To be argued by:
Mary Jo S. Korona, Esq.
(Time requested: 30 minutes)

APL No. APL-2021-00111
Appellate Division, Fourth Department Docket No. CA 20-00680
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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.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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This appeal concerns a tax foreclosure proceeding that Respondents conducted despite actual knowledge gained after the list of delinquent parcels was prepared but prior to the expiration of the redemption period, that the taxpayer had passed away and therefore could not have received the notices called for by RPTL §1125.

Respondents contend that despite knowledge of the taxpayer's death, they were not bound by the due process clauses of the 14th Amendment to the United States Constitution and Article 1 § 6 of the New York Constitution to provide §1125 notice to either the Appellant, the person Respondents knew was the taxpayer's widow, or any other interested person, because those persons could not have been identified in the public records as those records existed at the time Respondents prepared the list of the property owners to be noticed about the foreclosure of tax liens.

REPLY TO RESPONDENTS POINT I. A-D

Respondents defend this appeal on the ground that the notice requirements of §1125 were satisfied and no additional notice was required by due process even though Respondents knew that the taxpayer had passed away. *Respondents' Brief*

("*Res. Br.*"), Point I. A. pg 17-21 [no obligations imposed by due process clauses because there was strict compliance with §1125]; Point I. B. pg 21-25 [no obligations imposed by due process to halt the proceeding to provide notice to known interested parties because the mailings had not been returned as undeliverable]; Point I. C. pg 25-29 [no obligations imposed by due process to halt the proceeding pending notice to other interested parties because Appellant failed to identify the noticing efforts that should be been "attempted"; no governmental responsibility to consider any information and act upon information other than information available in public records at the time the owners of delinquent parcels are identified]; Point I. D. pg 30-32 [no due process obligations because Respondents made reasonable efforts "to prevent the foreclosure"].

Central to the arguments cited above is the erroneous premise that a due process analysis is not required unless there is evidence that the notice mailings were returned to the enforcement officer.

Respondents' argument suffers from a fatal flaw: a failure to acknowledge the fundamental difference between the due process requirements attendant to conducting searches of public records to compile the mailing list for RPTL §1125 notices and the due process requirements attendant to searches and notices when there is actual knowledge that the mailed notices would not or have not been received by a deceased person. This appeal falls into the latter category.

It is well established that for purposes of preparing the mailing list for notices called for by RPTL §1125, the enforcement officer is charged with investigating public records consisting of the tax roll and surrogate court records. (*See Kennedy v. Mossafa*, 100 NY2d 1, 10 [2003]) (recognizing that the public record for noticing purposes under RPTL 1125 does not consist solely of the tax roll and that RPTL 1125 specifically refers to records in the surrogate's office).

In contrast, actual knowledge, also sometimes referred by courts as "unique knowledge", mandates that noticing based upon information other than information found in public records may be required to satisfy due process. (*Jones v. Flowers,* 547 US 220, N.Y. 230 [2006]); (*Covey v. Town of Somers,* 351 US 141, 146-147 [1956]); (*Akey v. Clinton County*, N.Y. 375 F3d 231, 237 [2nd Cir 2004]); (*Cf Orra Realty Group v. Gillen*, 46 AD3d 649 [2d Dept. 2007] *lv to appeal denied,* 10 NY3d 712 [2008])).

Proof of compliance with a noticing statute does not excuse the government from its duty to undertake analysis and balancing of the parties' rights to ensure that the property owner is afforded due process when there is actual knowledge that the taxpayer did not receive notice. (*See Garden Homes Woodlands Co. v. Town of Dover,* 95 NY2d 516, 519 [2000]) (presenting an appeal on constitutional grounds; holding that compliance with a town law statute that permitted notice by publication of a hearing about a special assessment tax was inadequate to satisfy due process

requirements under the circumstances; recognizing that while the rationale originates from tax sale or condemnation cases, application of the rationale should not be limited to such cases but applied when the property owner's interest will be substantially affected by governmental action and there is knowledge of the owner's name and address).

It is well established that the government is obligated to consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case. (*See Jones v. Flowers*, 547 U.S. 220, 230 [2006]).

The obligation to consider actual knowledge in relationship to the possible need for additional noticing is not a discretionary duty; the required balancing analysis mandates that a decision be made as to whether on the facts at bar, the duty to identify and provide for alternative noticing imposes a reasonable or unreasonable burden. *(See Bender v. City of Rochester*, 765 F2d 7, 11 [2d Cir 1985]) ("An inquiry into reasonableness normally entails a weighing of interests; a heavy burden to ascertain a name may be 'reasonable' to undertake if the likelihood that the person will otherwise receive notice is very low, and a lighter burden may not be "reasonably" required if it is highly likely that actual notice will otherwise occur").

Reply to Respondent Point I. A.

Respondents' reliance upon (*Barnes v. McFadden*, 25 AD3d 955 [3d Dept. 2006] *appeal dismissed* 6 NY3d 890 [2006]) ("*Barnes*") in support of the arguments in Point I. A is misplaced. In *Barnes*, the judgment of foreclosure was upheld on the grounds that the landowner's daughter, who was the sole beneficiary was not entitled to notice of the tax lien foreclosure proceeding because her interest did not arise until after the landowner's death, was not a matter of public record as of the date the list of delinquent taxes was filed and the record failed to "disclose that respondent knew or should have known that decedent allegedly was incompetent". *Id.* Thus, the court recognized the distinction between notice obligations associated with determining the names and addresses of taxpayers in preparation for mailing the notices and notice obligations that may arise when the record establishes that the foreclosing party knew or should have known that the statutory notice was not received due to extenuating circumstances, such as an incompetency.

Here the Record establishes that Respondents knew of the taxpayer's death and the identity and location of the taxpayer's widow well before the expiration of the redemption period. R Vol 1 pg 472-473. Contrary to Respondents' contention (*Res. Br.* pg 20, fn1.), the outcome in *Barnes* is consistent with (*In the Matter of the Foreclosure of Tax Liens by City of Schenectady v. Kenrick Permaul*, 201 AD3d 1 [3d Dept. 2021]) *("City of Schenectady"). Barnes* recognized that the analysis turns

on whether the foreclosing party knew or should have known that notice had failed. (*Accord City of Schenectady*, 201 AD3d at 9) (vacating default judgment; following *Goldman*; petitioner on notice that property owner-decedent had passed away before the proceeding was commenced).

Reply to Respondent Point I. B.

Also misplaced is Respondents' reliance upon the decisions[1] cited in support of the Point I. B arguments. None of the cited decisions presented facts about the enforcing parties' actual knowledge before expiration of the redemption period that the taxpayer had passed away and the decisions are otherwise distinguishable.

In *Harner,* notice was upheld as constitutional because there was no question about the accuracy of the property owner's mailing address; the property owner had failed to verify his mailing address with the county and there were no facts to establish any question about the taxpayer's status as the owner of record. *Harner,* 5 NY3d at 140-41.

In *Helser*, the taxpayer's motion to reopen the default judgment was barred by the statute of limitations. The court also found that the county had resent the §1125 notices upon learning of a forwarding address and that the taxpayer, who was

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1 (*Matter of Harner v County of Tioga* 5 NY3d 136 [2005]) ("*Harner*"), (*Matter of Foreclosure of Tax Liens by County of Ontario (Helser)*, 72 AD3d 1636 [4th Dept. 2010]) ("*Helser*"); (*Matter of Foreclosure of Tax Liens by County of Sullivan (Matejkowski)*, 105 AD3d 1170 [3rd Dept 2013]) ("*Sullivan")* and (*Matter of Foreclosure of Tax Liens by County of Herkimer (Jones),* 34 AD3d 1327 [4th Dept 2006]) ("*Jones")*.

incarcerated at the time was engaged in efforts to evade service. *Helser,* 72 AD3d at 1637.

In *Sullivan,* the court ruled that the motion to vacate the default judgment was time barred; the §1125 notice was deemed received because the taxpayer failed to update his address as required by RPTL §1125 [1][d][2] and the county had used the address listed on the tax roll. *Sullivan*, 105 AD3d at 1172.

In *Jones,* the taxpayer's motion to vacate the default judgment was denied because there was no evidence to rebut the presumption of notice, mere denial of notice without more was insufficient to rebut the presumption. *Jones,* 34 AD3d at 1328.

Here, fully aware of the taxpayer's death, Respondents failed to implement any steps reasonably calculated to provide other potential interested parties with the notice called for by RPTL §1125. Tacitly acknowledging that the deceased property owner could not have received the notices called for by §1125, Respondents now at this stage of the appeal speculate that because the mailings were "delivered to an operating restaurant business (*Res. Br.* pg.22) and because Appellant herself worked at the property and Appellant's adult son "also worked daily at the Property" (*Res. Br* pg. 23), "it was likely that someone with that name [referring to the surname of Hetelekides] received the statutory notices" (*Res. Br.* pg 23). Respondents have not

[2] RPTL §1125 requires that the taxpayer to advise of address changes.

cited to any part of the Record to support this argument[3]. Indeed, Respondents did not request a ruling on this issue, as evidenced by the Record. R Vol 2 pg 775-792 [Respondents Findings of Fact and Conclusions of Law submitted to the trial court] and no such finding was made by the trial court. R Vol 1 pg 12-23 [trial court decision]. This speculative argument should be rejected.

Reply to Respondent Point I. C.

Respondents contend that this appeal should fail because Appellant failed to (a) identify the efforts that should have been attempted by Respondents and (b) demonstrate how the public records would have established her status as the taxpayer's "successor in interest." *Res. Br.* Point I. C. pg 26. Ignoring that they already possessed material information about the taxpayer's death and his widow, Respondents contend that a search of the public records would not have identified any information that could be used to consider and implement alternative curative noticing. In other words, Respondents contend that they were not obligated to use the unique information at hand to cure a known noticing defect.

RPTL §1125 charges Respondents, not Appellant, with the duty to provide notice. The Record is devoid of any evidence that noticing in this matter failed as a

[3] The Record establishes that the County Treasurer never asked for someone by the name of Hetelekides when he visited the restaurant, allegedly attempting to notify a taxpayer, or any other potentially interested party on the afternoon before the redemption deadline. R Vol 1 pg 472-473.

consequence of neglect or misconduct by Appellant and/or that Respondents' failure to notice Appellant should be excused because of Appellant's conduct.

The Record establishes that the Treasurer and the County Attorney conducted a legal team meeting in December 2006 during which the participants acknowledged that the property owner had passed away; that he had been married and that his widow was still alive and running the business." R Vol 1 pgs 472-473.

Numerous obvious solutions to cure the notice defect in the proceeding were available to the Treasurer and the County including: suspension of the proceeding pending (a) an application to the trial court presiding over the proceeding for an order for alternative noticing; (b) alternative mailing of the §1125 notice to Appellant, both of which could have led to the Surrogate's appointment of an estate representative, or even, more importantly, payment of the tax and redemption of the property. The Record does not establish that any of these common sense solutions were even considered. Instead, Respondents developed a plan to call the restaurant, followed by a three minute visit to the restaurant on the day immediately preceding the redemption date, the purpose of which was to inquire about the availability of an "owner," "a manager" or "someone in charge." R Vol 1 pg 368. In view of Respondents' unique knowledge, Appellant's contact information was or could have been reasonably ascertainable thereby leading to a common sense alternative for identifying interested parties for notice purposes. The failure to take additional steps

that would not have been burdensome was a violation of due process. *(Cf See* (*Kennedy v. Mossafa*, 100 NY2d 1, 11 [2003]).

Notably, after conclusion of the trial Respondents did not request of the trial court a ruling that any of the above described common sense solutions were not required because they would have created unreasonable burdens and the trial court did not make any such ruling. R Vol 2 pg 775-792 [Respondents Findings of Fact and Conclusions of Law]; R Vol 1 pg 12-23.

Relative to the burden inquiry is RPTL §1160, which provides:

> All provisions with respect to the procedure for the enforcement of tax liens requiring acts to be done at or within or before specified times or dates, except provisions with respect to length of notice, shall be deemed directory and failure to take such action at or within the time specified shall not invalidate or otherwise affect such tax lien nor prevent the accruing of any interest or penalty imposed for the non-payment thereof, nor prevent or stay proceedings under this article for any of the remedies for collection thereof in this article provided, nor affect the title of the purchaser under such proceedings.

Instead, Respondents contend that they were not obligated to consider and/or utilize any of the unique information they possessed about the deceased taxpayer and his widow to ensure that Appellant would be afforded notice to satisfy due process. *See Res. Br.* pg 29 ("Appellant points to no sources reasonably within the realm of the 'public record' that would have revealed this information between October 2006 and January 2007").

The decisions relied upon by Respondents in this regard are inapposite either because the foreclosing party did not possess unique knowledge of a defective notice issue or there was misconduct or neglect on the part of the taxpayer. (*Kennedy v. Mossafa*, 100 NY2d 1, 10 [2003]) (no unique facts known to enforcing officer; no due process violation because no evidence that search of public record would have revealed current address) (*MacNaughton v. Warren County*, 20 NY3d 252, 257-258[2012]) [no due process violation because county did not know taxpayer's new address in another state]; *(Matter of Foreclosure of Tax Liens by County of Schuyler (Solomon Fin. Ctr.)* 83 AD3d 1243, 1245-1246 (3rd Dept 2011), *lv to appeal dismissed,* 17 NY3d 850 [2011]) (no due process violation because after mailings returned as undeliverable county treasurer's mailings to alternative address based upon internet were not returned); (*In re Foreclosure of Tax Liens by County of Broome (Castle Heights, LLC)*, 50 AD3d 1300, 1302 [3rd Dept 2008]) two notice attempts by mail; both returned as attempted not known /unable to forward; no due process violation because notice was mailed to address provided by taxpayer); (*Hesler,* 72 AD3d at 1637) (taxpayer engaged in efforts to evade service).

Reply to Respondent Point I. D.

Respondents also contend that no due process violations occurred because the Treasurer's phone calls and three minute visit to the property just prior to the expiration of the redemption date support an inference that "interested persons at the

Property were trying to avoid notice." *Res. Br.* Point I. D., pg 32. The Record establishes that Respondents failed to preserve this issue for review. Respondents did not propose this inference either as a proposed finding of fact or conclusion of law. R Vol 2 pg 775-792 [Respondents' Proposed Findings of Fact and Conclusions of Law]. Indeed, this new argument is not supported by the trial court's findings concerning Appellant's inquiries made at the offices of the Town of Hopewell and the Treasurer's office. R Vol 1 pg 14-15. Moreover, the Record shows that Appellant visited the Treasurer's office two business days after he left a business card at the restaurant. R Vol pg 15-16. This fact contradicts Respondents' contention that Appellant was trying to evade notice.

REPLY TO RESONDENTS POINT II. A-D

Respondents contend that the order appealed from properly rejected the holding in *Goldman*, 165 AD3d 1112 (2d Dept. 2018) because *Goldman* conflates principles of *in rem* and *in personam* jurisdiction; the holdings in *Goldman* and *City of Schenectady* impose unreasonable burdens and are not supported by the law and, following *Goldman* and *City of Schenectady* would lead to permanent clouds on tax titles. *Res Br* pg 32-46. So limited, Respondents fail to address *Goldman* within the context of due process, as mandated by decisions from both federal and state courts, when the foreclosing party possesses actual knowledge that notices called for by

§1125 could not have been received due to the property owners' death. Respondents' arguments lack merit.

Consideration of the facts of *Goldman* is critical to this appeal. In *Goldman,* the Supreme Court invalidated a tax foreclosure proceeding because it had been commenced and maintained against deceased property owners, Thomas and Sharon Dixon. The notice mailed certified mail was signed for by an individual named Stephanie Burton; the mailed notices were not returned to the enforcement officer.

The County's attorney learned about the death of the property owner from a verified answer submitted by an attorney on behalf of Tammy Goldman, the niece of the deceased property owners. (*Goldman*, 165 AD3d at 1114. The answer included a representation about efforts to open an estate proceeding and for appointment of an administrator. Appended to the answer were documents including a death certificate that included contact information.

Notwithstanding the information included in the verified answer, the County requested an order of severance as to each parcel for which an answer had been filed (*Goldman*, 165 AD3d 1114-1115) and subsequently, commenced a special proceeding against Tammy Goldman, the sole named respondent and moved for a default judgment. (*Goldman*, 165 AD3d 1115. The County's motion included the Assistant Chief County Attorney's affidavit in support of a default judgment to the effect that he had conducted a search of records maintained by the Orange County

Surrogate and the Clerk's office (public records) and that the records did not identify Tammy Burton Goldman as an interested party with any right, title or interest in the subject property. (*Goldman*, 165 AD3 at 1115). There was no opposition to the County's motion. (*Goldman*, 165 AD3d at 1115).

The Supreme Court denied the County's motion holding that "since the proceeding was commenced against deceased individuals, it was a nullity". 165 AD3d 1115-1116. The Court denied the County's motion "without prejudice" and, in effect, upon searching the record, dismissed the petition. The court stated that the County "should seek the appointment of an administrator and recommence this [proceeding] with notice to the proper parties." (*Goldman*, 165 AD3d 1116).

The Appellate Division Second Department affirmed in an opinion that follows well-established precedent that requires analysis of jurisdiction within the context of jurisdiction and proper notice. "Jurisdictional basis on the one hand and the requirement of notice on the other, although both are products of due process and each is essential to jurisdiction, are best investigated separately." (Siegel, N.Y. Prac § 58 at 86 [5th ed 2011]). In this regard, the court followed the United States Supreme Court's holding in (*Shaffer v Heitner,* 433 US 186 [1987]) that rejected the fiction that an *in rem* proceeding is not asserted against any individuals, but only against the property itself.

In concluding that due process had not been afforded the *Goldman* court aptly

observed:

> We acknowledge that the United States Supreme Court "has not hesitated to approve of resort to publication as a customary substitute . . . where it is not reasonably possible or practicable to give more adequate warning" (*Mullane v Central Hanover Bank & Trust Co.*, 339 US at 317). "Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights" (*id.*). However, "[e]xceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties" (*id.* at 318).

(*Goldman,* 165 AD3d at 1121).

The *Goldman* court correctly recognized the obligations to make determinations on the facts and balance the County's interests in the efficient collection of delinquent taxes with the property rights of individuals "which may be extinguished forever if they default in a tax foreclosure proceeding". (*Goldman*, 165 AD3d at 1122). *Goldman* is based upon well-established legal precedent and should be adopted as the law of this State, and the order appealed from should be reversed.

Reply to Respondent Point II. A.

Although Respondents seemingly acknowledge that the analysis called for in this case turns on whether the options available to Respondents were reasonable (*Res. Br.* pg. 35), Respondents contend that in this case the requirement to provide notice to Appellant, or in fact any other interested persons, based on the actual

knowledge available to them in December 2006 would have been unreasonable. (*Res. Br.* pg. 36). No legal support has been offered in support of this contention other than citations to decisions addressing the requirements of due process in the context of preparing mailing lists and /or responding to notices returned to the enforcement officer, namely searches limited to public records.

Reply to Respondent Point II. B.

Respondents contend that the options identified in *Goldman* for resolving issues associated with known notice defects are "extraordinarily burdensome." In support of this contention, Respondents rely upon the dissent in *City of Schenectady* and identify speculative burdens such as the creation of a conflict of interest (*Res. Br.* pg 37-38); the need to "locate and cite" and notice all distributees (*Res. Br.* pg 38); the need to research the decedent's family tree (*Res. Br.* pg 39); in this case, the need to engage an investigator to perform internet searches, "and perhaps even interview employees and patrons of the restaurant business." *Res. Br.* pg 39. Respondents contend "[r]equiring these efforts would not only be expensive and burdensome but would also be exercise in futility." *Res. Br.* pg 41.

Notably, Respondents have not cited to the Record to establish that they identified and/or considered any of the steps they identify as "extraordinarily burdensome" steps and/or to establish that Respondents investigated the costs of providing proper notice to anyone, including Appellant. Rather, the Record

establishes that Respondents decided the circumstances did not call for direct notice to Appellant; instead, phone calls and a three minute visit to the restaurant the day before expiration of the redemption period, actions characterized by Respondents as only "discretionary", satisfied the notice obligations. Respondents' argument ignores the fact that they possessed material information and speculates about the noticing attempts that may be required in a hypothetical scenario.

On the issue of the burdens associated with providing alternative notice when there is knowledge of the property owner's death, *Goldman* correctly observed that:

> As in any other case involving the death of a defendant, the County need not provide notice to every potential beneficiary of the record owners' estates, it need only provide notice to the representative of their estates (*see* CPLR 1015[a]; 1021). As we have already noted, if the County is unable to identify or locate the representative of the record owners' estates, it may secure the appointment of one either in the Surrogate's Court (*see* SCPA 1002), or, if circumstances warrant, in the Supreme Court (*see Dieye v. Royal Blue Servs., Inc.,* 104 A.D.3d at 726, 961 N.Y.S.2d 478).

(*Goldman*, 165 AD3d at 1122).

Reply to Respondent Point II. C.

Respondents contend that *Goldman* and *City of Schenectady* erroneously relied upon decisions reached in the context of proceedings other than tax foreclosure proceedings under RPTL Article 11 to decide that essential to jurisdiction are jurisdictional basis and the requirement of notice, both of which are products of due process (*Goldman,* 165 AD3d at 1120).

A careful reading of *Goldman* establishes that Respondents' contention is incorrect because it is contrary to well-established general principles of jurisdiction established by the United States Supreme Court. (*Goldman*, 165 AD3d at 1120) (discussing general jurisdiction principles; citing decisions by the United States Supreme Court; recognizing the Supreme Court's rejection of the legal fiction that an *in rem* proceeding is not asserted against any individuals) (*Matter of McCann v. Scaduto,* 71 NY2d 164, 173-174 (1987) (construing the constitutionality of code provisions as applied to petitioners in an *in rem* tax lien foreclosure proceeding rejecting the rigid distinction between in *personam* and *in rem* proceedings as a basis for denying property owners meaningful notice of proceedings affecting their property interests).

Both the Fourth Department and Respondents failed to recognize that both jurisdiction and the requirement of notice are fundamental to due process in all proceedings in which an individual's legally protected interests are directly affected.

Reply to Respondent Point II. D.

Respondents erroneously contend that following *Goldman* and *City of Schenectady* will lead to permanent clouds on tax titles. *Res. Br.* pg 45-46 ("[I]nterested parties related to deceased owners could turn up at any time to overturn tax foreclosure judgments, and that statutes of limitations in RPTL §1131 and RPTL §1137 would not bar such claims").

Notably, Respondents cite to RPTL §1137, which provides for a conclusive presumption of regularity after two years from the date of the recording of the tax deed:

> Every deed given pursuant to the provisions of this article shall be presumptive evidence that the proceeding and all proceedings therein and all proceedings prior thereto from and including the assessment of the real property affected and all notices required by law were regular and in accordance with all provisions of law relating thereto. After two years from the date of the recording of such deed, the presumption shall be conclusive. No proceeding to set aside such deed may be maintained unless the proceeding is commenced and a notice of pendency of the proceeding is filed in the office of the proper county clerk prior to the time that the presumption becomes conclusive.

RPTL §1137 may be interpreted to preclude a "permanent cloud" absent the timely filing of an action to set aside a tax deed. (*But see, City of Schenectady,* 201 AD3d at fn.3) (recognizing that if a tax deed is declared a nullity the court may conclude that the two year limitations period is inapplicable).

Even if a court were to rule against application of the limitations period called for by RPTL §1137 in any future action to set aside a tax deed, Respondents have not demonstrated how they would be harmed. Indeed, Respondents did not raise the specter of a "permanent cloud on title" before the trial court as either a proposed finding of fact or conclusion of law. R Vol 2 pg 775-792 [Respondents' Proposed Findings of Fact and Conclusions of Law].

Finally, to the extent Respondents' "permanent cloud on title" contention could be construed as a legitimate legal argument in the defense of this appeal, it should be noted that Respondents' general concern about possible clouds on title could be significantly minimized if not eliminated if Respondents were to abide by the requirements imposed by due process, namely that when there is actual knowledge about the death of a taxpayer, Respondents take appropriate measures to ensure notice to interested parties.

II. APPELLANT'S VISITS TO THE TREASURER'S OFFICE AND THE TOWN OF HOPEWELL WERE EFFORTS TO BE IDENTIFIED AS AN INTERESTED PARTY THAT RESPONDENTS IGNORED

Respondents contend that Appellant has abandoned arguments in support of this appeal based upon the Record about her visits to both the Town of Hopewell and the Treasurer's office. *Res Brief,* pg 47-48. Contrary to this point, Appellant's Statement of Facts, (Appellant Brief, pg 18, ¶ 3) includes the facts about Appellant's pre-redemption date visits to the Town of Hopewell and the Treasurer's Office, visits made to inquire about whether any taxes were due. R Vol 1 pg 122, 126-129; 143-149 [Appellant's trial testimony; adopted by Trial Ct. Order. R Vol 1 pgs 14-15]. These facts further demonstrate the amount of information possessed by Respondents prior to making application for the default judgment, information that should have been caused them to undertake affirmative steps to provide the known interested party, the Appellant, with the information called for by §1125, or

minimally, to seek guidance from the trial court presiding over the foreclosure proceeding. These facts also establish that the failure to afford Appellant and/or any other potentially interested party with notice was not due to neglect and/or misconduct on the part of Appellant.

III. APPELLANT'S CLAIMS UNDER TITLE 42 U.S.C. §§1983 AND 1988 SHOULD BE REINSTATED BECAUSE RESPONDENTS' CONDUCT WAS EGREGIOUS AND ARBITRARY

Respondents do not contest that their refusal either to afford proper notice or accept Appellant's offer of payment was a decision made in reliance upon a policy that permits the foreclosing municipality to ignore unique facts in relationship to the conduct of the Article 9 proceeding. *See Res. Br.* pgs 49-50 (identifying a policy that that calls for "following well-settled statutory provisions equally to all parcels subject to *in rem* tax foreclosure proceedings"; describing the policy simply as "following the letter of the law it is statutorily charged to apply"; acknowledging reliance on the policy such that the County Board of Supervisors "had never granted such relief to a defaulting taxpayer").

Moreover, any such argument would be directly contrary to the Treasurer's trial testimony about an e-mail communication from the County's attorney to the Treasurer and the Treasurer's Memo he authored and submitted to the Ontario County Board of Supervisors. R Vol 1 pg 191, 518; R Vol 2 pg 609, 678.

Notwithstanding, Respondents argue that "it cannot be said that the County

was without legal justification for the decision against treating Appellant as an interested party entitled minimally to the notice called for by §1125, citing (*Bower Associates a Town of Pleasant Valley*, 2 NY3d 617 [2004]) (*"Bower"). Res. Br.* pg 50.

Bower does not stand for the proposition that a self-proclaimed policy that calls for rigid adherence to the black letter of the law is a policy immune from due process challenges. At issue in *Bower* was whether the conduct complained of, in relationship to substantive due process violations was official conduct sufficiently egregious to be considered as arbitrary, therefore making clear that 42 U.S.C. §1983 provides a remedy for arbitrary official conduct.

Lacking any support in the Record to question the existence of an official policy and/or of official conduct in furtherance of the policy, Respondents contend that their conduct does not satisfy the standard for establishing a claim under §1983 because (a) Appellant did not correct statements in a letter authored by John Tyo, Esq., who appeared before the Ontario County Financial Affairs Committee[4] with Appellant ; (b) there is no evidence in the record "that the County was aware of any issues pertaining to the statutory foreclosure notices under the plain meaning of RPTL Article 11"; and (c) Respondents were not obligated to "take additional steps

[4] R Vol 1 pgs 391-394 (trial testimony of John Tyo, Esq. and trial court's ruling on objection the Trial Ex P); R Vol 2 pg 714? (Trial Exhibit P)

to effectuate notice" because the mailings were not returned as "undeliverable". *Res. Br.* pg 51-52. Respondents' contentions lack merit.

First, Respondents appear to contend that as a condition precedent to stating a §1983 claim Appellant was required to advise the Ontario County Board of Supervisors about Respondents' failures to identify her as an interested party for noticing purposes. Notably, Respondents have not cited to any decision in support of this contention. Moreover, the record establishes that the trial court considered the Tyo letter to be a "nice summary" of Appellant's trial testimony, a summary characterized by the trial court as being in Appellant's "best interests". R Vol 1 pg 391-392. The trial court sustained an objection to testimony about attorney client communications concerning the letter R Vol 1 pg 303. Respondents have not cited to any part of the Record that establishes that written statements by Attorney Tyo were binding admissions attributable and/or harmful to Appellant's claims.

Second, the Record establishes that Respondents proceeded with the tax foreclosure proceeding despite knowing, prior to the redemption date, that the taxpayer could not have signed for and/or received the §1125 notices of the foreclosure proceeding.

Respondents contend that the Treasurer's conduct was not egregious and/or arbitrary (*Res. Br.* pg 53-54), but this argument is contrary to the Treasurer's testimony about: (a) a successful plan to prevent questions and/or discussion

associated with Appellant and her attorney's presence at the January 26, 2007, meeting of the Board of Supervisors in January 2007. R Vol 2 pg 678 (Cty Attorney strategy e-mail, Ex 14; R Vol 1 pg 518 [Ex 14 e-mail admitted into evidence])[5]; and (b) about the Memo he authored for circulation to the Board of Supervisors in March 2007. R Vol 1 pg 609 [Pl Ex 10]; R Vol 1 pg 192 [Pl Ex 10 admitted without objection]. The Treasurer's conduct was designed to cover up undisclosed noticing defects.

Reference is made to the County Attorney's e-mail (R Vol 1 pg 518) of January 26, 2007, that states:

> [f]or those of you weren't at last night's Board of Supervisor meeting, Krystalo and her attorney John Tyo, were in attendance. Gary B and I addressed the Board under privilege of the floor, and provided a general overview of the tax stuff. We successfully prevented them from discussing any individual properties -- in fact, there were no questions, and no discussion.

Also, reference is made to the Record and the Treasurer's trial testimony to the effect that he wrote the Memo, dated March 6, 2007, about the "Hetelekides Restaurant (Akropolis Rest)" because he wanted to make sure that they (reference to the Board of Supervisors) were "informed on every aspect of the foreclosure and what else would have happened." R Vol 1 pg 196-97. The Memo misstates that

[5] The e-mail's subject line is "Parcel 287 update", a reference to the restaurant property. R Vol 1 pg 473-474.

Mrs. Hetelekides signed for the foreclosure notices. R Vol 1 pg 609 (Pl Ex 10); R Vol 1 pg 544 (Foreclosure notices signed by Barbara Schenk, a restaurant waitress).

The Memo was the Treasurer's only presentation and/or report directed to the Ontario County Board of Supervisors about the foreclosure of the restaurant property. R Vol 1 pg 522.

On the facts at bar Appellant was legally entitled to notice of the proceeding. The failure to provide proper notice and Respondents' e-mail and Memo establish governmental action "wholly without legal justification". (*Cf Bower Associates v. Town of Pleasant Valley,* 2 NY3d 617, 627 [2004]) (no finding of violation of §1983 in the absence of a legitimate claim and governmental action wholly without legal justification).

The Respondents' conduct as evidenced by the County Attorney's e-mail and the Treasurer's Memo, coupled with the decision to not provide the §1125 notice to Appellant, despite knowing that the taxpayer could not have received the §1125 notices, satisfy the burden of establishing that Respondents (the County of Ontario and its Treasurer) engaged in egregious and arbitrary conduct in furtherance of the parties' policy governing the conduct of tax foreclosure proceedings.

Finally, Respondents contend that Appellant's §1983 claims are barred by the defenses of qualified immunity and /or legislative immunity. *Res. Br.* pg 54-58, even though neither of the defenses were asserted in Respondents' Answer. R Vol 1 pg 84-

90.

Governmental immunity must be pleaded as an affirmative defense. (*See Dangler v. Town of Whitestown*, 241 AD2d 290, 294 [4th Dept. 1998]) (lower court erred in instructing the jury that municipality was entitled to immunity when it was not raised as affirmative defense); (*Avila v. State of New York*, 39 Misc. 3d 1064, 1067-1068 [Ct. of Claims 2013]) ("In New York, governmental immunity is an affirmative defense, and, as with any other affirmative defense, it must be raised and proved by the defendant."); (*Blissett v. Coughlin*, 66 F.3d 531, 538 [2d Cir. 1995]) (incumbent upon the defendant to plead, and adequately develop the affirmative defense of qualified immunity).

Respondents failed to plead qualified or legislative immunity as affirmative defenses. *See also* R Vol 2 pg 786, ¶¶ 18, 19 (Respondents' Proposed Findings of Fact and Conclusions of Law) (Respondents' acknowledgement that defense of qualified immunity was not plead coupled with a proposed finding of law and request that answer be deemed amended to assert immunity defense). This request was not granted or even acknowledged by the trial court. R Vol 1 pg 12-23.

Even if Respondents had pleaded the defenses of qualified and legislative immunity, neither applies to claims asserted under § 1983. "[U]nlike various government officials, municipalities do not enjoy immunity from suit—either absolute or qualified—under § 1983." (*Leatherman v. Tarrant Cty. Narcotics*

Intelligence & Coordination Unit, 507 U.S. 163, 166 [1993]) (protection against municipal liability does not encompass immunity from suit).

Appellant commenced suit against Ontario County and Gary Baxter, in his official capacity, as County Treasurer. R Vol 1 pg 24-35 (Complaint) Accordingly, the immunity doctrines asserted by Respondents in the defense of this appeal are inapplicable. (*See Baines v. Masiello*, 288 F. Supp. 2d 376, 383-84 [WDNY 2003]) (finding legislative immunity is a personal defense, it cannot be asserted by a municipal entity or by municipal officers "sued in their official capacities").

IV. APPELLANT IS ENTITLED TO DAMAGES ARISING FROM BORROWING COSTS

Respondents do not dispute that Appellant was compelled to obtain a loan in connection with her post auction efforts to purchase the property, (*Res. Br.* pg. 59) and the Record establishes that Appellant's loan terms include interest at the rate of 9.78%. R Vol 1 pg 549. These facts establish pre-judgment interest at the statutory rate of 9% fails to restore Appellant wholly. Accordingly, the trial court order was in error and should be reversed.

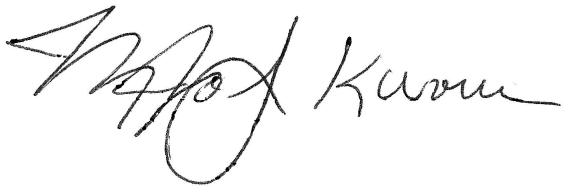
CONCLUSION

For the reasons set forth in Appellants' briefing, the Appellate Division should be reversed with a direction that the trial court determine damages to include borrowing costs and recovery of attorneys' fees pursuant to 42 USC §1988.

DATED: April 12, 2022
Rochester, New York

Respectfully submitted,

ADAMS LECLAIR LLP



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CERTIFICATE OF COMPLIANCE

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

The foregoing brief was prepared using Microsoft 365 Apps for Business, Version 2112. A proportionally spaced typeface was used as follows:

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DATED: April 12, 2022
Rochester, New York

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