To be Argued by:
CHARLES W. MALCOMB, ESQ.
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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.

REPLY BRIEF FOR PLAINTIFF-APPELLANT HERKIMER COUNTY INDUSTRIAL DEVELOPMENT AGENCY

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PRELIMINARY STATEMENT

The Village does not dispute that HCIDA did not contract for or consume the water at issue, that HCIDA never controlled the property, and that HCIDA never realized or expected any economic benefit from the property. Nor does the Village dispute that HCIDA held title to the property for the sole purpose of facilitating economic development, consistent with its statutory purpose. Nevertheless, the Village conflates the long-recognized distinction between purely nominal title with actual, beneficial ownership, insisting that *Adimey* is controlling, even though that case arose in the unique context of the Scaffold Law and has never been applied in any other context. The Village simply overlooks this Court's decision in *Roberts v. Erie County Industrial Development Agency* and several cases that have followed it, never even pausing to explain why the distinction between nominal and beneficial ownership should have no bearing in applying the Village Law, even though courts in virtually all other statutory and legal contexts involving IDAs have concluded that it should.

The Village next argues that HCIDA either admitted to being the owner or is precluded from denying ownership due to the prior bankruptcy litigation. But, again, the Village conflates ownership with possession of title: the alleged "admissions" on which the Village relies concern, at most, nominal title

and were consistently coupled with disclaimers as to other forms of ownership. R. 377-79, 384. As to the prior bankruptcy litigation, it also did not touch on the distinction between beneficial ownership and holding a title—the very issue which the Village now insists that HCIDA should be precluded from arguing. To the contrary, the nominal tenant, Quackenbush, never denied its beneficial ownership, and the Trustee's final report listed the property as an asset of the bankruptcy estate that would be abandoned "to the debtor," *i.e.* Quackenbush. C. 11, 13.

And, even if the Village were correct that HCIDA were the beneficial owner, it would still not be entitled to seek personal recovery directly from HCIDA. More than a century of case law precludes recovery of water rents from an owner who did not contract for or use the water in question and therefore is not in privity. The Village does not cite a single case where a New York court has permitted an *in-personam* recovery against a property owner for water charges contracted for and incurred by a tenant. New York courts have permitted at most the imposition of a lien against the property where expressly authorized by statute. The Village's attempt to infer some basis for an *in-personam* remedy from the Village Law and its own vaguely drafted Water Regulations is equally unpersuasive. There is no precedent or basis for the relief the Village seeks—a fact illustrated by the simple circumstance that it did not even occur to the Village

to invoice the HCIDA until some six years after the water charges at issue were incurred. So, however obvious the Village now claims the HCIDA's personal liability may be, that certainly was not the case at the time the charges were incurred. To the contrary, consistent with the Village Law, its own regulations, and apparent practice—certainly the Village has not cited to any examples where it previously sought payment from a non-contracting or consuming owner—the Village sought payment from the party that actually contracted and consumed the water, Quackenbush. C. 38, ¶ 5, 70, and 80.

This Court should therefore reverse the Fourth Department's Order and grant judgment in HCIDA's favor.

POINT I. THE VILLAGE'S ARGUMENTS IGNORE THE OVERWHELMING WEIGHT OF CASES HOLDING THAT AN IDA IS NOT THE BENEFICIAL OWNER UNDER INDISTINGUISHABLE CIRCUMSTANCES

New York courts, including this Court, have generally held that IDAs acting as conduits for bond transactions or similar financial arrangements are not the beneficial owners. *See Davidson Pipe Supply Co. v. Wyoming Cty. Indus. Dev. Agency*, 85 N.Y.2d 281, 286 (1995) ("The economic benefits and burdens of ownership are reserved to the company and the [IDA] serves only as a conduit for

the tax benefits provided by such an arrangement.") (quoting *Erie Cty. Indus. Dev. Agency v. Roberts*, 94 A.D.2d 532, 534–35, 540 (4th Dep't 1983), *aff'd for the reasons stated at the Appellate Division*, 63 N.Y.2d 810 (1984)); *see also Dorval v. Terrace 100, L.P.*, 116 A.D.3d 912 (2d Dep't 2014); *Smith v. N.Y.C. Indus. Dev. Agency*, 265 A.D.2d 477, 478 (2d Dep't 1999); *Al-Sar Realty Corp. v. Griffith*, 139 Misc.2d 104, 106 (Sup. Ct. Oneida Cty. 1987).

The Village's argument hinges on one exception—*Adimey v. Erie County Industrial Development Agency*—a 1996 decision in which this Court summarily adopted the reasoning of Justice Lawton's dissent[1] in the Appellate Division. 226 A.D.2d 1053, 1054 (4th Dep't), *aff'd as modified*, 89 N.Y.2d 386 (1996). The Village claims that in *Adimey*, this Court rejected the concept of "non-beneficial ownership" outright in favor of simply looking at title ownership. *See* Village Brief, at 7. This reliance on *Adimey* to argue that HCIDA was the beneficial owner is mistaken. Instead, *Adimey* should be understood as identifying a narrow exception to the general rule against treating IDAs as beneficial owners.

[1] Justice Lawton's dissent was joined by Justice Davis. The Village inexplicably attributes the opinion to a "Justice Schnepp" (Village Brief, at 6), and quotes a non-existent sentence from the Court of Appeals affirmance, which refers only to the "reasons stated in the dissenting in part memorandum at the Appellate Division." 89 N.Y.2d at 838.

First, Justice Lawton's opinion—published the year after this Court's ruling in *Davidson*—is, by its own language, dependent on the "wording of Labor Law § 240(1)," which he interpreted as applying to the title owner, whether or not they were pass-through owners. *Adimey*, 226 A.D.2d at 1054. The claim that either this Court or Justice Lawton rejected the concept of non-beneficial ownership is false. To the contrary, although Justice Lawton believed that IDAs were owners for the purposes of Labor Law § 240(1), he agreed with the majority that the Erie County Industrial Development Agency "was not an owner within the meaning of Labor Law . . . § 241(6)." *Id*.

Justice Lawton's opinion that IDAs are not owners within the meaning of other laws—as affirmed by this Court—shows that neither he nor the Court of Appeals intended to announce a broad rule rejecting the concept of non-beneficial ownership, and that this Court did not overturn *Roberts* or *Davidson*—the latter of which had been decided only a year earlier. This interpretation of *Adimey's* limit is supported by *Weiss v. City of New York*, in which the Appellate Division explained that *Adimey* was "decided under Labor Law Section 240(1)" and did not "control who is liable" under other statutes—and this Court affirmed that interpretation. *Weiss v. City of New York*, 260 A.D.2d 249 (1st Dep't 1999), *aff'd* 95 N.Y.2d 1 (2000).

The Village attempts to avoid the narrowness of the holding in *Adimey*—Justice Lawton's opening line limiting it specifically to Labor Law 240(1) notwithstanding—by pointing to *Spring Sheet Metal & Roofing Company v. County of Monroe Industrial Development Agency*, 226 A.D.2d 1064 (4th Dep't 1996), and noting that it, too, described the IDA as the "owner." Village Brief, at 7-8. But this dicta was part of the Appellate Division's ultimate holding that the IDA was not liable for a mechanic's lien attached to the property. The Village's strained interpretation of *Adimey* does not withstand the actual language used in that opinion. *Adimey* is clear that Labor Law 240(1) does not distinguish between title holders and beneficial owners, but is equally clear that other laws do recognize that distinction.

The Village also asserts the meritless claim that the great weight of authority is consistent with its position that IDAs are beneficial owners. Village Brief, at 12-14. The Village first cites *Roberts*, arguing that it turned on "'statutory reading and analysis' . . . not on concept [sic] of ownership of the property." Village Brief, at 13, quoting *Roberts*, 94 A.D.2d 532. This argument flies in the face of the Village's argument that *Adimey* should be broadly construed—despite the opening line of that opinion limiting it to a specific subsection of a single statute. Further, the Village overlooks that *Roberts* specifically held that, "the

function of the Quo Vadis plant is private and the economic attributes of ownership are vested in Quo Vadis [*i.e.,* the private project sponsor], and not the agency." *Id.* at 540. This holding has since been extended to other contexts, including by this Court, and is now considered generally applicable. *See, e.g.*, *Davidson Pipe*, 85 N.Y.2d at 286 ("The conveyance of legal title to the [IDA] with the simultaneous lease back to the company is structured merely as a mechanism to facilitate financing and is not a genuine allocation of ownership in the agency.") (quoting *Roberts*, 94 A.D.2d at 539).

In addition, the Village argues that *Smith* is "no longer good law" because it cited a prior case abrogated by *Adimey*. Village Brief, at 13. But *Smith* was decided in 1999, three years after *Adimey*. 265 A.D.2d at 478-78. As a matter of simple logic, *Adimey* could not have overruled or abrogated it. The Village also makes the same argument as to *Dorval*—that it is no longer good law because it cited *Smith* and *Roberts*, which the Village claims were overruled by *Adimey*. Village Brief, at 13. Of course, *Dorval* was decided in 2014, nearly two decades after *Adimey*, and no court shares the Village's conclusion that *Roberts* or *Smith* were overruled. 116 A.D.3d 912. Instead, *Dorval* and *Smith* are further examples of courts refusing to hold IDAs liable based on a merely nominal ownership interest in property—assumed for purposes of financing only. This is also true of

Al-SAR Realty—despite the Village's attempts to distinguish it as "an equitable action," Village Brief, at 13-14, it was one that demonstrated the general applicability of the *Roberts* analysis. 139 Misc.2d 104.

POINT II. THE HCIDA IS NOT PRECLUDED FROM DENYING BENEFICIAL OWNERSHIP

A. Collateral Estoppel is Inapplicable Here

The Village also asserts that HCIDA is estopped from denying beneficial ownership because of a proceeding in the United States Bankruptcy Court. Collateral estoppel is inapplicable because the Village was not a party to the bankruptcy proceedings and the issue being litigated was not the same.

In order to establish collateral estoppel, the party raising it must show: (1) an identical issue was necessarily decided in a prior action or proceeding; (2) the identical issue is determinative in the present action; and (3) the party to be estopped from litigating the issue was already afforded a full and fair opportunity to do so. *Buechel v. Bain*, 97 N.Y.2d 295, 304 (2001); *see also Auqui v. Seven Thirty One Ltd. P'ship*., 22 N.Y.3d 246, 255 (2013).

The issues being litigated are not identical. Here, the Village is seeking to recover water rents under the Rules and Regulations of its Water Department. C. 77. In contrast, in the adversary proceeding, Quackenbush

opposed attempts by HCIDA to compel specific performance and then rescission of the Lease. R. 370-371; C. 30, ¶ 6. Quackenbush opposed reconveyance of formal title 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. 26, ¶¶3, 4. It never denied that it was the true beneficial owner. C. 18-21; 22-25; *see Energycresent, Inc. v. Creative Modules Enter., Inc*., 183 A.D.2d 804 (2d Dep't 1992) (lessee's action for specific performance of an option to purchase real estate was not barred by res judicata by prior unsuccessful attempt to invalidate the lease and the option, where the gravamen of the lessee's claims were not the same wrongs at issue in the prior litigation, and the prior litigation was commenced long before the option could be exercised). On the contrary, Quackenbush claimed that the property was an asset belonging to Quackenbush with a value of $300,000 in its bankruptcy petition. C. 4-5. Hence, Quackenbush's interests in opposing reconveyence of title were unrelated to the Village's current interest in establishing HCIDA's beneficial ownership for purposes of recovering unpaid water rent or enforcing the Uniform Code. *See, e.g.*, *State v. Zurich American Ins. Co*., 106 A.D.3d 1222 (3d Dep't 2013) (State's right of indemnification against owner of gasoline station for environmental cleanup of property was independent of owner's indemnity rights against insurer and therefore did not establish privity required for

collateral estoppel to apply based on owner's prior action against insurer). Neither Quackenbush nor HCIDA could have sought any relief with respect to the Village's current claims within the adversary proceedings because, inter alia, the Village did not assert those claims until 2011, over a year after the bankruptcy concluded. C. 14, 82-83.

The Village also asserts that "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.'" Village Brief, at 21-22. But the dissent was correct. The Village never issued bills to the HCIDA until after the bankruptcy was concluded. C. 82-83.

B. HCIDA Has Never Admitted Beneficial Ownership, Judicially or Otherwise

The Village also argues that Herkimer has admitted to holding title in its Complaint, and that other documents also constitute "direct admission of ownership."[2] Village Brief, at 11. These arguments illustrate the Village's

[2] The Village also argues that HCIDA has failed to address these purported admissions. HCIDA addressed them before the Fourth Department (HCIDA 4th Dep't Brief, at 17-18; HCIDA 4th Dep't Reply, at 13) and again before this Court on Appeal, *see* HCIDA's Opening Brief, at 13-14.

confusion about the differences between holding a *title*—nominal, non-beneficial ownership—and actual ownership—a distinction made clear in *Roberts*, and one fundamental to common-law understanding of property as a "bundle of sticks." *See Flo & Eddie, Inc. v. Sirius XM Radio, Inc*., 28 N.Y.3d 583, 624 (2016) ("The multiple rights of ownership, use, and possession are expressed as 'a bundle of sticks'—a collection of individual rights which, in certain combinations, constitute property.") (internal quotation omitted). HCIDA does not deny nominal title, but title alone does not control actual, beneficial ownership—indeed, HCIDA's arguments revolve around this issue. That HCIDA admitted to holding the title in the Complaint is hardly an admission of actual ownership.

Instead, HCIDA has consistently denied being more than the nominal owner—something made clear by direct review of the "documentary evidence" cited by the Village. Village Brief, at 11. In the "Blockworks" agreement, Blockworks, LLC acknowledged that HCIDA "had only a 'paper' title to the Premises and the Property and has never exercised any control or dominion over either." R. 378, ¶ 9. HCIDA, in turn, agreed to convey for whatever "right, title and interest" it had in personal property located at the Property—but included the disclaimer that the conveyance was "without warranty of any nature or kind relative to . . . title." R. 377, ¶ 2. And in the 2009 transaction, HCIDA agreed to

convey—for a nominal $1—"any and all rights and interests of [HCIDA], *if any*" to the Universal Brownfield Revitalization Corporation for one year. R. 384 (emphasis added). This peppercorn consideration—combined with HCIDA's "if any" disclaimer—refutes the Village's assertion that this was an admission of ownership on HCIDA's part. The Village also cites an "opinion letter" written by HCIDA's attorney—but this simply discusses who held title during the bankruptcy proceedings, not who the beneficial owner actually was.[3]

POINT III. THE VILLAGE LACKS THE AUTHORITY TO MODIFY THE COMMON LAW AND ALTER THE ELEMENTS OF A CAUSE OF ACTION FOR BREACH OF CONTRACT

A. *Dunbar* Does Not Support an *In-Personam* Remedy

The Village insists that the majority below correctly applied *Dunbar v. City of New York*, 177 A.D. 647 (1st Dep't 1917), *aff'd* 223 N.Y. 597 (1918), *aff'd* 251 U.S. 516 (1920), in finding that there was an "implied contractual obligation," which purportedly allows the Village to pursue a direct, personal remedy against HCIDA, even though HCIDA neither contracted for nor consumed the water at issue. Village Brief, at 15-16. But, as the Village acknowledges,

[3] The Village's record cite is to an affirmation written by the Village's counsel, arguing that the letter—an inadvertently produced legal analysis sent to a client—is not protected by attorney-client privilege. (R. 381-82). It does not cite to the letter itself.

Dunbar involved a lien against property, which the plaintiff challenged on theory that it was a taking—*i.e.*, that it offended Due Process. *Id*. at 15. The case does not, as Village would have it, recognize a contractual remedy against the owner, who never contracted for or consumed the water at issue. To the contrary, *Dunbar* expressly rejected the owner's contention that the statute authorizing the lien should be invalidated because it purportedly required the owner to assume personal liability as a surety. *Dunbar*, 177 A.D. at 649. As the Appellate Division explained, "[i]n 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.* (emphasis added). So, nothing in *Dunbar* supports the Village's contention that an owner may be held directly and personally liable for the tenant's consumption of water. *See* HCIDA's Opening Brief at 47-48. *Dunbar*, like *New York University v. American Book Co.*, 197 N.Y. 294 (1910) and other authorities cited by the HCIDA, underscores rather that any remedy against an owner, who did not contract for or consume the water at issue, is defined by statute and limited to a lien against real property. *See* HCIDA's Opening Brief, at 37-40.

B. The Village's Reliance on *Winston* Is Misplaced and Only Highlights the Absence of Any Actual Authority Supporting Its Position

The Village repeatedly cites to the Second Circuit's decision in *Winston v. City of Syracuse*, 887 F.3d 553 (2d Cir. 2018).[4] But that decision is inapposite and thus only serves to highlight the Village's failure to cite any New York authority actually permitting a municipality to pursue an *in-personam* remedy against a property owner to recover unpaid water charges incurred by a tenant where the owner neither contracted for nor consumed the water.[5]

Winston was an equal protection case brought under 42 U.S.C. § 1983 by residential tenant of a multi-unit dwelling in Syracuse, who challenged the City's practice of terminating water service to tenants based upon the landlord's failure to pay its water bill. Unlike here, the landlord, not the tenant, had contracted for the water, as the City had a policy of allowing only landlords, and

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[4] The Village cites erroneously to *Winston v. City of New York*, 759 F.2d 242 (2d Cir. 1985). Village Brief, at 17, 19, and 25. That decision from 1985 concerning retirement benefits, however, has no apparent bearing on the present matter and it is clear from the Village's actual characterization of the case that it, in fact, intended to cite to *Winston v. City of Syracuse*, 887 F.3d 553 (2d Cir. 2018).

[5] The only case cited by either the Village or the majority below that even comes remotely close to supporting this proposition is *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). But the operable language in that lower court decision is vague dicta and both the statutory context and circumstances of that case are distinguishable on multiple grounds, as set forth in HCIDA's Opening Brief at 49-50.

not tenants, to open water accounts. *Id.* at 559. Further, *Winston* does not even obliquely address any of the dispositive issues here, including specifically whether a municipality is statutorily or otherwise authorized to pursue an *in-personam* remedy against a property owner for a tenant's unpaid water charges absent privity, as those issues are not present in *Winston.*

Likewise, the Village's insistence is absurd that *Winston* demonstrates, "consistent with the practice throughout this state, the regulations of the Village . . . do not make the tenant responsible for water rents; instead, liability is expressly placed on the property owner." Village Brief, at 19. The allegations in *Winston* were limited to Syracuse; there is nothing in that decision that suggests the existence of some prevalent policy common throughout the State. More importantly, not only has the Village never alleged (until possibly now) that it had a policy like Syracuse of permitting only landlords to open water accounts but it is also indisputable that the original water account holder was Quackenbush—the nominal tenant and beneficial owner—not HCIDA. C. 77 (the Village's pleading); C. 38, ¶ 5 (affidavit of Acting Village Clerk/Treasurer: "The water bills were sent to H.M. Quackenbush, the tenant of the property"); C. 80 (February 11, 2005 disconnect notice to H.M. Quackenbush from Village Clerk-Treasurer). And, if the Village's regulations did "not make the tenant responsible," why did the

Village originally seek payment from Quackenbush and then wait some six year after disconnecting service before sending an invoice to the HCIDA?[6] C. 82-83 (May 18, 2011 correspondence from Village to HCIDA enclosing invoice for first time).

The Village's reliance on *Winston*—which is both legally inapposite and factually distinguishable—thus only serves to underscore the fundamental lack of merit to its entire position.

C. The Village Concedes That Its Grant of Authority under the Village Law Is Limited

The Village acknowledges that "it is technically true that Village Law, Article 11 does not mention an 'in personam remedy against non-possessing owners'" but nevertheless declares, "[w]e submit that HCIDA's argument is plainly wrong; the legislature authorized Villages to determine their methods of enforcement." Village Brief, at 23. Elsewhere, the Village allows that, despite its

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[6] The Village provides two self-contradictory answers to this question in its Brief. On the one hand, it attempts to explain away its delay, noting that it was first "mandated" to levy against the property, "the primary method of collection" provided under the Village Law Article 11—thus conceding both its long delay and the controlling nature of the Village Law. Village Brief, at 17, n.2. Elsewhere, without citing to any evidence whatsoever, it characterizes the statement of the dissent below 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'" as "wildly inaccurate," *id.* at 21—thus falsely implying that the Village had sought to collect from the HCIDA before the conclusion of the bankruptcy proceeding in 2010, even though there is absolutely no evidence in the record to support this.

"considerable discretion," it is limited to collection methods that "are not inconsistent law." *Id.* at 17. Nowhere, however, does it offer much in the way of analysis, other than to insist, based on its misreading of *Dunbar*, that the Village Law permits municipalities to make owners personally responsible for the water charges of their tenants notwithstanding the absence of privity and the contractual nature of municipal water charges under New York law. HCIDA's Opening Brief, at 37-40. As far as the Village is concerned, "not inconsistent with law" apparently means that it is free to abrogate the common law, disregard over a century of jurisprudence, and modify the elements of a breach of contract cause of action, as it pleases.

The Village similarly gives short shrift to the two lead cases interpreting its authority under Article 11, claiming that they are inapplicable because they "involve very different statutory provisions." *Id*. at 24. But so what? The principle animating those cases applies here as well, namely that, "[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." *Vill. 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); *accord Torsoe Brothers Const. Corp. v. Bd. of Trs.*

of the Inc. Vill. of Monroe, 49 A.D.2d 461, 464 (2d Dep't 1975) (holding that, since a village has only such authority as is conferred on it by statute, any action or rule with respect to its water system must be evaluated in light of its enabling acts). The Village makes little or no attempt to reconcile its position with these cases, the specific enforcement methods already set forth in Article 11, or the inherently circumscribed nature of its authority, given that it "is a creature of the Legislature and may not act in excess of the power conferred upon it by statute." *People v. Scott*, 26 N.Y.2d 286, 289 (1970).

The Village further entirely dodges the very issue that led to the split panel and grant of leave by the court below, namely whether the words, "not inconsistent in law," in Village Law § 11-1116, permits it to override the common law and modify the elements of a breach of contract cause of action. Instead, the Village is content to hang its hat on the proposition that *Dunbar* permits a personal remedy against a non-contracting owner, although that case plainly stands for the far narrower proposition that a *statutorily authorized* lien does not offend Due Process. By not contesting whether the words "not inconsistent with law" permit a municipality to abrogate the common law, the Village has thus effectively conceded that it lacks this authority. *See Misicki v. Caradonna*, 12 N.Y.3d 511, 524 (2009) (holding that respondents conceded argument by not raising it in their

brief). The Village likewise has not addressed and thus has also conceded that its attempt to recover against HCIDA is in derogation of the common law and thus not permissible under the Village Law unless expressly authorized, which the Village has admitted was not the case. *Id.*; HCIDA's Opening Brief, at 55-58; Village Brief, at 23 (acknowledging that "it is technically true that Village Law, Article 11 does not mention an 'in personam remedy against non-possessing owners'").

D. The Village's Strained Reading of Its Water Regulations Does Not Support An *In-Personam* Remedy

The Village's treatment of its Water Regulations is also superficial. As in its original pleading, the Village relies on Rule 22, which is found in a section of the regulation, entitled "Meters." Village Brief, at 17; R. 315-316. Elsewhere, the Village blithely asserts that, "[t]he Village regulations make the property owner financially responsible, even if it does not receive a bill," citing again to Rule 22 as well as to Rules 7 and 8, none of which actually provide for an *in-personam* remedy against a non-possessing or consuming owner. R. 300-01, 316. To the contrary, the Village concedes that the regulations "allow the billing to go to either the owner <u>or</u> the tenant." Village Brief, at 21 (emphasis added). Further, Rule 8 provides that all bills for water use "are a lien on the premises where the water is used" and "failure to receive bills . . . does not relieve the owner

and/or consumer from liability to pay," R. 301 (emphasis added)—thus recognizing, in contrast to the Village's current position, that personal liability will not attach to the owner in all situations.

As noted, the Village further acknowledges that the Village Law *mandates* the levy of unpaid bills against the property. Village Brief, at 17, n.2. So, even if the Water Department's Rules and Regulations in fact authorized direct legal action against owners—which they don't—by the Village's own admission, they would be in direct conflict with the Village Law and therefore in excess of the powers and authority conferred to the Village by the Legislature and thus void. *Scott*, 26 N.Y.2d at 289; *Village of Webster*, 270 A.D.2d at 911; *Torsoe Bros. Const.*, 49 A.D.2d at 464.

In short, the Village is constrained by the authority granted it by the Legislature under Article 11, which—as repeated judicial rulings, as well as decades of State comptroller opinions, have underscored—are narrowly circumscribed.

POINT IV. THIS COURT SHOULD NOT ALLOW THE VILLAGE TO MISLEAD IT AS TO THE REACH AND IMPORT OF THE ISSUES RAISED ON THIS APPEAL

Lastly, the Village accuses the HCIDA of "channeling the doomsday predictions in the dissenting opinion that this case would 'cause significant instability in all commercial transactions across the state.'" Village Brief at 24. It goes on to claim that the Village—and by extension the dissent below—has engaged in the "exaggerated hyperbole . . . commonplace in certain elements of political discourse and the media today." *Id*. It likewise reproaches the HCIDA for its purportedly "hostile and combative tirade" towards the Village, which it insists is at the root of the present controversy. *Id*. at 25.

Needless to say, such unfounded invective is not a legal argument, nor should the Village be permitted to distract from the core issues presented in this case. As we have seen, these are twofold in nature. First, may an IDA be held liable for the debts of its nominal tenant and true beneficial owner simply by virtue of the IDA's assumption of nominal title as mechanism for spurring local economic development through tax-exempt financing? Second, may a municipality, such as the Village, override common-law requirements and

established jurisprudence absent a clear grant of authority in both its enabling legislation and its own regulations and enactments?

There are important and wide-ranging interests and expectations tied to both these questions. In the first instance, the Legislature endowed IDAs with special powers under Article 18-A of the General Municipal for purposes of advancing economic development. HCIDA's Opening Brief at 4-5. Consistent with that purpose—as well as established common-law and statutory authority shielding nominal title holders for financing purposes against liabilities incurred by the true, beneficial owners—courts have consistently refused to hold IDAs liable as nominal property owners. HCIDA's Opening Brief at 29-35; Point I *supra*.

The Village has provided no rationale or justification for why the very narrow exception recognized under *Adimey* in the Scaffold Law context should now be extended to encompass claims arising under local regulation issued pursuant to Article 11 of the Village Law. Instead, the Village simply insists, contrary to decades of case law, that *Adimey* should be the general rule and IDAs thus are generally answerable for liabilities to the same extent as if they were the true beneficial owners of the property. Obviously, if this Court were to endorse such a position, by affirming the Order below, it would expose IDAs to greater

financial and litigation risks, thus likely defeating the Legislature's very purpose in establishing IDAs as part of a general scheme for economic development, as this would chill the participation of IDAs in such transactions. Equally important, such a decision would also call into question the very distinction between beneficial and nominal ownership, even though this is well recognized, entirely independent from IDAs, both by statute and a long line of cases extending back well into the nineteenth century. HCIDA's Opening Brief at 33-34.

By the same token, the appropriate construction of the Village's authority under its enabling statute, Article 11 of the Village Law, and import of the words, "not inconsistent with law," are not trivial matters either. The words "not inconsistent with law," or very similar language appears at least fifty times in enabling statutes defining the authority of municipalities, agencies, and other entities in various contexts. C. 103-09. If upheld, the Order below would thus have wide-ranging impact for those regulated by those municipalities or agencies because officials would have far greater discretion to interpret vaguely drafted rules and resolutions in unpredictable and unforeseen ways, creating liabilities and previously unrecognized legal causes of action with little or any regard for common-law requirements or prohibitions. As long as some attenuated argument could be made that their actions do "not violate common-law principles," as the

majority below would have it, R. 10a, then the municipality or agency would have free rein. If that would not create a patchwork of unpredictable local requirements and otherwise impact settled commercial relations, it is not clear what would.

Under the common law, the contractual relationship between a municipal water supplier and a consumer further is no different from other utilities. *See Silkman v. Bd. of Water Comm'rs of City of Yonkers*, 152 N.Y. 327, 331-32 (1887). As a result, the Order below implicitly amends the common law by permitting utilities to seek direct recourse against owners for their tenant's consumption based on the mere installation of utility conduits, regardless of whether the owner was in privity with the utility or not. That, too, would work a significant change in legal relations and expectations through the State. Again, the Village has not cited a single New York case that has actually permitted a municipal water supplier, or for that matter any other utility, to hold an owner directly and personally liable for the consumption of their tenant absent actual privity.

Contrary to the Village's suggestion, the implications of the questions raised by this appeal are therefore not trivial and extend well beyond the local dispute from which it arises. If upheld, the decision below would upset settled

expectations and legal obligations in a variety of ways and contexts. And the law here is quite clear: municipal water charges are contractual and may not be enforced absent privity. Neither party here disputes that it was Quackenbush that contracted and consumed the water at issue, not the HCIDA. As a result, the HCIDA cannot be personally liable for Quackenbush's unpaid water charges. Nothing in the common law, Village Law, the Village's water regulations, or any other authority permits a different result. However unfortunate Quackenbush's bankruptcy may have been for the Village, it cannot look to the HCIDA to make it whole. The Village must lick its own wounds, just as the HCIDA and dozens of other creditors disadvantaged by Quackenbush's collapse have also been forced to do. By assuming nominal title of the property as a financing mechanism in furtherance of its Legislative mandated purpose, the HCIDA did not become the final guarantor of Quackenbush's debts for the Village or any other creditor. To hold otherwise would undermine the Legislature's intent in establishing IDAs under Article 18-A of the Municipal Law, while giving municipalities and other agencies the authority to refashion established common law requirements and legal precedent in an arbitrary, ad hoc manner for their own convenience.

CONCLUSION

For the foregoing reasons, the Court should reverse the Decision and Order below to the extent it granted summary judgment to the Village on its counterclaim and denied summary judgment on HCIDA's claim for declaratory relief that it is not liable for the water rents at issue. Having done so, the Court should then enter final judgment in HCIDA's favor.

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