



January 6, 2021

John P. Asiello, Esq.  
Chief Clerk and Legal Counsel  
Clerk's Office - State of New York Court of Appeals  
20 Eagle Street  
Albany, New York 12207-1095

RE: **Batavia Townhouses v. Council of Churches**  
Mo. No. 2020-807

Dear Mr. Asiello,

Thank you for your letter of December 28, 2020, in relation to the referenced Motion for Permission to Appeal, brought on behalf of our client, Council of Churches Housing Development Fund Company, Inc. (the "Churches"). Please accept this as our confirmation that the order sought to be appealed from does, indeed, finally determine the action, such that the Court of Appeals has subject matter jurisdiction pursuant to CPLR 5602.

More specifically, the Court notes that a request for attorneys' fees was included in the complaint initially filed by Batavia Townhouses, Ltd., Arlington Housing Corp. and Batavia Investors, Ltd. (the "Limited Partners"). The Court inquires whether that request for attorneys' fees is still pending. It is not.

There is no provision authorizing an award of attorneys' fees in the WrapAround Purchase Money Obligation and Security Instrument that is the basis for this litigation. R. 78 - 85. Further, the complaint's request for attorneys' fees was not set out as separate cause of action, nor was it expressed in the complaint's enumerated and specific requests for relief. Rather, it was listed only in the complaint's boilerplate request for a variety of generalized, miscellaneous relief. See, R. 56 (after identifying three items of specific relief, the complaint asks for "all other relief that this Court deems proper, including attorneys' fees, costs, and other declaratory and injunctive relief.")

In the proceedings before the trial court, the Limited Partners' cross-motion for summary judgment requested the same generalized, miscellaneous relief. R. 216 - 17 (notice of motion requests "such other relief that the court deems proper.") In its Decision and Order determining the cross-motions, Supreme Court did not reserve the issue of counsel fees; indeed the Court's Decision and Order did not mention the issue. "A court's failure to specifically address a motion or a part thereof is equivalent to a denial." See, *Klansky v. Weiden Lake Property Owners Association, Inc.*, 127 A.D.3d 1439, 441 (3d Dept. 2015); see also, *Hoesten v. Best*, 34 A.D.3d 143, 152 (1<sup>st</sup> Dept. 2006) (same); *Abelman v. Shoratlantic Development Co., Inc.*, (2d Dept. 1989) (same); *O'Neill v. O'Neill*, 174 A.D.3d 1526, 1527 (4<sup>th</sup> Dept. 2015) (same). Implicit denials are applicable in connection with a court's failure to address requests for counsel fees. *Hess v. Jojck-Hess*, 86 A.D.3d 847, 848 n.1 (3d Dept. 2011). As a result, Supreme Court's Decision and Order implicitly denied the Limited Partners' request for counsel fees. The Limited Partners' failure to appeal that implicit denial means that the Appellate Division's determination is a final resolution of all outstanding claims in the matter (remitting the matter to Supreme Court only the ministerial entry of a declaratory judgment). *Klansky, supra*, at 1441.

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Moreover, the record before the Court establishes that the principal parties to this appeal are also parties in related litigation now pending in the United States District Court for the Western District of New York (the "Federal Court"). See, *Council of Churches Housing Development Fund Company, Inc., v. Arlington Housing Corp.*, Case No.: 6:18-cv-06920-CJS-MWP; see also R. 234 - 35 (affidavit explaining pendency of federal litigation). In that case, the Court has entered a Stipulated Order staying all further proceedings before the Federal Court pending final resolution of this appeal. That Stipulated Order further provides that, if this appeal is resolved in favor of the Limited Partners, the Churches will take certain actions to cooperate with the Limited Partners in transferring control of the partnership and a majority of its assets to the Limited Partners, and the parties will execute and exchange general releases of all claims (including the claim for attorneys' fees). A copy of the Federal Court's Stipulated Order is enclosed with this letter.

Thus, this appeal from cross-motions for summary judgment is not affected by any question regarding an award of attorneys' fees. If the Churches prevail, there is no basis for an award of attorneys' fees. If the Limited Partners prevail, the Federal Court's Stipulated Order requires an exchange of general releases and precludes an award of attorneys' fees. The Appellate Division's order leaves nothing for further judicial intervention, apart from mere ministerial matters.

Of course, you should feel free to also contact me or my colleague William E. Brueckner, Esq. with any questions regarding this letter, or the matter, generally.

Very truly yours,

**McCONVILLE, CONSIDINE,  
COOMAN & MORIN, P.C.**



Peter J. Weishaar

PJW/web

Enclosure

cc.: Joseph Flynn  
Jeffrey A. Wadsworth, Esq.  
Stephen Gordon, Esq.  
Kevin S. Cooman, Esq.  
William E. Brueckner, Esq.

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

COUNCIL OF CHURCHES HOUSING  
DEVELOPMENT FUND COMPANY, INC.,

Plaintiff,

v.

ARLINGTON HOUSING CORPORATION, and  
BATAVIA INVESTORS, LTD.,

Defendants.

**STIPULATION AND  
ORDER TO STAY  
PROCEEDINGS**

18-CV-6920

The following agreement is stipulated between all parties to this action, as follows:

WHEREAS, plaintiff Council of Churches Housing Development Fund Company, Inc.

("CoC") is the general partner of a limited partnership known as Batavia Townhouses, Ltd., (the "Partnership") which owns and operates an apartment complex in Batavia, New York, known as Birchwood Village; and

WHEREAS, defendants Arlington Housing Corporation ("AHC") and Batavia Investors, Ltd. ("Investors") are limited partners in the Partnership; and

WHEREAS, CoC commenced this declaratory judgment action (the "Federal Action") by its Complaint, and an Answer and Amended Counterclaim was interposed by AHC and Investors, both of which pleadings seek an adjudication of various rights and responsibilities as between the parties with respect to their relationships and interests in the Partnership; and



WHEREAS, CoC is the holder as creditor of a certain Wraparound Note and Mortgage on Birchwood Village on which the Partnership is the debtor (the "Wrap"); and

WHEREAS, AHC and Investors commenced a derivative action in New York Supreme Court, Genesee County, Index# E67594 against CoC seeking an adjudication that the Wrap is unenforceable by CoC against the Partnership (the "State Action"); and

WHEREAS, upon cross motions for summary judgment in the State Action, the Supreme Court (Walker, J.) issued a Decision and Order dated August 16, 2019 declaring the Wrap to be unenforceable and granting other related relief (the "Decision and Order"); and

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WHEREAS, CoC intends to appeal expeditiously the Decision and Order through exhaustion in the New York State appellate courts; and

WHEREAS, the parties agree that the final adjudication of the State Action is substantially determinative of the economic interests of CoC in the Partnership, and ought to be concluded before the parties expend additional resources in pursuing their claims in this Federal Action;

NOW THEREFORE, the parties agree and stipulate as follows:

1. All further proceedings in this Federal Action are stayed, pending a final resolution of the State Action in the New York State appellate courts. The pending motion to compel filed by CoC [*Docket No. 45*], shall be withdrawn without prejudice.

2. The term of the Partnership is being extended to permit this Federal Action to be litigated to completion, if necessary, following a final resolution of the State Action.

3. If the Decision and Order is reversed following all appeals, then the stay of this Federal Action shall be lifted and vacated, and the parties will be entitled to resume prosecution of their claims in the Federal Action, without prejudice.

4. If the Decision and Order is sustained following all appeals (i.e. the Wrap is held to be unenforceable), then CoC shall: (a) immediately resign as General Partner of the Partnership; (b) permit AHC to become the General Partner of the Partnership without objection; (c) execute any and all necessary documents to effectuate CoC's resignation and the substitution of AHC as the General Partner and to formally cancel and discharge the Wrap (as an encumbrance of record or otherwise); (d) reasonably cooperate with AHC as the new General Partner in the transition of personnel, all Partnership and Birchwood Village records and accounts, and operations at Birchwood Village; and (e) execute a general release of claims in favor of AHC and Investors.

5. Simultaneously and in conjunction with CoC's resignation as General Partner, AHC shall pay CoC the sum of Seventy-Five Thousand Dollars (\$75,000), for its one-half of one percent (.5%) interest in the Partnership; and Investors and AHC shall execute a general release of claims in favor of CoC.

6. If the Decision and Order is finally sustained on appeal, then the parties agree to execute a stipulation of dismissal with prejudice of this Federal Action, without an award of costs, disbursements, or attorneys' fees to any party.

7. Investors and AHC may move to lift this stay before a final resolution of the State Action if CoC is alleged to have committed a new breach of its duties and responsibilities as the General Partner, or if Investors and AHC determine that CoC is not proceeding "expeditiously" with the prosecution of any appeal. Nothing in this Stipulation

shall be construed as: (a) a waiver by CoC of any opposition to such a motion to lift the stay;  
or (b) requiring the Court to grant any such motion.

SO STIPULATED AND AGREED:



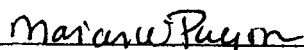
Kevin S. Cooman  
William E. Brueckner

McConville Considine Cooman  
& Morin, P.C.  
Attorneys for plaintiff  
25 East Main Street, Suite 400  
Rochester, NY 14614  
Telephone:  
585.546.2500  
kcooman@mccmlaw.co  
m



Holland & Knight, LLP  
Attorneys for defendants  
800 17<sup>th</sup> Street, N.W., Suite 1100  
Washington, D.C. 20006  
Telephone: 202.955.3000  
steven.gordon@hklaw.co  
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UPON THE FOREGOING STIPULATION OF THE PARTIES, this action be and hereby is  
STAYED, and may be further prosecuted only as set forth herein, or in accordance with a  
further order of this Court.

  
Marian W. Payson  
United States Magistrate  
Judge

8/27/19  
Dated

15925.003 - #1890