To be Argued by: Michael J. Longstreet, Esq.
Time Requested: 15 Minutes

STATE OF NEW YORK

COURT OF APPEALS

APL 2019-00222

HERKIMER COUNTY INDUSTRIAL DEVELOPMENT AGENCY,

vs. *Plaintiff-Appellant,*

THE VILLAGE OF HERKIMER,

and *Defendant-Respondent,*

THE COUNTY OF HERKIMER,

Defendant.

Action No. 1 - Herkimer County Index No.: 2005-83144

HERKIMER COUNTY INDUSTRIAL DEVELOPMENT AGENCY,

vs. *Petitioner,*

THE VILLAGE OF HERKIMER and JOHN SPANFELNER
As Codes Officer for THE VILLAGE OF HERKIMER,

Respondents.

Action No. 2- Herkimer County Index No.: 2016-102231

Appellate Division Docket Number: CA 18-01072

BRIEF FOR RESPONDENTS

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PRELIMINARY STATEMENT

In Action No. 1, Herkimer County Industrial Development Agency (HCIDA) has appealed from the Memorandum and Order of the Appellate Division, Fourth Judicial Department, entered August 22, 2019. The Memorandum and Order adjudged and declared that:

> "plaintiff Herkimer County Industrial Development Agency is liable to defendant Village of Herkimer for the subject unpaid water rents."

RELATED LITIGATION.

In Action No. 2, the Appellate Division concluded that HCIDA was improperly granted a writ of prohibition in a code enforcement action concerning the same properties. The writ had enjoined the Village and its Code Enforcement Officer from enforcing the Uniform Fire Prevention and Building Code against HCIDA. HCIDA has not appealed that portion of the Memorandum and Order.

After the Memorandum and Order of the Appellate Division, another code enforcement Citation was issued by the Village of Herkimer and its Code Enforcement Officer against HCIDA and its controlling officers regarding the same properties. We anticipate that an enforcement proceeding regarding violations of the "Property Maintenance Law of the Village of Herkimer" will be commenced during the pendency of this appeal.

QUESTIONS PRESENTED.

1. Is HCIDA the property owner?

2. Is HCIDA liable for the water rents?

STATEMENT OF FACTS.

A. Ownership and Water Rents.

On November 3, 1988, HCIDA accepted ownership of a large industrial complex owned by H.M. Quackenbush[1], located on Main Street in the middle of the Village of Herkimer downtown . (177) As part of the transaction, the parties executed a wide range of documents relating to the sale, including a Warranty Deed and a Lease. (57-285)

Between 2004 and 2005, water rents were incurred that were not paid. (348-50) Because the water bills were not paid, the Village included the amounts in the annual tax levy and turned them over to Herkimer County in both 2004 and 2005, which appeared to be required by RPTL 1442. (352-54) Herkimer County reimbursed the Village for the 2004 charges, but questioned the levy in February, 2005. (351) In March, 2005, Quackenbush filed a Petition in Bankruptcy, which ultimately lead to a Chapter 7 liquidation in bankruptcy. (344) HCIDA filed this

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[1]H.M Quackenbush invented and produced, among other things, a spring-jointed nutcracker and a nutpick. The designs are still in wide use today.

action against the Village of Herkimer and the County of Herkimer in September, 2005, seeking a declaration that two levies were void. (43-48)

B. Prior Motions and Appeals.

In December, 2008, the Village moved for summary judgment. (345, 352-54) The lower court granted summary judgment in favor of the Village and denied the County's motion to amend its Answer. (345) Then, the Appellate Division, by decision dated May 6, 2011, allowed the County's motion to amend its complaint to allege that it properly cancelled the tax lien. (352-54) Herkimer County thereafter cancelled the tax lien, pursuant to RPTL 1138. (345)

Because the tax lien was cancelled, the Village of Herkimer billed HCIDA for the water charges and amended its answer to allege that the HCIDA owed the amounts due. (49) The Village of Herkimer chose not to seek *in rem* relief against the dilapidated property.

The County and Village then moved for summary judgment. (345) The lower court, in a written opinion, granted the relief requested by the County. (355-61) The lower Court also dismissed the Village's Counterclaim against the IDA, in the absence of a cross motion by the IDA. (355-61) The Appellate Division, in an opinion dated January 2, 2015, affirmed the relief granted to the County, but found that this Court erred in dismissing the Village's counterclaim against plaintiff, that

alleged that the IDA is responsible for the unpaid water rents as owner of the property. (362-64)

After discovery, HCIDA moved for summary judgment dismissing the Counterclaim. (35) The Village of Herkimer cross-moved for summary judgment on the issue of liability. (343)

C. Opinion of Special Term.

The lower court, in Special Term, issued a written decision dated February 28, 2018. (25-34) On the issue of ownership of the property, Special Term found that HCIDA was the owner. (25-34) Special Term also found that HCIDA is liable for the water rents that accumulated at the property. (25-34)

D. Memorandum Opinion of Appellate Division, Fourth Department.

The Appellate Division issued its opinion on August 22, 2019. The Court found that HCIDA consented to the tenant's use of the water in its building at a time when the existing law imposed liability on property owners for municipal water service, "thereby giving rise to an implied contract for such service between HCIDA and the Village" (citing Dunbar v. City of New York, 177 App. Div. 647, *affd* 223 N.Y. 597, *affd* 251 U.S. 516). The Court also found that HCIDA was the owner of the property for the purpose of liability for water rents (citing Adimey v. Erie County Indus. Dev. Agency, 89 N.Y.2d 836, *mod for the reasons stated in dissenting in part mem* 226 A.D.2d 1053).

Two justices of the Appellate Division dissented, in part. The dissenting opinion disagreed with the majority's conclusion that HCIDA should be liable for the water rents. The dissent did not challenge the majority's conclusion that HCIDA owned the property.

This appeal has ensued. (20-24)

ARGUMENT.

I. HCIDA OWNS THE PROPERTY.

The primary argument of HCIDA was succinctly made below in its Attorney's Affirmation:

> " **although HCIDA was named as owner of the Quackenbush property, it never held actual title to the property**" (41).

Special Term and the Appellate Division unanimously rejected the argument. We submit that HCIDA's decade and a half denial of all responsibility for this property has been completely unjustified. It is also submitted that there is no basis to grant broad new legal protections to Industrial Development Agencies.

A. THE APPELLATE DIVISION PROPERLY DETERMINED THAT HCIDA OWNS THE PROPERTY.

The "ownership" issue presented in this case was previously resolved by this Court in Adimey v. Erie County Indus. Dev. Agency, 226 A.D.2d 1053, *aff'd.* as *mod.* 89 N.Y.2d 836 (1996). In Adimey, *supra*, the Appellate Division and this Court considered the liability of an IDA as title owner of the property where a

worker was injured. The majority in the Appellate Division, citing Collins v. County of Monroe Indus. Development Agency, 167 A.D.2d 914, adopted the arguments that the HCIDA is making in this action. Specifically, the majority of the Appellate Division held that a sale and lease-back transaction between the fee owner and an IDA was not a "genuine allocation of ownership". (Adimey, 226 A.D.2d 1053) Instead, the Appellate Division majority found that the IDA "served only as a conduit for the tax benefits derived by such an arrangement. It assumed no risk of loss and had no opportunity for gain." (Adimey, 226 A.D.2d 1053) The Appellate Division majority then concluded that the tenant was the true owner. (Adimey, 226 A.D.2d 1053) The Appellate Division majority found that the sale and lease back transaction amounted to no more than a financing mechanism; it was "not a genuine allocation of ownership in the agency" (Adimey, 226 A.D.2d 1053). According to the Appellate Division majority, the IDA served only as a conduit for the tax benefits derived by such an arrangement. (Adimey, 226 A.D.2d 1053)

This Court in Adimey, *supra,* modified the order of the Fourth Department "for the reasons stated in the dissenting opinion by Justice Schnepp". (Adimey, 89 N.Y.2d at 836) In doing so, the Court of Appeals rejected the reasoning of the Appellate Division majority opinion. Justice Schnepp's dissenting opinion was simple and direct:

> If an exception is to be made for "pass-through" owners like defendant, then such a change must be made by the Legislature. **ECIDA, as a public entity that owns the land, accepts the advantages and disadvantages associated with that ownership.** (Adimey, supra at 226 A.D.2d 1053 [emphasis supplied])

Consequently, all of the findings of the majority opinion in the Appellate Division were rejected and are no longer good law. (Adimey, 89 N.Y.2d 836) The legal fictions sought to be employed by HCIDA in this case, such as "mere conduit", "non-beneficial ownership", "no real interest in title", "conduit financing" and "financing vehicle", were all rejected in favor of the traditional property law concept of responsibility of ownership. (Adimey, *supra* at 226 A.D.2d 1053) The law in this state on the issue is now resolved, legal fictions are not to be applied to relieve an IDA from liability; IDA ownership is actual ownership. (Id.)

HCIDA attempts to distinguish Adimey, *supra*, by claiming that it is limited to liability under the Labor Law. In making this argument, HCIDA ignores the important point made by Justice Schnepp's dissenting opinion in the Appellate Division. The dissenting opinion cited the companion case of Spring Sheet Metal & Roofing Co. v. County of Monroe Indus. Dev. Agency, 226 A.D.2d 1064 as another example of the benefits IDAs receive from ownership of property. (Adimey, *supra* at 1054) Spring Sheet Metal & Roofing Company, Inc., *supra*, involved a mechanic's lien on IDA "owned" property. Because the IDA owned the property, the Court held:

> "The Lien Law does not permit the filing of a mechanic's lien against a project on publicly owned land even where, as here, it is leased to a private entity to be used for a private purpose." (*Id.* at 1065)

This argument that Adimey is limited to labor law cases ignores the fact that the consequences of the decision to own property involves both advantages and disadvantages.

HCIDA, in its Brief, has focused on supposedly unacceptable obligations that come along with ownership of real property. The documents executed by HCIDA and Quackenbush, however, demonstrate that the parties knew exactly what they were doing when the transaction was consummated. The deed to the property unconditionally transferred fee simple absolute ownership to HCIDA. (177-89) The Lease Agreement between HCIDA and Quackenbush contained contractual protections for HCIDA (191-260); however, there was no reversion in the deed. (177-89) In paragraph 6.1, the tenant agreed to indemnify HCIDA from all claims. (228) In paragraph 6.3, the tenant agreed to pay, all governmental charges that may be assessed against the facility and all utility and other charges imposed with respect to the operation and use of the facility "**as if the Company and not the issuer were the owner of the Facility . . .**". (228-29) Clearly, HCIDA and its tenant drafter knew about the responsibilities of ownership, i.e., that the water charges could be assessed against the owner of the facility. In the

lease, the tenant agreed to pay the water charges on HCIDA's behalf, and HCIDA was satisfied with that arrangement at the time. (228-29)

Unfortunately for HCIDA, when its tenant went bankrupt, the "owner's" contractual protections in the Lease Agreement evaporated. HCIDA could have contractually protected itself from liability from water bills in other ways, like requiring water deposit and escrow from its tenant, but did not. HCIDA's problem is that it entered into a lease with a company that went bankrupt. Its choice not to adequately protect itself or mitigate the risk in the event of a bankruptcy was voluntarily taken. There is no valid reason to now readjust HCIDA's legal responsibilities.

B. HCIDA IS PRECLUDED FROM DENYING OWNERSHIP.

In its motion papers below, HCIDA claimed that it owned nothing more than an "equitable mortgage" and that it never held "actual title". (41) It is submitted that HCIDA is precluded from denying ownership.

Issue preclusion may be applied in a subsequent proceeding to foreclose a party from relitigating, where an issue was determined in a prior proceeding against one of the parties to the subsequent proceeding. (Schwartz v. Public Adm'r of Bronx County, 24 N.Y.2d 65) There is no reason in policy or precedent to prevent the 'offensive' use of a prior judgment. (B. R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141)

Here, HCIDA commenced an Adversary Proceeding in the United States Bankruptcy Court against the debtor. (365-69) In the proceeding, HCIDA admitted ownership of the property, and sought an order directing the Debtor to accept delivery of HCIDA's deed. (365-69) HCIDA initially moved for judgment on the pleadings. By Order filed on January 24, 2006, the Bankruptcy Court, Gerling, J., rejected Petitioner's arguments. (372-75) After the Court denied the relief sought, HCIDA amended its complaint to request "an order declaring that a transfer of the Herkimer Facility to the Debtor may be achieved solely by execution by Plaintiff of a deed . . .", as well as an order "rescinding the Lease Agreement and authorizing reconveyance and transferring by Plaintiff of the Herkimer Facility to the Debtor". (365-69; A28-29) An Order was entered dismissing the adversary proceeding, "with prejudice". (377) By Stipulation of Discontinuance, signed on October 28, 2008, Petitioner discontinued the action "with prejudice". (376) Having acknowledged ownership and having failed to reconvey the property, it is respectfully submitted that HCIDA is now precluded from relitigating the issue of ownership of the property.

Nor can HCIDA claim that no issues were actually decided in Bankruptcy Court. The order of dismissal actually rejected the attempt to return title to the Trustee. Having failed to return title, HCIDA is stuck with the fact that it is

actually the owner. It has no basis in law to claim that the Trustee or Debtor's Estate is somehow the owner.

HCIDA can not claim that the Adversary Proceeding concerned a different issue. In its letter to HCIDA explaining the discontinuance, HCIDA's counsel explained that it was not legally possible to convey the property to the bankruptcy trustee. (381-82) Having the issue of title ownership resolved, HCIDA can not in good faith argue it was never the owner of the property. The argument was specious when it was made in Bankruptcy Court, and it is frivolous on this appeal.

C. HCIDA'S JUDICIAL ADMISSION OF OWNERSHIP IS BINDING.

In its "Complaint for Declaratory Judgment" in this action, HCIDA admitted that it "has held title" to the property, in order to justify its claim that the tax lien on the property is improper. (44-45) It is submitted that its judicial admission of ownership in the Complaint for Declaratory Judgment is a formal and binding admission of ownership, that can not be contradicted. (58 N.Y. Jur. 2d Evidence and Witnesses § 330, Admissions in pleadings, generally)

D. DOCUMENTARY EVIDENCE PROVED HCIDA'S OWNERSHIP.

In opposition to HCIDA's motion for summary judgment, documentation was supplied to the Court demonstrating direct admissions of ownership and actual control of the property by HCIDA. HCIDA has again failed to even address the evidence.

First, HCIDA signed an agreement that allowed Blockworks, LLC to strip the building in exchange for a $5,000.00 payment to Petitioner. (380-82) Second, HCIDA's attorney issued an opinion letter to the Board is an admission of ownership. The letter was provided in discovery, HCIDA's witness was questioned about the letter in depositions, copies were supplied to counsel thereafter, without objection. (404-05) Third, in 2009 HCIDA signed an agreement with UBRC, granting an option to purchase the property for $1. (383-86) With all of this evidence of ownership, HCIDA has no legitimate basis to deny ownership.

E. CASES CITED BY HCIDA ARE NOT APPLICABLE.

HCIDA has relied on a number of cases. We submit that they are not on point.

One is the1983 prevailing wage case of Erie County Indust. Dev. Agency v. Roberts, 94 A.D.2d 532, *aff'd* 63 N.Y.2d 810. In it, the majority opinion in the Appellate Division traced the history and interests of IDA financing. The Appellate Division found that the IDA did possess "formal title". In Erie County, *supra*, the Appellate Division ruled that a typical industrial development bond project does not involve "public works," within the meaning of section 220 of the Labor Law. The outcome of the case turned on "statutory reading and analysis" of the phrase "public works", not on concept of ownership of the property. Thus, the

result in Matter of Erie County Indus. Dev. Agency , *supra*, is limited to the very specific statutory considerations addressed by that court. (*cf* Davidson Pipe Supply Co. v Wyoming County Indus. Dev. Agency, 85 N.Y.2d 281 [IDA project not a "public improvement"; bonding not required])

Smith v. New York City Indus. Dev. Agency, 265 A.D.2d 477 (1999), cited by Appellant, is no longer good law. In it, the First Department stated "NYCIDA's ownership interest of the premises was no more than a financing mechanism". In support, the opinion cited Collins v County of Monroe Indus. Dev. Agency, 167 A.D.2d 914. Collins, *supra*, a Labor Law 240(1) case decided in 1983. Collins, *supra*, was abrogated by the Court of Appeals 1996 opinion in Adimey, *supra*. For the same reason, Dorval v Terrace 100, L.P., 116 A.D.3d 912 is no longer good law. In it, the Court cited Smith, *supra*, and the prevailing wage case of Matter of Erie County Indus. Dev. Agency , *supra*.

AL-SAR Realty Corp. v. Griffith, 139 Misc.2d 104 (Tenney, J.), cited by Appellants, is an equitable action that is not on point. AL-SAR, *supra*, concerned an ownership dispute between an IDA and the IDA's tenant. The IDA was attempting to block the sale of a project by the developer. In it, the Court cited Erie County Indust. Dev. Agency v. Roberts, 94 A.D.2d 532, *aff'd* 63 N.Y.2d 810 for the proposition that there was no "genuine allocation of ownership in the agency". After reviewing the entire transaction the Court went on to declare that

the deed was an equitable mortgage. In the context of determining the rights and obligations of parties in a contractual relation, a Court has the equitable power to see through the form of the transaction, which is what the Court did. It is submitted that the scope of AL-SAR Realty Corp., *supra*, does not extend to third party dealings with IDA owned property in light of Adimey, *supra*.

II. HCIDA IS LIABLE FOR THE WATER RENTS.

At Special Term, HCIDA made three arguments about its obligation to pay water rents:

1. The Village does not have legal authority to sue an owner for water bills by virtue of the Village Law §11-1116; and

2. The Village water regulations were not properly implemented; and

3. The Village is barred by an election of remedies. (37-42)

In its appeals, HCIDA has not addressed the second and third arguments. As a result, they have been waived.

HCIDA continues to claim that the Village had no power to collect water rents from the property owner by virtue of the Village Law §11-1116. (45) We submit that HCIDA's position is without merit. HCIDA has reworked its argument on appeal, now claiming "the Village is not asserting contractual privity with, or consumption by, HCIDA." (P 40) HCIDA's continually-evolving arguments ignore the law and facts.

A. THE APPELLATE DIVISION WAS CORRECT.

The Appellate Division concluded:

> "HCIDA assented to the Village supplying water to the tenant for use in the facility at a time when the existing law imposed liability on property owners for municipal water service, thereby giving rise to an implied contract for such service between HCIDA and the Village (see Dunbar, 251 U.S. at 517–518, 40 S.Ct. 250; Puckett v. City of Muldraugh, 403 S.W.2d 252, 255–256 [Ky. 1966]; see also Sherwood Ct. v. Borough of S. Riv., 294 N.J. Super. 472, 478–479, 683 A.2d 839 [Super. Ct. App.Div.1996])"

In Dunbar v. City of New York, 177 App.Div. 647, 649, 164 N.Y.S. 519 [1st Dept. 1917], *affd* 223 N.Y. 597, 119 N.E. 1039 [1918], *affd* 251 U.S. 516, 40 S.Ct. 250, 64 L.Ed. 384 [1920] , the plaintiff was the owner of a tenant occupied building who charged for metered water. The plaintiff claimed that the lien against the property was a "taking". The Appellate Division described the contractual nature of an owner's liability for water rents:

> When an owner expressly consents to the tenant's using water in the building, supplied through pipes installed by the owner, or continued by the owner, for the purpose of connecting the building with the city's water main, the owner assents to the city's supplying water to the tenant for use in the building. When such assent or arrangement is made, it must be deemed to be made with a view to the existing law. Indeed, the law is a part of every contract. (Id. at 177 A.D. 647)

The Appellate Division went on to conclude:

> Where two are liable, and one is said to be primarily liable, that does not necessarily mean that the other is liable as a surety. In the case at bar the tenant is liable to the city primarily for the water consumed, and the owner's property is also liable under the statute for water

> furnished to the tenant for use in the building with the owner's assent. Water so supplied is for the benefit of the owner as well as for the benefit of the tenant where the tenant's business and use of the building necessarily requires water, for if there had been no water supply available, there would have been no lease. (Id. at 177 A.D. 647)

This Court then affirmed, without opinion. The United States Supreme Court then affirmed, holding in relevant part:

> "the lease made by plaintiff contemplated the use of water by the lessees and provided, as far as the lessor (plaintiff) could, for the payment of the charges for it. That her tenants defaulted in their obligation by reason of their bankruptcy was her misfortune, but it did not relieve the property, which we may say, would be unfit for human habitance if it could not get water. (Id. at 251 U.S. 516)

The theory of contractual liability against a building owner was clearly described by the Appellate Division, this Court and the United States Supreme Court. Nothing any of these opinions suggests, as HCIDA now claims, that the owner is not contractually liable.

In support of its finding of an implied contractual obligation, the Appellate Division explored the applicable law and regulations. Village Law § 11-1116 granted the Village of Herkimer broad authority to adopt rules, regulations and local laws for enforcing the collection of water rents, including the right to cut off the supply of water:

> "Rules, regulations, and local laws. The board of water commissioners may adopt rules, regulations and local laws not inconsistent with law, for enforcing the collection of water rents and

> relating to the use of the water, and may enforce observance thereof by cutting off the supply of water."

This grant of authority allowed the Village Board considerable discretion over the method for collecting water rents, as long as the method of collection was not "inconsistent with law".[2]

Pursuant to Village Law § 11-1116, the Herkimer Municipal Commission adopted Rules and Regulations for the Village of Herkimer Water Department. Those regulations provide, in pertinent part:

> No. 22 The property owner will be held liable for all water bills rendered . . . (316)

The regulation explicitly placed the financial responsibility for payment squarely with "the property owner". The Appellate Division saw no reason for excluding owners such as HCIDA from the scope of these regulations. (10a-11a) In this vein, the Second Circuit has recently found that a municipality's policy of only opening water accounts in the owner's name is rationally related to legitimate governmental purposes. (Winston v. City of New York, 759 F.2d 242)

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[2] The primary method of collection, mandated by Village Law §11-1118, is the inclusion of amounts past due in the annual tax levy as well as a tax levy upon the real property. Here, the tax levy method failed, at HCIDA's urging. (352) As a result, the Village of Herkimer chose to pursue personal liability against building owner.

B. THE DISSENTING OPINION WAS INCORRECT.

HCIDA was granted leave, based on the dissenting opinion of two Justices of the Appellate Division. (5a-6a) With good reason, HCIDA, in its Brief, has not fully embraced the dissenting opinion. We respectfully submit that the wide-ranging dissenting opinion is flawed.[3]

The dissenting opinion twice offered the mushy conclusion that the majority opinion "conflates in rem with personal liability", citing Weinheimer v. Hutzler, 234 App.Div. 566, 566, 256 N.Y.S. 7 [4th Dept. 1932], *affd* 260 N.Y. 687, 184 N.E. 146 [1932]. (11a, 14a) By contrast, the majority opinion clearly delineated the basis for its opinion: the property owner can be held personally liable, regardless of whether a lien is imposed on their property. (8a-11a) Weinhemer, *supra*, was an *in rem* mechanic's lien case, in which there was no regulatory or factual basis to impose personal liability. Weinhemer, *supra*, is easily distinguishable because, in the case at bar, local regulations placed the financial responsibility for payment squarely on "the property owner".

The dissenting opinion offered an "aside", that the meaning of the phrase "property owner" in Regulation 22 is unclear. (12a) Regulation 22 expressly

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[3]Even the dissenting opinion's attempt at humor falls flat. ("the "counterclaim's theory of direct, personal liability under Regulation 22 does not, as a matter of law, hold water", 12a)

imposes liability on the property owner from the time of the setting of the meter until there is notice to discontinue such service. (316) HCIDA has never denied knowing that there were operating water meters at the property. Further, HCIDA expressly acknowledged in its lease that "governmental charges":

> "may at any time be lawfully assessed or levied against or with respect to the Facility . . . including . . . all utility and other charges . . ." (228)

We submit that the dissenting opinion does not fairly interpret the language actually employed. (12a)

The dissenting opinion's discussion of tenant's liability for the water bills is inaccurate. (11a-15a) Consistent with the practice throughout this state, the regulations of the Village of Herkimer Rules and Regulations do not make the tenant responsible for water rents; instead, liability is expressly placed on the property owner. (316, *accord* Winston, *supra*) Consequently, the dissenting opinion's discussion of guaranteeing the debt of another and suretyship is inappropriate. (11a-15a)

The dissenting opinion repeatedly discusses the fact that the Village of Herkimer's counterclaim does not seek a lien on the property. (11a-15a) That fact has never been in issue. The reason should have been obvious; the Village of Herkimer was unwilling to trade its valid financial claim for the liabilities associated with owning the dilapidated structure.

The dissenting opinion also contains a lengthy discussion about Regulation 22 conflicting with the common law, before launching into another discussion about privity of contract. (12a-14a) The majority opinion did not need to reach these arguments. (8a-11a) Instead, it fully discussed its rationale for finding the implied obligation to pay, summarily dismissing the dissenting opinion's verbosity on this issue. (8a-11a)

The dissenting opinion misstated the terms of the lease between the tenant and HCIDA:

> "the contract between the IDA and the tenant explicitly made the tenant solely responsible for all utility bills." (14a)

The Village was not a signatory to the Lease. (191-260) There is nothing in the Lease that established a relationship between the Village and the tenant or made the tenant primarily liable to the Village of Herkimer for the water bills. (191-260) In fact, the lease expressly contemplated that the tenant would pay HCIDA's utility charges:

> "**as if the Company and not the issuer [HCIDA] were the owner of the facility**" . (288)

In other words, the lease contemplated that there would be charges against the owner, and that the tenant would be contractually responsible to HCIDA for paying. Plainly, the exact wording of the lease was misstated by HCIDA and then

repeated by the dissenting opinion. The correct conclusion to be drawn from the lease was found in the majority opinion, which aptly observed:

> "When such assent [to] or arrangement [for the tenant's use of water] is made, it must be deemed to be made with a view to the existing law ([citing Dunbar, *supra]*)".

The dissenting opinion's claim that it would be inequitable to hold HCIDA liable is plainly wrong. (14a-15a) The Village regulations make the property owner financially responsible, even if it does not receive a bill. (300-01, 316) The regulations allow the billing to go to either the owner or the tenant. (300) HCIDA, by law, is charged with notice of the law and regulations.

The dissenting opinion made the wildly inaccurate claim that HCIDA "never received any water bills from the Village until after the Village's claims against the tenant for those bills had failed in bankruptcy court." (14a-15a) In fact, the controversy first arose in February, 2005, when the Village, for a second time, assessed the overdue bills as a levy against HCIDA's property. (44-45, 351) HCIDA's tenant's bankruptcy proceeding was thereafter filed in March, 2005. (344) This lawsuit by HCIDA followed in September, 2005. (43) The controversy did not arise after the Village's attempt to pursue bills in Bankruptcy Court, because in fact, the Village never pursued HCIDA's tenant in Bankruptcy. (351) HCIDA was the party that pursued the tenant in bankruptcy; and unsuccessfully sought to return its real property. (372-76) The Herkimer County Attorney, the

Herkimer County Legislature (whose Legislature's chairman served on HCIDA) and HCIDA had deep and intimate knowledge of HCIDA's responsibility for the water rents and the tenant's precarious financial situation before the bankruptcy. (351) The Village could not have asserted *in personam* liability against the tenant in 2004, because the County reimbursed the Village for the 2004 water rents when they were levied on the tax roll. (351)

C. HCIDA'S OTHER CLAIMS LACK MERIT.

HCIDA has made other claims in its Brief that the dissenting opinion did not address or adopt. We submit that they all lack merit.

The first point heading HCIDA's Brief, in relation to this issue, asserts that any right to bring an *in rem* claim must be authorized by statute. (P. 37-40) This point is not germaine to the discussion, because the Village of Herkimer never sought *in rem* relief. Then, under the same point heading, HCIDA presents vague irrelevant arguments about *in rem* claims involving contractual liability, privity of contract and private water companies.[4]

In section II(B) of its Brief, HCIDA claims that "The Village Law Does Not Authorize an In Personam Remedy against Non-Possessing Owners". Neither the majority nor the dissenting opinion below chose to address HCIDA's strained

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[4]Oddly, HCIDA does not discuss the heart of the issue in this case, i.e., the majority opinion below, until page 47 of 63 of its Brief.

argument. While it is technically true that Village Law, Article 11 does not mention an "in personam remedy against non-possessing owners", Village Law §11-1116 broadly grants the right to "adopt rules, regulations and local laws, not inconsistent with law, for enforcing the collection of water rents . . ." HCIDA would have you interpret this clause to mean that Villages only have the right to adopt rules, regulations and local laws that enforce statutory rights, i.e., by shut off or lien. We submit that HCIDA's argument is plainly wrong; the legislature authorized Villages to determine their methods of enforcement. (Village Law §11-1116)

In its Brief, section II(B), HCIDA has asserted that seeking payment from the property owner is inconsistent with the fact that the Village was also required by Village Law §11-1118[5] to add unpaid water charges to the tax roll and to collect them in the same manner as real property taxes. Although HCIDA's argument was not raised at Special Term, the Appellate Division properly rejected the entire line of attack:

> "Those remedies, however, are available in addition to, and not exclusive of, direct liability against property owners (see City of New York v. Idlewild Beach Co., Inc., 182 Misc. 205, 207–208, 43 N.Y.S.2d 567 [N.Y. City Ct. 1943], affd 182 Misc. 213, 50 N.Y.S.2d 341 [App. Term, 1st Dept. 1944])."

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[5]" The board of trustees shall include such amounts in the annual tax levy and shall levy the same upon the real property in default."

In section II(C) of its Brief, HCIDA discusses old tangential State Comptroller opinions. The cited State Comptroller Opinions do not deal with the issues at hand.

In section II(D) of its Brief, HCIDA claims that "Villages May Not Exceed the Powers and Authorities Granted Them Under Article 11 of Village Law." In it HCIDA discusses two cases, Matter of Torsoe Bros. Constr. Corp. v. Board of Trustees of Inc. Vil. of Monroe, 49 A.D.2d 461 and Village of Webster v. Town of Webster, 270 A.D.2d 910. In Matter of Torsoe Bros. Constr. Corp., supra, the Court found that the municipality exceeded its authority by collecting fees for connecting that were in excess of the cost of construction, in violation of Village Law §11-1108 and §11-1118. In Village of Webster, *supra*, the Court found that the Village was not authorized by Village Law §11-1110 to own privately installed supply connections of customers outside the Village limits. Both of these cases involve very different specific statutory provisions that were violated by the municipality. They do not concern collection of water rents.

In section II(H) of its Brief, HCIDA claims that "Legal Havoc" will ensue from the order below, channeling the doomsday predictions in the dissenting opinion that this case would "cause significant instability in all commercial transactions across the state". (12a-13a) Exaggerated hyperbole has become commonplace in certain elements of political discourse and the media today, but

has rarely found its way into the jurisprudence of the Courts of this state. We submit that the doomsday predictions are not credible. HCIDA's wish is to have this Court make tenants responsible for water rents, which would upend established practice and procedure throughout this state. (See Winston, *supra*) The policies and procedures of the Village of Herkimer in this case were established over a half century ago. They have endured the test of time.

The problems in this case developed when the recalcitrant governmental agency refused to acknowledge ownership of its property and refused to pay what it owed. Needless to say, Herkimer County and its IDA's hostile and combative tirade toward anything and everything involving the Village of Herkimer exposes its lack of credibility. We submit that the words of wisdom by Justice Lippman, in another protracted case involving the parties, continues to be relevant and appropriate:

> "Finally, we note that this dispute between related governmental entities has already spawned nearly a decade of litigation. In the interest of minimizing additional costs to taxpayers and conserving judicial resources, the parties might well consider the wisdom of compromise going forward. (Village of Ilion v. County of Herkimer, 23 N.Y.3d 812, 822)

CONCLUSION.

For the foregoing reasons, the Court should affirm the Order of the Appellate Division.

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STATE OF NEW YORK - COURT OF APPEALS

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Michael J. Longstreet