To be argued by:
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(Time requested: 30 minutes)

APL No. APL-2021-00111
Appellate Division, Fourth Department Docket No. CA 20-00680
Ontario County Clerk's Index No. 100932

Court of Appeals

of the

State of New York

KRYSTALO HETELEKIDES, Individually and as the Executrix
of the Estate of DEMETRIOS HETELEKIDES
a/k/a JIMMY HETELEKIDES,

Plaintiff-Appellant,

– against –

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

Defendants-Respondents.

BRIEF FOR PLAINTIFF-APPELLANT

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February 11, 2022

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JURISDICTIONAL STATEMENT --- RULE 500.13 (a)

This appeal as a matter of right proceeds pursuant to (CPLR 5601[b][1]) in that the Order appealed from finally determines an action where there is directly involved the construction of the due process clauses of the 14th Amendment of the Constitution of the United States and Article 1, Section 6 of the Constitution of the State of New York within the context of (Real Property Tax Law Article 11). The Court has jurisdiction to review the questions presented pursuant to (CPLR 5501[b]). The questions of law raised or likely to be raised, as relevant to this Jurisdictional Statement, are set forth below. [1]

1. Whether proceeding with the *in rem* tax foreclosure proceeding to an auction sale, pursuant to RPTL Article 11, with knowledge that the sole property owner had passed away prior to the date notices called for by RPTL § 1125 were mailed, violated the 14th Amendment of the U.S. Constitution and Article I, § 6 of the New York Constitution prohibitions against the taking of property without notice and an opportunity to be heard, because knowledge about the sole property owner's death required that Defendants-Respondents suspend the *in rem* proceeding as it related to the deceased property owner so that alternative noticing could be afforded.

[1] Citations to the Record on Appeal include volume number and page number ("R _Vol _pg__").

This question was raised and preserved in the Record at R Vol 1 pgs 25-83 [Complaint - pgs 32-34]; R Vol 2 pgs 764-766 [Plaintiff-Appellant's Proposed Findings of Fact and Conclusions of Law - pg 765].

2. Whether maintaining the *in rem* tax foreclosure proceeding after acquiring knowledge that the sole property owner had passed away prior to the date notices called for by RPTL § 1125 were mailed, without taking action to provide RPTL § 1125 notice to another person authorized to accept notice, violated the 14th Amendment of the U.S. Constitution and Article I, § 6 of the New York Constitution prohibitions against the taking of property without notice and an opportunity to be heard? This question was raised and preserved in the Record at R Vol 1 pgs 25-83 [Complaint - pgs 32-34]; R Vol 2 pgs 764-766 [Plaintiff-Appellant's Proposed Findings of Fact and Conclusions of Law - pg 765].

3. Whether the court presiding over the *in rem* proceeding lacked jurisdiction because the proceeding was maintained against property in title to a deceased person? This question was raised and preserved in the Record at R Vol 1, pgs 8-23 [Order of the Hon. John J. Ark, dated December 23, 2019]; R Vol 2 pgs 750-769 [Plaintiff-Appellant's Proposed Findings of Fact and Conclusions of Law]; R Vol 2 pgs 807-812 [Decision and Order, Hon. J. Ark, November 7, 2008 denying motion to dismiss (recognizing Appellant's legal contention that appointment of legal representative was required in order to maintain *in rem* proceeding)]; R Vol 2

pgs 1188-1193 [Affirmation in Opposition to Summary Judgment Motion]; pgs 1231-1234 [Plaintiff-Appellant Affidavit in Opposition to Summary Judgment Motion]; R Vol 2 pgs 1275-1277 [Notice of Appeal to New York Court of Appeals].

4. Whether Respondents' ongoing conduct in furtherance of maintaining the *in rem* proceeding to include the public auction of the property was municipal misconduct actionable pursuant to 42 USC § 1983? This question was raised and preserved in the Record at R Vol 2 pgs 750-769 [Plaintiff-Appellant's Proposed Findings of Fact and Conclusions of Law – pg 767].

5. Whether the taking of property pursuant to an invalid *in rem* proceeding gives rise to damages, to include proven borrowing costs incurred in response to the conduct of a foreclosure auction? This question was raised and preserved in the Record at R Vol 2 pgs 750-769 [Plaintiff-Appellant's Proposed Findings of Fact and Conclusions of Law – pgs 761-763; 764-765].

PRELIMINARY STATEMENT AND PROCEDURAL HISTORY

This appeal concerns a plenary action commenced on April 11, 2008, to challenge the constitutionality of a tax foreclosure proceeding that culminated in the auction sale of a real property conducted by Respondents, Ontario County and the Ontario County Treasurer pursuant to New York Real Property Tax Law ("RPTL") Article 11. The subject property was owned solely by Appellant's spouse, James Hetelekides, who acquired the property and in 1985 commenced operating a family run restaurant called The Akropolis. R Vol 1 pgs 115-116. Appellant, who emigrated to the United States from Greece as a bride at the age of 16 or 17 (R Vol 1 pgs 112-113), worked at the restaurant cooking, cleaning, grilling, and hosting. R Vol 1 pgs 116-117.

Respondents failed to suspend the *in rem* proceeding upon learning of the taxpayer's death, which occurred prior to the mailing of notices pursuant to RPTL §1125 and failed to afford alternative written notice pursuant to RPTL § 1125, to a known interested party and/or to seek appointment of a representative with authority to receive written notice. Instead, Respondents, with knowledge that noticing under RPTL § 1125 had failed, obtained a default judgment, and conducted a foreclosure auction of the restaurant property.

At bar before the Appellate Division Fourth Department (the "Appellate Division") was a final Trial Court Order and Judgment ("Order") issued by the New

York State Supreme Court, Ontario County. R Vol 1 pgs 8-11 [Trial Ct Order]; pgs 12-23 [Trial Ct Decision, Judgment and Order]. The Appellate Division modified the Order to vacate the relief afforded by ordering paragraphs: 1 (declaration of tax foreclosure proceeding a "nullity"), 7 (financial award of refund in the amount of $138,656.84), 8 (award of prejudgment interest), 10 (award of costs), and 11 (post judgment interest) and left undisturbed the trial court's denial of Respondents' motion for summary judgment and the dismissal of Appellant's claims under 42 USC §§ 1983 and 1988 for damages arising from borrowing costs. (*Hetelekides v. Cty of Ontario,* 193 AD3d 1414, 1415-17 [4th Dept. 2021]).

The procedural history of this case is extensive. Respondents' motion to dismiss the complaint [CPLR 3211(a)(7)] was denied. (*Hetelekides v. Cty of Ontario,* Sup Ct Ontario County, November 11, 2008, Ark, J., Index No. 100932, *affd* 70 AD3d 1407 [4th Dept. 2010])("upon gaining knowledge of the property owner's death from his widow, the County could have immediately advised her of the need to commence a proceeding in Surrogate's Court with the appointment of a representative" but failed to do so; action contesting the validity of the tax foreclosure sale timely filed within the applicable two year statute of limitations citing *Somers v. Covey,* 2 NY2d 250 (1957)). R Vol 2 pgs 807-812.

Respondents' motion for summary judgment was denied. (*Hetelekides v. County of Ontario,* Sup Ct Ontario County, August 6, 2018, Ark, J., Index

No. 100932)(court has broad equity power to vacate default judgment in the interests of substantial justice; citing *In re Foreclosure of Tax Liens*, 59 AD3d 1065 (4th Dept. 2009); *In re Foreclosure of Tax Liens by Proceeding In Rem Pursuant to Art. 11 of Real Prop. Tax Law by County of Ontario*, 155 AD3d 1567 (4th Dept. 2017); *Matter of Foreclosure of Tax Liens by Proceeding in Rem Pursuant to Art. 11 of Real Prop. Tax Law by County of Ontario*, 30 NY3d 912 (2018); finding discrepancies and credibility ambiguities resolvable only at a hearing). R Vol 2 pg 794.

Following a non-jury trial conducted on December 12 and December 13, 2018, and January 11, 2019, the trial court issued a Decision, Judgment and Order followed by the Order filed with the Ontario County Clerk's Office on January 3, 2020. R Vol pgs 8-11; 12-23.

The trial court found that the foreclosure was invalid for two reasons: (1) the property owner was not properly notified of the proceeding in accordance with RPTL § 1125; and (2) Respondents improperly commenced an action against the deceased party. R Vol 1 pg 19. The trial court nullified the *in rem* proceeding and ordered damages limited to $138,656.83, which was the difference between the bid price at public auction and the amount of taxes due, plus pre- and post- judgment interest. R Vol 1, pg 11. The trial court denied compensatory damages for the borrowing costs incurred by Appellant to pay the bid price and dismissed Appellant's claims pursuant to 42 USC § 1983, stating: "Plaintiff has failed to sustain her burden

of proof… '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.'" R Vol 1 pg 21 [Conclusions of Law]. The trial court acknowledged "missteps by Ontario County in this case" and relative to the Treasurer found there was "no showing that the 'challenged conduct was arbitrary or irrational in the constitutional sense' ... [i]ndeed, the Treasurer took extraordinary, albeit unsuccessful, steps to effect notice of the foreclosure." *Id.*

The filing dates of Respondents' Notice of Appeal and Appellant's Notice of Cross Appeal were January 23, 2020 and January 30, 2020, respectively. R Vol 1 pg 1; Vol. 1 pg 4. The record before the Appellate Division included a Joint Record on Appeal [Volume 1 (pgs 1-636) and Volume 2 (pgs 637- 1304)]. On April 30, 2021, the Appellate Division issued a unanimous Memorandum and Order. (*Hetelekides v. Cty. of Ontario*, 193 AD3d 1414 [4th Dept. 2021])[2]

The Appellate Division held that "the evidence established that defendants fully complied with all of the statutory and due process requirements related to this tax foreclosure proceeding and that any determination to the contrary could not be reached under any fair interpretation of the evidence… (citations omitted). We thus conclude that plaintiff was not entitled to any relief." (*Hetelekides v. Cty. of Ontario* 193 AD3d at 1417).

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[2] R Vol 2 pgs 1278-1283 (original Memorandum and Order).

Appellant timely filed a Notice of Appeal on June 2, 2021. R Vol 2 pgs 1275-1277. Thereafter, Appellant filed with the Clerk of the Court of Appeals a Preliminary Appeal Statement and a Jurisdictional Response. This brief is submitted in accordance with the Court's correspondence of December 14, 2021 that terminated the Court's jurisdictional inquiry and denied the motion for leave to appeal as unnecessary.

STANDARD OF REVIEW

The Appellate Division's Order neither modified the trial court's fact findings nor expressly adopted facts different from those adopted by the trial court. Thus, the questions preserved for potential review are limited to "such questions as whether, upon the decision upon the facts, the legal conclusion followed … whether any material finding of fact was without evidence to support it, and whether any material error was committed in the admission or exclusion of evidence." (4 NY Jur 2d, Appellate Review § 556), *citing McKinley v. Hessen*, 202 NY 24, 27 (1911).

QUESTIONS PRESENTED

1. Did the Appellate Division err when it ruled that Respondents' compliance with the noticing requirements called for by Real Property Tax Law ("RPTL") §1125 ("§1125") satisfied the requirements of due process under the 14th Amendment of the United States Constitution and Article 1, Section 6 of the New York Constitution in relationship to the conduct of an *in rem* foreclosure auction of real property in title to a deceased person?

Answer: Yes, the Appellate Division erred as a matter of law. Strict reliance on the noticing provisions called for by §1125 did not satisfy the obligations imposed by due process because Respondents knew, prior to the taking, that statutory noticing attempts had been undertaken against a deceased person. The presumption that arises upon proof of compliance with the noticing requirements was rebutted and Respondents were obligated to afford noticing designed to be successful and/or appointment of an estate representative to satisfy the constitutional requirement of due process requisite to the taking of a person's property.

2. Did the Appellate Division err by ruling that unsuccessful, verbal noticing measures undertaken by Respondents upon learning that notices mailed to a deceased person could not have been received satisfied the requirements of due process under the 14th Amendment of the United States Constitution and Article 1, Section 6 of the New York Constitution?

Answer: Yes, the Appellate Division erred as matter of law. The *in rem* proceeding could not proceed because the unsuccessful verbal noticing measures undertaken were not reasonably calculated under all the circumstances to apprise interested parties of the pendency of the *in rem* proceeding.

3. Did the Appellate Division err by ruling that the court presiding over the *in rem* proceeding possessed jurisdiction even though the person in title to the property was deceased on the grounds that an *in rem* proceeding is not asserted against any individuals, but only against the property itself?

Answer: Yes, the Appellate Division erred as a matter of law. The *in rem* proceeding could not proceed; the court lacked jurisdiction because the tax-payer in title to the property and named in the foreclosure proceeding had passed away prior to the date foreclosure notices were mailed; in view of Respondents' knowledge, the jurisdictional defect could be cured only if Respondents substituted a personal representative of the deceased parties' estate so that notices compliant with RPTL §1125 could be given.

4. Did the Appellate Division err when it affirmed the trial court's determination that although Respondents engaged in "missteps", relief was not available under 42 U.S.C § 1983 because (1) Appellant failed to establish the existence of a policy or custom of the government itself that caused a violation of her constitutional rights; and (2) "proof of a single incident of objectional conduct

by a municipality is insufficient to establish the existence of a municipal policy for section 1983 purposes"

Answer: Yes, the trial testimony of the Respondent-Treasurer established a policy of reliance upon strict compliance with noticing called for by §1125, even when alternative noticing measures were called for based upon the unique knowledge possessed by Respondents such as, in this case, the death of the property owner, followed by a course of misconduct associated with the policy that resulted in a taking of property that violated due process.

5. Did the Appellate Division err when it affirmed the trial court's determination that Appellant was not entitled to compensatory damages consisting of proven borrowing costs pursuant to a loan that calls for a final payment on June 1, 2022?

Answer: Yes, the trial evidence established that but for the invalid *in rem* proceeding, Appellant would not have been required to purchase back the property for the auction bid price of $160,000, a price that necessitated a bank loan of $50,000 with interest calculated at 9.78%.

STATEMENT OF THE CASE-STATUTORY BACKGROUND

A. STATUTORY BACKGROUND --- RPTL ARTICLE 11 ---NOTICE PRIOR TO TAKING

This appeal concerns Respondents' use of, and reliance upon, Article 11 of the Real Property Tax Law for enforcement for the collection of delinquent taxes. Title 3, at issue in this appeal, governs *in rem* foreclosure proceedings. Section 1125, subsections [1][a][i] and [1] [a] [ii] identify the parties entitled to notice of commencement of foreclosure proceeding to include in relevant part:

> (i) 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, including the records in the offices of the surrogate of the county, or from material submitted to the enforcing officer pursuant to paragraph (d) of this subdivision,
>
> (ii) any other person who has filed a declaration of interest pursuant to section eleven hundred twenty-six of this title which has not expired.

Section 1125[1] [b] [i] –[iv] establishes the notification methods that include in relevant part:

> (i) Such notice shall be sent to each such party both by certified mail and ordinary first-class mail, subject to the provisions of subparagraph (iv) of this paragraph. The notice shall be deemed received unless both the certified mailing and the ordinary first class mailing are returned by the United States postal service within forty-five days after being mailed. In that event, the enforcing officer or his or her agent shall attempt to obtain an alternative mailing address from the United States postal service.

When notice is required to be sent to the commissioner of taxation and finance, an alternative notice may be used by the enforcing officer, in accordance with instructions prescribed by the commissioner of taxation and finance.

(ii) If an alternative mailing address is found, the enforcing officer shall cause the notice to be mailed to such owner at such address both by certified mail and by ordinary first class mail. Notwithstanding any provision of law to the contrary, such owner may redeem the parcel in question or serve a duly verified answer to the petition of foreclosure until either the thirtieth day after such mailing, or the date specified by the notice of foreclosure as the last day for redemption, whichever is later.

(iii) If no alternative mailing address can be found, then in the case of an owner, the enforcing officer shall cause a copy of such notice to be posted as provided herein on the property to which the delinquent tax lien relates; in the case of a non-owner, the enforcing officer shall cause a copy of such notice to be posted in his or her office and in the office of the clerk of the court in which the petition of foreclosure has been filed. Notwithstanding any provision of law to the contrary, the party to whom such notice is directed may redeem the parcel in question or serve a duly verified answer to the petition of foreclosure until either the thirtieth day after such posting or delivery, or the date specified by the notice of foreclosure as the last day for redemption, whichever is later.

(iv) Where an owner is listed as "unknown" on the tax roll and the name of such owner cannot be found in the public record, the notice shall be mailed to the property address by ordinary first class mail addressed to "occupant" and a copy thereof shall be posted on the property to which the tax lien relates.

RPTL §1125 [1][c] governs the requirement of posting notice on subject properties:

Posting of notice. When a notice is required to be posted on the property to which the delinquent tax lien relates pursuant to this section, the posting shall be deemed sufficient if it is either (i) affixed to a door of a residential or commercial structure on the premises, or (ii) attached to

a vertical object, such as a tree, post or stake, and plainly visible from the road. Provided, that if, when visiting the premises for this purpose, the enforcing officer or his or her agent should find thereon an occupant of suitable age and discretion, he or she may deliver such notice to such occupant in addition to or in lieu of posting it. The process of so posting or delivering such notice shall warrant the imposition of an extra charge of one hundred dollars against the parcel, in addition to any other charges authorized by section eleven hundred twenty-four of this title and without regard to any limitations set forth therein.

RPTL §1125 [2] describes the information that must be provided to interested parties:

The notice to be so mailed shall consist of (a) a copy of the petition and, if not substantially the same as the petition, the public notice of foreclosure, provided that such copies need not include the descriptions or the names of the owners of any parcels in which the addressee does not have an interest, and (b) a statement substantially as follows:

To the party to whom the enclosed notice is addressed:

You are presumed to own or have a legal interest in one or more of the parcels of real property described on the enclosed petition of foreclosure.

A proceeding to foreclose on such property based upon the failure to pay real property taxes has been commenced. Foreclosure will result in the loss of ownership of such property and all rights in that property. To avoid loss of ownership or of any other rights in the property, all unpaid taxes and other legal charges must be paid prior to..... (insert the last date to redeem) or you must interpose a duly verified answer in the proceeding. You may make payment to ..... (insert name, title and address of the official to whom such payments are to be made) in the amount of all such unpaid taxes and legal charges prior to that date. You may wish to contact an attorney to protect your rights. After..... (insert the last date to redeem), a court will transfer the title of the property to the..... (Name of the tax district) by means of a court judgment.

> Should you have any questions regarding this notice, please call..... (insert the name of the enforcing officer) at..... (insert telephone number).

Dated,..... (Insert date).

Regarding a final taking, RPTL § 1136, subsection [c] provides "Any sale directed by the court pursuant to this subdivision shall be at public auction by the enforcing officer." (Real Property Tax Law §1136 [c]). An *in rem* proceeding under Article 11 calls for entry of a default judgment that once entered grants the taxing district the property in fee simple absolute and the foreclosing tax district is permitted to keep the entire surplus, even if it far exceeds the debt owed to the tax district. R Vol 2 pgs 1186-1187 [Default Judgment]. (see e.g. *Kennedy v. Mossafa,* 100 NY2d 1 [2003]) (recognizing right of the foreclosing county to retain the surplus of an *in rem* proceeding auction sale that yielded $8,000 where the tax owed was approximately $600.00).

B. PUBLIC AUCTION CONDUCTED TO COLLECT PAST DUE TAXES ON RESTAURANT PROPERTY KNOWN AS THE AKROPOLIS RESTAURANT

This appeal concerns Respondents' use of and reliance upon RPTL Article 11 to collect past due taxes in the amount of $21,343.17 against property in title to a person known by Respondents, prior to expiration of the redemption period, to be deceased. Entry of a default judgment led to a public auction conducted in May 2007 that resulted in a final bid of $160,000 and a windfall surplus of $138,656.83, which

was retained by Respondent County. R. Vol. 1 pgs 10-11 [Trial Ct. Order]; R Vol 1 pg 545 [Ex. 1 Stip. ¶¶ 20, 21].

STATEMENT OF THE CASE --- FACTS

The Record establishes facts about events that occurred during relevant four time periods: (1) the period during the conduct of the *in rem* proceedings measured from October 2, 2006 through the redemption date of January 12, 2007; (2) the period during which Appellant offered to tender payment in full of the past due taxes (January 16, 2007 – February 8, 2007), the latter date being the date Ontario County submitted an application to the trial court presiding over the *in rem* proceeding for a default judgment; (3) the period following the date application for a default judgment was made through March 29, 2007, the date the Ontario County Board of Supervisors decided that Appellant would not be permitted to redeem the property and that the auction sale would proceed; and (4) the period from March 29, 2007 to June 1, 2007, including the conduct of the auction sale in May 2007 and the steps taken by Appellant to secure repurchase of the property to include a loan from a local bank.

October 2, 2006 - January 12, 2007

On October 2, 2006, over two months after the death of James Hetelekides, Respondents sent notices of pending foreclosure proceedings by certified mail addressed to "Geo-Tas-Inc. Hetelekides James", and "Hetelekides James Geo-Tas-Inc." ("Notices") to the Property. R Vol 1 pg 544 [Ex. 1 Stip. ¶ 8]; R Vol 2 pg 681

[Defendants' Ex. B]; R Vol 2 pg 687 [Def. Ex C]; R Vol 2 pgs 693-695 [Defendants' Ex. D].

Respondent-Treasurer was the County's Treasurer and as such, the enforcement officer for conduct of *in rem* proceedings (R Vol 1 pg 543 [Ex. 1 Stip. ¶4]), with duties that included execution of documents filed in support of Respondent-County's application for a default judgment. R Vol 2 pgs 696-699 [Aff. of Posting, Service and Publication]; R Vol 1 pgs 317-318 [Respondent-Treasurer trial testimony].

James Hetelekides was the sole owner of the Property; Geo-Tas-Inc. was not in title to the Property. R Vol 1 pg 544 [Ex 1 Stip. ¶ 5]. Respondents were aware that a restaurant was operated at the Property. R Vol 1 pgs 472-73.

Prior to expiration of the redemption period, Appellant visited both the Hopewell Town Hall (Town in which Property was located) and the Ontario County Treasurer's office in Canandaigua, New York to determine if taxes were owed on the Property. She was provided conflicting information but ultimately was advised that no taxes were due. R Vol 1 pgs 122, 126-129; 143-149 [Appellant's trial testimony; adopted by Trial Ct. Order. R Vol 1 pgs 14-15].

In December 2006, Respondent-Treasurer met with the Ontario County Attorney and Treasurer's office staff to review properties slated for public auction unless past due taxes were paid for by the redemption date of January 12, 2007.

R Vol 1 pgs 363-364 [Treasurer's Testimony]; 603-04 [Plaintiff's Ex. 6 Baxter Email dated Jan. 3, 2007].

Respondent-Treasurer admitted at trial that he knew that the sole Property owner, James Hetelekides, had died. R Vol 1 pg 471 [Baxter Testimony]. During this December 2006 meeting, County employees, including the County Attorney and Respondent-Treasurer discussed James Hetelekides' death. R Vol 1 pg 469 concerning December 2006 meeting with County Attorney); pg 471 (Treasurer admits that he knew on the date he visited the property that the property owner was deceased).

Defendants-Respondents knew that the RPTL §1125 notices delivered on October 3, 2006 could not have been received by the property owner. In fact, Respondents knew that the notices had not been signed by anyone with the surname of Hetelekides; rather, Respondents knew that the notices had been signed for by an individual named Barb Schenk. R Vol 1 pg 544 [Plaintiff's Ex. 1 Stip. ¶ 9]; R Vol 2 pgs 693-695 [Respondents' Ex D]. Barb Schenk was a waitress who worked at the restaurant. R Vol 1 pgs 13 [Trial Ct. Order]; 120 [Appellant's trial testimony].

Understanding that that notice was necessary (R Vol 1 pg 364), Respondent-Treasurer telephoned the restaurant on January 9 and 10, 2007 and then visited the property on January 11th for three minutes. R Vol 1 pgs 365-368 [Baxter Testimony]; Vol 2 pg 700 [Defendants' Ex. H]. It is undisputed that Baxter never mentioned the

in rem foreclosure proceeding or the January 12 redemption deadline during his phone calls or visit. R Vol 1 pg 470 [Baxter Testimony]. Respondent- Treasurer failed to ask for Mrs. Hetelekides, or anyone with the surname of Hetelekides, during any of these three attempts to provide notice. R Vol 1 pgs 470-472 [Baxter Testimony].

During the three-minute visit to the Property, the Treasurer inquired about the availability of an "owner," "a manager" or "someone in charge." R Vol 1 pg 368 [Baxter Testimony]. Respondent-Treasurer knew that the sole owner was deceased. R Vol 1 pg 471 [Baxter Testimony]. Yet, he did not ask to speak with Mrs. Hetelekides or anyone with the surname of Hetelekides even though it was discussed during the December 2006 meeting with the County Attorney that the deceased taxpayer had been married and that "his wife was still alive and running the business." R Vol 1 pgs 472-473 [Respondent-Treasurer's trial testimony].

When the Treasurer visited the property on January 11, 2007, he did not take with him a copy of the foreclosure notice or even the certified return receipt cards. R Vol 1 pgs 469-70. He did not post the property. R Vol 1 pg 470. The only written material left by the Treasurer was his business card. R Vol 1 pgs 147-148 [Appellant's Testimony]; 368-369 [Baxter Testimony]. The Treasurer testified that he left without speaking with anyone about the impending foreclosure. R Vol 1 pg 470.

Thus, as of January 11, 2007 (the day before expiration of the redemption period), Respondents had not successfully delivered any written notice of the *in rem* proceeding to any person, whether a representative of the deceased taxpayer's estate or anyone with the surname of "Hetelekides". Moreover, he had not disclosed to any living person the impending *in rem* proceeding. In sum, after determining notice was required during the December 2006 meeting, Respondents failed to provide any notice of taxes owed, the deadline to pay taxes, or even the impending tax foreclosure proceeding. Respondents' telephone calls and the three minute visit to the property occurred just days before the redemption deadline. The Treasurer left his business card at the restaurant during the afternoon on the day before the taxes had to be paid. R. Vol 1 pgs 470; 472-473.

January 16, 2007- February 8, 2007

Appellant found the Treasurer's business card (R Vol 1 pgs 149-151 [Appellant's Testimony]) and returned to the Treasurer's office on January 15, 2007, only to discover it was closed for Martin Luther King, Jr. Day. R Vol 1 pgs 151-152 [Appellant's Testimony]. Also, she called the Treasurer's office and left a voicemail message about her previous inquiries regarding taxes and the information imparted to her by a member of the Treasurer's staff. R Vol 1 pgs 151-152 [Appellant's Testimony]. Respondents failed to retain the voicemail message even though the

Treasurer and the County employees were aware of the need to do so. R Vol 1 pgs 266-267 [Deposition testimony of Respondent-Treasurer].

On January 16, 2007, Appellant returned to the Treasurer's office and spoke with the Treasurer, learned of past due taxes, and offered to pay the taxes. R Vol 1 pg 544 [Ex 1. Stip. ¶ 13]. The Treasurer refused the offer and declared "The taxes are due, [sic] is due date, that restaurant is mine right now, mine." R Vol 1 pgs 152-153 [Respondent-Treasurer's Testimony].

Respondents applied for a default judgment on February 1, 2007, which was granted and then entered on February 8, 2007. R Vol 2 pgs 705-707 [Defendants' Ex. N]. Notably, the application was supported by the Treasurer's notarized statement that "notices were mailed to each owner by certified mail, and to all other others by ordinary first-class mail." R Vol 2 pg 698 [Defendants' Ex. G]. Defendants-Respondents' motion for a default judgment did not disclose any information concerning the knowledge they possessed concerning James Hetelekides, the tax-payer named in the proceeding, and the fact that the tax-payer had passed away before the notices were mailed; the unsuccessful telephone calls and the Treasurer's three minute visit; and/or the efforts of the deceased property owner's widow to ascertain the status of the property and pay the tax. R Vol 1 pgs 462-466 [Respondent-Treasurer's trial testimony concerning his affidavit of mailing used to support the application for default judgment]; R Vol 1 pg 342 [Treasurer's testimony

concerning trial exhibit F (Affidavit of Posting, Service and Publication); Ex. G, (Treasurer's Affidavit concerning Certified Mailing List); R Vol 1 pgs 518-522 (Treasurer did not disclose facts about calls/visit to the Property)].

February 9, 2007-March 29, 2007

After Appellant visited the Respondent-Treasurer's office on January 16, 2007, she retained an attorney and made an appeal to the Financial Management Committee of Ontario County Board of Supervisors on February 28, 2007, during which Appellant's attorney presented her ability to pay the past due taxes and thereby avoid an auction sale, as permitted by RPTL § 1166. R Vol 1 pg 545 [Ex 1 Stip. ¶ 16].

Meanwhile, Respondents pursued a strategy to withhold the unique facts about the conduct of the *in rem* proceeding from the Ontario County Board of Supervisors. R Vol 2 pg 678 [Plaintiff's Ex 14 (email communication between County Attorney and the Treasurer declaring success in preventing the Board of Supervisors from discussing individual properties in the *in rem* proceeding)]; R Vol 1 pg 609 [Pl. Ex. 10 (Treasurer's Memo to the Ontario County Board of Supervisors in which he misrepresents that Mrs. Hetelekides signed for the foreclosure notice delivered by mail)]. The Treasurer failed to disclose to the Board of Supervisors the information he possessed about his visit to the restaurant one day before the redemption date R Vol 1 pg 522 [Baxter Testimony], 609 [Plaintiff's

Ex 10]; 504 [Baxter Testimony- failure to disclose to exchange with Appellant on January 16, 2007]; R Vol 1 pg 609 [Plaintiff Ex. 10 - Baxter Memorandum to Ontario County Board of Supervisors].

On March 29, 2007, Supervisor Green introduced a resolution to permit Mrs. Hetelekides to redeem the Property in accordance with an offer that was in excess of the amount of the past due taxes, but the Ontario County Board of Supervisors did not approve the resolution. R Vol 2 pgs 672-673 [Plaintiff's Ex 12 (Minutes of Ontario County Board of Supervisors)].

March 29, 2007-June 1, 2007

No further action was taken by the parties and an auction sale occurred on May 9, 2007, resulting in a sale of the property for $160,000 to the highest bidder, Pavlos Panitsidis, who in turn assigned the bid to Appellant. R Vol 1 pg 545 [Ex. 1, Stip. ¶¶ 20, 21].

Appellant paid the bid price with funds borrowed from friends, members of the community, and a local bank. All bid funds provided by friends and/or family members in the amount of $110,000 were repaid by Mrs. Hetelekides. R Vol 1 pgs 159-160 [Appellant's Testimony]; the bank loan was taken out on June 1, 2007 in the principal amount of $50,000. R Vol 1 pgs 547-574 [Plaintiff's Ex. 2, Holman Affidavit].

As of November 30, 2018, Appellant had incurred and paid borrowing costs in the amount of $33,751,58 pursuant to loan terms that call for interest at 9.78% and a final payment on June 1, 2022. R Vol 1 pg 549 [Plaintiff Ex. 2, Holman Affidavit, ¶¶ 7,8].

Regarding the authority of the Respondent-Treasurer, reference is made to the Treasurer's affidavit submitted in support of Respondents' summary judgment motion. R Vol 2 pgs 1143, 1147 (admitting that as the County Treasurer he is the enforcing officer for *in rem* foreclosure proceedings; acknowledging discretionary authority with respect to foreclosure proceedings).

Further, the Record establishes that Baxter understood that in refusing to afford Appellant the opportunity to redeem the property based upon the unique facts of the case, he was adhering to a "policy." R Vol 1 pg 609 [Plaintiff Ex. 10, Baxter Memo dated March 6, 2007 [referring to the "policy" of Ontario County]; R Vol 1 pgs 521-522 [Baxter's Testimony admitting he prepared Exhibit 10 [Memo] and presented it to the Ontario County Board of Supervisors].

ARGUMENT

I. THE FORECLOSURE PROCEEDING SHOULD BE DECLARED A NULLITY BECAUSE RESPONDENTS FAILED TO AFFORD DUE PROCESS UNDER THE LAW

A. Although RPTL Article 11's framework and requirements pass muster under the due process clauses of the 14th Amendment of the United States Constitution and Article 1, §6 of the New York Constitution, compliance with the noticing provisions under RPTL §1125 does not relieve a taxing authority of its obligations to ensure due process has been afforded as a requisite to taking property.

Appellant does not challenge the constitutionality of RPTL Article 11, RPTL §1125, which permits written notice of *in rem* proceedings by mail, and/or the legal presumption that arises upon proof of compliance with the statutory notice and mailing protocols, such as certified mail, return receipt requested. Indeed, the United States Supreme Court has recognized that while publication alone does not satisfy due process, written notice mailed to the taxpayer's address would satisfy due process noticing requirements. (*See e.g., Mullane v. Central Hanover Bank & Trust Co.,* 339 US 306, 318 [1950]) (also recognizing the relevance and significance of the foreclosing party's knowledge about persons with interests in the property).

This Court has ruled that written mailed notice constitutes "actual notice" as opposed to "constructive notice." (*Matter of McCann v Scaduto,* 71 NY2d 164, 176-178 [1987]) ("*McCann*") ("actual notice must be given to 'all parties readily ascertainable who have a substantial interest in the property'"; actual notice of tax

sale proceedings is required; mailed notice to a person whose name and address are known imposes a minimal burden).

This appeal concerns the scope of a foreclosing municipality's obligations to guarantee due process of law, imposed by the 14th Amendment of the U.S. Constitution and Article 1, Section 6 of the New York State Constitution, when the foreclosing municipality utilizes and relies upon the summary processes afforded by RPTL Article 11 in the face of unique knowledge that written notices mailed to a deceased taxpayer, about property known to be an operating restaurant, could not have been received.

The protections guaranteed by the 14th Amendment of the United States Constitution ("nor shall any State deprive any person of life, liberty, or property, without due process of law") and Article 1, Section 6 of the Constitution of the State of New York ("no person shall be deprived of life, liberty or property without due process of law") are at bar when courts are called upon to determine the constitutionality of municipal conduct involving the taking of property pursuant to *in rem* proceedings. (*Cf. Matter of Orange County Com. of Fin. (Helseth),* 18 NY3d 634, 639 [2012]) (recognizing as well established that "[b]oth the Federal and State Constitutions provide that the State may not deprive a person of property without due process of law). (*Cf. Cent. Sav. Bank in City of New York v. City of New York*, 280 NY 9, 10 [1939]) (recognizing that the due process protections afforded by the

United States Constitution and the New York Constitution are set forth in clauses "formulated in the same words and are intended for the protection of the same fundamental rights of the individual" and that there is "no room for distinction in definition of the scope of the two clauses"); (*Ives v. S. Buffalo Ry. Co.*, 201 NY 271, 292-293 [1911]) (recognizing the meaning of 'Process of law' in its broad sense as law in its regular course of administration through courts of justice, and that every man's right to life, liberty, and property is to be disposed of in accordance with "those ancient and fundamental principles which were in existence when our Constitutions were adopted"); (*Arroyo v. Annucci,* 61 Misc3d 930 [Sup Ct Albany 2018]) (recognizing that "[t]he Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 6 of the New York State Constitution guarantee due process protections for life, liberty and property"]).

While the Appellate Division's Order cites to decisions of the United States Supreme Court and New York State courts that address and establish a property owner's rights to due process in the context of property tax foreclosure proceedings (see e.g. *Hetelekides v. Cty. of Ontario,* 193 AD3d at 1417-1418) (citing decisions construing due process in the context of *in rem* proceedings including *Robinson v. Hanrahan*, the Appellate Division failed to properly analyze and apply due process principles that mandate a level of responsibility, conduct and measures when there is unique knowledge based upon acknowledged facts that statutory noticing has

failed.

In this case, the Appellate Division ruled that the Appellant, the widow of the deceased person named on the tax records as the owner, was not entitled to any written notice of the *in rem* proceeding because "the evidence established that defendants fully complied with all of the statutory and due process requirements related to this tax foreclosure proceeding and that any determination to the contrary could not be reached under any fair interpretation of the evidence". (*Hetelekides v. Cty. of Ontario,* 193 AD3d at 1417).

The Appellate Division's legal conclusion does not comport with the Trial Record that establishes that at no time did Respondents ever attempt to provide to Appellant, or even any member of the Hetelekides family, written notice compliant with §1125 after they became aware of the death of the property owner, even though Respondents concluded during a legal team meeting that alternative notice was required. R Vol 1 pgs 368, 470, 472-73.

The Appellate Division ignored the trial court's express finding that "[p]rior to the January 12, 2019 [sic] 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 Plaintiff's deceased husband and Geo-Tas, Inc."[3] "None

[3] The redemption deadline was Friday January 12, 2007. R Vol 1 pg 544 [Ex. 1 Stip. ¶ 10]. Geo Tas, Inc. was not in title to the property. R Vol 1 pg 544 [Ex. 1 Stip.¶5]; R Vol 1 pg 13 [Trial

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." Trial Court Order R Vol 1 pgs 18-19.

The Appellate Division's Order is contrary to the law because it stands for the proposition that the unique knowledge of a municipality is not relevant to determining whether the requirements of due process as called for by the Fourteenth Amendment and the New York State Constitution have been met where the municipality establishes slavish compliance with statutory noticing provisions. The Appellate Division's Order provides municipalities with the right to ignore facts relevant to the conduct of *in rem* proceedings, the aim of which is the taking of property to realize profits that far exceed the taxes owed.

The Appellate Division's Order is the outcome of mechanistic or rigid analysis, an approach expressly rejected by well -developed due process precedent that rejects such rigidity. (*See e.g. Garden Homes Woodlands Co. v. Town of Dover,* 95 NY2d 516, 519 [2000]) (recognizing "[t]he determination as to what process is constitutionally due does not depend upon a mechanistic or rigid analysis....

Ct. Decision, Judgment, and Order - finding that Respondents had determined that Geo-Tas was not in the title and had been erroneously listed as an owner on the abstract report].

[i]nstead, the State's interests and administrative burdens are balanced against the need to safeguard the individual's interest by requiring actual notice of the specific government action").

B. Under the Due Process Clauses of the 14th Amendment to the United States Constitution and Article 1 §6 of the New York Constitution, Respondents were not entitled to rely upon strict compliance with RPTL § 1125; rather, Respondents were had the duty to afford alternative notice that minimally required notice to an interested party at least as effective as the information mandated by the noticing statute as a condition for taking the property.

Two decisions by the United States Supreme Court have addressed the issue as to when particular facts and circumstances arising in the context of a statutory proceeding to take real property mandate that steps in addition to the statutory noticing requirements be taken in furtherance of the protection of a person's rights to due process.

In (*Jones v. Flowers,* 547 US 220 [2006]) ("*Jones*") the United States Supreme Court addressed the issue of the noticing steps that are required by due process beyond those statutorily mandated when the government becomes aware prior to the taking of a person's residence, that its notice attempt has failed. In *Jones*, the Court framed the issue before it in terms of whether knowledge on the government's part that notice has failed is a circumstance and condition that varies the "notice required." *Jones* at 227. *Jones* involved a notice of tax sale that was returned to the Tax Commission as unclaimed. The Tax Commissioner's curative consisted of

notice by publication two years after the initial unsuccessful mailed notice and a few weeks before the tax sale. The taxpayer filed suit alleging that the Tax Commissioner's failure to provide notice of the tax sale and of the taxpayer's right to redeem resulted in a taking of his property without due process. (*Id* at 223-224). The Court ruled in favor of the taxpayer.

The *Jones* Court observed that "[t]he Courts of Appeals and State Supreme Courts have addressed this question on frequent occasions, and most have decided that when the government learns its attempt at notice has failed, due process requires the government to do something more before real property may be sold in a tax sale." *Id.* at 228. Further, the Court recognized that "[i]n prior cases, we have required the government to consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case." *Id.* at 230. *(citing Robinson v. Hanrahan* [notice defective because it was sent to vehicle owner's home when the State knew that the property owner was in prison] and *Covey v Somers* [notice of foreclosure by mailing, posting and publication inadequate when town officials knew that the property owner was incompetent and without a guardian's protection]).

In *Jones*, the Court considered the issue within the context of prior decisions involving taxpayers who could not have received notice; ruled that efforts to provide notice of an impending tax sale of taxpayer's house were insufficient to satisfy due

process "given the circumstances of this case" and concluded that, under the circumstances presented, "the State cannot simply ignore that information [that notice was not delivered] in proceeding to take and sell the owner's property – any more than it could ignore the information that the owner in *Robinson* was in jail, or that the owner in *Covey* was incompetent." (*Id.* at 237).

In (*Covey v. Town of Somers,* 351 US 141, 146 [1956]) ("*Somers*") the United States Supreme Court considered the notice issue in the context of a tax foreclosure proceeding commenced in New York State Supreme Court pursuant to Article VII—A, Title 3, of the New York Tax Law (§165-h) wherein the named taxpayer was known to be an unprotected incompetent.

In addressing the requirements of due process, the Court observed that:

> An elementary and fundamental requirement of the process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. * * * (W)hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. (citing *Mullane v. Central Hanover Bank & Trust Co);* Notice to a person known to be an incompetent who is without the protection of a guardian does not measure up to this requirement.

With respect to the municipality's knowledge and the significance of its knowledge, the Court stated:

> Assuming the truth of the uncontradicted assertions, that the taxpayer Nora Brainard was wholly unable to understand the nature of the

> proceedings against her property (from which it must be inferred that she was unable to avail herself of the statutory procedure for redemption or answer), and that the town authorities knew her to be an unprotected incompetent, we must hold that compliance with the statute would not afford notice to the incompetent and that a taking under such circumstances would be without due process of law.

Id. at 146-147.

New York courts have also addressed the issue of when a foreclosing party's unique knowledge mandates that it undertake additional, meaningful noticing steps prior to taking real property in order that the requirements of due process be satisfied.

In (*In the Matter of Foreclosure of Tax Liens*, 165 AD3d 1112 (2d Dept. 2018), *lv dismissed* 35 NY3d 998 [2020]) *("Goldman")*, the Second Department upheld the trial court's dismissal of a tax foreclosure proceeding because the enforcing county, with knowledge of the taxpayer's death, failed to substitute a personal representative of the deceased party's estate. (*Id.* at 1117).

More recently, the Third Department, addressed the issue of whether a tax foreclosure proceeding may include a parcel where the owner is deceased at the time the action is commenced. (*In the Matter of the Foreclosure of Tax Liens by City of Schenectady v. Kenrick Permaul*, 201 AD3d 1, 4 [3d Dept. 2021]) *("City of Schenectady").*

In *City of Schenectady*, the Third Department observed that the petitioner was on notice that the property owner-decedent had passed away before the proceeding was commenced; holding that the failure to seek appointment of a personal

representative of the estate, meant that the proceeding was a nullity from its inception with respect to the property and "Paul" an interested party; recognizing a split of authority between the Second and Fourth Departments (referring to *Goldman* and *Hetelekides v. Cty. of Ontario)* with respect to whether a tax foreclosure proceeding may include a parcel where the owner is deceased at the time the action is commenced; expressly "ascribing" to the viewpoint expressed in *Goldman*). *(See also, Orra Realty Group v Gillen*, 46 AD3d 649 [2d Dept. 2007] *lv to appeal denied,* 10 NY3d 712 [2008]) (considering unique known facts; declaring null and void a tax deed because the foreclosing trust, the purchaser of a tax lien certificate issued by the Village of Freemont, New York, with knowledge of the taxpayer's death, failed to petition the Surrogate's Court for the appointment of an administrator). In nullifying the tax deed, the *Orra* court held "[u]nder these circumstances, we conclude that the means…selected for providing notice were not reasonably calculated to apprise the interested parties of the pendency of the tax sale and transfer and afford them an opportunity to redeem the outstanding tax lien." (citing *Covey v. Town of Somers* and other decisions). (*Id.* at 650-651).

The Appellate Division explicitly rejected the holding in *Goldman* (93 AD3d at 1420), and in so doing adopted a rule that all that is required upon learning that RPTL §1125 notices were mailed to a deceased property owner is an attempt to provide verbal notice, to any person, even a person not identified as an interested

party in RPTL §1125, and even when there is knowledge of the identity of the deceased property owner's widow; that there are no obligations to disclose to the trial court presiding over the *in rem* proceeding that notice was sent to a person known to be deceased and/or seek appointment of a representative authorized to receive notice, and that alternative noticing steps need not be in any writing, need only be attempted and not even successful.

With respect to the attempted alternative notice, the Order holds that Respondents were not required to provide written notice of the *in rem* proceeding in accordance with RPTL §1125 (2). This holding creates precedent directly contrary to RPTL §1125, the very statute upon which Respondents have relied during the pendency of this case (now in its fourteenth year), that expressly calls for written notice by mail. As established by the Record, Respondents rely solely upon the written notices sent to the deceased property owner and proof that the mailed notices were received at the property, with the proof consisting of green cards utilized by the United States Postal Service, referred to as certified mail return receipt requested, that were signed for by "Barbara Schenk," a restaurant waitress. R Vol 1 pg 544 [Ex. 1 Stip. ¶9]; R Vol 2 pg 998 [Appellant's trial testimony].

It is well established that RPTL §1125 merely creates a "presumption . . . that those notices have been received by the party to whom they were sent." (*In re Foreclosure of Tax Liens By Proceeding In Rem Pursuant to Article 11 of Real Prop.*

Tax L. By Cty. of Seneca, 151 AD3d 1611, 1612 [4th Dept. 2017]) (vacating foreclosure judgment where affidavit of service did not establish notice was duly addressed). In this matter, the Trial Record established that the statutory notices prescribed by RPTL §1125 could not have been received by the property owner, thereby invalidating the presumption. Respondents knew as early as December 2006, a date well in advance of the redemption date, as well as the date Respondent County applied to the trial court presiding over the *in rem* proceeding for a default judgment (February 1, 2007), that the property owner had passed away. R Vol 1 pgs 471-472 [Baxter Testimony]; R Vol 2 pg 708 [Defendants' Ex. O]. Nevertheless, Respondents pursued and obtained a default judgment of foreclosure.

Further, with respect to attempted alternative notice attempts, the Record establishes that Respondents failed to provide any written notice of the pending *in rem* proceeding to anyone. Alternative notice consisted of two phone calls and a visit to the property that occurred the day before the redemption date. R Vol 1 pgs 366-369 [Baxter Testimony]; R Vol 2 pg 700 [Defendants' Ex. H]. Such attempts failed to provide to anyone the notice prescribed by RPTL §1125 and were not reasonably calculated to satisfy due process. (*See Akey v. Clinton Cty.*, 375 F3d 231, 235 [2d Cir. 2004]) (reasonably calculated notice is notice by means "such as one desirous of actually informing the [property owner] might reasonably adopt to accomplish it.").

The Appellate Division's Order wrongly establishes a new rule that when alternative noticing is mandated by due process, the type of notice and the manner of delivery are within the complete discretion of the enforcing officer, in this case, the Respondent-Baxter, and that the content of such alternative notice need not be of the same substance and/or quality as the original notice, in this case content mandated by RPTL § 1125(2). Rather, the Appellate Division upholds, as constitutional, virtually any attempted, albeit unsuccessful, alternative notice even when the alternative, discretionary notice is not directed to persons known to have an interest in the property. This holding is contrary to the premise that "actual notice must be given to all parties readily ascertainable who have a substantial interest in the property." (*McCann,* at 176-178). As this Court observed in *McCann*, "where the interest of a property owner will be substantially affected by an act of government, and where the owner's name and address are known, due process requires that actual notice be given." (*Id.* at 176).

Despite Respondents' admitted knowledge about the occurrence of the taxpayer's death before §1125 noticing was mailed, and despite the fact that the only written notices called for by §1125 were addressed to a deceased person, the Appellate Division concluded that conduct of the proceeding did not violate due process because: (a) "Baxter complied with all statutory requirements"; (b) duplicate notices were mailed by both certified and ordinary first class mail; and (c) Baxter

made "three personal attempts to talk to someone with authority at the restaurant and provide 'that person' with actual notice" (*Hetelekides v. Cty. of Ontario,* 193 AD3d at 1417-1419).

The foregoing constitutes circular logic; there is no independent ground or evidence that supports the Order's legal conclusion. With reference to the reasoning identified above in (a) and (b), the Appellate Division reached an erroneous conclusion because it ignored the rule of law that requires careful and thoughtful due process analysis of the scope of the foreclosing municipality's obligations when it possesses unique knowledge, in this case, the knowledge that Respondents possessed before expiration of the redemption period, that all of the statutory notices had been addressed and mailed to a deceased person and signed for by a restaurant waitress as well as knowledge of the identity of the deceased taxpayer's widow. The Trial Record establishes that the County knew Appellant's home address and did not attempt to contact her there. [Plaintiff's Ex. 10, Baxter Memo referencing "other properties" owned by Mrs. Hetelekides in Ontario County; Defendants' Ex. Q, County Tax Records for Appellant's Home Address].

The Appellate Division's reasoning identified above in (c), reliance upon the Treasurer's personal attempts, is also faulty because, as with (a) and (b) above, it is not based upon the type of meaningful analysis required to satisfy due process. (*McCann,* 71 NY2d at 173) (recognizing that the "means employed must be such as

one desirous of actually informing the absentee might reasonably adopt to accomplish it.... [w]hether the proceeding involved person or property, due process required a balancing of the State's interests and the individual's interest in actually being informed of proceedings affecting rights or property.) Moreover, the Order is not supported by the statutory notice requirements set forth in RPTL §1125 pertaining to the type of written notice that has been upheld as valid notice.

As to the first point, it is well established that when the foreclosing municipality concludes that statutory notices could not have been received by a deceased person, it is incumbent that the means employed to provide alternative notice be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. (*Somers v. Covey,* 351 US 141, 146-147 (citing *Mullane v. Central Hanover Bank & Trust Co.*)).

Juxtaposed against the Record, including the trial court's factual findings (R Vol 1 pgs 368, 471,472-73 [Baxter testimony]; R Vol 1 pgs 18-19 [Trial Ct. Fact Findings]), the Appellate Division's conclusions are not rational. In reaching its decision that the Respondent Treasurer satisfied his obligations under the law, the Appellate Division identified and erroneously relied upon the Treasurer's trial testimony about "three personal attempts" and RPTL §1125, "[n]othing in RPTL 1125 shall be construed to preclude the enforcing officer from issuing at his or her *discretion,* duplicate notices or informal notices to interested persons" *citing*

RPTL 1125 [4][a], [b]. (*Hetelekides v. Cty. of Ontario,* 193 AD3d at 1419).

The Appellate Division's reliance upon §1125 [4][a][b] was misguided because the cited subsection does not address the issue of curative noticing. Rather, RPTL §1125 [4] [a] and [b] deal with additional, discretionary notice, not alternative notice called for when noticing under RPTL §1125 has failed. Section [4] [a] and [b] states:

> 4. (a) Nothing contained herein shall be construed to preclude the enforcing officer from issuing, at his or her discretion, a duplicate of any such notice, clearly labeled as such, through means other than ordinary first-class mail, including but not limited to personal service, registered, or certified mail, facsimile transmission, or electronic mail.
>
> (b) Nothing contained herein shall be construed to preclude the enforcing officer from issuing, at his or her discretion, one or more informal notices to an owner or other party prior to issuing the notice required by this section.
>
> (c) The failure of the enforcing officer to mail any such discretionary notice, or the failure of an intended recipient to receive such a notice, shall not invalidate any tax or prevent the enforcement of the same as provided by law.

A correct reading of RPTL §1125 [4] [a] and [b], called for by well-established rules of statutory construction (*see e.g. Colon v. Martin*, 35 NY3d 75, 78 [2020]) establishes that the enforcing officer is permitted, in his or her discretion, to provide a duplicate written notice. The clear statutory language at bar establishes that the noticing permitted by subsection [4] is additional written notice, not the alternative written noticing constitutionally mandated when there is knowledge that noticing called for by §1125 [2] has failed. Defendants-Respondents were not permitted to

rely on a presumption of notice because they knew such notice had failed.

The Record establishes that Appellant was not provided notice in accordance with RPTL §1125, either in her individual capacity as the property owner's widow or in her eventual capacity as Executrix. In reliance upon a misreading of §1125 [4], the Appellate Division erroneously held that "discretionary", "informal" and unsuccessful verbal notice attempts satisfy the enforcing municipality's obligations imposed by due process of the law. This holding was in error.

C. The Appellate Division's Order erroneously holds that the presumption of validity afforded by RPTL §1125 is irrebuttable

It is recognized that a presumption of validity attaches to the taxes assessed and the procedures undertaken by a tax district in a proceeding commenced under Article 11. (*City of Schenectady* at 6). It is also well recognized that the presumption of validity may be overcome. (*Matter of Seneca County [Maxim Dev. Group]*, 151 AD3d 1611, 1612 [4th Dept. 2017]) (recognizing that the "presumption of regularity" may be overcome by "affirmatively establishing a jurisdictional defect or invalidity in [such] proceedings"). (*Cf. Matter of City of Utica (Suprunchik),* 169 AD3d 179, 182 [4th Dept. 2019]) (recognizing that "[t]he failure to substantially comply with the requirement of providing the taxpayer with proper notice constitutes a jurisdictional defect which operates to invalidate the sale or prevent the passage of title").

Despite the Record and well-established precedent, the Appellate Division vacated the relief and upheld the validity of the *in rem* proceeding. In so doing, the Order erroneously establishes at law an irrebuttable presumption that written notice to a deceased property owner that complies with the notice and mailing protocols called for RPTL §1125 cannot be challenged even when the foreclosing municipality possesses (a) actual knowledge that the notice could not have been delivered to a deceased property owner; (b) unique knowledge of the identity of the deceased property owner's widow; (c) adequate time to implement alternative and meaningful noticing; (d) knowledge that the Respondent-Treasurer's alternative notice attempts failed to comport with the type of noticing mandated by RPTL §1125.

In contrast to the Appellate Division's Order, the only legal conclusion that could be reached on the Record was that Respondents' compliance with RPTL §1125 did not afford notice to either the taxpayer or any interested party and that the application for and entry of the default judgment and conduct of the auction sale violated Appellant's rights to due process of law.

II. THE APPELLATE DIVISION ERRED BECAUSE THE COURT PRESIDING OVER THE *IN REM* PROCEEDING LACKED JURISDICTION

The trial court Order declared the proceeding a nullity because the court presiding over the *in rem* proceeding lacked jurisdiction. R Vol 1 pgs 18-20. In vacating relief, the Appellate Division erroneously rejected this legal conclusion on the ground that there is a distinction between individuals and entities, as necessary parties in *in personam* cases, and "a petition in a tax foreclosure proceeding" that "relates only to the property and not any particular person." (*Hetelekides v. Cty. of Ontario,* 193 AD3d at 1420). The Appellate Division's Order stands for the proposition that so long as there is strict compliance with noticing called for by §1125, noticing to a deceased person suffices for jurisdictional purposes. The Appellate Division's Order is in error.

The notion that an *in rem* proceeding is not asserted against any individuals, but only against the property itself, commonly referred to as a "fiction," has been rejected by the United States Supreme Court. (*Shaffer v. Heitner,* 433 US 186, 216 [1987]) (reasoning that "an adverse judgment in rem *directly affects the property owner* by divesting him [or her] of his [or her] rights in the property before the court").

In *McCann,* this Court construed the constitutionality of code provisions as applied to petitioners in an *in rem* tax lien foreclosure proceeding and acknowledged

that the rigid distinction between in *personam* and *in rem* proceedings could no longer be justified as a basis for denying property owners meaningful notice of proceedings affecting their property interests). (*McCann, supra,* 71 NY2d at 173).

In *Goldman*, the Appellate Division Second Department squarely addressed this jurisdictional issue and ruled that an *in rem* foreclosure proceeding commenced against a person known to be deceased person was a nullity. (*Goldman,* 165 AD3d at 1117). The Second Department reasoned that the procedure in special proceedings is the same as in actions and is governed by the CPLR provisions applicable to actions:

> Accordingly, in the absence of any affirmative legislation explicitly authorizing the County to commence or maintain an in rem tax lien foreclosure proceeding against deceased individuals, there is no statutory reason to distinguish between the forms of civil judicial proceedings with respect to this issue.
>
> Indeed, this Court has previously applied these general principles to an *in rem* tax lien foreclosure case . . .. Numerous trial-level decisions have similarly applied these principles to proceedings in rem. In the absence of any countervailing authority, we conclude that the prohibition against commencing or maintaining an action or proceeding against a deceased individual, which applies to every other type of judicial proceeding, is applicable here, too."
>
> (*Goldman,* 165 AD3d at 1118-1119 (quotations and citations omitted)).

The Appellate Division Third Department recently adopted *Goldman's* holding in *City of Schenectady* (*in rem* proceeding may not be commenced until such time as the petitioner first acquires jurisdiction over the personal representative of

the decedent's estate; holding that the statutory structure of RPTL Article 11 protects an owner throughout, indicating that the proceeding is not just against the property and that jurisdiction must be obtained through proper service upon the owner of record). (*City of Schenectady,* 201 AD3d 1, at 3-4).

The legal conclusions in *Goldman* and *City of Schenectady* comport with the statutory framework in RPTL Article 11 for *in rem* proceedings and the dictates of due process. In this regard, it is likely that Respondents will contend that the notice issue in this appeal is distinguishable from the notice issues in *Goldman* and *City of Schenectady* on the grounds that the proceedings in *Goldman* and *City of Schenectady* were "commenced" prior to the deaths of the taxpayers (*Goldman* 165 AD3d at *1117 [record owners were deceased before proceeding commenced]; *City of Schenectady, supra* 201 AD3d 1 at 4 [petitioner on notice of death of taxpayer before commencement of proceeding]).

The *Goldman* court expressly addressed this issue and held that "even if the proceeding had been properly commenced against the record owners…., once the County and the Supreme Court were made aware of their death, it was incumbent upon the County to substitute a personal representative of the deceased parties' estates before the matter could proceed." (*Goldman,* 165 at 1118 (citing CPLR 1015 [a]; 1021); *Singer v. Riskin,* 32 AD3d 839 at 839-840 [2d Dept. 2006]).

Goldman's reasoning is supported by CPLR §1015 and it comports with *McCann*. Moreover, the reasoning in *Goldman* is supported by RPTL Article 11's framework as a whole. Thus, RPTL Article 11 provides for commencement of a tax foreclosure *in rem* proceeding by filing a petition (RPTL §1123 [commencement of proceeding)], followed by public notice by publication (RPTL §1124). Personal notice to the taxpayer of record and "interested parties" is the subject of NY RPTL §1125 and it provides for actual notice as opposed to notice by publication. The Record on appeal establishes that personal notice pursuant to §1125 was mailed to a deceased person, a fact about which Respondents were aware before the date the redemption period expired and before and Respondents made application for a default judgment.

The Record is devoid of any testimony that alternative noticing pursuant to a court order would have caused Respondents any hardship. Indeed, the public auction was not conducted until May 2007. R Vol 1 pg 545 [Ex. 1 Stip. ¶19]. Moreover, the Record does not support any legal justification for not suspending the proceeding to afford notice as called for §1125 except to rely upon slavish compliance with noticing to a deceased person.

III. APPELLANT SATISIFIED THE PREDICATES FOR ESTABLISHING LIABILITY UNDER 42 USC §1983 AND COSTS PURSUANT TO §1988

The Appellate Division affirmed dismissal of Appellant's claim under 42 USC §1983. (*Hetelekides v. Cty of Ontario,* 193 AD3d at 1414-1415). Although the trial court found that Respondents "failed to properly notify the Property's owner" (RPTL §1125 [1][a]) (R Vol 1 pg 18) and that Respondents' conduct resulted in a fatal 'jurisdictional defect' [that] invalidates a sale or prevents passage of title (R Vol 1 pg 19), it found, relative to the §1983 claim, that Respondent-County's conduct amounted to "a misguided course of action" as opposed to a byproduct of a widespread policy and that Respondent-Treasurer's conduct was neither arbitrary nor irrational "in a constitutional sense". R Vol 1 pg 21.

The foregoing formed the basis for the trial court's holding that "Plaintiff has failed to sustain her burden of proving a policy or custom of the government itself that caused a violation of her constitutional rights citing (*Harris v. City of New York,* 153 AD3d 1333 [2d Dept. 2017] ("*Harris*") and (*Simpson v. New York City Transit Authority,* 112 AD2d 89 [1st Dept. 1985]) ("*Simpson*") (Proof of a single incident of objectionable conduct by a municipality is insufficient to establish the existence of a municipal policy for 1983 purposes.') R Vol 1 pg 21. Appellant contends that this was error and that the Appellate Division's failure to reverse was error.

42 USC §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(An Act to Permit Civil Suits under section 1979 of Revised Statutes [42 USC §1983]). 42 USC §1983 (originally called the Ku Klux Klan Act of 1871) was enacted to provide a measure of federal control over state and territorial officials reluctant to enforce state laws against persons who violated the rights of newly freed slaves and union sympathizers. The Act created a right of action in federal court against local government officials who deprive citizens of their constitutional rights by failing to enforce the law, or by unfair and unequal enforcement. (__ Fed Reg ____ [1871], codified at _____) (H.R. REP. 96-548, H.R. Rep. No. 548, 96TH Cong., 1ST Sess. 1979, 1979 U.S.C.C.A.N. 2609, 1979 WL 10219 (Leg.Hist.).

A successful §1983 claim provides the prevailing party with a claim for costs including reasonable attorneys' fees. (Civil Rights Attorney's Fees Award Act § 2 [42 USC §1988 (b)]).

The contours of §1983 liability in relationship to the type of municipal conduct actionable under §1983 has been the subject of several decisions. In *Monell v. City of New York*, the United States Supreme Court considered the scope of §1983 liability and held that municipal governments and their officers could be liable under §1983 for actions that violated the civil rights of persons within their jurisdiction. (*Monell v. City of New York* 436 US 658 [1978] (*"Monell")*. The Court held that local governing bodies may be sued directly under §1983 and that "although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decision-making channels". (*Id. at* 690-691).

Subsequently, the Court sought to clarify the definition of municipal liability for purposes of §1983 holding that identification of policy-making officials is a matter of state law. (*City of St. Louis v. Praprotnik,* 485 US 112, 124 [1988]).

Lower courts have construed the contours of §1983 liability relative to the proof necessary to demonstrate a municipal policy or custom. In (*Nelson v. Ulster Cty.*, 789 F Supp 2d 345 [ND NY 2010]), the district court considered a claim for relief under §1983 within the context of an *in rem* tax foreclosure proceeding against

multiple parties, including Ulster County, the County Treasurer and the County Clerk in which the taxpayer disputed proper noticing. With respect to the burden to establish a municipal policy or custom the court observed:

> To establish a municipal policy or custom, a plaintiff must allege: (1) the existence of a formal policy officially endorsed by the municipality; (2) actions taken or decisions made by municipal officials with final decision making authority, which caused the alleged violation of plaintiff's civil rights; (3) a practice so persistent and widespread that it constitutes a custom of which constructive knowledge can be implied on the part of the policymaking officials; or (4) a failure by policymakers to properly train or supervise their subordinates, amounting to "deliberate indifference" to the rights of those who come in contact with the municipal employees.

(Nelson v. Ulster Cty, 789 F Supp2d at 355).

With respect to a section 1983 claim based upon a "single incident" the *Nelson* court observed that a single incident "alleged in a complaint, especially if it involved only actors below the policy-making level, does not suffice to show a municipal policy", however a policy may be inferred from circumstantial proof "that the municipality displayed a deliberate indifference to the constitutional rights of persons within its jurisdiction by failing to train its employees or repeatedly failing to make any meaningful investigation into complaints of constitutional violations after receiving notice". (*Id.*)

The *Nelson* court denied defendants' motion for summary judgment for dismissal of the 1983 claim on the ground that the Nelsons had provided sufficient

evidence such that "a reasonable jury could find that Ulster County had a constitutionally deficient policy, custom, or practice that caused the Nelsons to be deprived of their property without due process of law". (*Id.*)

This Court has recognized that "[m]uncipalities are 'persons' subject to suit under section 1983 for the deprivation of constitutionally protected rights caused by actions which 'implement or execute a policy statement, ordinance, regulation, or decision officially adopted and promulgated by its officers"; that the injury must arise from acts of municipal officers or employees in the course of executing municipal policy or custom... ; and that [l]iability may even be imposed for a single act, as long as it is the act of an official authorized to decide policy in that area." (*Town of Orangetown v. Magee*, 88 NY2d 41, 49 [1996]) (land use dispute involving a claim arising under the Fifth Amendment or the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution; claim for damages under 42 USC § 1983 upheld based on official's arbitrary and irrational revocation of building permit). (*Cf. Bower Associates v. Town of Pleasant Valley,* 2 NY3d 617 [2004])(considering §1983 liability; applying a two part test for consideration of substantive due process violations; recognizing that "only the most egregious official conduct can be said to be arbitrary in the constitutional sense").

In *Bassett v. City of Rye,* the Appellate Division Second Department, observed that:

> "A municipal custom or policy can be shown by establishing that an official who is a final policy maker directly committed or commanded the violation of the plaintiff's rights" (citations omitted). Liability for a violation of 42 U.S.C. § 1983 may be predicated on "a single act, as long as it is the act of an official authorized to decide policy in that area"

(Bassett v. City of Rye, 104 AD3d 889, 890-91 [2d Dept. 2013]).

The conduct at bar consists of several discrete and deliberate decisions in furtherance of a policy that calls for reliance solely upon the noticing provisions of RPTL §1125 in connection with the maintenance of an *in rem* proceeding against a tax- payer known to be dead and disregard of unique facts.

The conduct took place over the course of several months and concluded with the auction sale of the property. R Vol 1 pg 545 [Ex. Stip. ¶¶19-22; R Vol 1 pg 17 Trial Ct Order-Appellant forced to purchase the property for the auction bid price of $160,000 to cure tax delinquency of $21,343.17].

The proof in this case insofar as conduct that was carried out in furtherance of Respondents' policy was not conclusory; rather, it consisted of the trial testimony of Respondent-Treasurer, the county's fiscal officer charged with the duty to enforce the collection of delinquent taxes. R Vol 1 pg 317-318.

The trial court's reliance upon *Harris* and *Simpson* was error. Both *Harris* and *Simpson* involved decisions on motions for summary judgment that resulted in dismissal of § 1983 claims on the grounds that the alleged deprivations did not derive from a policy or custom of the municipality. (*Harris v. City of New York,* 153 AD3d at 1335) (conclusory assertions failed to raise a triable fact as to whether the alleged unconstitutional actions resulted from a policy, regulation or custom of the City); (*Simpson v. New York City,* 112 AD2d at 91) (failure to state a cause of action under 42 USC §1983; "proof of a single incident of objectionable conduct by a municipality is insufficient to establish the existence of a municipal policy for §1983 purposes in the absence of any wrong which could be ascribed to municipal decisionmakers").

Here, the Record belies the trial court's holding; the §1983 claim at bar is not based upon "conclusory assertions" of unconstitutional actions arising on the basis of policy and/or "proof of a single incident of objectionable conduct".

Indeed, Respondent-Treasurer testified about a memorandum that he authored wherein he justified the decisions that led to the violation of Appellant's property rights on the basis of a "policy". R Vol 1 pg 609 [Plaintiff Ex. 10]; 191-98 [Treasurer's trial testimony that: he authored and typed the Memo, perhaps with the assistance of the Ontario County Attorney; Memo's purpose was to inform the Board of Supervisors that the court presiding over the *in rem* proceedings had signed

a statement to the effect that "the Hetelekides" were out of all legal interests to their property even though the Court did not issue any such statement; he did not collect any data to support his statement about purported costs associated with a decision permitting Appellant to purchase the property out of the foreclosure process; he prepared the Memo to inform the Ontario County Board of Supervisors about "every aspect of the foreclosure"].

Respondent-Treasurer was so intent upon influencing the County Board of Supervisors to uphold a policy of indifference to the protection of due process rights that he included in his Memo misstatements. R Vol 1 pg 609 [Defendants' Ex. 10]; R Vol 2 pg 678 [Plaintiff's Ex. 14]. This conduct was "egregious" and arbitrary in view of the extraordinary steps undertaken by Appellant to pay the tax due notwithstanding Respondents' failure to provide proper notice of the *in rem* proceeding. R Vol 1 pg 16 [Trial Ct Order].

On the basis of the foregoing, Appellant requests reversal of the lower courts' decisions denying relief pursuant to 42 U.S.C §1983.

IV. APPELLANT IS ENTITLED TO DAMAGES INCLUDING BORROWING COSTS INCURRED TO PAY THE AUCTION SALE BID PRICE OF $160,000

The trial court denied Appellant's damage claim for borrowing costs incurred to protect her interest in the property stating that "[b]ecause 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 borrowing costs she incurred through the Canandaigua National Bank are not a proper item of damages and are therefore denied." R Vol 1 pgs 10-11; 22. The Appellate Division affirmed. (*Hetelekides v. Cty. of Ontario,* 193 AD3d at 1414-1415). These rulings were in error and this appeal presents an issue concerning the scope of damages to which a party is entitled where the damages arise from a violation of constitutional due process rights.

By way of background, the trial court nullified the *in rem* proceeding and directed a refund of $138,656.83, with prejudgment interest at the rate of 9% pursuant to CPLR §§ 103(a), 5001(a) and General Municipal Law § 3-a but declined to award compensatory damages in response to Plaintiff-Appellant's proof of borrowing costs (interest payments) that as of November 30, 2018 amounted to $33,751.58. R Vol 1 pg 549 [Pl Ex. 2, Holman Affidavit ¶¶ 2, 4; Appellant took out a loan in the amount of $50,000 to pay a portion of the redemption price of $160,000; loan imposes interest calculated at the variable rate of 9.78%].

The trial court's decision in this regard did not dispute Appellant's proposed finding of fact about the borrowing costs incurred by Appellant to protect the property interests during the public auction. Rather, the trial court ruled that pre-judgment interest computed at 9% on the refund amount precludes recovery of the borrowing costs associated with a private bank loan as compensatory damages.

This Court has identified the "fundamental purpose" of compensatory damages is to have the wrongdoer make the victim whole. (*E.J. Brooks, v. Cambridge Security Seals*, 31 NY3d 441, 448 [2018]) (recognizing that compensatory damages must result directly from and as a natural consequence of the wrongful act). (*See also, 423 S. Salina St. v. City of Syracuse,* 68 NY2d 474 (1986) *appeal dismissed and cert. denied* 481 US 1008 [1987]) (§ 1983 claim for damages resulting from City's alleged violation of constitutional rights sufficiently stated; observing that within the stated context that "the remedy provided in § 1983 [is] independently enforceable whether or not it duplicates a parallel state remedy.") (*Id.* at 486).

Further, there is the United States Supreme Court decision in *Monell* wherein the Court construed §1983 and observed that "[l]ocal governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or

executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." (*Monell,* 436 US at 690).

Compensatory damages cannot be remote, contingent or speculative; however, they need not be immediate, but need to be "so near to the cause only that they may be reasonably traced to the event." (*E.J. Brooks, v. Cambridge Security Seals*, 31 NY3d at 448-449) (considering compensatory damages in the context of an unfair competition claim).

In this case, the award of pre-judgment interest is the sole basis for denial of Appellant's claim for compensatory damages; however, the Record establishes that pre-judgment interest computed at the statutory rate of 9% fails to restore Appellant wholly because the bank loan, a direct consequence of the wrongful taking, imposes an interest rate of 9.78%. Thus, the failure to award damages to include those borrowing costs that exceeded the amount awarded as pre-judgment interest was in error.

CONCLUSION

For the foregoing reasons, the Appellate Division should be reversed with direction to the Trial Court for determination of a damage award to include borrowing costs and costs to include recovery of attorney's fees pursuant to 42 USC §1988.

DATED: February 11, 2022
Rochester, New York

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Under this Court's Rule 500.13 (c), I certify that:

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Line Spacing:	Double

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DATED: February 11, 2022
Rochester, New York

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