineer, but not the others, as a condition imposed upon the grant of the variance.

Petitioners now seek review of the ZBA's determination pursuant to CPLR art 78, claiming that such was arbitrary and capricious for a variety of reasons, including but not limited to that it largely ignored the town's engineer's recommendations and, as most relevant to this court's determination, failed to make factual findings in support of its conclusions with respect to the Town Law § 287-b (3) factors.

> "Pursuant to Town Law § 267-b (3), when determining whether to grant an area variance, a zoning board of appeals must weigh the benefit of the grant to the applicant against the detriment to the health, safety and welfare of the neighborhood or community if the variance is granted. The zoning board is also required to consider whether (1) granting the area variance will produce an undesirable change in the character of the neighborhood or a detriment to nearby

> properties; (2) the benefit sought by the applicant can be achieved by some method, feasible to the applicant, other than a variance; (3) the requested area variance is substantial; (4) granting the proposed variance would have an adverse effect or impact on physical or environmental conditions in the neighborhood or district; and (5) the alleged difficulty is self-created. While the last factor is not dispositive, it is also not irrelevant" (*Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 612-613 [2004] [internal citations omitted]).

Local zoning boards have broad discretion when considering applications for variances, and judicial review of their determinations "is limited to ascertaining whether the determination has a rational basis and is supported by substantial evidence" (*Matter of Hanson v Valenty*, 198 AD2d 598, 598 [3d Dept 1993]; *see Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613[2004]). While a zoning board is "not required to justify its determination with supporting evidence with respect to each of the five factors" (*Matter of Merlotto v Town of Patterson Zoning Bd. of Appeals*, 43 AD3d 926, 929 [2d Dept 2007]), meaningful judicial review "necessarily requires the zoning board to set forth in its determination the evidence it relied upon in reaching its conclusions" (*Matter of Hanson*, 198 AD2d at 598-599).

The ZBA's determination in this matter is "entirely conclusory with no attempt to correlate the evidence in the record to the [Town Law § 267-b (3) factors], or to indicate what evidence the [ZBA] acted upon in reaching its conclusion" (*Matter of Hanson*, 198 AD2d at 599). It recites the balancing test required under Town Law § 267-b (3) and the five factors enumerated therein, but offers no discussion of its application of the balancing test to the facts before it and cites no evidence to support its conclusions that "there would be no undesirable change produced in character of the neighborhood or a detriment to nearby properties"; "there is no feasible alternative to the variance that can provide a benefit if sought by the applicant"; "the

requested variance is substantial"; the variance would not have an adverse impact on the physical or environmental conditions in the neighborhood"; and "the alleged difficulty is self-created."

As such, this court deems it appropriate to hold its determination of the petition in abeyance and remit this matter to the ZBA to cure the defects in its determination (*Matter of Hanson*, 198 AD2d at 598-599). Insofar as petitioner concurs with the ZBA's findings that the variance is substantial and respondent's alleged difficulty is self-created, the ZBA's attention should be directed primarily to the remaining three factors, though the court encourages the ZBA to address all five factors in keeping with the statutory requirements.

Based upon the foregoing, it is hereby

ORDERED, that the petition is held in abeyance and the matter is remitted to the Town of Chester Zoning Board of Appeals for further proceedings not inconsistent with this court's decision; and it is

ORDERED that within 60 days of the date of this decision and order, the ZBA is to file a supplemental record with the court, setting forth its findings as directed herein, together with any amended or further resolution and supplemental or additional submissions. Upon receipt of the foregoing, petitioners are permitted to renew and supplement their petition within 30 days.

The within constitutes the decision and order of this court.

Signed this 10th day of September 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:

John D. Wright, Esq.
Mark Schachner, Esq.
Mary Elizabeth Slevin, Esq.

Matter of Valentine Park Assn., Inc.
Warren County
Index No. EF2021-68873

STATE OF NEW YORK SUPREME COURT
COUNTY OF WARREN

CLEARWATER LAKE RESTORATION ASSOCIATION, INC.,
Plaintiff,

-against-

GAIL M. BOGGIO and MICHAEL D. SHALHOUB,
Defendants/Third-Party Plaintiffs,

-against-

WOOD, SEWARD & MCGUIRE, LLP and JEREMIAH WOOD, ESQ., Individually,
Third-Party Defendants.

DECISION AND ORDER

Index No.: EF2019-67151

RJI No.: 56-1-2019-0520

APPEARANCES:

Wood, Seward, McGuire & Sacco, LLP, Gloversville (Jeremiah Wood, of counsel), for plaintiffs.

McCarthy Fingar, LLP, White Plains (Gail M. Boggio, of counsel), for defendants/third-party plaintiffs.

MARTIN D. AUFFREDOU, J.

Cross-motions by Plaintiff Clearwater Lake Restoration Association, Inc. (hereinafter plaintiff) and Defendants/Third-Party Plaintiffs Gail M. Boggio and Michael D. Shaloub (hereinafter defendants), seeking partial summary judgment and summary judgment, respectively. This action involves a covenant in deeds conveying title to parcels of land associated with a body of water now known as Clearwater Lake, in the Town of Horicon, Warren County, New York, that are identified on a subdivision map entitled "Map of Clear Water Lake Development Owned by Walter Grube, Brant Lake, Warren County, New York," made by Henry W. Watts, dated November 15, 1963, and filed with Warren County on November 15, 1968. Sometime in 1961, Clear Water Lake (as it was then known) was formed, apparently by Grube, by the installation of a sluice or rough wooden dam that partially stopped up a flow of water into nearby Brant Lake, causing waters to backfill into the

lowlands in the area (hereinafter "the 1961 dam"). Some parcels in the subdivision are upon the shoreline of Clear Water Lake (hereinafter "lakefront parcels") and some are set back off the lake, with lake use rights appurtenant to title (hereinafter "non-lakefront parcels"). The chain of title to each parcel may be traced back to Grube as common grantor, and each deed therein, including those at issue here, contains a covenant that states:

> "In the event that the parties of the first part convey title to the dam which controls the levels of the waters of Clear Water Lake to a membership corporation then in that event, the parties of the second part for themselves, their heirs and assigns, covenant and agree that they will become members of said membership corporation."[1]

Defendants first took title to a non-lakefront parcel within the subdivision in 1988, and thereafter acquired five other parcels—a non-lakefront parcel in 1993, a non-lakefront parcel in 1994, two lakefront parcels in 1996, and a lakefront parcel in 2003. Sometime in June 2004, the 1961 dam failed and was destroyed when the lake overflowed. The water drained out of Clear Water Lake, leaving only the stream from which it was formed.

On June 11, 2008, certain owners of parcels within the subdivision formed plaintiff—a not-for-profit corporation organized under the laws of the State of New York for the stated purposes of acquiring "all the rights necessary to restore and maintain the dam called 'Clearwater Lake Road Dam,'" title to the land "bordering on, contiguous to and adjacent to the said Dam," title to "the land lying adjacent to and lying under Clearwater Lake" and all the rights necessary to the maintenance of the road that serviced the subdivision, including title to the land on which the road is situated. Plaintiff's articles of incorporation declare that the owners of subdivision parcels that are subject to the above covenant are its members. Plaintiff's bylaws state that the funds necessary for it to carry out its purposes would be raised by levying assessments against its members.

On April 3, 2009, plaintiff acquired title to the land on which the 1961 dam once was, certain lands around it, the land where Clear Water Lake once was, and the land containing and surrounding the road. Sometime in mid-June 2009, plaintiff provided defendants with certificates of membership in the corporation, along with other documents related to corporate business, prompting defendants to repudiate membership by letter to plaintiff's secretary dated June 19, 2009. Therein, stating their disapproval of plaintiff's purposes and the means by which it meant to accomplish them, defendants advised plaintiff that they did "not intend in any way to be subject to the organization, or to participate in its rights, liabilities and obligations," though they intended to continue to exercise the rights deeded to them.

Thereafter, plaintiff assessed the costs of their planned restoration to their purported members—defendants' share being $20,000.01—constructed a new dam and cleared lands for the re-formation of the lake, which they then called Clearwater Lake. Defendants allege, and it does not appear to be in dispute, that plaintiff also undertook certain other improvements on the other lands that it acquired, including the road. Defendants refused to pay. However, plaintiff credited defendants with the payment of $7,500 toward the assessment. The documentary proof before the court demonstrates that this payment, made on or about December 5, 2018 "for the Clearwater work + road maintenance," was made to an individual named Mark Sanantonio, who was apparently a member but was neither an incorporator nor an officer of plaintiff. On April 1, 2019, plaintiff invoiced defendants for the remaining $12,500.01, which remains unpaid.

Hence, on August 23, 2019, plaintiff commenced this action for declaratory judgment and money damages. Specifically, plaintiff seeks a judgment declaring that defendants are among its

[1] The covenants that appear in the various deeds contain certain grammatical differences that do not impact their material terms.

members and owe the remainder of the assessment to it as such; and judgment awarding it $12,500.01 on the grounds of unjust enrichment. Defendants joined issue on September 23, 2019 by submitting an answer. Therein, they raised six affirmative defenses to plaintiff's causes of action—the complaint fails to state a cause of action; plaintiff's claims are barred by laches, waiver and estoppel; two theories upon which they assert that documentary evidence establishes a factual defense to the claims; plaintiff's expenditures were beyond the scope of authority granted to it in the covenants, if any; and plaintiff's claims are barred by the statute of limitations. Defendants also interposed eight counterclaims against plaintiff. The first six counterclaims seek declaratory judgment that defendants are not members of plaintiff and are not obligated to pay its assessments, one counterclaim being addressed to each of the six parcels that defendants own. The seventh counterclaim asserts that plaintiff, its president, its counsel and counsel's law firm violated the Federal Fair Debt Collection Practices Act (FDCPA) (15 USC § 1692 *et seq.*) in their attempts to collect the assessment. Similarly, the eighth counterclaim asserts that plaintiff, its president, its counsel and counsel's law firm violated the New York Debt Collections Procedures Act (NYDCPA) (General Business Law art 29-H) in their attempts to collect the assessment. Both parties seek costs.

Plaintiff replied to the answer on October 14, 2019, asserting affirmative defenses to the counterclaims. As against defendants' first six counterclaims for declaratory judgment, defendant asserted that such are barred by ratification, estoppel and waiver by virtue of defendants' partial payment. They asserted five affirmative defenses against defendants' counterclaim for relief under the FDCPA—that plaintiff and third-party defendants are not debt collectors under federal law; plaintiff is not a creditor under federal law; the assessment was not a consumer debt under federal law; the counterclaim was made in bad faith for the purposes of harassment, and plaintiff and third-

party defendants should therefore receive an award of attorney fees; and the counter claim is frivolous and sanctions should therefore be imposed upon defendants. Plaintiff also asserted five affirmative defenses as to the counterclaim under the NYDCPA—that plaintiff's claim is not a consumer claim within the meaning of the law; plaintiff is not a creditor within the meaning of the law; defendants are not debtors within the meaning of the law; defendants are not aggrieved persons under the law because it does not provide for a private right of action; and the counterclaim is frivolous and sanctions should therefore be imposed upon defendants.[2]

Defendants now move to dismiss, and for summary judgment dismissing, both of plaintiff's causes of action on the grounds of failure to state a claim; statute of limitations, laches, waiver and estoppel; and failure to comply with discovery demands. Defendants also seek attorney's fees, and certain other relief related to the purported discovery violations. Plaintiff opposes the motion and cross-moves for partial summary judgment granting it relief under its first cause of action seeking a declaration that defendants are its members and thus obligated to pay the assessment. Defendants have filed a reply affirmation in support of its motion and in opposition to the cross-motion. Neither party has directly addressed the counterclaims or the affirmative defenses thereto.

Upon the court's review of all the aforesaid papers, including all the exhibits attached thereto and all memoranda of law submitted therewith by both parties; the court having heard oral argument on the motion on January 29, 2021; and the court having duly deliberated upon all the foregoing, decision is hereby rendered as follows.

On a motion for summary judgment, the movant bears the initial burden to demonstrate

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[2] At some point in 2020, defendants commenced a separate action against plaintiff's counsel and counsel's law firm in Westchester County, in which they asserted the same or substantially the same claims as were raised in their seventh and eight counterclaims. This court ordered consolidation of said action with this action on January 4, 2021 and all such matters are now pending herein.

entitlement to judgment as a matter of law (*see Dibartolomeo v St. Peter's Hosp. of City of Albany*, 73 AD3d 1326, 1326 [3d Dept 2010]). If this burden is met, the burden shifts to the opponent of the motion to demonstrate that a triable issue of fact exists (*see id.*). The court has the authority to search the record and grant summary judgment to a nonmoving party (*see Digesare Mech., Inc. v U.W.Marx, Inc.*, 176 AD3d 1449, 1455 [3d dept 2019]). On a motion to dismiss on statute of limitations grounds, the movant must first establish that the limitations period has expired, shifting the burden to the opponent of the motion to show that the limitations period was tolled, otherwise inapplicable, or that the action was timely commenced (*see Gurecki v Gurecki*, 189 AD3d 1729, 1730 [3d Dept 2020]).

It is undisputed that defendants repudiated the covenant, any obligation to become a member of plaintiff and any obligation attendant to such membership by letter dated June 19, 2009. Defendants attached a copy of the letter and proof that it was served upon plaintiff's secretary by certified mail with return receipt on June 22, 2009 as Exhibit 2 to their answer. Plaintiff has neither questioned the bona fides of these documents nor controverted the factual proof they contain.

A cause of action to enforce an affirmative covenant the terms of which do not specify a time for completion of the obligations therein accrues upon the refusal of the servient estate's owner to perform the obligation (*see Shea v Signal Hill Rd. LLC*, 172 AD3d 1604, 1607 [3d Dept 2019], *lv dismissed* 34 NY3d 1038 [2019]; *Rivemont Farms, LLC v Northeast Solite Corp.*, 46 AD3d 1170, 1171-1172 [3d Dept 2007]; *Concklin v New York Cent. & Hudson R.R. Co.*, 149 App Div 739, 744 [2d Dept 1912], *lv dismissed* 207 NY 752 [1913]). Similarly, a cause of action in unjust enrichment accrues upon the commitment of the wrongful act from which a claim of

restitution arises (*see Boardman v Kennedy*, 105 AD3d 1375, 1376-1377 [4th Dept 2013]; *Elliott v Qwest Communications Corp.*, 25 AD3d 897, 898 [3d Dept 2006]). Thus, these causes of action accrued no later than June 22, 2009, upon plaintiff's receipt of defendants' refusal to become members or accept obligations attendant to membership. A six-year statute of limitations applies to both claims (*see* CPLR 213 [1]; *Shea*, 172 AD3d at 1607; *Rivemont Farms, LLC*, 46 AD3d at 1171; *Elliott*, 25 AD3d at 898; *Boardman*, 105 AD3d at 1376).

Thus, the court finds that these claims, interposed on August 23, 2019, are time-barred unless the statute of limitations ran anew upon defendants' payment of $7,500 on December 5, 2019, as plaintiff argues.[3] The partial payment exception to the statute of limitations, if proven, "has the effect of extending or renewing the statute of limitations period" (*McNeary v Charlebois*, 169 AD3d 1295, 1296 [3d Dept 2019]). To establish that this exception is applicable, plaintiff is required to show that "'there was a payment of a portion of an admitted debt, made and accepted as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder'" (*id.* at 1297, quoting *Lew Morris Demolition Co. v Board of Educ. of City of N.Y.*, 40 NY2d 516, 521 [1976]).

Defendants attached copies of the cancelled check to Sanantonio and the handwritten note to him with which it was conveyed as Exhibit 1 to their reply. The bona fides of these documents have not been challenged and the import of their contents is plain. Moreover, the circumstances surrounding defendants' provision of the documents to Sanantonio are not meaningfully disputed. As such this question is ripe for decision as a matter of law.

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[3] The court notes that plaintiff's arguments respecting the statute of limitations challenged neither the asserted accrual date nor the application of a six-year limitations period.

Certainly, there is no dispute that plaintiff ultimately received the $7,500 from defendants via Sanantonio and credited it to their assessment against defendants. Nor is there any question that defendants' payment of these monies was "for the Clearwater work + road maintenance," but these are not the relevant questions. Rather, the relevant questions are whether defendants admitted their debt to plaintiff by making the payment, and whether the payment constituted an "'absolute and unqualified acknowledgment by [defendants] of more being due, from which a promise may be inferred to pay the remainder'" (*McNeary*, 169 AD3d at 1297, quoting *Lew Morris Demolition Co.*, 40 NY2d at 521).

The $7,500 was paid directly to Sanantonio, who was neither an incorporator nor an officer of plaintiff. The note that accompanied the check indicates that the payment was made to Sanantonio, not plaintiff, and there is no allegation or indication that Sanantonio was acting on behalf of plaintiff, or that defendants believed him to be so acting. As such, the payment cannot be viewed as defendants' acknowledgement of debt to plaintiff. Further, even if it could be inferred that defendants' payment to Sanantonio toward the dam and roadwork was an admission of debt to plaintiff, such admission would be limited to a $7,500 share of the expenditures made toward those projects and would still not constitute an admission of defendants' membership in plaintiff, particularly in light of defendants' June 19, 2009 letter in which they plainly and unambiguously disavowed membership in plaintiff and any obligation to it, and stated their disapproval of many of the purposes for which the $20,000.01 assessment was levied. Nothing about the payment suggests defendants' absolute and unqualified acknowledgement of an obligation to become members of plaintiff or an obligation to pay an additional $12,500.01 to it, such that a promise to pay these additional monies may be inferred. Accordingly, the court finds

that the statute of limitations period expired on June 22, 2015 and plaintiff's claims are time-barred (*see* CPLR 213 [1], 3211 [a] [5]; 3212; *Lew Morris Demolition Co.*, 40 NY2d at 521; *Shea*, 172 AD3d at 1607; *McNeary*, 169 AD3d at 1296-1297; *Boardman*, 105 AD3d at 1376; *Rivemont Farms, LLC*, 46 AD3d at 1171-1172; *Elliott*, 25 AD3d at 898; *Concklin*, 149 App Div at 744; *cf. Hon Fui Hui v East Broadway Mall, Inc.*, 4 NY3d 790, 791 [2005]). It is, therefore, hereby

ORDERED and ADJUDGED that defendants' motion is granted, plaintiff's cross-motion is denied, the complaint is dismissed, and plaintiff's first six affirmative defenses in reply are dismissed; and it is further

ORDERED and ADJUDGED that judgment is awarded to defendants upon their first six counterclaims; and it is further

ORDERED and ADJUDGED that defendants are entitled to costs of the action and defendants are directed to file a bill of costs; and it is further

ORDERED and ADJUDGED that defendants' application for attorney fees is denied.

The foregoing determination renders the remainder of the claims raised in these cross-motions academic.

The within constitutes the decision and order of this court. The court notes that the counterclaims alleging violations of the FDCPA and NYCDPA, as well as the five affirmative defenses in reply that plaintiff interposed as to each such claim, remain extant. The court directs that a conference will be held to discuss the remaining claims and will reach out to the parties to schedule same in the near future.

Signed this 24th day of August 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]).

Papers considered:

Defendants' notice of motion, the affidavit of Gail M. Boggio, Esq. in support of the motion, all the exhibits attached thereto, and a memorandum of law in support of the motion, all of which is dated January 7, 2021;
Plaintiff's notice of cross-motion, the affidavit of Jeremiah Wood, Esq. in support of the cross-motion dated December 8, 2020, the affidavit of Frank Yunker in support of the cross-motion dated November 25, 2020 and all the exhibits attached thereto, and a memorandum of law in support of the cross-motion dated December 8, 2020;
The affidavit of Gail M. Boggio, Esq. in opposition to plaintiff's cross-motion and further support of defendants' motion for dismissal and/or summary judgment dated January 26, 2021, and all the exhibits attached thereto (heretofore referred to as defendants' reply);
The reply affidavit of Frank Yunker dated January 14, 2021; and
A transcript of oral argument held January 29, 2021.

Distribution:

Jeremiah Wood, Esq.,
Gail M. Boggio, Esq.,
David B Cabaniss, Esq.

Clearwater v Boggio
Warren County
Index No. EF2019-67151

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

CPLR Article 16 and 4th Grade Math

Hon. Mark C. Dillon *

Thank goodness for 4th grade math class. It provides the foundation for computations that are made by attorneys and judges each day for determining proportional shares of liability under CPLR Article 14, collateral source set-offs under CPLR 4545(c), statutory interest additions under CPLR 5001-5003, marital shares of property and QDROs under DRL 236(B), and of course, the all-important value of one-third contingency fees. All are simple additions, subtractions, or percentages. We leave the complications of algebra and calculus to the MBAs.

But there is one provision of the CPLR, section 1601, where 50% does not necessarily mean 50%. CPLR 1601(1) provides that when a claim for personal injury is determined against two or more joint-tortfeasors, and the liability of a defendant is found to be "50% or less" of the total liability assessed against all persons liable, that defendant's liability for non-economic loss (e.g. past and future pain and suffering, loss of enjoyment of life) shall not exceed its own equitable share of the total culpability. The statute acts as a cap upon a qualifying defendant's liability, to protect parties liable for a "minor" percentage of culpability from paying a much larger percentage of the *non*-economic loss damages. Economic loss calculations are unaffected. There are some major exceptions, as CPLR Article 16's limitations of liability do not apply to administrative proceedings, workers' compensation claims, intentional and reckless torts, actions involving the use of automobiles, and other boutique carve-outs (CPLR 1602[1]-[14]).

Along came *Robinson v June* at the Supreme Court, Tompkins County, in 1996 (167 Misc.2d 483). The case involved a physical altercation at Poor Richard's Saloon, where the plaintiff commenced an action against the saloon for negligent security at the premises and violations of the Dram Shop Act, and against defendants June and Norman for the intentional tort of battery. A jury, upon hearing the evidence of the plaintiff's unfortunate beat-down, found the saloon to be 50% liable, the individual defendants 45% liable, and the plaintiff, not being entirely innocent in the sordid affair, 5% contributorily negligent. The court held that the various defendants were jointly liable, and that since defendants June and Norman were liable for intentional torts, they were not entitled to the limitations of liability under CPLR 1602(5).

The saloon in *Robinson* argued that since it *was* found 50% or less negligent from among all persons liable, it was entitled to the CPLR 1601 limitations of liability. The saloon was presumably the only defendant with a deep pocket insurance policy, and without the limitations of liability under CPLR 1601, it would otherwise be required to pay 95% of the plaintiff's damages, subject to contribution from the individual defendants who presumably had no assets. But not so fast. Recall, the jury found that the plaintiff was 5% contributory negligent. CPLR 1601 applies its statutory limitations of liability to tortfeasors "jointly liable." The plaintiff, while 5% contributory negligent, was not a tortfeasor "jointly

liable" to himself and would not enforce payment of 5% of the damages to himself. Therefore, if the plaintiff's 5% contributory negligence is eliminated from the statutory calculation, the liability of the defendants is no longer 50% and 45%, but must be "extrapolated" to a scale of 100%. Doing the math, the saloon's proportional liability of the joint defendants' liability was actually 52.63% on a 100% scale, and the individual defendants' proportional liability was 47.37%. The saloon's liability among the joint tortfeasors increased from 50% to 52.63% on a 100% basis, rendering the saloon *ineligible* for the limitations of liability under CPLR 1601, as its percentage of extrapolated liability was no longer "50% or less." Thus, in this context, 50% did not mean 50%, and instead meant 52.63%, notwithstanding what was taught in 4th grade math.

Robinson v June was never appealed, but a case from the First Department lends appellate credence to its mathematical approach upon eliminating the plaintiff's contributory share (*Risko v Alliance Builders Corp*., 40 AD3d 345 [2007]). Extrapolating percentages of liability seems to be legally correct, when applicable, in deducting the plaintiff's percentage of contributory negligence from the overall calculations.

In the end, the unavailability of the limitations of liability under CPLR Article 16 might have made Poor Richard's Saloon all the bit poorer.

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*Mark C. Dillon is a Justice of the Appellate Division, 2nd Dept., an Adjunct Professor of New York Practice at Fordham Law School, and 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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Damages in death case not limited to economic loss of survivors.

Hauser v. Fort Hudson Nursing Center, Inc. (Garry, P.J., 12/23/21)

Damages in most death cases in New York are limited to injuries to the decedent *before* death (EPTL 11-3.3(a)) and the pecuniary (economic) losses of surviving family members resulting from the death (EPTL 5-4.3(a)). Here, plaintiff's decedent lived at the defendant's residential health care facility for a few months before he died, after which an action was brought alleging, among other claims, negligence, conscious pain and suffering, wrongful death and violations of Public Health Law §§ 2801-d and 2013-c. Supreme Court (Muller, J., Washington Co.) denied the defendants' motion in limine which sought to preclude any claim for damages to the decedent for his "death", and the Third Department affirmed, finding that "the express language" of PHL § 2801-d makes a nursing home liable to a patient for certain injuries which by definition include "death of a patient". As such, said the Appellate Division, any other interpretation of the law would detract from "the statute's overall goal of deterring nursing homes from depriving patients of their rights".

"Co-employee" defense sinks police officer's injury action.

Ferretti v. Village of Scotia (Colangelo, J., 12/9/21)

Plaintiff, a Town of Glenville police officer responding to a domestic incident, was struck in the abdomen by a bullet fired from the gun of another cop (employed by the defendant Village). Scotia police assisted on the call pursuant to a "mutual aid" agreement entered into by the municipalities 10 years earlier. Supreme Court (Buchanan, J., Schenectady Co.) denied the Village's motion for summary judgment but the Third Department reversed and dismissed plaintiff's complaint. General Obligations Law § 11-106(1) permits negligence actions by a police officer for injuries "against entities other than municipal employers and fellow workers" but the Appellate Division concluded the statute did not apply as the plaintiff and the Scotia police officer were acting as co-employees at the time of the response to the domestic incident.

Labor Law § 240(1).

Eherts v. Shoprite Supermarkets, Inc. (Lynch, J., 11/24/21)

Called to the defendant supermarket on New Year's Day to investigate the cause of the store's low/no water pressure, the plaintiff (a plumber) needed to climb a ladder into order to step onto a shelving unit and a meat cooler in order to reach and shut off the hot water heater. When the shelf detached from the wall, plaintiff fell and was injured. Defendant's motion for summary judgment (arguing that plaintiff was performing "routine maintenance" not protected by Labor Law § 240(1)) was denied by Supreme Court (Meddaugh, J., Sullivan Co.), as was plaintiff's motion for partial summary judgment. The Third Department affirmed the former and reversed on the latter, concluding that plaintiff was "engaged in repair work at the time of the accident and fell due to a defective safety device".

Russo v. Van Dale Properties, LLC (Egan, J.P., 12/23/21)

Plaintiff, a machine equipment operator whose employer operated out of property leased from defendant, was injured when a damaged overhead door suddenly closed on him, after a co-worker manipulated the door with a crowbar. Supreme Court (Cahill, J., Ulster Co.) granted plaintiff's motion for summary judgment on liability under Labor Law § 240(1), which the Third Department affirmed. Although the defendant retained the responsibility to make certain repairs to the property, the leasing employer was permitted to make emergency repairs, it was "undisputed that the door had been so damaged by an accident earlier that day", and there was no question that a safety device should have been used to prevent the door from falling while it was being fixed.

Capuzzi v. Fuller (Aarons, J., 12/23/21)

Supreme Court (Fisher, J., Ulster Co.) denied the defendant property owner's motion for summary judgment, which relied on the exemption in Labor Law §§ 240 and 241(6) for homeowners "who contract for but do not direct or control the work". Plaintiff, injured when he fell some 14 feet while installing floor joists across the span of a concrete foundation, contended that the defendant discussed work orders, materials and architectural drawings and even took part in some of the on-site activities (moved rocks and applied tape to plywood). The Third Department reversed and dismissed the complaint in its entirety, finding it critical that "there was no evidence indicating that defendant directed plaintiff on how to install the floor joists or to climb on them as part of the installation process".

Slip-and-fall plaintiffs survive SJ motions.

Buckley v. 18 East Main Street, LLC (Pritzker, J., 11/24/21)

Defendant Monroe Mechanical Services was hired by the defendant gas station owner to remove and replace underground gas tanks. Plaintiff alleged she fell and injured her ankle when she stepped on a stone while walking on the sidewalk next to the gas station. The contractor's vice-president testified that workers installed a temporary fence designed, in part, to prevent stones and debris from spilling onto the sidewalk and that the sidewalk was cleared at the end of every work day. Supreme Court (Slezak, J., Montgomery Co.) granted Monroe's motion for summary judgment but the Appellate Division reversed, finding plaintiff's testimony about the rock that caused her fall – even without "direct evidence that defendant caused that particular rock to be on the sidewalk" – was enough to create a question of fact allowing the action to go forward.

Telesco v. Smith (Lynch, J., 12/2/21)

Plaintiff operated an auto painting and repair business in defendant's building- in which the sole bathroom had (only) an exterior entrance. Plaintiff claimed that while en route to the bathroom; he slipped and fell on a patch of ice near the downspout of a gutter that emptied into the seams of the exterior walkway (which had become covered with a "dusting" of snow). Supreme Court (Mott, J., Ulster Co.) denied the property owner's motion for summary judgment and the Third Department affirmed. While the defendant satisfied its prima facie burden showing that a storm was in progress at the time plaintiff fell, there was enough evidence (including expert affidavits from a meteorologist, architect and gutter installer along with a post-accident photo of the fall location) to show triable issues of fact.

Liability judgment affirmed in ambulance collision claim.

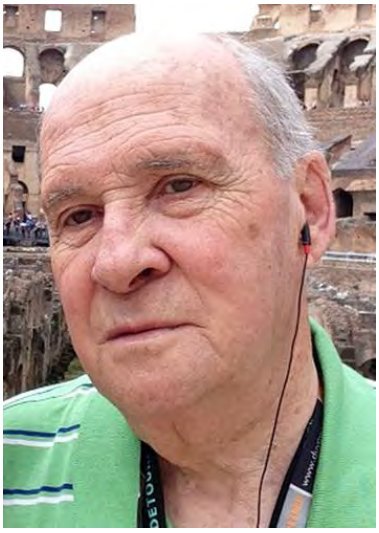
Kreis v. Kiyonaga (Reynolds Fitzgerald, J., 12/2/21)

Plaintiff, injured when the ambulance in which she was being taken to the hospital collided with defendant's car, successfully moved in Supreme Court (Ryba, J., Albany Co.) for summary judgment on liability. Affirming, the Third Department noted proof that the ambulance (facing a red light) stopped and slowly traveled through the intersection with emergency lights and sirens activated, supporting plaintiff's claim that defendant's conduct established a "negligence per se" violation of Vehicle & Traffic Law § 1144. Defendant's testimony that she did not see or hear the ambulance prior to impact did not

create an issue of fact that the accident was caused by an unforeseen emergency.

IN MEMORIAM

Joseph R. Brennan, Esq.
March 15, 1942-March 8, 2022



QUEENSBURY — Joseph R. Brennan, 79, died Tuesday, March 8, 2022 at Glens Falls Hospital. He was born in Mineville, NY on March 15, 1942.

After graduating from Clarkson University and Albany Law School, he was a Special Agent with the FBI and Assistant U.S. Attorney. He was an attorney in private practice in Glens Falls from 1974 until his death.

Survivors include his wife of 53 years Faye (Kozloski); daughters: Caitrin Navarro MD of Delmar, Colleen (C John) Thorndike of Newbury Park CA, Erin Brennan of NYC, and Bevin Brennan of Chicago; grandchildren: Brendan, Ava and Padraig Navarro, Abigail and Ryan Thorndike, Archer, Vivienne and Tobin Caltabiano; also survived by a brother William J. (Patricia) Brennan DDS of NH (formerly of Ticonderoga and Hague).

In lieu of flowers, please donate to Open Door Mission, North Country Ministry or St. Jude's Research Hospital. For those who wish, online condolences may be made to the family by visiting www.sbfuneralhome.com.

***All information taken from The Post Star, March 10, 2022**

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WARREN COUNTY BAR ASSOCIATION
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May 1, 2022