

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ONTARIO

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In the Matter of the Application of

KRYSTALO HETELEKIDES, individually  
And as the Executrix of the Estate of  
Demetrios Hetelekides, a/k/a Demetrios Hetelekides.

Plaintiffs,

-vs-

Index No. 2010-0932

COUNTY OF ONTARIO and GARY  
G. BAXTER, as the Treasurer of the  
County of Ontario,

Defendants,

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**Appearances:**

Adams & LeClair, LLP (by Mary Jo S. Korona, Esq. and Robert P. Yawman, Esq.) for Plaintiff

Jason S. DiPonzio, Esq. for Defendants.

**DECISION, JUDGMENT, AND ORDER**

**Ark, J.**

I. FINDINGS OF FACT

In November 2005, Demetrios “Jimmy” Hetelekides (hereinafter “Demetrios”) owned the Akropolis Restaurant (hereinafter “Property”) located at 4025 Route 5 & 20 in the town of Hopewell, New York. Taxes on the Property were unpaid dating back to January 1, 2005. Because of this delinquency, the Defendants included the Property on a list of delinquent properties filed in November 2005 with the Ontario County Clerk’s Office. On January 1, 2006, Defendant Gary Baxter (hereinafter “Treasurer”) was sworn in as Ontario County Treasurer, having no duties in that Office beforehand.

Nine months after the County listed the Property as delinquent, Demetrios died on August 1, 2006. By this point, the County had not attempted to notify any interested parties of the impending foreclosure. At the time of his death, Demetrios was the sole owner of the Property. It is uncontested that Demetrios' wife (Plaintiff Krystal Hetelekides) became the sole owner upon his death. At the time of Demetrios' death, the property taxes on the Property remained unpaid with \$21,343.17 owed in back taxes. Prior to his death, Demetrios managed the taxes for the Property. Following Demetrios' death, the Plaintiff operated the Property.

On October 2, 2006 (two months after Demetrios died), the Treasurer and his staff mailed foreclosure notices to Demetrios and Geo-Tas, Inc. The Defendants, relying upon an abstract report from thirteen months before (August 31, 2005), mailed the notices to Demetrios and Geo-Tas, Inc. The report listed Demetrios and Geo-Tas, Inc. as the Property's owners, but the Defendants later determined that Geo-Tas was not actually in the title and therefore was erroneously listed as an owner on the abstract report. No other abstract report was performed except for the one on August 31, 2005.

The Defendants mailed the October 2, 2006 notices via certified and first class mail. A waitress from the Property (Barbara Schenk) signed the receipt for the certified mail. Schenk had no connection with the Property or its owners other than being a waitress. The notice stated that the last day to redeem the property was approximately three months later: Friday, January 12, 2007.

From December 2006 to January 2007, the Ontario County Treasurer's Office employed three people (excluding the Treasurer): Stephanie Cook, Chrisann Phillipson, and Gary Lafler. Cook served as a clerk.

In either late December or the first week of January 2007, the Treasurer met with Gary Curtiss (Assistant Ontario County Attorney) to discuss properties in the upcoming round of foreclosures. According to the Treasurer, the purpose of that meeting was “to make sure that if there was any that had to be visited – or had to be notified.” During this meeting, the Treasurer believes that they discussed Demetrios’ death. Additionally, they discussed the fact that Demetrios’ “wife was still alive and running the business.” The Assistant County Attorney did not notify the Treasurer that it would be necessary to commence the foreclosure action against Demetrios’ estate and/or successors in interest or to substitute the deceased party.

Following the meeting to discuss which properties “had to be notified,” the Treasurer circulated an email to his staff – including Cook – on January 3, 2007. The email contained an Excel spreadsheet authored by the Treasurer titled “2007 Auction extra attempts” listing multiple properties, including the property at issue. In the body of that email, the Treasurer wrote, “These are the lists of the parcels that I will be following up with.” During his testimony, the Treasurer explained the reason he drafted and circulated the email: “A review of the properties in December showed that these were still available or still out and I felt they may need extra – myself and Gary Curtiss and Stephanie [Cook] met and we decided that these properties should have an extra non-mandated visit . . . . These were identified as parcels that could use another visit.”

On January 1, 2007, the County issued residential tax bills. Upon receiving her residential tax bill for an unrelated property, the Plaintiff visited the Ontario County Treasurer’s Office to inquire about the status of the taxes for the Property. During that visit, office clerk Stephanie Cook told her that the taxes on the Property were up-to-date and paid. The Plaintiff then went to the Town of Hopewell to inquire about the Property’s taxes. Hopewell employee Karen Carson told the Plaintiff that the taxes were *not* paid, and they could not accept payment in the Town of

Hopewell. The Plaintiff then returned to the County Treasurer's Office where Cook again told her that the taxes were paid.

The Plaintiff returned to the Town of Hopewell, where Carson called the County Treasurer's Office and gave the phone to the Plaintiff to complete the remainder of the conversation. The Plaintiff spoke to a male named Gary who was not the Treasurer. After that phone call, the Plaintiff returned to the County Treasurer's Office and spoke to Cook, who again informed the Plaintiff that the taxes *were* paid and that there was no one else in the office for the Plaintiff to speak to about it. This all occurred before the Plaintiff found the Treasurer's business card at the Restaurant on January 9, 2007.

Three days before the redemption deadline (Tuesday, January 9, 2007), the Treasurer called the Restaurant. He identified himself and asked to speak to someone in charge. He was told that no one was available. He did not identify the person to whom he spoke, and he did not tell anyone why he was calling or that the Property was in danger of foreclosure. He simply asked for a return call. The following day (Wednesday, January 10, 2007), he placed an identical call with the same results.

The day before the redemption deadline (Thursday, January 11, 2007), the Treasurer made his first in-person visit to the Property at approximately 1:30 PM. The Treasurer stated that he knew at least as of this date that Demetrios Hetelekides was deceased. According to the Treasurer's testimony, the purpose of this visit "was to notify the people or person involved that their property was in jeopardy of being foreclosed on, and that they only had a certain time to redeem that property." The Treasurer spoke to a waitress in the Restaurant, asked to speak to someone in charge, was told no one was available, left his business card and asked that someone in charge call him, and said that it was "very important." He stayed on the premises for

approximately three minutes. Again, he never told anyone the reason for his visit. At this visit, he did not provide any additional foreclosure notice. Prior to the January 12, 2019 redemption deadline, the only foreclosure notice (within the meaning and parameters of RPTL § 1125) ever attempted by the County was the October 2, 2006 mailings to the Plaintiff's deceased husband and Geo-Tas, Inc.

The redemption date (Friday, January 12, 2007) passed without the taxes being paid. On Monday, January 15, 2007, after receiving the Treasurer's business card at the Property, the Plaintiff went to the County Treasurer's Office, but it was closed due to an official holiday. She attempted to call, and she left a message, but no one returned her call. The next day (Tuesday, January 16, 2007), the Plaintiff returned to the Treasurer's Office and attempted to redeem the Property, but the Treasurer declined to accept payment because the January 12, 2007 redemption deadline had passed. The Plaintiff retained an attorney, and on January 25, 2007, that attorney presented the County's Financial Management Committee with a money order in the amount of \$25,000, \$3,656.83 more than the unpaid tax bill of \$21,343.17. On March 29, 2007, Hopewell Town Supervisor Mary Green introduced a resolution to the Ontario County Board of Supervisors that would have allowed the Plaintiff to redeem the Property for \$30,786. The Treasurer informed the Board of Supervisors that the Property had been redeemed from foreclosure multiple times in the past, but he did not inform them of the issues relating to notice in the present foreclosure. The redemption resolution did not pass.

On February 5, 2007, the Defendants applied to the Ontario County Court for an *in rem* default judgment on the Property. The Application did not name anyone related to this Property other than "James" Hetelekides and Geo-Tas, Inc. In support of that Application, the Defendants also filed an Affidavit of Posting, Service, and Publication wherein the Treasurer affirmed that he

“executed, filed, served, posted and had published the Petition and Notice of Foreclosure herein” and referenced a Certified Mailing List stating that “on October 2, 2006, a copy of the Petition and Notice was mailed to each name and address on the list.”

The Certified Mailing List was a two-page document. On the first page, the Treasurer certified that “notices were mailed to each owner [listed on the attached mailing list] by certified mail, and to all others by ordinary first class mail.” The second page contained a list of thirty separate names and addresses, five of which were “James Hetelekides” and/or Geo-Tas, Inc. No other party was ever named in any of the foreclosure proceedings regarding the Property. Neither the Application nor any of the supporting papers submitted to the County Court gave any indication that “James” Hetelekides had died.

Although the Plaintiff was represented by counsel and at this point had actual notice of the pending foreclosure proceedings, the Plaintiff never declared an interest in the Property (RPTL § 1126), interposed an answer (RPTL § 1123[6]), or objected to the foreclosure proceeding in any way. In the absence of any challenge to the foreclosure proceeding or knowledge that the Defendant James Hetelekides was deceased, that Court executed a default judgment divesting James Hetelekides of title to the Property on February 7, 2007.

On May 9, 2007, the County sold the Property at a public auction to Pavlos Panitsidis for \$160,000. Panitsidis assigned the bid to the Plaintiff, who paid the entire purchase price, resulting in the County receiving a windfall surplus of \$138,656.83 beyond the original unpaid tax bill of \$21,343.17.

On September 6, 2007, the Plaintiff served a Notice of Claim in the present matter upon the Defendants, and she filed a Summons and Complaint on April 11, 2008.

## II. CONCLUSIONS OF LAW

### A. The tax foreclosure proceeding was a nullity from its inception.

The foreclosure was invalid for two reasons. First, the Defendants failed to properly notify the Property's owner (RPTL § 1125[1][a]). Second, the Defendants improperly commenced an action against the deceased party Demetrios "James" Hetelekides.

#### 1. Defective Notice

The foreclosure was void because the Defendants failed to provide the requisite notice to the Plaintiff Property owner.<sup>1</sup> The Defendants concede that "title to the [P]roperty immediately vested in Plaintiff upon Mr. Hetelekides' death" (*Defendants' Supplemental Post Trial Brief*, July 29, 2019, pp. 7-8, *citing DiSanto v. Wellcraft Marine Corp.*, 149 A.D. 2d 560, 562 [2<sup>nd</sup> Dept. 1989] ["As a rule, title to real property devised under the will of a decedent vests in the beneficiary at the moment of the testator's death"]). Nevertheless, the Defendants mailed foreclosure notices to the decedent, who had already been deceased for two months. The Defendants never mailed notices addressed to the Plaintiff or to the decedent's estate. The Defendants never attempted to serve the Plaintiff or the decedent's estate through any of the methods contained in RPTL Section 1125. According to Treasurer Baxter's testimony, the Defendants knew at least approximately 1-3 weeks before the January 12, 2007 redemption deadline that Demetrios had died and that the Plaintiff "wife was still alive and running the business."

Despite that knowledge, the only other attempts at notice were two phone calls (three days before the redemption deadline) and one in-person visit (two days before the redemption deadline)

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<sup>1</sup> Section 1125 of the Real Property Tax Law ("RPTL") requires the government to notify: "each owner and any other person whose right, title, or interest was a matter of public record as of the date the list of delinquent taxes was filed, which right, title, or interest will be affected by the termination of the redemption period, and whose name and address are reasonably ascertainable from the public record" (RPTL § 1125[1][a][i]). Section 1125 also lists the specific mechanisms whereby notice is to be provided.

to the Property, which was an operating restaurant. None of these attempts resulted in the Defendants communicating directly with the Plaintiff, and the Defendants provided no notice of the foreclosure pendency in any of those communications. While the Treasurer made extra efforts to notify someone at the Property of the foreclosure, none of those extra efforts comported with the requirements of RPTL Section 1125.

Thus, the Defendants failed to comply with the statutory notice requirements (RPTL § 1125; *McCauley v. Holser*, 136 A.D. 3d 1256 [3<sup>rd</sup> Dept. 2016]; *Land v. County of Ulster*, 84 N.Y. 2d 614, 616 [NY 1994]; *Kiamesha Dev. Corp. v. Guild Props.*, 4 N.Y. 2d 378 [NY 1958]; *In re Foreclosure of Tax Liens by County of Seneca [Maxim]*, 151 A.D.3d 1611, 1612 [4<sup>th</sup> Dept. 2017]; *Dinos v. Gazza*, 76 A.D. 2d 853 [2<sup>nd</sup> Dept. 1980])<sup>2</sup>. Failure to provide notice to a property owner is a fatal, “jurisdictional defect [that] invalidate[s] a sale or prevents passage of title” (*Ulster* at 616).

## 2. Lawsuit Against a Deceased Party

The foreclosure proceeding was a nullity because the Defendants commenced the foreclosure action against a deceased party. The Defendants commenced the foreclosure proceeding on February 5, 2007, six months after Demetrios died (RPTL §§ 1123, 1120; CPLR § 304[a]). The action named only “James” Hetelekides and Geo-Tas, Inc. Geo-Tas, Inc. had neither title nor connection to the Property and was listed erroneously. Notably, the Defendants commenced the action at least one month after they definitively learned that Demetrios had died

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<sup>2</sup> See also *Matter of Foreclosure of Tax Liens by City of Utica [Suprunchik]*, 169 A.D. 3d 179, 182 [4<sup>th</sup> Dept. 2019] [if the government fails to substantially comply with statutory notice requirements, the violation “constitutes a jurisdictional defect” that invalidates “the sale [and] prevents the passage of title”]; *Seine Bay Realty v. Jones*, 112 A.D. 2d 573, 574 [3<sup>rd</sup> Dept. 1985] [“a party’s ability to take steps to safeguard its interests does not relieve a municipality of its constitutional obligation”]; *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 315 [1950] [the reasonableness of the method of notice affects the “constitutional validity” of the action].



and his wife (the Plaintiff) inherited the Property. The Defendants concede that they never sought substitution pursuant to CPLR § 1015.

“It is well established that the dead cannot be sued” (*Matter of Foreclosure of Tax Liens by Orange County v. Goldman* [“Goldman”], 165 A.D. 3d 1112, 1116 [2<sup>nd</sup> Dept. 2018], cited favorably on other grounds by *Town of Irondequoit v. County of Monroe*, 175 A.D. 3d 846 [4<sup>th</sup> Dept. 2019]). Thus, New York jurisprudence does not permit lawsuits to be commenced against deceased parties.

In *Wendover Financial Services v. Ridgeway*, the Fourth Department confronted this issue in the context of a foreclosure proceeding. In that case, the titled owner died, and “[n]otwithstanding decedent’s death, plaintiff named her in the summons and complaint” (*Wendover Financial Services v. Ridgeway*, 93 A.D. 3d 1156 [4<sup>th</sup> Dept. 2012]). The Court held that “the action against decedent from its inception was a nullity inasmuch as it is well established that the dead cannot be sued” (*Id.*). First Department jurisprudence also follows the principles of *Wendover*:

[b]ecause there is simply no precedent nor any support in New York’s Civil Practice Law and Rules for a court obtaining jurisdiction over an action ‘commenced’ three months after the death of the individual named as the sole defendant, we find that the order appealed from is a nullity (*Marte v. Graber*, 58 A.D. 3d 1 [1<sup>st</sup> Dept. 2008]; see also *Vello v. Liga Chilean de Futbol*, 148 A.D.3d 593, 594 [1<sup>st</sup> Dept. 2017] [“any action commenced against [defendant] after his death would be a ‘nullity’ since ‘the dead cannot be sued.’ Instead, plaintiffs were required to commence a legal action naming the personal representative of the decedent’s estate”]; *Jordan v. City of New York*, 23 A.D.3d 436, 437 [2<sup>nd</sup> Dept. 2005]).

Here, the foreclosure proceeding commenced six months after Demetrios died, and thus the entire lawsuit was null from its inception.<sup>3</sup>

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<sup>3</sup> There has been no argument that the proceeding commenced before Demetrios’ death. However, even if that were the case, the foreclosure remains null because the Defendants failed to properly substitute a party (CPLR 1015; *Goldman* 165 A.D. 3d at 1116 [“The death of a party divests the court of jurisdiction and stays the proceedings until a proper substitution has been made pursuant to CPLR

B. 42 U.S.C. § 1983

With respect to the Plaintiff's 42 U.S.C § 1983 action against the Defendants, the Plaintiff has failed to sustain her burden of proof. In order to establish a § 1983 violation, the Plaintiff must establish the existence of a policy or custom of the government itself that caused a violation of her constitutional rights (*Harris v. City of New York*, 153 A.D. 3d 1333 [2<sup>nd</sup> Dept. 2017]). "Proof of a single incident of objectionable conduct by a municipality is insufficient to establish the existence of a municipal policy for section 1983 purposes" (*Simpson v. New York City Transit Authority*, 112 A.D. 2d 89 [1<sup>st</sup> Dept. 1985]).

While this Court finds that there were missteps taken by Ontario County in this case, there is insufficient evidence to demonstrate that the objectionable conduct was a byproduct of a widespread policy by a government body as opposed to a misguided course of action.

With respect to the Plaintiff's § 1983 action against the Treasurer, this Court finds similarly insufficient evidence. There was no showing that the "challenged conduct was arbitrary or irrational in the constitutional sense" (*Bowen v. Nassau County*, 135 A.D. 3d 800 [2<sup>nd</sup> Dept. 2016]). Indeed, the Treasurer took extraordinary, albeit unsuccessful, steps to effect notice of the foreclosure.

III. JUDGMENT AND ORDER

The Court hereby adopts the Defendants' Counsel's analysis submitted on September 12, 2019. In this matter, the Plaintiff in her individual capacity received a tax deed to the Property in June 2007, and she has remained in title to the Property ever since. RPTL Section 1136(1) provides:

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1015(a)"); *Sills v. Fleet Nat. Bank*, 81 A.D. 3d 1422, 1423-1424 [4<sup>th</sup> Dept. 2011] ["Any order rendered after the death of a party and before the substitution of legal representative is void"]; *Giroux v. Dunlop Tire Corp.*, 16 A.D. 3d 1068 [4<sup>th</sup> Dept. 2005]). Without moving for a substitution, a court lacks "jurisdiction over the deceased party's successors in interest" (*Goldman* at 1116-1117). Once the County was aware of the record owner's death, "it [was] incumbent upon the County to substitute a personal representative of the deceased parties' estates before the matter [could] proceed" (*Goldman* at 1118).

the Court shall have full power to determine and enforce in all respects the priorities, rights, claims, and demands of the several parties to the proceeding, as the same exists according to law, including the priorities, rights, claims and demands of the Respondents, as between themselves” (RPTL § 1136[1]).

The Plaintiff currently holds title to the Property in her individual capacity by virtue of a tax deed from June 2007. If the underlying foreclosure proceeding is deemed a nullity and the deeds that issued therefrom are voided, then it follows that the entire purchase price would need to be refunded to the Plaintiff. If that happened, then the 2004, 2005, and 2006 tax liens underlying the above foreclosure proceeding would remain unpaid, requiring the County to commence foreclosure proceedings in the event the tax liens remained unpaid.

However, RPTL § 1136(1) permits the Court to preserve the deed under which the Plaintiff currently holds title, while directing the refund of any difference between the purchase price and tax arrearages as supported by the record. Under this scenario, judicial economy is preserved since the Plaintiff will remain in title to the Property, and the older tax liens that underlie this action would remain paid in full. Further proceedings to foreclose the older tax liens and to transfer the Property into the Plaintiff’s name would be unnecessary.

Finally, CPLR § 5002 governs the Court’s award of interest on any refund. The purpose of CPLR § 5002 is to pay a successful Plaintiff the cost of the loss of use of money for a specified period of time and to indemnify a successful Plaintiff for the nonpayment of what is due to them (*Love v. State*, 78 N.Y. 2d 540 [NY 1992]; *New York State Higher Educ. Svcs. Corp. v. Laudenslager*, 161 Misc. 2d 329, 331 [1<sup>st</sup> Dept. 1994]). Because an award of statutory interest fulfills the purpose of indemnifying the Plaintiff for the cost incurred by the lack of use of her funds for a period of time, the Plaintiff’s claims for the borrowing costs she incurred through Canandaigua National Bank are not a proper item of damages and are therefore declined.

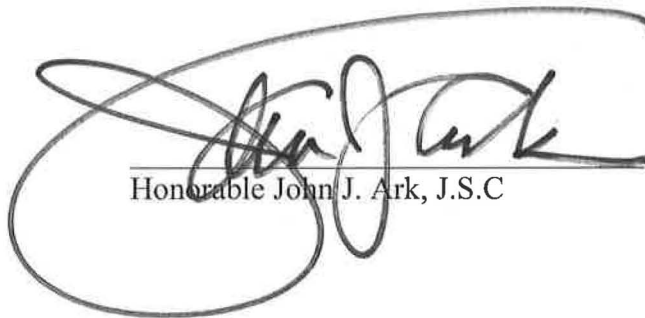
Accordingly, with respect to the Plaintiff's challenges to the validity of the foreclosure proceedings, this Court, pursuant to CPLR Section 4213, awards monetary damages to the Plaintiff in the amount of the difference between the unpaid tax arrearage and tax sale price of \$160,000. Per implementation of CPLR §§ 103(a), 5001(a), and New York General Municipal Law § 3-a, interest in the amount of nine percent is to be recovered from May 9, 2007. Pursuant to RPTL Section 1136(1), the Plaintiff remains the titled owner of the Property.

With respect to the Plaintiff's 42 U.S.C. § 1983 and 1988 claims, the Court hereby DISMISSES those actions.

Any requested relief inconsistent with this decision is hereby denied and any requested relief necessary to implement this decision is granted.

Submit order.

Dated: October 30, 2019  
Rochester, New York



Honorable John J. Ark, J.S.C

SUPREME COURT  
STATE OF NEW YORK COUNTY OF ONTARIO

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KRYSTALO HETEEKIDES, Individually and as the  
Executrix of the Estate of Demetrios Hetelekides a/k/a  
Jimmy Hetelekides,

Plaintiff-Respondent,

vs.

COUNTY OF ONTARIO and GARY G. BAXTER, as  
the Treasurer of the County of Ontario,

Defendants-Appellants.

**AFFIRMATION OF SERVICE**

Index No. 100932

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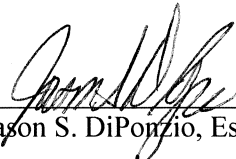
The undersigned, an attorney at law licensed to practice in the State of New York, does hereby affirm under CPLR 2106:

That on the 27th day of January, 2020, deponent caused to be served the Notice of Appeal dated January 23, 2020 upon:

**Mary Jo S. Korona, Esq.**  
**Robert P. Yawman, Esq.**  
**Adams LeClair, LLP**  
**28 East Main Street, Suite 1500**  
**Rochester, NY 14614**

by delivering a true copy of same enclosed in a properly addressed wrapper, via courier delivery service to the office address designated above.

Dated: January 28, 2020

  
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Jason S. DiPonzio, Esq.