To be Argued by:
CHARLES W. MALCOMB, ESQ.
Time Requested for Argument:
(15 Minutes)

STATE OF NEW YORK

Court of Appeals

APL 2019-00222

HERKIMER COUNTY INDUSTRIAL DEVELOPMENT AGENCY,
Plaintiff-Appellant,

vs.

THE VILLAGE OF HERKIMER,
Defendant-Respondent,

and

THE COUNTY OF HERKIMER,
Defendant.

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

HERKIMER COUNTY INDUSTRIAL DEVELOPMENT AGENCY,
Petitioner,

vs.

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 PLAINTIFF-APPELLANT HERKIMER COUNTY INDUSTRIAL DEVELOPMENT AGENCY

HODGSON RUSS LLP
CHARLES W. MALCOMB, ESQ.
JOSHUA FEINSTEIN, ESQ.
Attorneys for Plaintiff-Appellant-Herkimer County Industrial Development Agency
The Guaranty Building
140 Pearl Street, Suite 100
Buffalo, New York 14202
Telephone: (716) 856-4000
Email: cmalcomb@hodgsonruss.com
jfeinste@hodgsonruss.com

Date of Completion: January 27, 2020

STATUS OF RELATED LITIGATION

On November 16, 2016, Respondent Village of Herkimer (the "Village") initiated an enforcement proceeding against Appellant Herkimer County Industrial Development Agency ("HCIDA") in Herkimer Village Court, alleging Fire and Building Code violations at the former industrial property also at issue in the appeal currently before this Court (the "Code-Enforcement Proceeding"). R. 425-32.

On December 6, 2016, the HCIDA commenced a CPLR Article 78 Proceeding against the Village in Supreme Court, Herkimer County under Index No. 2016-10221, seeking to enjoin the Village from taking enforcement actions under the Fire and Building Code against it, on the grounds that HCIDA is neither the beneficial owner of nor has dominion and control over the property at issue (the "Article 78 Proceeding"). R. 413-432. On, January 11, 2018, Supreme Court, Herkimer County (Erin P. Gall, J.) granted the HCIDA's petition. R. 9-17. The Village appealed that determination on the same consolidated Record that is before this Court in the current appeal. On August 22, 2019, the Appellate Division, Fourth Department dismissed the Article 78 Proceeding, on the grounds that the HCIDA should have sought the relief at issue through the Code-Enforcement Proceeding in the Village justice court, in the same Memorandum and Order that is appealed from in the current appeal. R. 11a.

HCIDA elected not to seek leave to appeal the Fourth Department's dismissal of the Article 78 Proceedings. That matter therefore is concluded.

DISCLOSURE PURSUANT TO RULE 500.1(f)

The Herkimer County Industrial Development Agency is a corporate governmental agency, constituting a public benefit corporation, established by special act of the Legislature pursuant to Article 18-A of the General Municipal Law ("GML") to benefit Herkimer County and its residents. It has no parents, subsidiaries, or affiliates.

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS - cont'd

TABLE OF CONTENTS - cont'd

TABLE OF AUTHORITIES

PAGE

Federal Cases

State Cases

TABLE OF AUTHORITIES - cont'd

PAGE

TABLE OF AUTHORITIES - cont'd

PAGE

TABLE OF AUTHORITIES - cont'd

PAGE

Federal Statutes

TABLE OF AUTHORITIES - cont'd

PAGE

State Statutes

TABLE OF AUTHORITIES - cont'd

PAGE

Rules

Other Authorities

QUESTIONS PRESENTED

Question 1: New York courts have consistently held — following a line of authority confirmed by this Court in *Erie County Industrial Development Agency v. Roberts*, 94 A.D.2d 352 (4th Dep't 1983), *aff'd for the reasons stated at the Appellate Division*, 63 N.Y.2d 810 (1984) — that an industrial development agency's ("IDA") nominal, record ownership of property for the purpose of conferring economic incentives does not constitute actual ownership. An IDA's involvement is merely as a "conduit" or other legal mechanism to achieve tax-exempt status to fulfill the IDA's statutory economic development mandate. Courts have consistently rejected efforts to impose liability on IDAs under various theories due to their nominal status as record title owner. There is one limited exception: this Court's decision under the Scaffold Law in *Adimey v. Erie Industrial Development Agency*, 226 A.D.2d 1053, 1054 (4th Dep't, *modified for the reasons stated by the dissent below*, 89 N.Y.2d 836 (1996). There, this Court determined that an IDA's status as nominal owner was captured within the statutory definition of "owner" under the Scaffold Law, given its remedial purpose and well-understood broad reach. Is *Adimey* limited to application of the Scaffold Law, or was it designed to overturn *Roberts*, meaning that an IDA's participation in an economic development transaction makes it an actual owner of real property,

subject to liability as the property owner and the guarantor of debts of private companies who have received economic incentives under GML Article 18-A?

Issue preserved at: R. 11a, 39-41.

Answer: This Court's holding in *Adimey* was based upon an interpretation of the Scaffold Law, which is broadly construed and remedial in nature. *Roberts* was not overruled. This Court applied *Roberts* approvingly only one year before *Adimey*, and other courts have consistently followed *Roberts* to this day. In contrast, no court until now has applied *Adimey* outside the context of the Scaffold law. It is therefore respectfully submitted that *Adimey* was not meant to overturn decades of precedent holding that IDAs are nominal title holders only and are not liable for damages or debts of private companies that have received economic incentives.

Question 2: Under at least the last 100 years of jurisprudence, property owners have never been held personally liable for utility debts incurred by their tenants. This is because a tenant's purchase of utility services is a contractual relationship between the tenant and the utility provider, to which the property owner is not a party. While a lien may attached to the owner's real property if authorized by State statute, personal liability has never been imposed absent a contractual relationship. Can a village water provider hold a property owner liable

for utility debts — for which the owner never contracted for nor consumed — by modifying the elements of a common-law breach of contract cause of action in the face of enabling legislation specifically limiting a village's authority to remedies "not inconsistent with law"?

Issue preserved at: R. 9a, 41.

Answer: No. Village Law § 11-1116 provides that villages "may adopt rules, regulations and local laws *not inconsistent with law*, for enforcing the collection of water rents and relating to the use of water, and may enforce observance thereof by cutting off the supply of water." (Emphasis added). Metered water charges are contractual in nature. Villages may not adopt regulations which modify the common law to (1) do away with the privity requirement for contractual liability; (2) modify the elements of a breach of contract cause of action; and (3) create a new cause of action to impose contractual liability on a non-party based on status as a property owner.

JURISDICTION

This is an appeal from an Order of the Appellate Division, Fourth Department that was entered on August 22, 2019 with respect to an appeal from Supreme Court, Herkimer County. On September 24, 2019, HCIDA moved for leave to appeal from a non-final order under CPLR § 5602(b)(1). On November 8, 2019, the Fourth Department granted HCIDA's motion. R. 3a-6a. Accordingly, this Court has jurisdiction over this appeal under CPLR § 5602(b)(1).

BACKGROUND AND PROCEDURAL HISTORY

A. The Parties

HCIDA is a corporate governmental agency, constituting a public benefit corporation, established by special act of the Legislature for the benefit of Herkimer County and its inhabitants. R. 44, ¶ 1; GML §§ 856(2) and 898. Pursuant to Article 18-A of the General Municipal Law ("GML"), HCIDA's purpose is "to promote, develop, encourage and assist in the acquiring, constructing, reconstructing, maintaining, equipping and furnishing industrial, manufacturing, warehousing, commercial, research and recreation facilities . . . and thereby advance the job opportunities, health, general prosperity and economic welfare of the people of the state of New York." GML §§ 858 and 898. In accomplishing these objectives, the agency "perform[s] a governmental function

… and shall be required to pay no taxes or assessment upon any of the property acquired by it or under its jurisdiction or control or supervision or upon its activities . . . ." GML § 874(a). HCIDA is further authorized to provide financial assistance in the form of tax-exempt bonds, agreements for payments in lieu of taxes, and tax exemptions to projects that meet uniform guidelines consistent with the agency's purposes. GML §§ 858 (12) and (15), 859-a, 874.

The Village is a municipal corporation organized and existing under the laws of the State of New York. R. 44, ¶ 2.

B. The Bond Financing Transaction

On October 6, 1987, pursuant to its Article 18-A powers, HCIDA approved an application by a long-established, local manufacturer, H.M. Quackenbush ("Quakckenbush"), to issue $1.6 million in bonds supporting expansion of Quackenbush's existing metal plating and finishing business located in the Village (the "Project"). R. 57-73; 74-86. Quackenbush anticipated that the Project would allow it to increase its capacity by over 150% and create up to 24 new jobs within two years. R. 72 at Part C, question 7.

To permit the bonds to be issued, HCIDA and Quackenbush entered into a number of interrelated agreements and transactions with each other and with

Security Pacific National Trust Company (the "Bond Trustee") and Marine Midland Bank N.A. (the "Bank"). Among other items, these included: the simultaneous sale and leaseback by Quackenbush of its facility (the "Property" or the "Facility") to HCIDA for nominal consideration of $1.00. R. 190, 191-260. To the very limited extent that HCIDA assumed any interest in the Property, it was to promote local economic development by enabling the issuance of tax-free bonds to support the Project. HCIDA never received actual possession or control of the Property. It also obtained none of the benefits and assumed none of the risks of ownership with respect to the Property.

HCIDA and Quackenbush thus acknowledged that the "Lease Agreement is executed in part to induce the purchase by others of the Bonds" and "all covenants and agreements . . . set forth in this Lease Agreement are . . . for the benefit of the Trustee and the [bondholders]." R. 216. They likewise agreed to apply the bond proceeds exclusively to specified expenses associated with the Quackenbush expansion Project. R. 219-220 (Sections 4.2 and 4.3). The bonds further constituted only "special obligations" of HCIDA, which were "payable solely from the Revenues" derived from the rent paid by Quackenbush under the Lease Agreement and other specified sources, and were not a personal liability of HCIDA. R. 111 ("Revenues"), 116 (Section 2.05).

In exchange for HCIDA delivering "sole and exclusive" possession, Quackenbush agreed to pay "basic rent," which was limited to the amount necessary to satisfy bond debt service. R. 223 (Sections 5.2 and 5.3). The Lease also provided for payments in lieu of taxes (*i.e.*, "PILOT") for the benefit of the Village and other local municipalities, and reimbursement only for certain specified expenses, such as attorney's fees. R. 223-224 (Section 5.3). The Lease and related bond transaction documents did not permit HCIDA to derive any profit or otherwise receive revenue beyond the limited reimbursement of certain expenses and monies necessary to satisfy the debt service on the bonds and amounts owed under the PILOT to the Village and other jurisdictions, for which HCIDA served as a pass-through entity. HCIDA was specifically prohibited from recovering "any annual or continuing administrative or management fee." R. 224.

Any nominal ownership interest by the HCIDA was to last only as long as necessary to complete the payments owed on the bonds. The Lease was set to terminate on September 1, 2003 "or on such earlier date as the Bonds are paid in full . . . ." R. 223. In the event that the bonds were paid off prior to the lease's termination date, Quackenbush was entitled to use of the Property without any further payment of basic rent. R. 226.

Quackenbush further agreed to a mandatory repurchase of the Property back from the HCIDA "upon termination of the Lease Term or upon the expiration of the Lease Term . . . or upon any other payment in full of the Bonds" for $1.00. R. 248-249 (Section 11.3). The Lease defined "Lease Term" simply as "the duration of the leasehold estate created by this Lease Agreement." R. 202. Quackenbush likewise remained "entitled to all depreciation deductions with respect to any depreciable property in the Facility," notwithstanding its formal status as the lessee. R. 239.

In addition, HCIDA agreed to a Collateral Assignment of the Lease in favor of the Bond Trustee and the Bank underwriting the bonds, granting them a lien and a security interest in any and all proceeds due under the Lease. R. 242, 548-556. HCIDA further "irrevocably constitute[d] and appoint[ed] the [Bond] Trustee its true and lawful attorney, with power of substitution for the Issuer [*i.e.*, HCIDA] and in the name of the Issuer" to pursue remedies under the Lease. R. 550. The only "unassigned rights" that remained with HCIDA with respect to the lease were "to insurance and contractual indemnities and otherwise under the hold harmless provisions thereof." R. 112. By its own terms, the Lease was also subordinate to the mortgage running in favor of the Bond Trustee and the Bank. R. 252 (Section 12.8).

HCIDA's limited interest in the Property as its nominal owner for purposes of the bond transaction and tax pass-through purposes is a matter of public record, as the Mortgage, Collateral Assignment of Lease, and Master Indenture of Trust, among other related documents, are all recorded in the Herkimer County Clerk's Office. R. 175, 284, and 548.

C. Quackenbush Files for Bankruptcy

On March 16, 2005, Quackenbush filed for a Chapter 11 bankruptcy in the United States Bankruptcy Court for the Northern District of New York. Compendium to Appellant's Brief ("C.") 2-3.

On its bankruptcy petition, Quackenbush listed the Property as an asset worth $300,000.00, demonstrating that the beneficial ownership was always with Quackenbush and not the HCIDA. C. 4-5. Quackenbush further listed Village of Herkimer as a secured creditor with a tax lien in the amount of $67,502.53 for water/sewer service. C. 6. The Village did not object to an order requiring it to continue to provide Quackenbush with water service during the pendency of the bankruptcy proceeding. C. 7-9.

During the bankruptcy proceeding, HCIDA brought an adversary proceeding to compel Quackenbush to accept re-conveyance of formal title to the

Property. Quackenbush opposed the application on the grounds that "the relief sought by the HCIDA would not confer any benefit to the estate and would constitute a burden on the bankruptcy estate." C. 27, ¶ 3. Further, Quackenbush complained that it was no longer occupying the Property. *Id.* ¶ 5.

The Bankruptcy Court initially rejected the application on the narrow basis that it could not order specific performance of Quackenbush's contractual obligations as a remedy. R. 370-371; C. 31, ¶ 6. After HCIDA sought to amend its complaint to add a claim seeking to rescind the twenty-year old Lease, the Bankruptcy Trustee opposed this relief on grounds that HCIDA could not prove any of the grounds necessary to justify rescission, such as fraud in the inducement, failure of consideration, inability to perform, or repudiation or breach that substantially and materially defeats the entire purpose of the contract. R. 370-371; C. 34, ¶¶ 11, 12. Subsequently, HCIDA stipulated to discontinue the adversary proceeding, which was dismissed with prejudice. R. 523-524. At no time, however, did Quackenbush ever deny beneficial ownership of the Property. C. 18-21; 22-25.

Eventually, Quackenbush's bankruptcy was converted to a Chapter 7 proceeding. On March 11, 2010, the Bankruptcy Trustee filed an amended final

report with the court. This listed an allowed priority, secured claim by the Village in the amount of $99,545.85 in addition to a secured allowed claim of $226,018.80 by the County based on pre-petition tax liens. C. 14-15, 17. The payments on these claims were $0.00. *Id*. Likewise, the Trustee's final report listed a secured claim in the amount of $47,824.58 as well as allowed unsecured claims by HCIDA, including unpaid PILOT payments, totaling $337,450.89; the payments on these claims, too, were $0.00. C. 14, 16.

The Trustee's final report listed the Property as an asset of the bankruptcy estate. The Trustee, however, advised that he was abandoning the Property pursuant to Section 554(c) of the Bankruptcy Code "to the debtor," Quackenbush. C. 11, 13. Quackenbush thus retained its interest as the beneficial owner of the Property at the conclusion of the bankruptcy.

D. The Unpaid Water Rents at Issue Accrue Against Quackenbush and the Property

The Village has never clarified the exact basis and scope of the water charges that it seeks to recover against HCIDA. The Village's previous submissions indicate that the water rents appear to go back to at least 2003, and totaled $231,178.21 as of September 30, 2005. C. 37-46. From 2003 to 2007, the

Village sought to recover the rents by levying them against the Property as real property taxes. C. 47-71.

The Village did not send a notice to disconnect water service to Quackenbush until February 11, 2005. At this point, the unpaid water rents already exceeded $200,000.00. C. 79-80.

E. Years Later, the Village Seeks to Bill HCIDA for the Water Service

HCIDA was never a customer of the Village's water service, never ordered water, never used water, and never otherwise contracted with the Village to provide water service at the Property. C. 84. Any water provided to the Property was for Quackenbush's benefit, not HCIDA's, which never enjoyed dominion or control over the Property.

Nevertheless, on May 18, 2011, the Village invoiced HCIDA for the "past due water/sewer charges" incurred by Quackenbush at the Property. C. 81-83. This was the first time that the Village had ever attempted to bill HCIDA for these or any other water rents or charges at the Property.

The invoice and the accompanying correspondence did not cite any basis for holding HCIDA responsible for water consumed and rents incurred by Quackenbush. C. 81-83.

F. HCIDA Has Never Asserted Dominion or Control Over the Property

Over the years, two parties have approached HCIDA concerning the Property. In dealing with these parties, HCIDA has made clear that whatever purported interest it may have in Property as the nominal title holder was very limited. HCIDA has never represented that it had dominion and control over the Property.

On November 6, 2008, HCIDA entered into an agreement with Blockworks, LLC, under which Blockworks acquired any right, title and interest belonging to the HCIDA in personal property located at the Property. R. 377-379. In entering this agreement, however, Blockworks represented that it had or was in the process of acquiring the "lien interests" in both the personal property and the real Property belonging to M&T Bank, which on information and belief, held any remaining mortgages. *Id*. Any transfer of the personal property was also "without warranty of any nature or kind relative to . . . title." *Id*. ¶ 2. Blockworks likewise

acknowledged that the HCIDA "had only a 'paper' title to the Premises and the Property and has never exercised any control or dominion over either." *Id*. ¶ 9.

Similarly, in April 2009, HCIDA entered into an option agreement, under which the Universal Brownfield Revitalization Corporation ("UBRC") acquired "the exclusive right and option to purchase . . . any and all rights and interests of [HCIDA], if any" in the Property for a period of one year. R. 384 (emphasis added). Consideration for the option was $1.00 and, in the event the option was exercised, the agreed upon price for HCIDA's interest in the Property, "if any," was also $1.00.

G. This Action

On September 28, 2005, HCIDA brought this action against the Village and the County of Herkimer (the "County") in Supreme Court, Herkimer County, seeking a declaratory judgment that $231,178.21 in real property taxes, which the Village had levied against the Property were void, given HCIDA's tax-exempt status. R. 44-48.

1. *Herkimer I*

After issue was joined, the Village moved to dismiss HCIDA's Complaint and for a declaration that the County was obligated to reimburse it,

pursuant to Real Property Tax Law § 1442(4), for the taxes that it had levied. The County sought a declaration to the opposite effect, namely that it had no obligation to reimburse the Village. *See Herkimer County Indus. Dev. Agency v. Village of Herkimer*, 84 A.D.3d 1707, 08 (4th Dep't 2011) ("*Herkimer I*").

Meanwhile, as these motions were pending, the County Legislature determined under Real Property Tax Law § 1138(6) that there was no practical means of enforcing the tax liens against the HCIDA and cancelled them. *Id*.

In an Order entered on June 17, 2009, Supreme Court, Herkimer County (Michael E. Daley, J) agreed with the Village that the taxes it had levied against the property were valid, notwithstanding HCIDA's tax-exempt status. It thus dismissed HCIDA's complaint and declared that the County should reimburse the Village for the uncollected taxes that it had levied on the Property. *Herkimer I* at 1708; *see also* the disposition of the related appeals, *Herkimer County Indus. Dev. Agency v. Village of Herkimer*, 84 A.D.3d 1706 (4th Dep't 2011) and *Herkimer County Indus. Dev. Agency v.Village of Herkimer*, 84 A.D.3d 1709 (4th Dep't 2011).

On appeal, however, the Fourth Department concluded that Supreme Court had erred and reinstated HCIDA's complaint and the County's cross claims

against the Village. *Herkimer I*, 84 A.D.3d 1709; *see also Herkimer County Indus. Dev. Agency*, 84 A.D.3d 1706.

2. *Herkimer II*

After remand, the Village amended its pleading to include a counterclaim, which sought to hold HCIDA directly liable, as the alleged owner of the Property, for the water rents incurred by Quackenbush, under Regulation No. 22 of the Rules and Regulations of the Village of Herkimer Water Department (the "Village Water Regulations"). C. 77.

In an Order filed on June 17, 2013, Supreme Court, Herkimer County (Erin P. Gall, J.) sided this time with the County and HCIDA and entered judgment against the Village. *See Herkimer County Indus. Dev. Agency v. Village of Herkimer*, 124 A.D.3d 1298, 1298-99 (4th Dep't 2015) ("*Herkimer II*").

After the Village appealed, the Fourth Department affirmed Supreme Court's determination with respect to the County, agreeing that "the County had a proper basis to cancel the tax lien based upon its determination that 'there is no practical method to enforce the collection of the delinquent tax lien and that a supplementary proceeding to enforce the collection of the tax would not be effective.'" *Id*. at 1300.

The Fourth Department, however, reinstated the Village's recently asserted counterclaim, which sought to hold HCIDA directly liable as the alleged property owner. It did so on narrow, procedural grounds, namely that Supreme Court had erred in dismissing this claim as time-barred. *Id*. at 1300-01. The Court also noted that HCIDA had not moved to dismiss the counterclaim below. *Id*.

At the same time, the Fourth Department modified Supreme Court's judgment in favor of HCIDA as follows: "It is ADJUDGED and DECLARED that the assessment of real property taxes against plaintiff [*e.g.*, HCIDA] by defendant Village of Herkimer was unlawful based upon plaintiff's tax exempt status . . . ." *Id*. at 1301. Thus, as set forth below in Point II, the Village's remaining claim that HCIDA is liable as the "owner" of the Property is limited to contractual principles only because water rents are contractual in nature except to the extent that they may be converted to a tax lien and levied against real property under statute.

Accordingly, the Fourth Department granted judgment dismissing the County but remanded to consider on the merits whether HCIDA could be held liable for the water rents as the Property's alleged owner.

H. The Trial Court Decision

Upon remand from the Fourth Department, the HCIDA and the Village both renewed their respective motions for summary judgment. HCIDA sought a declaration that it was not responsible for the water rents and dismissing the Village's counterclaim; the Village sought dismissal of the complaint and a determination that HCIDA was liable for the rents. R. 35-36; 343.

On January 11, 2018, Supreme Court, Herkimer County (Erin P. Gall, J.) entered its Decision and Order determining jointly the parties' motions.[1] R. 9-17. On February 28, 2018, Supreme Court then entered its Amended Decision and Order. R. 25-33.

Supreme Court first considered whether HCIDA was the owner of the Property. Rejecting HCIDA's argument that it took formal title to facilitate financing and never had a true ownership interest, Supreme Court ruled that HCIDA was the Property owner. In support of this result, Supreme Court cited this Court's decision under the Labor Law in *Adimey v. Erie County Industrial Development Agency*, 89 N.Y.2d 836 (1996), and the Bankruptcy Court's dismissal

[1] In the same Decision and Order, Supreme Court also issued its determination with respect to the Article 78 Proceedings described in the Status of Related Litigation section *supra.*

of HCIDA's application to compel Quackenbush, as the debtor, to accept formal title to the Property. R. 29-30, 32.

Supreme Court then concluded that the Village Water Regulations permitted the Village to recover the unpaid water rents from HCIDA. R. 30-31.

I. The Order Appealed From

On March 27, 2018, HCIDA filed a timely appeal to the Fourth Department with respect to Supreme Court's February 28, 2018 Amended Decision and Order.

On August 22, 2019, the Fourth Department issued its Memorandum and Order (the "Order" or, alternatively, the "Majority's Decision"). As relevant to the current appeal, a three-member majority of the five-justice panel voted to affirm Supreme Court's grant of partial summary judgment to the Village on the issue of liability for water rents.[2]

The majority acknowledged that metered water charges are contractual in nature and therefore "…the obligation to pay therefor must primarily

[2] The Order also modified the Amended Order by unanimously granting the Village's motion to dismiss the Article 78 Proceeding, and as so modified, affirmed the Amended Order without costs. R. 7a-7b.

rest upon [the consumer] who buys and consumes the article." R. 9a. (quoting *New York Univ. v. American Book Co.,* 197 N.Y. 294, 297 (1910)). Nevertheless, they reasoned that HCIDA was liable as the alleged property owner because it "assented to the Village supplying water to the tenant [*i.e.*, Quackenbush] 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." R. 10a. The majority based this conclusion on both the Village authority under Village Law § 11-1116 to "adopt rules, regulations and local laws not inconsistent with law, for enforcing the collection of water rents and relating to the use of water . . ." and the Village Water Regulations. The majority did not identify any provision of the Village Water Regulations specifically authorizing an *in personam* legal action against a property owner to recover water charges based on a tenant's consumption. Nevertheless, "construing the regulations as a whole and according to the ordinary and plain meaning of the words therein," the majority ruled that "the regulations provide for imposition of liability on property owners for water consumed on such property and supplied by the Village." R. 10a.

Two members of the panel dissented, noting that "the majority's analysis conflates in rem liability with personal liability, does not address the

principles of contractual privity ... and effectively permits a single municipality to rewrite — to its own advantage — the foundational rules governing the enforcement of contracts." R. 11a.

The dissent rejected the notion that Village Law § 11-1116 permits the imposition of personal liability against an alleged owner like HCIDA that did not contract for or consume the water at issue, because "the legislatively delegated authority to enact municipal ordinances not 'inconsistent with the laws' does not allow a 'municipality to adopt ordinances which should be superior to the common law of the State.'" R. 12a. (quoting *Lyth v. Hingston*, 14 A.D. 11, 17 (4th Dep't 1897)). In particular, the dissent pointed out the lack of any New York authority supporting the majority's assertion that an owner's consent to the use of water by the tenant allows for an *in personam* remedy against the owner for a tenant's consumption. Rather, the cases relied upon by the majority only supported the far narrower proposition that the owner's consent to the tenant's water use satisfies Due Process concerns where a lien against the property is authorized by statute. R. 14a. The Village's attempt to recover contractually incurred water charges against HCIDA therefore was not authorized under the Village Law because, "under the Village's interpretation," the Village Water Regulations do "what the common law explicitly forbids: it imposes direct personal liability upon one person for the debts

of another without regard to whether he or she contractually agreed to pay those debts. Thus, if applied to these facts [the Village Water Regulations] would abrogate the common-law requirement of contractual privity . . . ." R. 14a. Under the Village's interpretation, the Village Water Regulations would also modify the elements of a breach of contract cause of action, eliminating the requirement of a binding contract between the parties. For these reasons, the dissent concluded, "although the evidence might warrant an inference that the IDA, as the property owner, sufficiently consented to the provision of water so as to give rise to valid lien against the property, it is undisputed that the IDA never agreed, expressly or impliedly, to pay for the water bills of its tenant." R. 14a.

Further, the dissent pointed out that, even on their own terms, the Village Water Regulations do not support personal liability, as the meaning of Regulation 22 — the one provision actually relied upon by the Village in its counterclaim — is, at best vague, R. 12a. In contrast, other provisions cited by the majority expressly authorize and therefore support the imposition of a property lien only. R. 15a.

Neither the majority nor the dissent, however, addressed HCIDA's contention that it was not the beneficial owner of the property and therefore could

not be held liable, even assuming *arguendo* personal liability based on ownership alone was otherwise permissible. R. 7a-15a.

J. The Fourth Department Grants Leave to Appeal

On September 24, 2019, HCIDA moved for leave to appeal under CPLR § 5602(b). On November 8, 2019, the Fourth Department granted leave and this timely appeal followed.

STATEMENT OF THE CASE

Courts have consistently held that where an IDA assumes nominal title to property as part of a sale-leaseback arrangement — like the one between HCIDA and Quackenbush here — it is not responsible for the liabilities of its nominal tenant. The only exception to this general rule arises under the Scaffold Law (Labor Law § 240(1)) where the definition of "owner" is accorded a uniquely broad construction. In all other contexts, courts have held IDAs to be non-beneficial owners who could not be found liable. And whatever public policy considerations that may have justified drawing an exception with respect to the Scaffold Law are not present here. So, the majority below erred by concluding that HCIDA could be held liable as the nominal property owner.

Even if the HCIDA could be considered the owner for purposes of liability, it neither contracted for nor consumed the water giving rise to Quackenbush's liabilities. Under over a century of common law, metered water rents are a contractual obligation, which is enforceable under traditional principles of contract law. Therefore — regardless of whether HCIDA is the owner or not — the Village may not recover against HCIDA for obligations incurred by Quackenbush, as it the undisputed that the Village is not in privity with HCIDA.

There is also no statutory authority for the relief the Village seeks. Article 11 of the Village Law, the enabling statute governing the Village's provision of water services, provides a complete procedure for the collection of delinquent water rents and does not authorize *in personam* legal action against a non-contracting owner for the tenant's consumption. To the contrary, the Village Law prohibits remedies that are inconsistent with existing law, for which there is neither a statutory nor common law basis — and it is hornbook law that a contract may not be enforced against a non-contracting party with whom there is no privity.

Lastly, even assuming *arguendo* the Village had the requisite statutory authority to invent a theory of liability, it never did so. Nowhere in the Village's own water regulations is there any provision for an *in personam* remedy for the

recovery of water rents against a non-contracting owner. Therefore, the Village's attempt to impose personal liability against HCIDA as a non-contracting owner also runs directly counter to New York's anti-derogation doctrine, which teaches that "legislative enactments in derogation of common law ... are deemed to abrogate the common law only to the extent required by the clear import of the statutory language." *Morris v. Snappy Car Rental*, 84 N.Y.2d 21, 28 (1994).

Accordingly, this Court should declare that HCIDA is not liable for Quackenbush's water rents and order the Village's counterclaim dismissed.

ARGUMENT

POINT I. HCIDA IS A NON-BENEFICIAL OWNER AND THEREFORE MAY NOT BE HELD LIABLE FOR QUACKENBUSH'S LEGAL OBLIGATIONS

A. HCIDA Acted as a Mere Conduit in Facilitating the Bond Transaction and Never Assumed Beneficial Ownership, Dominion, or Control Over the Property

Courts recognize the very limited and nominal nature of the title that an IDA assumes for purposes of conferring tax benefits as an economic development tool. As the court explained in *Postler & Jaeckle Corp. v. County of Monroe Industrial Development Agency*, IDA bond financing often takes the form of a "bond and mortgage" combined with a "sale and leaseback" arrangement. The IDA issues tax-free bonds, which are used to purchase the property and otherwise

pay for the project, while simultaneously securing the bonds through a mortgage. 153 Misc.2d 392, 393–94 (Sup. Ct. Monroe Cty.), *aff'd*, 188 A.D.2d 1039 (4th Dep't 1992). The project sponsor, *i.e.*, the intended beneficiary of the financing, then leases the property from the IDA for rent equal to the amount necessary to amortize the bonds. Once the bonds are paid off, the IDA then returns formal title of the improved property to the project sponsor for nominal consideration:

> A typical IDA financing is a "conduit" financing achieved through a "bond and mortgage" and "sale and leaseback" transaction. The agency sells its bonds to a bond purchaser. With the funds that are the proceeds of that sale, the agency acquires and takes title to a facility. To secure the bonds, the agency mortgages the acquired facility; thus, the "bond and mortgage" transaction. The agency leases the facility to the entity benefited by the financing and agrees to reconvey the facility for one dollar upon termination of the financing; thus, the "sale and leaseback" transaction. The revenue stream under the lease is the amount necessary to amortize the bond and is assigned by the agency to the bondholder.

Postler & Jaeckle Corp., 153 Misc.2d at 393–94.

Consistent with the IDA's status as a mere pass-through with no actual interest in the property, the bonds themselves are only "special obligation" bonds, with no recourse against the IDA or any other governmental agency. It is the project sponsor that benefits from the financing who is responsible for their repayment:

> The bond issued by the agency is a "special obligation bond." That is, no full faith and credit of either the agency, the county, the state, or any other governmental agency secures payment of the bond. The credit which stands behind the bond is the guaranty of the entity financed or some other credit enhancement, such as a letter of credit, which is based upon the credit of the entity financed. The agency's liability is limited by this "special obligation."

Id. Thus, "the IDA is not the intended beneficiary; it is only a conduit." *Id.* at 397. "The ultimate beneficiary" — besides the project sponsor — "is the people of New York who benefit by the fostering and growth of business. . . ." *Id.*

Here, the bond transaction conforms entirely to the model described above in *Postler & Jaeckle Corp.* HCIDA issued bonds, which were secured through a mortgage of the Property. R. 94-176; 261-285. Simultaneously, HCIDA purchased the Property from Quackenbush, the project sponsor for $1.00, and immediately leased it back to Quackenbush. R. 190; 191-260. In entering into the Lease, HCIDA and Quackenbush acknowledged that the "Lease Agreement is executed in part to induce the purchase by others of the Bonds." They agreed to apply the bond proceeds exclusively to specified expenses associated with Quackenbush's expansion Project. R. 219-220 **(**Sections 4.2 and 4.3). In exchange for HCIDA delivering "sole and exclusive" possession, Quackenbush further

agreed to pay "basic rent," equal to the amounts necessary to satisfy debt service on the bonds. R. 223 (Sections 5.2 and 5.3).

The HCIDA's nominal title to the Property was further to last only as long as necessary to complete the payments owed on the bonds. The Lease would terminate on September 1, 2003 "or on such earlier date as the Bonds are paid in full . . . ." R. 223. In the event that the bonds were paid off prior to the Lease's termination date, Quackenbush would be entitled to use of the Property without any further payment of basic rent. R. 226. And Quackenbush was obligated to purchase the Property back from the HCIDA "upon termination of the Lease Term" — which is defined simply as "the duration of the leasehold estate created by this Lease Agreement" — or "any other payment in full of the Bonds" for $1.00. R. 202, 248 (Section 11.3). Consistent with its beneficial ownership of the Property, Quackenbush further remained "entitled to all depreciation deductions with respect to any depreciable property in the Facility," notwithstanding its nominal status as the lessee. R. 239.

In addition, HCIDA agreed to a Collateral Assignment of the Lease in favor of the Bond Trustee and the Bank underwriting the bonds. R. 242. HCIDA thus granted the Bond Trustee and the Bank a lien and a security interest in any

and all proceeds due under the Lease. The only "unassigned rights" that remained with HCIDA with respect to the lease was "to insurance and contractual indemnities and otherwise under the hold harmless provisions thereof." R. 112. The Lease was further subordinate to the mortgage running in favor of the Bond Trustee and the Bank. R. 252 (Section 12.8).

Other than "basic rent" dedicated to bond service, HCIDA was entitled only to payments due under the PILOT for the benefit of the Village and other local municipalities and the reimbursement for certain specified and limited expenses, such as attorney's fees. R. 223-224 (Section 5.3). The Lease and related bond transaction did not allow the HCIDA to derive any profit or receive revenue beyond the reimbursement of specified expenses. On the contrary, HCIDA was expressly prohibited from recovering "any annual or continuing administrative or management fee." R. 224.

B. Courts Have Consistently Refused to Hold IDAs Liable Based on Their Nominal Title Outside the Scaffold Law Context

Courts have refused to treat IDAs as beneficial owners in a variety of contexts. In doing so, courts have made clear IDAs cannot be made liable for debts or obligations of the true beneficial owner, given the IDAs' status as public

benefit corporations charged with furthering economic development as well as the structure, nature, and purpose of IDA bond financing arrangements themselves.

In *Erie County Industrial Development Agency v. Roberts*, the Appellate Division — in a decision whose reasoning was adopted by this Court in affirming it — held that prevailing wage requirements under Labor Law § 220 were not applicable to an IDA-financed project, as the project was not a "public work" within the meaning of that statute. 94 A.D.2d 532 (4th Dep't 1983), *aff'd for the reasons stated at the Appellate Division*, 63 N.Y.2d 810 (1984). In reaching this holding, the court emphasized how an IDA merely facilitates tax-exempt financing to the private project sponsor, which is responsible for planning and carrying out the project. Once the bond transaction is entered into, funding flows directly to the private project sponsor and rents paid directly into a bond fund, with the IDA playing practically no role:

> In a typically financed project, a private business company seeking industrial development revenue bond (IDB) financing makes all the necessary preliminary decisions concerning land acquisition, construction and budgeting of the project and submits an application to the agency for approval. Upon receiving approval the company negotiates the economic terms of the financing with a private lender, usually a bank, willing to purchase an IDB from the agency. . . . All the documents are part of a single, integrated transaction with delivery of each document dependent upon delivery of each of the others.

> When the financing transaction is closed, the bank does not pay the agency for the IDB but instead holds the loan funds in a project fund which it controls as trustee. . . . Rents under the lease are paid by the company to a bond fund held by the bank which is used to pay the interest and amortize the principal amount of the IDB. When the IDB is paid in full, the agency returns to the company the title to the project.

Roberts, 94 A.D.2d at 534–35.

For these reasons, the court underscored, "the conveyance of legal title to the agency with the simultaneous leaseback to the company . . . *is not a genuine allocation of ownership in the agency* . . . ," because, among other reasons, "[t]he economic benefits and burdens of ownership are reserved to the company and the agency serves only as a conduit for the tax benefits and the agency serves only as a conduit for the tax benefits provided by such an arrangement." (emphasis added. *Id*. at 540-41 (emphasis added).

Other courts have likewise adopted and extended the holding in *Roberts* in concluding that IDAs have no beneficial interest in a sale-leaseback arrangement and, therefore, is not a true owner. In *Davidson Pipe Supply Co. v. Wyoming County Industrial Development Agency*, this Court quoted *Roberts* with approval, again emphasizing that "[t]he conveyance of legal title to the agency with simultaneous leaseback to the company is structured merely as a mechanism

to facilitate financing and is not a genuine allocation of ownership." 85 N.Y.2d 281, 286 (1995). Accordingly, the Court concluded that an IDA was not obligated to post a bond guaranteeing prompt payment to all contractors pursuant to State Finance Law § 137(1), as would have been required if it were in fact the property owner, notwithstanding that the IDA had assumed nominal title under a sale and leaseback agreement with the project sponsor. *Id*. at 288.

Similarly, in *Smith v. New York City Industrial Development Agency,* the First Department, following *Roberts*, held that an IDA was not liable to a personal injury plaintiff, as its "ownership interest of the premises was no more than a financing mechanism." 265 A.D.2d 477, 478 (2d Dep't 1999). The result was also no different in *Al-Sar Realty Corp. v. Griffith*, where the court ruled that an IDA could not prevent the project sponsor from selling a portion of the property, emphasizing, as in *Roberts*, that the transfer of nominal title as part of the sale and leaseback agreement was not "a genuine allocation of ownership in the agency." 139 Misc.2d 104, 106 (Sup. Ct. Oneida Cty. 1987) (quoting *Roberts*, 94 A.D.2d at 539-40). And, in *Postler & Jaeckle Corp.*, the court rejected the claims of a construction firm seeking to recover from the IDA for labor, services, and materials utilized in realizing the project because, among other reasons, the IDA "was not the beneficiary of the financing transaction or of the contract entered into

by the plaintiff and [the project sponsor]." 153 Misc.2d at 397. This is directly on point with the facts here. The Village is an unpaid vendor and seeks to recover from the HCIDA, which "was not the beneficiary . . . of the contract entered into by the plaintiff and [the project sponsor]." *Id.*

In the bankruptcy context, too, numerous courts have held that leases entered into to facilitate IDA bond financing are not true leases but rather a financing arrangement. *In re Hotel Syracuse, Inc.*, 155 B.R. 824, 840 (Bankr. N.D.N.Y. 1993) (lease was not true lease because it was structured for purposes of amortizing the bonds, rather than to assure a profit to the IDA as the nominal landlord); *In re Appleridge Ret. Cmty., Inc.*, 422 B.R. 383, 398 (Bankr. W.D.N.Y. 2010) (same); *Bank of New York v. United Air Lines, Inc*., No. 04 C 2838, 2005 WL 670528, at *1 (N.D. Ill. Feb. 16, 2005) (applying holding that, under New York law, leases between an industrial development agency and a project sponsor were financing vehicles, not true leases), *aff'd sub nom*. *United Airlines, Inc. v. Bank of New York*, 146 F. App'x 836 (7th Cir. 2005).

C. This and Other Courts' Refusal to Hold IDAs Liable Based on Nominal Title is Consistent with Well-Established Common Law and Statutory Authority

The recognition of nominal, non-beneficial title is hardly unique to IDAs and arises from long-established precedent. Courts draw a sharp distinction

between nominal title and true equitable or beneficial ownership whenever a title is conveyed as a means of security or otherwise to facilitate financing. In 1887, the U.S. Supreme Court noted that "it is an established doctrine that a court of equity will treat a deed, absolute in form, as a mortgage, when it is executed as security for a loan of money." *Peugh v. Davis*, 96 U.S. 332, 336 (1877); *see also Mooney v. Byrne*, 163 N.Y. 86, 91 (1900) ("The facts agreed upon show that there was a mortgage; for a deed, although absolute on its face, when given as security only, is a mortgage by operation of law."). These common law tenets are codified in Real Property Law § 320, which explains "[a] deed conveying real property, which, by any other written instrument, appears to be intended only as a security in the nature of a mortgage, although an absolute conveyance in terms, must be considered a mortgage." *See generally Leonia Bank v. Kouri*, 3 A.D.3d 213, 217 (1st Dep't 2004). Significantly, "one who has taken a deed absolute in form as security for an obligation, in order to foreclose the debtor's right to redeem, must institute a foreclosure, and is entitled to have the premises sold in the usual way." *Bean v. Walker*, 95 A.D.2d 70, 72 (4th Dep't 1983). This is because, when title is conveyed for purposes of creating a security interest, "the conveyance is deemed to create a lien rather than an outright conveyance, even though the deed was recorded." *Id.*

D. The Majority Below Provided No Justification for Its Misguided Reliance on *Adimey*

Despite the overwhelming weight of authority demonstrating the nominal nature of HCIDA's title, the majority below provided no explanation why it was relying on the rarely if ever-followed *Adimey* — whose application is limited to Scaffold Law context — and not *Roberts,* which courts have applied broadly to preclude liability against IDAs by virtue of nominal property ownership in all other contexts. Instead, the majority concluded cryptically, "we see no reason for excluding owners such as HCIDA from the scope of the [Village Water] regulations." R. 10a-11a.

In reaching this conclusion the majority overlooked that *Adimey* represents a very limited exception to the general rule that IDAs may not be held liable for the debts of the nominal tenant but true beneficial owner by virtue of the IDAs' nominal title under a lease-back arrangement. The current lawsuit arises in the context of Article 11 of the Village Law, not Labor Law § 220 or State Finance Law § 137(1) as respectively was the case in *Roberts* and *Davidson Pipe Supply Co.* But there is no reason why the holdings in those and numerous other decisions cited above are not equally applicable here. In contrast to the Scaffold Law at issue in *Adimey*, the Legislature did not intend to advance some special remedial interest through the Village Law that compels a uniquely broad construction of

ownership. *See, e.g.*, *Striegel v. Hillcrest Heights Dev. Corp*., 100 N.Y.2d 974, 977 (2003). And, even if it had, it would still be necessary to weigh that interest against the Legislature's purpose in endowing IDAs with special powers under Article 18-A of the General Municipal Law for purposes of advancing economic development, not to mention well-established common law and statutory authority shielding parties who assume nominal title for financing purposes against liabilities incurred by the true, beneficial owners.

That *Adimey*'s application is limited is further illustrated by *Weiss v. City of New York*, where the Appellate Division expressly declined to extend *Adimey* to a comparable Labor Law provision governing the allocation of liability in personal injury suits involving factory elevators. 260 A.D.2d 249 (1st Dep't 1999) (dismissing personal injury suit against IDA), *aff'd*, 95 N.Y.2d 1 (2000). It is beyond cavil that the sale-lease back arrangement here conforms fully with those in the numerous cases where courts have concluded that the IDA's ownership interest was strictly nominal. There is no basis for rejecting this Court's rulings in *Roberts* and *Davidson Pipe Supply Co.* in favor of *Adimey*, which has never been applied outside the context of the Scaffold Law.

Accordingly, the sale and leaseback agreement between HCIDA and Quackenbush conveyed merely nominal title to HCIDA, strictly as a means of

facilitating tax-exempt financing pursuant to State law. The sale and leaseback never vested in HCIDA a true beneficial interest in the Property. HCIDA is not the true owner of the Property, nor can it be held liable for legal obligations of the beneficial owner such as the water rents at issue here.

POINT II. THE VILLAGE HAS NO CONTRACTUAL REMEDY ABSENT PRIVITY OR LEGISLATIVE AUTHORITY PERMITTING IT TO OVERRIDE THE COMMON LAW.

A. Metered Water Rents are Contractual and Chargeable Against the Property Only Where Authorized by Statute

Under well over a century of precedent, metered rents for water consumption — like the ones at issue here — are contractual in nature. As this Court has explained, where water is metered, "there is merely a voluntary purchase by the consumer from the city of such quantity of water as he chooses to buy, and the obligation to pay therefor must primarily rest upon him who buys and consumes the article." *New York University v. American Book Co*., 197 N.Y. 294, 297 (1910) (internal citation omitted); *see also Silkman v. Bd. of Water Comm'rs of City of Yonkers*, 152 N.Y. 327, 331-32 (1897) ("The water rents charged the plaintiff were not in the nature of taxes, but were rents established for water actually used and supplied to him under an express contract that he would pay for it at the rates established by the defendant."); 1980 Ops St Comp No. 226

(unpublished) ("The village residents have a contractual relationship with the Water Authority and the water charges are in the nature of contractual charges."). C. 89.

"Under the traditional common-law rule, only parties in privity of contract could sue on the contract: It is essential to the maintenance of an action on any contract that there should subsist a privity between plaintiff and defendant in respect of the matter sued on." 13 Williston on Contracts § 37:1 (4th ed.) (internal quotations omitted). Thus, a plaintiff may not enforce a contract against a defendant who was not a party to the contract. *See, e.g.*, *Vintage, LLC v. Laws Constr. Corp.*, 13 N.Y.3d 847, 849 (2009) (holding that directed verdict was proper where agreements showed that defendants were not parties to the contract); *Victory State Bank v. EMBA Hylan, LLC*, 169 A.D.3d 963, 965 (2d Dep't 2019) (lease could not be enforced against non-parties to the contract).

Municipalities, however, may be authorized by statute to impose a lien and "[the owner's] property being thus pledged for the security of the [user's] debt." *New York University*, 197 N.Y. at 297; *see also*, *e.g.*, Second Class Cities Law § 95; Village Law § 11-1118; County Law § 266(2); Town Law §§ 198(3)(d) and 215(12). Such statutes, however, do not authorize a municipality to bring an *in*

personam claim against a non-possessing owner who did not contract for or consume the water itself. *Id*. Nor does an imposition of a lien under such statutes create a surety relationship that would permit a direct *in personam* action against an owner who is not otherwise responsible for the water rents. *See Dunbar v. City of New York*, 177 A.D. 647, 649 (1st Dep't 1917), *aff'd without op.* 223 N.Y. 597 (1918), *aff'd*, 251 U.S. 516 (1920) (upholding constitutionality of lien against owner's property but rejecting argument that owner was thus personally liable as surety for the rents).

Notably, under these same contract principles, a private water company cannot shut off water to a tenant or to a subsequent purchaser of the property due to the delinquent rents owed by the owner. *See Title Guarantee & Trust Co. v. 457 Schenectady Ave.*, 260 N.Y. 119, 127 (1932); *United States v. Springwood Vill., Inc*., 168 F. Supp. 885, 887 (S.D.N.Y. 1958); *cf.* 21 Ops St Comp No. 652 at 505 (1965) (a village may not cut off the water supply as a means of coercing a present user to pay the personal contractual debt of his grantor); 1980 Ops St Comp No. 226 (unpublished) (C. 88-89). Further, a water charge by a private water company "[does] not become a lien upon real estate, as no lien is or has ever been given to a private water company" by any statute or act. *Title Guarantee*, 260 N.Y. at 124.

Here, the Village is not asserting contractual privity with, or consumption by, HCIDA. C. 73-78. Nor is it seeking to foreclose upon a lien against the Property itself. C. 73-78. Rather, the Village is attempting to proceed under a novel cause of action directly against a non-possessing alleged owner who did not incur the water rents itself. This also goes well beyond what is permissible under the common law. Further, as discussed immediately below, it also exceeds the authority granted the Village with respect to unpaid water bills under the applicable enabling statute, Article 11 of the Village Law.

B. The Village Law Does Not Authorize an *In Personam* Remedy against Non-possessing Owners

Like other municipalities, a village, "unknown at common law . . . is a creature of the Legislature and may not act in excess of the powers conferred upon it by statute." *People v. Scott*, 26 N.Y.2d 286, 289 (1970) (town acted in excess of statutory powers in enacting ordinance that effectively required abrogation of an existing contract, a power not delegated to towns by the Legislature). In particular, "[w]here a statute describes the particular situation in which it is to apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted and excluded." *Village of Webster v. Town of Webster*, 270

A.D.2d 910, 911 (4th Dep't) (internal quotation omitted), *lv. to appeal dismissed in part and denied in part*, 95 N.Y.2d 901 (2000).

Article 11 of the Village Law provides a complete procedure for the collection of unpaid water charges, or "rents" as the statute refers to them. Under Village Law § 11-1116, the Village "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 the water." (Emphasis added). In addition, under Village Law § 11-1118, "[s]uch [water] rents, together with the amount of any penalty . . . for non-payment of such rents . . . shall be a lien on the real property upon which or in connection with which the water is used . . . ." To the extent unpaid water rents are outstanding on the first day of the month following the commencement of the fiscal year, the Village is then required to follow prescribed procedures and "levy the same upon the real property in default." Village Law § 11-1118.

The Village Law thus provides for two distinct avenues for "enforcing the collection of water rents." First, a village "may adopt rules, regulations and local laws, not inconsistent with law," which are enforceable "by cutting off the supply of water." Village Law § 11-1116. Second, water rents by operation of law

create a lien on the real property served on which a village is required to levy taxes to the extent that they remain unpaid by a specified date. Village Law § 11-1118; *see also* 1987 Ops St Comp No. 87-18 at 32 ("Water rents are contractual charges and not taxes. However, . . . once such water rents become delinquent, they must be included in the annual tax levy."). C. 98.

C. The State Comptroller has Repeatedly Emphasized That the Authority Granted Villages Under Article 11 is Narrowly Circumscribed

As repeated rulings by the State Comptroller have underscored, the means and authority granted villages under the Village Law for purposes of collecting unpaid water rents are narrowly circumscribed. It is thus mandatory that a village include delinquent water rents in its tax levy. 15 Ops St Comp No. 59-1113 at 472 [1959]. C. 92. Once this occurs, no further collection of the rents may be made and a village must refuse any later tender of payment. 15 Ops St Comp No. 59-634 at 290 [1959]. C. 91; *see also* 1980 Ops St Comp No. 226 (unpublished) ("Once water rents are placed on the tax rolls . . . they become taxes and are no longer considered contractual charges"). C. 89. Further, the village must restore water service to the property in question. 1987 Ops St Comp No. 87-18 at 31. C. 97; *see also generally*, 1980 Ops St Comp No. 80-8 at 5 (parallel provision, Town Law § 198(3)d, "provides a complete procedure for enforcing the

collection of unpaid water rents by inclusion of such amounts in the levy of town-county taxes."). C. 96.

Similarly, "the authority granted . . . to a village, whereby the supply of water to a customer may be cut off, must be strictly construed." 19 Ops St Comp No. 63-380 at 255 [1963]. C. 93. A village may not use this authority for other purposes, such as compelling a customer to connect to a public sewer system. *Id*.; *see also* 1979 Ops St Comp No. 79-564 (unpublished) (village may not withhold water service to a delinquent property until the taxes and levied water rents from previous years are paid) (C. 86). Notably, before 1972, the Village Law permitted villages to enforce the collection of water rents not merely "by cutting off the supply of water" but "also by the imposition of penalties or by both." But the Legislature amended this provision to remove penalties as an enforcement option and limit the enforcement provisions available to a village absent a tax levy solely to the discontinuance of water service. *See* former Village Law § 228.

Indeed, in its Amended Answer, the Village conceded that it is bound to follow the procedures set forth in Village Law 11-1118, including the levying of any unpaid water rents in its annual levy. C. 75, ¶ 19 ("Under 11-1118 of the Village Law, the Village of Herkimer is required to include unpaid water rents in

the annual tax levy, even for tax exempt property."). So, it is difficult to fathom why it has persisted in claiming that it may proceed — as if by magic without any common-law, statutory, or other legal basis — against HCIDA, which has never had possession of the Property and did not contract for or consume the services in question.

D. Courts have Consistently Held That Villages May Not Exceed the Powers and Authorities Granted Them Under Article 11 of Village Law

This matter is no different than other cases where courts have held that a village may not exceed the specific powers and authority conferred to it under Village Law Article 11 governing the provision of water.

For example, in *Torsoe Brothers Construction Corp. v. Board of Trustees of the Incorporated Village of Monroe*, 49 A.D.2d 461 (2d Dep't 1975), a village sought to defray the cost of maintaining and improving its water system through "tap-in" permit fees charged to property owners seeking to connect new lines to its water system. Under Village Law § 11-1112, the village was permitted to recover the actual costs of connecting new pipe. *Id*. at 464. Village Law §§ 11-1108 and 11-1118 further permit villages to recover the costs of improving and extending their water systems through various means, including general taxation, special benefit assessment, and water rents. *Id*. at 465. Nevertheless, the

Appellate Division held that the tap-in permit fees at issue were invalid because the Village Law did not permit villages to use such fees as a means to recover the costs of maintenance and improvement. *Id*.

Similarly, in *Village of Webster*, a village sought a declaratory judgment that it owned certain valves and waterlines that it used to supply water customers outside of its limits. 270 A.D.2d at 910. Again, there was no question that the village was authorized to supply such customers under the Village Law. *Id*. at 911. Likewise, under Village Law § 11-1122, the village had authority to extend water mains outside its limits to supply the village as well to acquire real property generally for governmental purposes under Village Law § 1-102(2). *Id*. Nevertheless, the Court held that the village had not acquired ownership or control over the lines at issue as the "specific powers of a village regarding the supply of water to customers outside the village limits are explicitly defined" in Section 11-1110 of the Village law. *Id*. And, while this section "includes the express authorization . . . to acquire ownership of existing pipes under public highways," it "does not authorize ownership of the privately installed supply connections of customers outside Village limits," over which the village sought control. *Id*.

In other contexts, too, courts have repeatedly made clear that a municipality or agency's authority is derived from and limited by the relevant enabling legislation and may not be exceeded. *See Scott*, 26 N.Y.2d at 289-90; *Weiss v. City of New York*, 95 N.Y.2d 1, 4-5 (2000) (administrative regulation was invalid to the extent it expanded scope of liability for elevator safety violations beyond that contemplated under controlling statute); *Guilani v. Hevesi*, 90 N.Y.2d (municipal water authority could not issue bonds to finance purchase of water system from municipality where controlling legislation did not authorize bonds to be issued for that purpose); *Holroyd v. Town of Indian Lake*, 180 N.Y. 318, 322 (1905) ("While the towns of our state are municipal corporations, they have limited corporate powers, and can make no contract except as authorized by statute."); *Town of Ithaca v. Village of Cayuga Heights*, 182 A.D.2d 78, 83-84 (3d Dep't 1992) (municipalities could not contract in excess of authority granted under controlling legislation with respect to sewer services); *Barron v. Getnick,* 107 A.D.2d 1017, 1018 (4th Dep't 1985) (municipalities' authority with respect to zoning limited by enabling legislation).

Again, the facts here are no different than in *Torsoe Brothers Construction Corp*. and *Village of Webster*. The Village Law establishes specific means and procedures for villages to enforce the collection of unpaid water rents.

These methods, however, have never included bringing an *in personam* action against an alleged owner who neither contracted nor consumed the services in question. Lacking a proper statutory basis, the Village cannot fashion a novel remedy out of whole cloth, let alone one that violates the common law.

E. The Majority Opinion Below Improperly Interpreted the Village Law as Giving the Village Authority to Override the Common Law

1. Neither *Dunbar* nor the Other Authority Relied Upon by the Majority Below Hold That the Common Law Permits Personal Liability of a Non-Contracting and Non-Consuming Owner

Here, HCIDA never contracted for nor consumed the water at issue. Nevertheless, despite the undisputed lack of privity between the Village and HCIDA, the majority below held that the imposition of liability against HCIDA "does not violate common-law principles, nor do the regulations require the property owner to pay the debt of another." R. 10a.

In support of this conclusion, the majority cites to *Dunbar v. City of New York*, 177 A.D. 647 (1st Dep't 1917), *aff'd without opinion*, 223 N.Y. 597 (1918), *aff'd*, 251 U.S. 516 (1920). But *Dunbar* does not stand for the premise that supplying water to a tenant gives rise to an "implied contract" between the owner

and the municipality supplying the water, as the majority holds. *Id.*; *cf.* R. 10a.[3] Rather, *Dunbar* stands for the distinct proposition that, when an owner assents to installation of pipes to supply water from a municipal source, there is sufficient basis to impose liability upon the owner's *property* by *statute* — not the common law — without offending the Due Process Clause. *Dunbar*, 177 A.D. at 648.

> It said that the tenant was primarily liable, which is true; but under the statute both the tenant and the owner are liable. 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.

Id. at 649 (emphasis added). It is therefore by virtue of statute, not under the common law, that a municipal lien is permissible.

Additionally, the majority below relied on a number of cases from other jurisdictions. But these also do not hold that the common law permits

---

[3] The majority below cites to the U.S. Supreme Court's affirmation of *Dunbar* for support of its contention that the installation of pipes to supply water on the property gives rise to an "implied contract" between the owner and municipal water utility. R. 10a. But the U.S. Supreme Court did not hold that. Rather, like the First Department below, it more narrowly held that Due Process is not offended by the imposition of a lien because the installation of pipes gave rise to "implied consent" sufficient for that purpose. *Dunbar*, 40 S.Ct. at 251. That question is distinct from whether the common law permits personal liability against the owner in the absence of privity. The answer to this second question is indisputably no. *See* Section II.A *supra*.

imposing direct liability upon a non-contracting or consuming property owner. Instead, these cases support the narrower proposition that the owner's assent to the installation of piping may provide a sufficient nexus or rational basis for imposing liability by statute. *See Puckett v. City of Muldraugh*, 403 S.W.2d 252, 254 (Ky. 1966) (ordinance permitting recovery of unpaid water rents against landlord was within authority granted municipality under Kentucky statute); *Sherwood Court v. Borough of S. River*, 683 A.2d 839 (N.J. App. Div. 1996) (upholding statute that expressly authorized lien against property based on tenants' unpaid electric bills). So, even assuming those cases are otherwise consistent with New York law, they, too, would not justify direct action against a non-consuming property owner under the common law.

Finally, the majority below cites to *City of New York v. Idlewild Beach Co, Inc.*, 182 Misc. 205, 207-208 (N.Y. City Ct., 1943), *aff'd without opinion*, 182 Misc. 213 (Sup. Ct., N.Y. Ctny, App. Term 1944) for the proposition that discontinuing the water supply and imposing a lien against the real property are remedies "available in addition to, and not exclusive of, direct liability against property owners." R. 10a. But *Idlewild Beach* arose under the New York City Administrative Code, which was enacted directly by the State Legislature, unlike

the Village regulations that are applicable here.[4] Further, the plain language of the Administrative Code permits personal action only against "the person for whose benefit or by whom the water is taken or used," not the property owner. *Idlewild Beach* at 208. And the property owner in *Idlewild Beach* does not appear to have contested her personal liability. Rather, the only contested issue before the court was whether proceeds from the condemnation of the property should be applied first to delinquent real estate taxes or to delinquent water rents. *Idlewild*, 183 Misc. 205. So, this lower court's musings on the personal liability of owners are both inapplicable — because they concerned a legislatively enacted statute as opposed rules adopted by mere municipal resolution as here — and dicta.

2. The Village Law Does Not Authorize the Village to Abrogate the Common Law

The plain language of the Village Law does not contemplate an *in personam* remedy against a property owner who neither contracted for nor consumed the water in question. Rather, as we have seen, the statute sets forth two

[4] *Idlewild Beach* turned on Section 415(1)-19.0 of 1937 New York City Administrative Code, which derived from the sixth and seventh sentences of section 1022 of the City 's 1901 Charter (Chapter 466 of the Laws of 1901), as last amended (as of that time) by Section 1 of Chapter 329 of the Law of 1919. *See Matter of Shannon B.*, 70 N.Y.2d 458, 464 (1987) ("It is well settled that the New York City Charter has the force of State law."). A copy of section 1022 is included for the Court's convenience at C. 100.

remedies for "enforcing the collection of water rents." First, a village "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." Village Law § 11-1116. Second, water rents by operation of law create a lien on the real property served on which a village is required to levy taxes to the extent that they remain unpaid by a specified date. Village Law § 11-1118.

The majority below does not explain how these provisions authorize an *in personam* remedy but relies instead on language permitting the adoption of "rules, regulations and local rules, not inconsistent with law, for enforcing the collection water rents, . . ." as providing the Village with broad enforcement powers. But there are several problems with this reasoning. A village, "unknown at common law . . . is a creature of the Legislature and may not act in excess of the powers conferred upon it by statute." *Scott*, 26 N.Y.2d at 289; *see also Village of Webster*, 270 A.D.2d at 911. And, as repeated rulings of the State Comptroller have held, the Village Law provides a comprehensive procedure for the collection of unpaid water rent and a village's ability to deviate from its requirements are circumscribed. *See, e.g.*, 1987 Ops St Comp No. 87-18 at 32 (once water rents become delinquent, they must be included in the annual tax levy) (C. 98); 1980

Ops St Comp No. 226 (unpublished) ("Once water rents are placed on the tax rolls . . . they become taxes and are no longer considered contractual charges.") (C. 89); 19 Ops St Comp No. 63-380 at 255 [1963]. C. 93. ("The authority granted . . . to a village, whereby the supply of water to a customer may be cut off, must be strictly construed.").

In addition, as the dissent below underscored, the phrase, "not inconsistent with law," does not bestow upon the Village the authority to abrogate the common law. "Put simply, when the legislature has denied a municipality the power to enact ordinances inconsistent with state law, the municipality may not create a cause of action or theory of liability inconsistent with, or otherwise unrecognized by, state statute or the common law." R. 12a; *see also Lyth v. Hingston*, 14 App. Div. 11, 17 (4th Dep't 1897) (the legislatively delegated authority to enact municipal ordinances not "inconsistent with the laws" does not allow a "municipality to adopt ordinances which should be superior to the common law of the State"); *Koch v. Fox*, 71 A.D. 288, 294 (1st Dep't 1902) ("It is not within the province of the municipal assembly to create a cause of action" if, "[u]nder the general law [*i.e.*, the common law] the owner owed no duty and was under no liability ... under such circumstances.").

F. The Order Below is Premised on a Strained Reading of the Village's Water Regulations

Even assuming the Village Law authorizes an *in personam* remedy against a property owner who neither contracted for nor consumed the water at issue, the Village did not exercise any such authority as its Water Regulations do not provide for this relief.

The majority relied on Regulations 7, 8, 9, and 22. Notably, the Village in its counterclaim alleged liability based on Regulation 22 alone, thus suggesting that even the Village never believed that any of these other regulations were actually relevant to its claims against HCIDA. C. 77. In any event, Regulation 7 does not authorize any remedies for non-payment. Instead, it states merely "all bills . . . are a charge against the owner . . . and said bills will be rendered to the owner <u>or</u> occupant," without specifying under which circumstances or how the owner as opposed to the occupant might be liable or *vice versa*. (Emphasis added). Regulation 7 thus hardly authorizes an *in personam* legal action against an owner based on a tenant's non-payment. In contrast, Regulations 8 and 9 do define an express remedy for non-payment: a lien against the property. So, these, too, do not support an *in personam* remedy against a non-contracting owner like the HCIDA.

Lastly, Regulation 22 — the Regulation relied upon by the Village to support its counterclaim in the first place — is entitled "Meters" and addresses when liability attaches and how it is measured; it does not purport to set forth remedies for delinquent bills.

> The property owner will be liable for all water bills rendered:
>
> (A) From the time of setting the meter to and including 48 hours (excepting Sundays and Holidays), following receipt at the office of the Municipal Commission of written notice to discontinue such service, and
>
> (B) As indicated by the meter or estimated by the Municipal Commission from the best available information, should the meter be found to incorrectly register the actual consumption.

R. 316.

Thus, while Regulation 22 may state that "the property owner" is liable for water bills, it is not even clear whether Regulation 22 is referring to the property owner at the time the meter is installed or subsequent owners. R. 316. Notably, too, Regulation 22 makes no reference to the tenant. R. 316. Should that mean then that tenants are not liable for the water they consume? Regulation 22 was designed to address timing of liability and appears simply to be sloppy draftsmanship, which reflects the assumption that the "property owner" would be the party installing the water meter.

In short, it is impossible to infer an *in personam* remedy against an owner who neither ordered nor consumed the water at issue from the Water Regulations' actual language without substantial logical leaps. Given that there is also no precedent under New York law for such a remedy, it is all but inconceivable that such a remedy was even contemplated at the time the Regulations were drafted. Rather, this Court should recognize the Village's attempt to hold HCIDA personally liable for what manifestly is: a creative but baseless, hail-Mary maneuver concocted out of desperation years after the fact once all efforts to recover first against Quackenbush failed. C. 81-83 (showing that Village first attempted to bill HCIDA for water on May 18, 2011, over six years after Quackenbush declared bankruptcy).

G. The Order Below Violates the Derogation Canon

The majority's decision also violates New York's derogation canon, which holds that legislative enactments that contravene the common law must be narrowly construed and interpreted. *See, e.g.*, *Morris v. Snappy Car Rental*, 84 N.Y.2d 21, 28 (1994) ("It is axiomatic concerning legislative enactments in derogation of common law ... that they are deemed to abrogate the common law only to the extent required by the clear import of the statutory language"); *Smalley v. Bemben*, 50 A.D.3d 1470, 1471 (4th Dep't 2008) (statute holding landowners

liable for failure to maintain sidewalks did not render owners liable for injuries relating to ice and snow; statute changed the common law and therefore should be strictly construed under the derogation doctrine), *aff'd*, 12 N.Y.3d 751 (2009); *Cummings v. Manville*, 153 A.D.3d 58, 64 (4th Dep't 2017) (holding that statute immunizing owners of certain roads in rural areas from liability should be strictly construed under the derogation doctrine).

The majority's decision violates the derogation doctrine in two distinct ways. First, it interprets the phrase "not inconsistent with law" under Village Law § 11-1116 to mean that a village may adopt regulations for enforcing the collection of water rents so long as they "do[] not violate common-law principles." R. 10a. Although the majority did not elaborate what this test might involve, it apparently affords considerable latitude. Certainly, the majority did not identify any common law remedy that actually permits direct liability against HCIDA as the owner here. Instead, as discussed under Point I above, the majority cited to cases where courts have upheld liens against property, which are specifically authorized under the Village Law and other statutes enacted by the State Legislature. In other words, the majority appears to have interpreted "not inconsistent with law" to afford municipalities and other agencies free reign to abrogate the common law, so long as there is some precedent arguably holding that

the Legislature would have the Constitutional authority to do so. But, if that were the case, then the words "not inconsistent with law" in an enabling statute would actually mean the opposite of their plain meaning. Rather than circumscribing the powers of a municipality exercising an administrative function, these words would endow the municipality with the same broad authority to override common law requirements, subject only to Constitutional restraints, as that enjoyed by the Legislature.

Second, the majority's decision below violates the derogation doctrine by interpreting the Village's Water Regulations broadly to permit imposition of contractual liability in the absence of privity even where not "required by the clear import" of the regulatory language. *Smalley*, 50 A.D.3d at 1471. On the contrary, as discussed under Point II.F above, the Water Regulations provide no such remedy and the majority's reading of them is extraordinarily strained. So, even assuming the Village theoretically has the authority under the Village Law to override the common law — although it does not — the anti-derogation cannon prohibits interpreting the Village's vague and inconsistent Water Regulations as doing so here, as nothing in the regulations clearly provides *in personam* liability against a non-contracting and non-consuming owner such as the HCIDA. *Miglino v. Bally Total Fitness of Greater New York, Inc.*, 20 N.Y.3d 342, 349 (2013)

("[L]egislative enactments in derogation of common law, and especially those creating liability where none previously existed, must be strictly construed.") (internal quotation omitted).

H. The Majority's Order is an Invitation to Legal Havoc

The majority's Order further disturbs settled legal and commercial precedent in at least two distinct ways.

1. The Order Below Implicitly Amends the Common Law by Permitting Utilities to Seek Personal Recourse Against an Owner Based on a Tenant's Consumption

According to the majority, holding a property owner personally liable for tenant's water consumption by virtue of the owner consenting to the installation of water pipes "does not violate common-law principles." R. 10a. But the logical extension of this proposition has absurd results that extend far beyond municipal water systems. Under the common law, the contractual relationship between a municipal water supplier and a consumer is no different from other utilities. *See Silkman v. Bd. of Water Comm'rs of City of Yonkers*, 152 N.Y. 327, 331-32 (1897) (holding that metered water charges by municipal supplier are contractual in nature). So, if the majority below is correct, then any utility, whether private or municipal, would have personal recourse against a property owner if a tenant failed

to pay its bill. Any owner would thus be personally responsible if a tenant did not pay his or her electric, gas, or cable bill.

Indeed, the common law does not "imply" a contract between the owner and the utility, as the majority below held, R. 10a, simply by virtue of the owner permitting utility conduits to be installed on the property. Rather, the tenant's liability may only be imputed to the landlord, if at all, by statute. The common law itself provides no recourse. *See Hoch v. Brooklyn Borough Gas Co.*, 117 A.D. 882 (2d Dep't 1907) (gas company did not have right to require owner to pay bills incurred by former occupant); *Morey v. Metropolitan Gas Light Co*., (1874) 38 N.Y. Super Ct. (6 Jones & S) 185 (same); 64 Am. Jur. 2d Public Utilities § 46 (gathering cases across multiple U.S. jurisdictions and concluding, "[t]he consumer of public utility services is liable in contract for the charges for such services. In the absence of a lien authorized by statute or special agreement, a public utility cannot impose liability for utility charges incurred upon one other than the user or one who has contracted for the supply, and this limitation applies with equal force to the regulations of a public service company and the ordinances of a municipal corporation. In the absence of statute, there is no unconditional personal liability imposed upon owners of real estate for water rents or water rates while the property is in the possession of their tenants."); *cf. Title Guarantee &*

Trust Co. v. 457 Schenectady Ave., 260 N.Y. 119, 127 (1932) (holding that a private water company cannot shut water to or to a subsequent purchaser due to the delinquent rents owed by the owner); *United States v. Springwood Vill., Inc.*, 168 F. Supp. 885, 887 (S.D.N.Y. 1958) (same).

The practical ramifications of this question should also not be discounted, even as it relates narrowly to municipal water systems. The Village Law as it applies to the water supply may seem like a sleepy province of State law. But millions of households throughout the state depend on municipal water systems. As discussed under Point II.A and II.E above, there is no New York precedent for seeking a direct, *in personam* remedy against a property owner based on a tenant's water consumption either under statute or the common law. Certainly, this type of relief is not expressly contemplated under the Village Law or similar enabling acts for municipal water systems. *See, e.g.*, Second Class Cities Law § 95; Village Law § 11-1118, County Law § 266(2); Town Law §§ 198(3)(d) and 215(12). Under the Order below, however, municipal water systems now suddenly have authority to sue property owners directly for debts incurred by their tenants, even though it did not occur even to the Village here to attempt to bill HCIDA until many years after the charges were incurred and all efforts to collect from the bankrupt manufacturing tenant had failed. C. 80-82. If the Order below

stands, other municipal water authorities may likewise decide to reinterpret their regulations and rules to permit direct recovery against owners for their tenant's water consumption. Their action may further embolden other utilities to seek similar relief, now that it is established that *in personam* relief against non-contracting owners is consistent with "common-law principles." If this result would not upset well-established commercial relationships and expectations, it is not clear what would.

2. The Result Below Would Grant Municipalities and Agencies Broad Latitude to Override the Common Law Without Legislative Authorization

The phrase "not inconsistent with law," or very similar language, appears at least 50 times in various State statutes with respect to the authority of municipalities, agencies, and other entities to promulgate rules, regulations, and laws. C. 103-09 (summarizing State law provisions granting rule making authority "not inconsistent with law"). The Legislature presumably includes phrases such as "not inconsistent with law" to ensure that municipalities and agencies have a degree of flexibility and discretion in discharging the laws that they administer so that may adapt to changing conditions and test new solutions. Nevertheless, an overly flexible approach implicates other countervailing concerns, including both Due Process and the stability and predictability of commercial relationships.

At least with respect to the common law, the dissent below interprets the words, "not inconsistent with law," to grant a municipality almost unlimited authority to vary well-settled precedents. Indeed, the majority does not cite even a single New York case that actually holds that a non-contracting or consuming property owner may be held personally liable for their tenant's water consumption. Nevertheless, as discussed under Point II.E.1 above, the majority interprets *Dunbar* and other authority — which support the entirely distinct and much narrower proposition that a lien may be imposed *by statute* against *the property* without offending Due Process — as demonstrating that personal liability against a non-contracting owner is somehow "consistent with common law principles." The majority reaches this conclusion, even though over a century of legal New York precedents have squarely held that metered water rents are contractual in nature and therefore may not be charged against a property owner absent privity or express statutory authorization. *See, e.g., New York University v. American Book Co*., 197 N.Y. 294, 297 (1910); *Silkman*, 152 N.Y. at 331-32; 1980 Ops St Comp No. 226 (unpublished) (reproduced at C. 89).

In other words, if, as the majority below itself emphasizes, parties who assent to a contract do so "with a view to the existing law," then those parties are entitled to fair notice of what the law actually is so that they may arrange their

affairs accordingly. R. 9a. They should not be subjected to laws that permit local officials to interpret vaguely drafted rules enacted by mere resolution in unpredictable and unforeseen ways. Otherwise, as the dissent below underscores, "municipalities could vary the common law rules governing the enforcement of contracts, thereby creating a chaotic patchwork of inconsistent and conflicting regulation in which a person's rights and obligations under an identical contract and set of facts would depend on the municipality in which the transaction arose." R. 13a. And that risk is surely present if local officials are presumed to have broad, yet imprecisely defined authority to create liabilities and previously unrecognized legal causes of action in contravention of clear common law prohibitions, by mere municipal resolution, such, as HCIDA would urge, was the case in this matter.

CONCLUSION

For these reasons, the Court should reverse the Order below, and order the entry of final judgment, i) declaring that HCIDA is not liable for the water rents at issue, and ii) dismissing the Village's counterclaim for damages.

Dated: January 27, 2020

HODGSON RUSS LLP
Attorneys for Plaintiff-Appellant

By: _____
Charles W. Malcomb
Joshua Feinstein
The Guaranty Building
140 Pearl Street, Suite 100
Buffalo, New York 14202-4040
716.856.4000

PRINTING CERTIFICATION PURSUANT TO 22 NYCRR 500.13(c)(1)

Pursuant to 22 NYCRR Part 500, Plaintiff-Appellant certifies that this brief complies with the printing requirements under 500.1, that this brief is computer generated, the typeface is Times Roman, the line spacing is proportional and the word count for all printed text in the body of the brief is 13,391.