*To be argued by:*
Jason S. DiPonzio
(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 DEFENDANTS-RESPONDENTS

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March 28, 2022

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## COUNTER-STATEMENT OF QUESTIONS PRESENTED

1) Did the Fourth Department properly determine that Defendants-Respondents complied with the notice requirements of RPTL §1125, where Defendants-Respondents issued statutory foreclosure notices to all parties who could be ascertained from the public record as of the date of the filing of the List of Delinquent Taxes, and signed certified mail receipts indicating delivery of these statutory notices to the delinquent tax parcel were received by Defendants-Respondents?

Answer: Yes. The Fourth Department properly applied precedent from the Court of Appeals and United States Supreme Court and determined that Defendants-Respondents complied with the statutory requirements of RPTL §1125 and dismissed Plaintiff-Appellant's causes of action related to the subject tax foreclosure.

2) Did the Fourth Department properly decline to follow the Goldman case from the Second Department, which involved tax foreclosures under Real Property Tax Law Article 11 where the owner of property subject to an *in rem* tax foreclosure is deceased?

Answer: Yes. The Fourth Department properly recognized that the Goldman case improperly applied principals of *in personam* jurisdiction to an *in rem* proceeding and declined to follow it.

3) Did the Fourth Department properly affirm the trial court's dismissal of Plaintiff-Appellant's causes of action under 42 U.S.C. §§1983 and 1988, where did not demonstrate a widespread policy by a government body or egregious conduct that was arbitrary or irrational in a constitutional sense?

Answer: Yes. The Fourth Department found that the trial court's dismissal of these causes of action were supported by a fair interpretation of the evidence.

4) Did the trial court properly dismiss Plaintiff-Appellant's request for borrowing costs as an element of damages, where the trial court awarded prejudgment interest in excess of $157,000, which would have more than adequately compensated Plaintiff-Appellant for the loss of her use of money during the relevant time?

Answer: Yes the trial court found that the purpose of CPLR §5002 is to indemnify a successful plaintiff for the loss of use of money for a period of time and declined to award borrowing costs to Plaintiff-Appellant. Because the Fourth Department reversed all parts of the trial court's order and judgment awarding monetary relief to Plaintiff-Appellant, it did not specifically address this question.

## COUNTER-STATEMENT OF FACTS

This appeal arises from an action to set aside *in rem* tax foreclosure proceedings. Pursuant to Article 11 of the N.Y. Real Property Tax Law ("RPTL"), the Defendant-Respondent County of Ontario (the "County") commenced the proceedings against real property located at 4025 Routes 5&20 in the Town of Hopewell, County of Ontario, tax map number 323400 099.000-0001-029.000 (the "Property"). (R. 544)

### The Property

According to the Ontario County Clerk's records, the Property was owned by "James Hetelekides" as of January 1, 2005. Tax records maintained in the Town of Hopewell show that the Property was assessed to "James Hetelekides" and "Geo-Tas, Inc." (R. 679-680) Geo-Tas, Inc. was a corporate entity owned by James Hetelekides. (R. 536) James Hetelekides and his wife, Plaintiff-Appellant Krystalo Hetelekides ("Appellant"), operated a restaurant business at the Property known as the Akropolis Restaurant. (R. 116-117)

### The Tax Foreclosure Proceedings

The Ontario County Treasurer serves as the enforcement officer for the collection of delinquent real property taxes pursuant to RPTL §1102(3). Gary Baxter ("Baxter") has served as Ontario County Treasurer since November 2005. (R. 317)

Real property taxes levied upon the Property that came due on January 1, 2005 remained unpaid as of November 1, 2005. (R. 332) Ten months after the lien date, the County Treasurer files a "List of Delinquent Taxes" in the county clerk's office, containing all properties for which tax liens remain unpaid. RPTL §1122(1). The List of Delinquent Taxes serves as a notice of pendency against the delinquent tax parcels contained therein. RPTL §1122(8). With respect to the 2005 property taxes at bar, the List of Delinquent Taxes was filed in the Ontario County Clerk's Office on November 14, 2005. (R. 88, 332)

According to RPTL §1123, a petition for foreclosure may then be filed in the county clerk's office against properties listed on the List of Delinquent Taxes for which tax liens remain unpaid for 21 months after the lien date. Under RPTL §1125, the enforcement officer serves statutory notices of foreclosure upon the property owners and all other persons whose right, title and interest in the property may be affected by the expiration of the redemption period. In this matter, the *in rem* foreclosure petition was filed in the Ontario County Clerk's office on October 2, 2006. (R. 690)

RPTL §1125(1)(a)(i) dictates which parties are entitled to notice of *in rem* foreclosure proceedings. Interested parties consist of owners and any other persons whose right, title or interest would be affected by the redemption period's expiration,

*and who could be ascertained from the public record as of the date of the filing* of the List of Delinquent Taxes – in this case, November 14, 2005.

The County contracts with Crossroads Abstract to search records of the county clerk and Surrogate's Court to ascertain interested parties as of the date of the filing of the List of Delinquent Taxes. (R. 210-211) Crossroads prepared this report for the Property on August 31, 2005, and then re-certified it through May 31, 2006. (R. 680) This period – August 31, 2005 to May 31, 2006 – included the time at which the List of Delinquent Taxes was filed on November 15, 2005 (R. 89, 187, 323) According to Crossroads' property report, the interested parties were identified as James Hetelekides, Hetelekides James and Geo-Tas, Inc. (R. 680-681)

James Hetelekides died on August 1, 2006. The interested party's death occurred 8 ½ months after the List of Delinquent Taxes was filed. (R. 543) Probate proceedings for James Hetelekides' estate were not filed in Ontario County Surrogate's Court until February 2007. (R. 43). Appellant was not formally appointed executor of James Hetelekides' estate until May 2007.

After filing the *in rem* foreclosure petition, the County Treasurer's Office then sent the statutory notices as required by RPTL §1125 by both certified mail, return receipt requested and ordinary first class mail to the three interested parties identified in Crossroads's report: "James Hetelekides," "Geo-Tas, Inc." and "Hetelekides James." Each notice was addressed to 4025 State Route 5&20, Canandaigua, New

York 14424. In total, six notices were sent. (R. 341-342, 354-355, 681-692) The certified mailings were received at the Property on October 3, 2007, and the return receipts were signed for by Barb Schenk, an employee of the restaurant operated at the Property. (R. 120, 395, 693-695)

Under RPTL §1110, the statutory foreclosure notices specified the final day that a party in interest may redeem the property, said date being at least two (2) years after the lien date. Failure to redeem or answer the petition by an interested party results in that party's right, title and interest in the property being forever barred and foreclosed (*see* RPTL §1131). With respect to this matter, the redemption period expired on January 12, 2007. (R. 681-692)

The notices of foreclosure proceedings also explained, in multiple places, that the failure to redeem the property prior to the expiration of the redemption period will result in the party's right, title and interest in the property being extinguished, that the owner's property interest will be lost, that the property will be sold at public auction, and that the entire proceeds of sale will belong to the County. (R. 681-692)

In addition, statutory foreclosure notices were posted in the County Treasurer's Office, the Ontario County Courthouse and the Ontario County Clerk's office, and were also published on three (3) separate occasions in the *Canandaigua Messenger Post* and the *Finger Lakes Times* pursuant to RPTL §1124. (R. 696-697)

After James Hetelekides' death in August 2006, Appellant worked at the restaurant business on a daily basis. (R. 534-535) The restaurant's hours of operation were from 6:00 a.m. until 9:00 p.m., seven days per week. (R. 534) During this period, Appellant would work most of the day, taking breaks to go home for meals. (R. 534-535) Appellant's adult son also worked at the restaurant business at the Property during this period. (R. 399-400). Appellant was in charge of the restaurant operations after James Hetelekides died. (R. 397, 401) Barb Schenk further testified that if she retrieved any mail, she would either hand it to Appellant or leave it on a ledge outside of the office at the restaurant for Appellant to retrieve. (R. 398)

In late December 2006 – early January 2007, the County Treasurer met with several staff to review unredeemed delinquent tax parcels, and to organize additional efforts, such as phone calls or personal visits, to interested parties to encourage a timely redemption of the delinquent tax parcel. (R. 188-189; 603) The Property, being an ongoing operating restaurant business, was identified as one of the delinquent tax parcels for which additional notifications of the pending redemption deadline would be attempted. (R. 363-365) Baxter testified that during this period, he first learned that James Hetelekides had died. (R. 471-472)

On January 9, 2007, Baxter called the restaurant business at the Property and asked to speak to an owner or manager. (R. 366) The person who answered the

telephone advised that an owner or manager wasn't available, so the County Treasurer left a message to have an owner or manager call him back. (R. 366) Not having heard back, Baxter called the restaurant again on January 10, 2007 to speak with an owner or manager. (R. 367) He was again advised that one was not available. (R. 367) Baxter left another phone message asking that an owner or manager call him back. (R. 368). Both messages advised that it was very important that an owner or manager return the phone call. (R. 367-368)

Not having heard back from his two (2) telephone messages, Baxter *personally visited the restaurant* on January 11, 2007 and asked if he could speak with an owner or manager of the restaurant business. (R. 368) For the third time, Baxter was advised that an owner or manager was not available. (R. 368) Baxter then left his business card, asking that an owner or manager call him back, and further stressed that the matter was "very important." (R. 368)

The Property was not redeemed by paying the delinquent taxes before the January 12, 2007 redemption deadline. (R. 705-713)

On January 15, 2007, the County Treasurer's office was closed for the Martin Luther King Jr. Day holiday. Appellant left a voice mail message at the County Treasurer's office on that date. (R. 544)

Appellant testified that she paid real estate taxes for her residence in the Town of Canandaigua in December 2006, and on that date asked an employee of the

County Treasurer's office if the taxes for the restaurant property had been paid. (R. 121-123) Appellant alleged that she was told that the real estate taxes for the restaurant property had been paid. (R. 122) Tax receipts produced at trial, however, demonstrated that Appellant paid the school taxes for her residence on October 31, 2006 and that she paid the town and county taxes for her residence on January 23, 2007. (R. 748-749) Both of these tax payments would have been made not at the County Treasurer's office but at the town or school district, as they were timely, and would not yet have been turned over to the County for collection and enforcement. (R. 132, 437-442)

Appellant also testified that she went to the Town of Hopewell to inquire about the real estate taxes due for the Property. (R. 148) According to Appellant, an employee of the Town of Hopewell told her that taxes were due for the restaurant property and further assisted Appellant in making a phone call to the County Treasurer's Office. (R. 148) Appellant testified that she spoke with an employee of the County Treasurer's Office and was told that the taxes had been paid. (R. 148)

Despite Appellant's claims, testimony from employees and records of the County Treasurer's office contradicted this testimony. (R. 409-412, 700, 704) Furthermore, testimony from Karen Carson, an employee of the Town of Hopewell, testified that she did assist Appellant on one occasion in placing a call to the County Treasurer's office, but that she did not look up the status of taxes due for the Property

and did not hear the contents of this telephone conversation. (R. 305, 306, 309) Records further indicated that this encounter likely took place on January 15, 2007 (Martin Luther King Jr. Day), being the same day when Appellant left a voice mail message at the County Treasurer's office. (R. 313-314, 379, 701-702)

Appellant personally visited the County Treasurer's office on January 16, 2007 and said that she wished to pay the outstanding taxes due for the Property. (R. 152, 369) But she was advised that by law, the County Treasurer could not accept tax payments beyond the redemption deadline. (R. 369-370) Shortly thereafter, Appellant retained counsel. (R. 155)

On February 8, 2007, a default judgment of foreclosure was filed in the Ontario County Clerk's office. (R. 705-707) Under RPTL §1131, an aggrieved party could have filed an application to vacate the default judgment of foreclosure in Supreme Court on or before March 10, 2007. Despite being represented by counsel during this period, Appellant failed to file such an application.

In February 2007, Appellant's attorney appeared before the County's Board of Supervisors, asking to permit a late redemption of the Property. (R. 46, 715) In support of this request, Appellant's attorney submitted correspondence stating the following:

> [W]e realize that the County Treasurer, Gary Baxter, personally went to the property prior to the tax deadline date. The failure to pay the

> taxes in a timely fashion is not readily understandable, and is not ordinarily excusable. . .
>
> Christine, who had never attended in any way to the restaurant's financial matters, simply assumed that the taxes were being paid by the family members who worked along side her in the restaurant. This is true despite all of the efforts of Gary Baxter and the County Treasurer's office personnel to send the required notices . . .
>
> [W]e accept responsibility for all that has happened. But we ask for a second chance for a hard-working lady whose mistake focusing so hard on which she knew needed doing, namely, caring for her sick husband and working in the family business, caused her to overlook the practical necessity of checking on the taxes.

(R. 46, 715)

The Board of Supervisors denied Appellant's request for a late redemption of the Property on March 29, 2007. (R. 674-675). At trial, neither Baxter nor Mary Green, the supervisor who introduced the resolution to permit the late redemption, could recall a prior occasion where the Ontario County Board of Supervisors allowed a late redemption. (R. 231, 372-373)

On May 9, 2007, a public auction of the delinquent tax parcels, including the Property, was conducted in accordance with RPTL §1166. (R. 545) The Property was auctioned for $160,000 to an individual personally known by Appellant. (R. 159, 545) On June 1, 2007, the tax deed to the County, and deed from County to the high bidder were recorded in the Ontario County Clerk's Office. Appellant then

purchased the Property back from the high bidder for the auction price and that deed was recorded the same day. (R. 545)

## SUMMARY OF THE PROCEEDINGS

Appellant commenced this action on April 11, 2008 alleging the following as bases underlying her requests for relief: (1) that the County was obligated to petition Surrogate's Court for the appointment of a personal representative for James Hetelekides' estate in order to serve statutory notices; (2) that Appellant herself was not served with the statutory notices required by RPTL Article 11; (3) that the County failed to satisfy due process requirements of the Fourteenth Amendment in its conduct of the Property's *in rem* tax foreclosure; and (4) that Appellant was given incorrect information regarding the delinquent tax amounts due in order to redeem the Property. (R. 24-35)

Appellant's complaint sought the following relief:

(1) damages for alleged due process violations, including: (a) a declaration that the County lacked jurisdiction to conduct the auction sale of the Property; (b) vacatur of the default judgment of foreclosure; (c) recovery by the Appellant of the purchase price; and (d) a declaration that the Appellant is entitled to redeem the property;

(2) divestiture by the County of the difference between the auction bid and the delinquent taxes due; and

(3) damages and attorneys' fees pursuant to 42 U.S.C. §§1983 and 1988. (R. 24-35)

After extensive discovery was completed, this action was tried in Ontario County Supreme Court in December 2018 – January 2019. (R. 91-542) By decision dated October 30, 2019 and order dated December 23, 2019, the trial court found that by not serving a personal representative for the Estate of James Hetelekides, the County did not comply with the notice requirements of RPTL §1125. (R. 8-23) Relying largely upon Matter of Foreclosure of Tax Liens by County of Orange (Goldman), 165 A.D.3d 1112 (2d Dep't 2018), the trial court held that because James Hetelekides had died on August 1, 2006, the tax foreclosure proceedings against the Property were null from inception. (R. 20) The trial court awarded Appellant $138,656.83 plus statutory interest of 9% from May 7, 2007. (R. 10-11) The trial court further dismissed Appellant's claims for damages under 42 U.S.C. §1983 and for borrowing costs she incurred. (R. 10)

The County appealed the trial court order and judgment to the Appellate Division, Fourth Department. On April 30, 2021, the Fourth Department issued a memorandum and order, modifying the trial court order by vacating all decretal paragraphs that awarded Appellant any relief, and further affirming the denial of all other relief sought by Appellant. In its decision, the Fourth Department held "we conclude 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." Hetelekides v. County of Ontario, 193 A.D.2d 1414, 1417 (4th Dep't 2021).

In its decision, the Fourth Department carefully considered and specifically rejected the arguments advanced on Appellant's behalf. Regarding the argument that Appellant should have been given personal notice of the pending tax foreclosure proceedings, the Fourth Department held: "RPTL 1125 former (1) and current RPTL 1125 (1) (a) (i), specify that the only other people entitled to notice of a tax foreclosure proceeding are those persons whose right, title or interest in the property was a matter of public record "as of the date the list of delinquent taxes was filed" and whose '*right, title or interest will be affected by the termination of the redemption period*' (emphasis added). Here, the list of delinquent taxes was filed on November 14, 2005, when decedent was still alive. Plaintiff was thus not entitled to notice under that statute." Id.

The Fourth Department also analyzed Appellant's argument that the County was required to pursue further notification attempts since the certified mail receipts had not been signed by anyone with the name Hetelekides, and rejected that argument based on the RPTL and well-settled case law. "As noted, pursuant to the amended statute, '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' [citation omitted]. If both are returned, then and only then is the enforcing officer, i.e., Baxter, obligated to investigate alternative addresses for the relevant person. Inasmuch as none of the mailings were returned, Baxter was under no further obligation to obtain alternative addresses." Id. at 1418.

The Fourth Department further considered whether the County was required to do more to fulfill due process in issuing notice, due to Baxter's becoming aware of James Hetelekides' death 2-3 weeks prior to the expiration of the redemption deadline. Under these circumstances, the Court held, no further attempts above and beyond what the County had already attempted were required. Indeed, the County did engage in additional efforts above and beyond what was required by the statute. "In striking the balance that the due process analysis requires, we note that, inasmuch as no Surrogate's Court proceeding had been commenced, defendants could not have been aware of those people whose interests in the property arose after decedent's death. Moreover, despite three personal attempts to talk to someone with authority at the restaurant and provide that person with actual notice, no owner or manager was ever made available until after the redemption period had ended. To require more of defendants would be unreasonable." Id. at 1419.

The Fourth Department expressly declined to follow the Second Department decision in Goldman because the Goldman court improperly relied on *in personam* jurisdiction cases in support of the proposition that a legal proceeding cannot be commenced or maintained against a dead person. "Individuals, as well as entities, are necessary parties in *in personam* cases . . . and, as a result, reliance on such cases is misplaced in this *in rem* proceeding. In addition, by statute, mortgagors are necessary party defendants to mortgage foreclosure actions . . . In contrast, a petition in a tax foreclosure proceeding relates only to the property and not any particular person . . . The distinction between *in rem* tax foreclosure proceedings and mortgage foreclosure actions with respect to the 'parties' is critical. While an action or proceeding cannot be commenced against a dead person who, by necessity, is a named party to the action . . ., a tax foreclosure proceeding is not commenced against any person; it is commenced against the property itself. The owners are not necessary 'parties' to the tax foreclosure proceeding; they are only '[p]arties entitled to notice' of the proceeding . . . As a result, the tax foreclosure proceeding was properly commenced even though decedent had died . . . and there was no need to substitute someone for the dead owner." Id. at 1420.

Finally, the Fourth Department affirmed the trial court's dismissal of Appellant's causes of action under 42 U.S.C. §§1983 and 1988 and the denial of Appellant's request for borrowing costs. Id.

This appeal followed.

## ARGUMENT

### I. THE FOURTH DEPARTMENT'S DECISION IS BASED UPON WELL-SETTLED COURT OF APPEALS PRECEDENT REGARDING NOTICE REQUIREMENTS UNDER RPTL §1125.

It is well settled that in the context of in rem tax foreclosure proceedings, due process requires notice reasonably calculated under all the circumstances to apprise interested parties of the pending in rem tax foreclosure action, so that the interested party may have an opportunity to be heard. Jones v. Flowers, 547 U.S. 220, 226 (2006); Matter of Harner v. County of Tioga, 5 N.Y.3d 136, 140 (2005); Matter of Orange County Comm'r of Fin. (Helseth), 18 N.Y.3d 634, 639 (2012); Kennedy v. Mossafa, 100 N.Y.2d 1, 9 (2003). Due process is a flexible concept requiring a case-by-case analysis that measures the reasonableness of a municipality's actions in seeking to provide adequate notice. Kennedy, 100 N.Y.2d at 9; Harner, 5 N.Y.3d at 140 ("[a] balance must be struck between the State's interest in collecting delinquent property taxes and those of the property owner receiving notice").

The reasonableness of the chosen method of notice may be established by demonstrating that the notice itself is reasonably certain to inform those affected. Miner v. Clinton County, 541 F.3d 464, 471 (2d Cir. 2008), citing Mullane v. Central

Hanover Bank & Trust Co., 339 U.S. 306 (1950). A court must examine whether a taxing authority's belief that notice was received is objectively reasonable under the circumstances. Miner, 541 F.3d at 472; see also Harner, 5 N.Y.3d at 141.

In Jones v. Flowers, the Supreme Court overturned an in rem tax foreclosure proceeding where the sole notice of foreclosure proceedings, being a certified mailing of a notice of foreclosure, was returned to the enforcing officer. The Supreme Court determined that due process required "additional steps" to be taken to notify interested parties of pending foreclosure in such a case, leaving it up to the states to determine what additional steps were required. Jones, 547 U.S. at 220

In response to Jones v. Flowers, the New York legislature modified the personal notice requirements of RPTL §1125 in 2006. See Historical and Statutory Notes, N.Y. Real Property Tax Law §1125 (McKinney 2020). Under RPTL §1125, personal notice is required to be given to each owner and any other person whose right, title or interest will be affected by the termination of the redemption period. Said personal notices are required to be given by both certified mail and by ordinary first-class mail. Said notices will be deemed received, unless both the certified mailing and the first-class mailing are returned to the enforcement officer. In the event both mailings are returned to the enforcement officer, then further notice requirements must be fulfilled.

Although amended RPTL §1125 did not become effective until after the commencement of the proceedings applicable to the Property, the County followed the procedures required by amended RPTL §1125 in these proceedings, since the new notice requirements added an additional mailing to the requirements of superseded RPTL §1125.

Appellant's arguments that the due process requirements of RPTL Article 11 were not met are based upon a misapplication of relevant case law and must be disregarded.

### A. The Fourth Department Properly Determined Parties Entitled to Notice of Pending Foreclosure Proceedings.

Appellant ignores that the New York legislature has specifically stated the point in time at which the foreclosing municipality must determine interested parties entitled to notice. According to RPTL §1125(a):

> The enforcing officer shall on or before the date of the first publication of the notice above set forth cause a notice to be mailed to (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 . . .

(Emphasis added.)

Here, the County contracted with an abstracting company to ascertain parties entitled to notice under RPTL §1125. (R. 211-212; 680-681) The abstractor's report pertaining to the Property was prepared on August 31, 2005, and then re-certified through May 31, 2006. (R. 680) This period included the time at which the List of Delinquent Taxes was filed on November 15, 2005. (R. 89, 187, 323) James Hetelekides was still alive on both of those dates, and any purported testamentary interest held by Appellant had not yet arisen.

In Barnes v. McFadden (conspicuously omitted from Appellant's brief), tax foreclosure notices were sent to the property owner at his daughter's address, which was where the property owner lived because he allegedly suffered from dementia at the time. Barnes, 25 A.D.3d 955, 956 (3d Dep't 2006) *app dismissed* 6 N.Y.3d 890 (2006).[1] The notices at issue were mailed in December 2003, signed for by the property owner's 16 year-old granddaughter, and then handed to the property owner. Id. The property owner died in February 2004, and the property was foreclosed in May 2004. Id. The Third Department rejected the petitioner's claim that as executor and sole beneficiary under the property owner's will, she was an interested party entitled to notice and upheld the County's procedures as meeting the requirements of due process. Specifically, the appellate division reasoned that: (1)

1 Oddly, the Third Department did not discuss its departure from prior precedent, nor did it overrule its holding in Barnes in the majority opinion in Matter of Foreclosure of Tax Liens by City of Schenectady (Paul), 201 A.D.3d 1 (3d Dep't 2021)

when the notices were sent, the County did not know that the property owner was incompetent; and (2) the petitioner was not an "interested person" as defined by RPTL 1125 because her interest in the property was not a matter of public record when the list of delinquent taxes was filed. Id. at 957. The Third Department did not require substitution of the personal representative of that taxpayer's estate, even though he passed away after the mailing of the required statutory foreclosure notices and prior to entry of the default foreclosure judgment. Id.

Here, the Fourth Department correctly determined that, like the petitioner's testamentary interest in Barnes, Appellant's status as an interested party had not yet arisen when the list of delinquent taxes was filed, and therefore, she was not a party entitled to notice under RPTL §1125. Accordingly, the determination below dismissing Appellant's due process causes of action must be affirmed.

### B. The Certified and First-Class Mailings Were Never Returned to the County Giving any Indication of an Invalid Address; Thus No Further Obligation Arose for the County to Obtain an Alternate Address.

Appellant continuously misstates throughout her brief that the County was under a further obligation to send additional foreclosure notices upon learning, three weeks prior to the redemption deadline and three months after the foreclosure notices had been sent, that the property owner had died. Under the plain meaning of RPTL §1125(1)(c), no such obligation arose because both the certified mailings and the

first-class mailings were delivered to the operating restaurant business at the Property. A foreclosing municipality's duty to search for names of persons to receive notice arises only when the mailings are returned indicating an infirmity with the address. Harner, 5 N.Y.3d at 136.

In Harner, the taxing authority issued statutory tax foreclosure notices to the taxpayer by both certified mail and by ordinary first-class mail. Id. at 139. The certified mailings were returned to the County as "unclaimed," but the ordinary first-class mailings were never returned to the County. Id. at 139. This Court, in reversing the lower court's determination that a notation of "unclaimed" required additional efforts to ascertain an alternate address, held that no additional efforts were required to satisfy due process. Id. The notation "unclaimed" indicates no infirmity with the address and it is reasonable for the County to assume that an interested party is attempting to avoid notice by ignoring a certified mailing. Id. at 141. See also Matter of Foreclosure of Tax Liens by County of Ontario (Helser), 72 A.D.3d 1636 (4th Dep't 2010) (return of certified mailing but delivery of first-class mailing did not trigger obligation to search for alternate address); Matter of Foreclosure of Tax Liens by County of Herkimer (Jones), 34 A.D.3d 1327 (4th Dep't 2006) (proof of delivery of certified mailing and first-class mailing to subject property satisfied due process); Matter of Foreclosure of Tax Liens by County of Sullivan (Matejkowski), 105 A.D.3d 1170 (3d Dep't 2013) (tax foreclosure upheld

as satisfying due process obligations where although certified mailing was returned as unclaimed, first-class mailing was not returned).

Here, it is undisputed that three copies of the statutory foreclosure notices were delivered by certified mail, and another three copies of the same notices were delivered by first-class mail, all to the operating restaurant business at the Property. Appellant argues that because the certified mailing receipts were signed by a restaurant employee rather than by someone with the last name of Hetelekides somehow renders the procedure infirm. Appellant's contention is flat wrong. See Nelson v. City of New York, 352 U.S. 103, 107-108 (1956) (rejecting arguments that property owner did not receive notices due to concealment by employee, and reasoning "[i]t is clear that the City cannot be charged with responsibility for the misconduct of the bookkeeper in whom appellants misplaced their confidence nor for the carelessness of the managing trustee in overlooking notices of arrearages"). Regardless, the Record demonstrates that during the period in question, Appellant herself worked every day at the Property, oftentimes for most of the working day. (R. 534-535) Appellant's adult son also worked daily at the Property. (R. 399-400) Given their constant presence at the Property, someone with that last name was likely to receive the statutory foreclosure notices as a result of the certified and first class mailings.

Appellant's reliance on Orra Realty Corp. v. Gillen, 46 A.D.3d 649 (2d Dep't 2007) is misplaced. Orra Realty Corp. involved a tax sale under former RPTL §1464, which is a similar statute to tax sales under former RPTL Article 10, authorizing a taxing authority to undertake an administrative process where it sells its tax liens to a high bidder, and then the high bidder is tasked with notifying interested parties of a period of redemption. See Opinions of Counsel, SBEA Volume 7 No. 93; Matter of Valente v. Culver, 124 A.D.2d 950, 952-953 (3d Dep't 1986). Furthermore, in Orra Realty Corp., the purchaser of the tax lien certificate failed to issue notice to a mortgagee whose existence was readily ascertainable from the public record. Orra Realty Corp, 46 A.D.3d at 651.

Likewise, Covey v. Town of Somers, 351 U.S. 141 (1956) is inapposite to the facts of this case. In Covey, it had been known to the taxing authority at the time of the filing of the lis pendens and issuance of notices that the delinquent taxpayer had been incapacitated for 15 years and incapable of understanding the contents of a notice. Covey, 351 U.S. at 146. Here, at the statutorily prescribed times, Appellant's decedent was still alive, and by the time the County learned he was deceased, it would be reasonable to presume that those individuals responsible for administering his estate would be retrieving his mail.

The trial record demonstrated that the County's procedures satisfied the due process requirements outlined in RPTL §1125. The necessary interested parties

were identified as of the date of the filing of the List of Delinquent Taxes in November 2005. All three certified mailing were signed for by an employee of the restaurant business operated at the Property. Additionally, the first-class mailings were not returned to the County thereby creating the presumption that they had been delivered to the correct address. See, Akey v. Clinton County, 375 F.3d 231, 235 (2d Cir. 2004) ("[w]here . . . the County provides evidence that the notices of foreclosure were properly addressed and mailed in accordance with regular office procedures, it is entitled to a presumption that the notices were received.") Mere denial of receipt is insufficient to rebut this presumption of delivery. Sendel v. Diskin, 277 A.D.2d 757, 759 (2d Dep't 2000).

The County received no indication whatsoever that the statutory notices had not been received at the Property. Therefore, the County was not required to engage in any further efforts in order to locate an owner or interested party. On these facts, this Court must affirm the Fourth Department's decision.

### C. Even If Any Further Obligation Had Arisen for the County to Ascertain an Alternate Address for Mailing Notices, Appellant Has Failed to Demonstrate Where Such Information Would Have Been Available in the Public Record.

Appellant has argued at length that upon learning of James Hetelekides' death less than three weeks prior to the expiration of the redemption deadline, that additional efforts were required to effectuate notice. From these arguments,

Appellant omits: (a) what efforts should have been attempted; and (b) how Appellant's existence as James Hetelekides' successor in interest would have been available from the public record at the relevant time. These arguments must be rejected.

This Court's prior precedent has set forth the requirements imposed on foreclosing municipalities as well as the responsibilities of property owners. This precedent makes clear that under RPTL §1125(1)(c), a foreclosing municipality's duty to search for names of persons to receive notice arises when the mailings are returned indicating an infirmity with the address, and that the municipality need not search beyond the public record. See, e.g., Kennedy, 100 N.Y.2d at 1 (certified mailing returned with notation "not deliverable as addressed" may have required further search of the public record, but did not necessarily require "searching the Internet, voting records, motor vehicle records, the telephone book or other similar resource." Tax foreclosure upheld where evidence did not demonstrate that a search of the public record would have revealed an alternate address); MacNaughton v. Warren County, 20 N.Y.3d 252, 258 (2012) (taxpayer located in New Jersey had moved without notifying taxing authority; when certified mailing was returned with notation "undeliverable as addressed – forwarding order expired," county was not required to search public records in taxpayer's New Jersey county of residence to ascertain alternate address. To require such "would put too great a burden on the

taxing authority. It is one thing to require a search of records in . . . the county where the property being taxed is located. It is something different to require taxing authorities to familiarize themselves with the procedures for searching records in any location where a taxpayer happens to have lived.")

Appellate courts have applied this Court of Appeals precedent to confirm that a municipality must only search the public record when a statutory notice is returned, indicating an issue with an address, and further confirms that extraordinary efforts are not required to locate the whereabouts of an interested party. See, e.g., Helser, 72 A.D.3d at 1637 (Fact that taxpayer was incarcerated at the time foreclosure notices issued was not ascertainable from the public record. "[k]nowledge that respondent was incarcerated cannot be imputed to petitioner"). Matter of Foreclosure of Tax Liens by County of Schuyler (Solomon Fin. Ctr.), 83 A.D.3d 1243 (3d Dep't), *lv to app dismissed,* 17 N.Y.3d 850 (2011) ("Where, as here, petitioner complied with the notice requirements of RPTL article 11 and there is no evidence that a further search of the public records would have revealed any further information, including that respondent's address as listed on the mortgage was no longer valid, 'due process [did] not require petitioner to go to lengths beyond the inquiry, publication and posting measures taken here'") In re Foreclosure of Tax Liens by County of Broome (Castle Heights, LLC), 50 A.D.3d 1300, 1302 (3d Dep't 2008) (rejecting as beyond the statute's requirements that, where principal of

corporate owner was deceased, a search of Department of State records would have identified principal, and then a search of Surrogate's Court records under deceased principal's name would have revealed party in interest); Matter of City of Hudson, 114 A.D.3d 1106, 1109 (3d Dep't 2014) ("A taxing authority's enforcing officer is not required to be a lawyer, title searcher or have special expertise in ferreting out errors in recorded deeds, nor have courts imposed unreasonable obligations on taxing authorities to perform burdensome research to discover potential interested parties.").

The Second Circuit has rejected a similar argument, holding that a taxing authority is not required to ascertain the parties interested in the estate of a deceased property owner. Bender v. City of Rochester, 765 F.2d 7 (2d Cir. 1985). In Bender, the taxpayer died in December 1979 and tax foreclosure proceedings were instituted in November 1982. Bender, 765 F.2d at 9. After defaulting in paying taxes before the redemption deadline and entry of a default foreclosure judgment, the Second Circuit rejected arguments that the City should have ascertained the taxpayer's distributees and notified them of the pending foreclosure proceedings. Id. at 9-10. To require the City to search the records of the Surrogate's Court to ascertain the names of distributees would be onerous, and it is also reasonable for the taxing authority to "expect that those appointed to administer estates that include real property would . . . obtain mail addressed to their decedent." Id. at 17.

Even if the statutory notices had been returned to the County after being mailed in October 2006, Appellant has failed to demonstrate how a further search of the public record would have revealed that Mr. Hetelekides had died in August 2006, or that Appellant was his successor in interest. No probate proceeding was filed in Ontario County Surrogate's Court until February 2007 and letters testamentary were not issued to Appellant until June 2007. Appellant points to no other sources reasonably within the realm of the "public record" that would have revealed this information between October 2006 and January 2007.

The County fulfilled its statutory and constitutional due process obligations by sending the required notices to the Property by both certified and first-class mail. Based upon the fact that these notices were delivered to the ongoing business at the delinquent tax parcel, the County was under no further obligation to undertake additional notification attempts. Furthermore, Appellant has failed to demonstrate how the existence of the successor parties in interest could have been ascertained from the public record during the relevant time. Accordingly, Appellant's argument that additional notice was required lacks basis in law and fact and must be rejected.

### D. The County's Actions in Attempting to Prevent the Foreclosure of the Property Were Reasonable.

Appellant attempts to mislead the Court with her fancy phrase "curative noticing," purportedly in reference to the County's non-existent, additional notice requirements. Appellant improperly conflates the additional attempts by Baxter to contact an owner or manager of the restaurant business at the Property of the upcoming redemption deadline with the required notification procedures outlined under RPTL §1125. As correctly determined by the Fourth Department and discussed above, because the statutory notices were successfully delivered to the Property, the County was not obligated to engage in any further notification attempts under RPTL §1125. County staff was not obligated to meet in late December 2006 / early January 2007 to review properties still unredeemed. Baxter was not obligated to call the restaurant at the Property and leave a message on January 9, 2007. Baxter was not obligated to call the restaurant at the Property and leave a message again on January 10, 2007. Baxter was not obligated to visit the restaurant at the Property and leave a message on January 11, 2007. Baxter went above and beyond the statute's notice requirements.

Although further notification efforts were not required, the Fourth Department analyzed due process, *arguendo*, acknowledging that "[d]ue process is a flexible concept, requiring a case-by-case analysis that measures the reasonableness of a

municipality's actions in seeking to provide adequate notice. A balance must be struck between the State's interest in collecting delinquent property taxes and those of the property owner in receiving notice . . . In striking such balance, the courts may take 'into account the status and conduct of the owner in determining whether notice was reasonable.'" Hetelekides, 193 A.D.3d at 1419 citing Harner, 5 N.Y.3d at 140.

Appellant's due process argument conveniently ignores key facts developed by the record below. During October 2007, Appellant worked every day at the Property, often for nearly the entire time that the restaurant was open for business. (R. 534-535) The record further established that the certified mail receipts were signed by Barb Schenk, a restaurant employee. (R. 120, 395, 693-695) Barb Schenk still worked at the restaurant and had not been terminated at the time of trial. (R. 120, 395) Barb Schenk was a trustworthy employee who handled cash and ran the cash register at the restaurant. (R. 179) If an employee at the restaurant retrieved mail, they would hand it to Appellant, as she was always there. (R. 172-173) Barb Schenk testified that if Appellant was not there, then mail would be left on a ledge between the kitchen and the dining area of the restaurant for Appellant to retrieve. (R. 398) After James Hetelekides died, Appellant was in charge of the operations at the restaurant. (R. 397, 401).

Despite three separate attempts by Baxter to speak with an "owner or manager" at the Property and leaving messages for an owner or manager to call him,

Baxter received no response. If the employee failed to relay the message, or if the employee did relay the message and management subsequently ignored it is no fault of the County's. Under these circumstances, it was reasonable for the County to assume that interested persons at the Property were trying to avoid notice. See Harner, 5 N.Y.3d at 141. It is further reasonable for the County to assume that those appointed to administer estates would take necessary steps to retrieve mail addressed to the deceased, particularly important governmental notices delivered by certified mail. See Bender, 765 F.2d at 17. Even if this Court were to analyze the County's additional efforts under due process principles, no due process violations occurred.

## II. THE FOURTH DEPARTMENT PROPERLY DECLINED TO FOLLOW THE GOLDMAN CASE.

Appellant relies upon the Second Department case of Matter of Foreclosure of Tax Liens by County of Orange (Goldman), 165 A.D.3d 1112 (2d Dep't 2018) to support the proposition that Article 11 *in rem* tax foreclosure proceedings cannot continue until a personal representative of the estate of the interested party is substituted. See also Matter of Foreclosure of Tax Liens by City of Schenectady (Paul), 201 A.D.3d 1 (3d Dep't 2021) ("Schenectady"). As the Fourth Department properly recognized, these decisions contain three flaws: they improperly conflate principles of *in rem* and *in personam* jurisdiction; they are inapposite to the statutory requirements of RPTL Article 11; and they impose unduly burdensome requirements

upon taxing authorities in carrying out their statutorily mandated function in collecting delinquent tax liens.

### A. The Goldman and Schenectady Courts Disregarded the Nature of Article 11 as an In Rem Proceeding.

The plain language of RPTL §1120 states that proceedings to foreclose tax liens are *in rem* (against a thing), not *in personam* (against a person). In contrast, RPTL §990 (which was not the remedy at issue here), authorizes taxing authorities to elect to proceed *in personam* against delinquent taxpayers for the imposition of a money judgment for unpaid taxes. Because the majority opinions in Goldman and Schenectady conflate the requirements of *in rem* jurisdiction with *in personam* jurisdiction, it is necessary to review the fundamental difference between the two.

"*In rem* jurisdiction involves an action in which a plaintiff is after a particular thing, rather than seeking a general money judgment, that is, he wants possession of the particular item of property, or to establish his ownership or other interest in it, or to exclude the defendant from an interest in it." Majique Fashions, Ltd. V. Warwick & Co., 67 A.D.2d 321, 326 (1st Dep't 1979). "Presence of a *res* within the state gives courts the power to determine claims to it and the other legal relations of persons not subject to *in personam* jurisdiction." Kelly v. Stanmar, Inc., 51 Misc.2d 378, 380 (Supreme Court Albany Cty. 1966).

An action brought *in personam* requires personal service of process upon those against whom a money judgment was sought, while proceedings brought *in rem* requires "notice by publication or otherwise to parties having interests which may be affected." Sloane v. Martin, 145 N.Y. 524, 533 (1895) (emphasis added) *citing* Mohr v. Mannierre, 101 U.S. 422 (1880) (in an action *in rem*, personal service of process upon infant parties having interest in subject real property held not essential to attaching of jurisdiction).

Indeed, New York courts have recognized that real property tax foreclosure proceedings are based upon *in rem* jurisdiction because real property taxes are levied against the land and not the owner. Lily Dale Assembly v. County of Chautauqua, 72 A.D.2d 950, 951 (4th Dep't 1979) *aff'd* 52 N.Y.2d 943 (1981) ("Ownership is only one part of the identification and absent a description so imperfect that identification of the property with any degree of certainty is impossible, error or omission in identifying the owner does not invalidate the levy or enforcement proceedings"). See also RPTL §504(4). See also Hetelekides, 193 A.D.3d at 1420 ("While an action or proceeding cannot be commenced against a dead person who, by necessity, is a named party to the action, a tax foreclosure proceeding is not commenced against any person; it is commenced against the property itself. The owners are not necessary 'parties' to the tax foreclosure proceeding; they are only '[p]arties entitled to notice' of the proceeding.")

The statutory notification procedures in tax foreclosure proceedings stem from the United States Supreme Court's decision in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), which involved notifying persons interested in common trust funds of accounting proceedings by the trust company. The Supreme Court held that service upon persons interested in a common trust fund by publication in a newspaper is inadequate. Id. at 318. However, the Supreme Court set limits to the trust company's obligation to give notice, especially to unknown persons. Id. at 317 ("[w]e recognize the practical difficulties and costs that would be attendant on frequent investigations into the status of great numbers of beneficiaries . . . and we have no doubt that such impracticable and extended searches are not required in the name of due process.") Id. at 317-18.

RPTL §1125 was developed based upon precedent from the United States Supreme Court and from this Court. Notice by publication alone has been rejected by both courts in tax foreclosure proceedings. See Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983); McCann v. Scaduto, 71 N.Y.2d 164 (1987). In addition, where the sole notice of a foreclosure is sent by certified mail and returned has been deemed insufficient. Jones, 547 U.S. at 220. However, in these cases, the courts have held that taxing authorities' obligations to provide notice are limited by what is reasonable. The Jones court, for instance, rejected the idea that a taxing

authority must use the local telephone book or income tax rolls, holding that "[a]n open-ended search for a new address - especially when the State obligates the taxpayer to keep his address updated with the tax collector, imposes burdens on the State" that would be excessive. Jones, 547 U.S. at 236. And the Mennonite court clarified that "[w]e do not suggest, however, that a governmental body is required to undertake extraordinary efforts to discover the identity and whereabouts of a mortgagee whose identity is not in the public record." Mennonite, 462 U.S. at 799.

The history of notice in *in rem* proceedings does not suggest that such proceedings must be suspended if a person interested in the proceedings has died, nor does the above line of cases suggest that a foreclosing municipality must search out unknown heirs or ascertain whether an interested party has died. However, were this Court to accept Appellant's arguments and follow the majority opinions in Goldman or Schenectady, then taxing authorities would be required to search beyond the public record to determine if an interested party has died after the List of Delinquent Taxes has been filed. A bridge too far, this potential requirement well exceeds the scope of what is reasonable according to established Supreme Court and Court of Appeals precedent.

### B. Efforts to Ascertain Successor Parties in Interest or Substitute Estate Representatives Where an Interested Party Has Died Would Be Extraordinarily Burdensome.

Application of the holdings in Goldman and Schenectady would create considerable burdens for foreclosing municipalities. The dissent in Schenectady thoroughly analyzed these burdens. See Matter of City of Schenectady, 193 A.D.3d at 18-20. ("Under this holding, before being permitted to collect unpaid tax liens, cities and counties must first serve an untenable role as private investigators, burdened with tracking down obituaries, wills, heirs and potential estate representatives. If property owners are known to be deceased, the municipality's chief fiscal officer may find himself or herself serving as an unwilling serial filer of estate proceedings. . . , especially in larger municipalities. Worse, if no willing estate representative can be located, the chief fiscal officer — who is responsible for the collection of delinquent taxes in addition to being a statutorily permitted appointee as a public administrator of estates . . . — could be granted letters of administration upon a deceased owner's estate, and thus be saddled with the attendant fiduciary obligations.")

In sum, every tax foreclosure proceeding involving a recently deceased owner whose passing is not yet public could charge the municipality's chief fiscal officer with serving as the decedent's estate representative. Absurdly, this public service

would also create a conflict of interest preventing the municipality from foreclosing on the very estate property that led to the proceeding in the first place. The Goldman and Schenectady decisions must be overturned, lest tax foreclosure in these instances be rendered impossible.

As the Schenectady dissent recognized, in order to commence an estate proceeding under Surrogate's Court Procedure Act ("SCPA") §1002, the County would be required to issue process to "all [the] presumptive distributees" of a deceased person. SCPA §1003(1). To that end, "[e]very eligible person who has a right to administration prior or equal to that of the petitioner and who has not renounced must be served with process upon an application for letters of administration." SCPA §1003(2).

Estates, Powers and Trusts Law ("EPTL") §4-1.1 determines the distributees of an intestate's estate. Here, it is now known that James Hetelekides was survived by a wife and 3 children. Had he been intestate, according to EPTL §4-1.1(a)(1), his estate would be shared by his spouse and his three children ("If a decedent is survived by . . . .[a] spouse and issue, fifty-thousand dollars and one-half of the residue to the spouse, and the balance thereof to the issue by representation.") All 4 distributees would have needed to be ascertained, located and notified of any estate proceedings.

SCPA §1001 sets forth the order of priority for granting letters of administration to distributees. In the event no appointment is made under SCPA §1001, then the court shall appoint the public administrator or the chief fiscal officer of the county. SCPA §1001(8)(a). SCPA §1219 establishes that the chief fiscal officer of the county, namely the County Treasurer, shall fulfill the role of Public Administrator, and this rule applies in Ontario County. See County Law §550(1). In addition, the County Treasurer serves as the enforcing officer in tax enforcement proceedings. RPTL §1102(3).

The nominated executor and all beneficiaries named in the Will, plus all distributees would need to be located and cited in a pending Surrogate's Court proceeding. In such cases, the County Treasurer would be required to research the family tree of the decedent and ascertain whether that decedent ever executed a Will. In this instance, upon learning that James Hetelekides had died, the County would have had to engage the services of an investigator to determine the existence of a Will and to ascertain the family tree. The investigator would presumably need to perform internet searches, and perhaps even interview employees and patrons of the restaurant business at the Property. Given that Baxter could not get so much as a timely return phone call after three contacts at the Property, ascertainment would have been particularly challenging in this case.

Furthermore, because attorney-client matters are privileged, ascertaining the existence of a Will would be nearly impossible for a County Treasurer or an investigator. Indeed, a petition to be appointed as administrator of an estate would be delayed until the distributees and Will beneficiaries were ascertained and notified of the pending estate proceedings in Surrogate's Court.

Such requirements are far beyond anything that this Court or the United States Supreme Court has ever required in tax foreclosure proceedings. Consistent Supreme Court and Court of Appeals precedent has determined that searches of the internet, telephone records and income tax records are extraordinary efforts not required by RPTL §1125. Contrary to well-settled precedent, Appellant – following the Goldman and Schenectady decisions – argues that a full-blown proceeding in Surrogate's Court was required, complete with investigations into difficult-to-obtain facts regarding a person's family tree and whether they had ever executed a Will.

Assuming a County Treasurer successfully jumped through all of these hoops and became the administrator of a delinquent taxpayer's estate, he would have a conflict of interest that would prevent him from foreclosing on property on the County's behalf. In re Estate of Zaharia, 243 A.D.2d 926 (3d Dep't 1997) (County Treasurer appointed as administrator of estate in which a delinquent tax parcel was an estate asset, but Surrogate prohibited foreclosure or sale of the tax parcel as

condition of appointment). See also In re Cunningham, 63 A.D.3d 1061 (2d Dep't 2009) (public administrator's authority limited to prevent conflict with estate beneficiary).

In other words, after expending all this time, energy and expense in becoming the estate representative, the county treasurer would likely end up being conflicted out from pursuing *in rem* tax foreclosure proceedings against estate property. Under Appellant's proposed scheme (and the Goldman and Schenectady decisions), a municipality would never be able to recover in tax foreclosure against estate property owned by a recent decedent where the municipality's chief fiscal officer became estate representative as a necessary consequence of commencing tax foreclosure proceedings. Requiring these efforts would not only be expensive and burdensome but would also be an exercise in futility. Such efforts cannot be said to fall within the realm of reasonable efforts to locate interested parties, as stated by longstanding precedent.

### C. The Goldman and Schenectady Courts Relied Upon Case Law Inapposite to RPTL Article 11.

As the Fourth Department and the dissenting opinions in both Goldman and Schenectady recognized, the majorities in both cases relied upon case law that was misplaced in relation to i*n rem* tax foreclosure proceedings under RPTL Article 11. See Goldman, 165 A.D.3d at 1123-1134; Schenectady, 201 A.D.3d at 15-21.

Importantly, the majority in Schenectady relied solely upon Goldman in reaching the result in that case and provided no explanation or reasoning for its departure from the Fourth Department's decision below. Schenectady, 201 A.D.3d at 21-22.

Initially, the Goldman court relied upon Matter of Foreclosure of Tax Liens by County of Orange (Al Turi Landfill, Inc.), to support its position that principles of *in personam* jurisdiction apply to *in rem* tax foreclosure proceedings. Id. at 1117. However, the Al Turi Landfill case involved an alternate method of enforcing tax liens under RPTL §990, which seeks to impose personal liability upon property owners and then levy against their personal property and requires *in personam* jurisdiction. Id. at 1125-1126; see RPTL §926.

In its incorrect ruling applying principles of *in personam* jurisdiction to an *in rem* tax foreclosure proceeding, the Goldman panel relied upon only one other appellate case, NYCTL 2004-A Trust v. Archer, 131 A.D.3d 1213 (2d Dep't 2015), which did not even involve RPTL Article 11. See Goldman, 165 A.D.3d at 1119. Rather, that case involved the distribution of surplus moneys after a tax foreclosure sale in a plenary action that had been commenced by a summons and complaint with specific named defendants, necessarily involving *in personam* jurisdiction. Id. One of the defendants had died before the order appealed from had been issued. Id. The appellant had been appointed as administrator of the defendant's estate but had never been formally substituted for the deceased defendant pursuant to CPLR §1015.

Id. The Archer court held, under principles of *in personam* jurisdiction, that the failure to substitute the deceased defendant's estate representative in the action divested the Court of jurisdiction to determine the distribution of the subject funds. Id. See Goldman, 165 A.D.3d at 1126 (in dissent) ("[T]he issue [in Archer] was not whether there was jurisdiction to foreclose on the realty. The dispute was over who was entitled to the surplus proceeds from the sale of the foreclosed property, a matter of indifference to the taxing authority, and a matter involving a dispute between living persons for which personal jurisdiction was required.")

Similarly, NYCTL 2009-A Trust v. 706 Fourth Avenue, LLC, 39 Misc.3d 1202 (Sup. Ct., Kings Co., 2013) is also distinguishable. That case did not involve an *in rem* proceeding under RPTL Article 11, but rather a tax foreclosure governed by the Administrative Charter of the City of New York. Section 11-335 of the Administrative Code of the City of New York requires that a plenary action be commenced to foreclose a tax lien, and that it must be conducted in accordance with the rules applicable to mortgage foreclosure actions, which in turn require that interested persons be named as party defendants to the plenary action. See RPAPL §1311 (delineating persons required to be named as party defendants in a mortgage foreclosure action). The RPAPL's requirement that interested persons be named as party defendants sounds in *in personam* jurisdiction is fundamentally distinct from the foreclosure procedures at issue here, which sound in *in rem* jurisdiction. This

procedural distinction renders the 706 Fourth Avenue, LLC case inapposite to county tax foreclosure proceedings, and the Goldman decision's reliance thereon improper.

As summarized by the Fourth Department, the cases relied upon by the Goldman majority have no bearing upon whether a taxing authority has a continuing obligation to ascertain whether an interested party in an in rem tax foreclosure proceeding has died:

> The Second Department, in Goldman, relied upon *in personam* jurisdiction cases in support of the general proposition that a legal action or proceeding cannot be commenced against a dead person (165 AD3d at 1116, citing *Krysa v Estate of Qyra, 136 AD3d 760, 760-761 [2d Dept 2016], lv denied 27 NY3d 907 [2016]; Marte v Graber, 58 AD3d 1, 3 [1st Dept 2008]; Jordan v City of New York, 23 AD3d 436, 437 [2d Dept 2005])* and one mortgage foreclosure action (*id.*, citing *Dime Sav. Bank of N.Y. v Luna, 302 AD2d 558, 558 [2d Dept 2003]*). Our decision in *Wendover Fin. Servs.* also dealt with a mortgage foreclosure action. Aside from Goldman, all of the cited cases must be distinguished from in rem tax foreclosure proceedings.
>
> Individuals, as well as entities, are necessary parties in *in personam* cases (*see generally Gager v White, 53 NY2d 475, 485 [1981], cert denied 454 US 1086 [1981]*) and, as a result, reliance on such cases is misplaced in this in rem proceeding. In addition, by statute, mortgagors are necessary party defendants to mortgage foreclosure actions (*see RPAPL 1311 [1]*). In contrast, a petition in a tax foreclosure proceeding relates only to the property and not any particular person (*see RPTL 1123 [2] [a]*).

Hetelekides, 193 A.D.3d at 1420.

The Goldman majority misapplied law applicable solely to *in personam* jurisdiction to this proceeding *in rem*. Accordingly, the Fourth Department properly declined to follow Goldman.

### D. Following the Goldman and Schenectady Majorities Would Lead to Permanent Clouds on Tax Titles.

In tax foreclosure proceedings, a foreclosing municipality conveys not whatever title the former owner may have had, but "a new and complete title to the land under an independent grant from the sovereign, a title free of any prior claims to the property or interests in it." Melahn v. Hearn, 60 N.Y.2d 944, 946 (1983); see also W.T. Grant Co. v. Srogi, 52 N.Y.2d 496, 516 (1981), ("[a] government must function and to that end it must have funds. . . . Thus, a municipality ordinarily should not be denied or delayed in the enforcement of its right to collect the revenues upon which its very existence and the general welfare depends.")

The Goldman and Schenectady cases are inconsistent with Court of Appeals precedent as stated in Melahn. The dissents in both cases recognized the future impact upon tax titles. See Schenectady, 193 A.D.3d at 20 (discussing whether a tax deed would be valid if the underlying proceeding were deemed a nullity: "[a]nd if the municipality, still unaware of the death, sells that parcel, can someone who had some interest in the parcel or in the estate of the decedent later attack any

subsequent deed in that chain? As these scenarios illustrate, the majority holding here creates a potential cloud on title to such parcels which may embroil the municipality and others in title litigation for untold years in the future. For these reasons, a straight-forward application of the law regarding in rem proceedings — as delineated herein and by the Fourth Department is not only the correct statutory interpretation, but would avoid these problems entirely.") (citations omitted).

When a municipality forecloses on a property, the municipality will not always be certain that the property owner has not died during the course of the proceeding. Municipalities and purchasers will be overburdened in trying to discover facts may be impossible to ascertain from the public record (as they were in this case). Further, interested parties related to deceased owners could turn up at any time to overturn tax foreclosure judgments, and the statutes of limitations in RPTL §1131 and RPTL §1137 would not bar such claims, despite the municipality's having given notice to all persons ascertainable in the public record. These unknown parties could appear years after a tax sale made in good faith and overturn the settled expectations of the new property owner. Following the Goldman and Schenectady majority opinions would subvert the purpose of RPTL Article 11: returning delinquent parcels to the tax rolls. To fulfill the statute's purpose, these decisions must be overruled.

## III. APPELLANT HAS ABANDONED HER ARGUMENTS THAT SHE WAS GIVEN INCORRECT INFORMATION REGARDING TAXES DUE FOR THE PROPERTY.

Although Appellant claimed in her pleadings and in her testimony at trial that she was given incorrect information regarding the status of taxes due for the Property, she has failed to brief any arguments that this provided grounds for the court to award relief to her. These arguments are deemed abandoned. People v. Correa, 15 N.Y.3d 213, 233 (2010) (argument deemed abandoned where although raised before the Appellate Division, Appellant failed to brief issue before the Court of Appeals).

Even if this court were to consider these arguments, these claims amount to a defense of "equitable estoppel" which provides no grounds for relief. Settled law dictates that estoppel is not available against a governmental agency in the exercise of its governmental functions. Matter of Village of Fleischmanns v. Delaware Nat'l Bank of Delhi, 77 A.D.3d 1146, 1148 (3d Dep't 2010); see also Wilson v. Neighborhood Restore Housing, 129 A.D.3d 948, 949 (2d Dep't 2015). Although an exception to the general rule exists where there has been a showing of fraud or deception, "erroneous advice by a governmental employee will not give rise to an exception to the general rule." Village of Fleischmanns, 77 A.D.3d at 1148; Wilson, 129 A.D.3d at 949.

This rule has been applied in the *in rem* tax foreclosure context in two Appellate Division cases. See Village of Flesichmanns, 77 A.D.3d at 1148 (mortgagee's claim that it was incorrectly advised that the taxes had already been paid rejected. Reliance on allegedly erroneous advice did not present a meritorious defense to the foreclosure proceedings). See also Wilson, 129 A.D.3d at 949 (foreclosed property owner's claim that municipality should be estopped from asserting statute of limitations defense based upon an erroneous representation made by a municipal employee likewise rejected).

## IV. APPELLANT'S CAUSES OF ACTION UNDER 42 U.S.C. §§1983 AND 1988 WERE PROPERLY DISMISSED.

A cause of action under Section 1983 may only lie against a municipality "if the plaintiff shows that the action that is alleged to be unconstitutional either implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers or has occurred pursuant to a practice so permanent and well settled as to constitute a custom or usage with the force of law." Hudson Valley Marine v. Town of Cortlandt, 79 A.D.3d 700, 703 (2d Dep't 2010); DiPalma v. Phelan, 179 A.D.2d 1009, 1010 (4th Dep't 1992), *aff'd* 81 N.Y.2d 754 (1992).

To prevail on a Section 1983 claim against a municipality, a plaintiff must "plead and prove (1) an official policy or custom that (2) causes her to be subjected

to (3) denial of a constitutional right." Howe v. Village of Trumansburg, 199 A.D.2d 749, 751 (3d Dep't 1993).

### A. Respondent-Appellant Failed to Demonstrate a County Policy That Led to a Deprivation of Her Constitutional Rights.

To hold a municipality liable under 42 U.S.C. §1983, the Appellant was required to demonstrate the existence of a policy or custom of the government itself that caused a violation of her constitutional rights. Harris v. City of New York, 153 A.D.3d 1333 (1st Dep't 2017). The policy must be both widespread and reflective of a "deliberate indifference to its citizens," and was the "moving force behind plaintiff's constitutional injury." De Lourdes Torres v. City of New York, 26 N.Y.3d 742, 766-767 (2016). Proof of a single incident of objectionable conduct by a municipality is insufficient to establish a municipal "policy" for Section 1983 purposes. Simpson v. New York City Transit Auth., 112 A.D.2d 89, 91 (1st Dep't 1985).

Appellant's claimed purportedly offensive "policy" followed by the County is one "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 (sic) known to be dead and disregard of unique facts." (Appellant's Brief, p. 53) In other words, Appellant is faulting the County for following well-settled statutory provisions equally to all parcels subject to *in rem* tax foreclosure proceedings.

Initially, Appellant ignores that, despite being represented by counsel, she failed to avail herself to the remedies afforded by RPTL §1131 to seek vacatur of the default judgment of foreclosure. Rather, Appellant sought redress through the County's Board of Supervisors to permit a late redemption of the Property, even though the Board of Supervisors had never granted such relief to a defaulting taxpayer. (R. 231, 372-373) Appellant attacks Baxter's memo to the Board of Supervisors, but ignores the correspondence, presented by Supervisor Green in support of her resolution to permit a late redemption of the Property, which included a presentation by the County Attorney regarding tax collection and enforcement considerations. (R. 612, 634-636) In this presentation, the County Attorney outlines the reasons why the County has consistently followed RPTL Article 11, including the number of requests from defaulting taxpayers, administrative impacts, cash flow issues and auction costs. (R. 634-636) Thus it cannot be said that the County was without legal justification for simply following the letter of the law it is statutorily charged to apply. Bower Assocs. v. Town of Pleasant Valley, 2 N.Y.3d 617, 627 (2004).

Appellant's reliance upon Nelson v. Ulster County, 789 F.Supp.2d 345 (N.D.N.Y. 2010) is misplaced. In Nelson, the statutory foreclosure notices had been returned to Ulster County as "undeliverable," and Ulster County took no further steps to ascertain an alternate mailing address to send additional copies of

the statutory notices. Id. at 351. The Nelson court denied Ulster County's motion for summary judgment, finding questions of fact surrounding that plaintiff's due process and 42 U.S.C. §1983 claims. Id. at 356. Here, the record demonstrates delivery of the statutory notices to the Property in October 2007, which as discussed above, triggered no further obligations to ascertain an alternate means of notice under the black letter of the statute.

Appellant further disregards the actions she took through counsel between the time the redemption deadline expired in January 2007 and the date of the tax foreclosure auction in May 2007. Appellant's attorney sent a letter to the Ontario County Board of Supervisors, admitting that:

> [W]e realize that the County Treasurer, Gary Baxter, personally went to the property prior to the tax deadline date. The failure to pay the taxes in a timely fashion is not readily understandable, and is not ordinarily excusable. . . .
>
> Christine, who had never attended in any way to the restaurant's financial matters, simply assumed that the taxes were being paid by the family members who worked along side her in the restaurant. This is true despite all of the efforts of Gary Baxter and the County Treasurer's office personnel to send the required notices. . . .
>
> [W]e accept responsibility for all that has happened. But we ask for a second chance for a hard working lady whose mistake focusing so hard on which she knew needed doing, namely, caring for her sick husband and working in the family business, caused her to overlook the practical necessity of checking on the taxes.

(R. 714-717).

At no point in Appellant's submissions to the Board of Supervisors does she claim that the County did anything wrong with respect to the issuance of notice under RPTL §1125.

There is no evidence that the County was aware of any issues pertaining to the statutory foreclosure notices under the plain meaning of RPTL Article 11. Indeed, six copies of the statutory notices were received at the Property, where Appellant and her son worked daily, and none of the notices were returned to the County by the United States Postal Service indicating that the notices were undeliverable. (R. 352-357, 436, 544, 693-699).

Tax foreclosure law during the relevant period was, and still is, dictated by Kennedy, 100 N.Y.2d at 1 and Harner, 5 N.Y.3d at 136, which uphold that a taxing authority's obligations to take additional steps to effectuate notice arises only when the mailings are returned indicating that a notice was undeliverable. Under this precedent, there was nothing wrong with the notices that had been issued to the Property.

Aside from pure speculation unsupported by the facts in this record, Appellant failed to demonstrate a "widespread" policy, or even facts applicable in her situation that would support the existence of any such policy upon which she can predicate liability under Section 1983. Accordingly, Appellant's claims under Sections 1983 and 1988 were properly dismissed.

### B. Appellant Failed to Demonstrate Facts That Would Support a Section 1983 Cause of Action Against Baxter.

Appellant has also failed to identify conduct by Baxter that is actionable under Section 1983. Where the alleged misconduct of an individual governmental actors underlies a claim under Section 1983, "it must be so egregious as to rise to constitutional proportions before a valid civil rights claim may arise under Section 1983." Broadway & 67th Street Corp. v. City of New York, 100 A.D.2d 478, 483 (1st Dep't 1984). See also Bower Associates v. Town of Pleasant Valley, 304 A.D.2d 259, 263 (2d Dep't 2003) *aff'd* 2 N.Y.3d 617 (2004) ("In order for there to be liability under 42 USC §1983 the Respondent-Appellant must show that it was deprived of its property interest by conduct which is 'arbitrary as a matter of federal constitutional law.' Conduct which is 'arbitrary or capricious and for that reason correctable in a state court lawsuit' . . . is not the same as conduct which is 'arbitrary as a matter of federal constitutional law.'") (citations omitted). See also Bowen v. Nassau County, 135 A.D.3d 800, 801 (2d Dep't 2016) ("Substantive due process standards are violated only by conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority.") See also St. Joseph Hosp. of Cheektowaga v. Novello, 48 A.D.3d 139, 144 (4th Dep't 2007) ("importantly, only the most egregious official conduct can be said to be arbitrary in the constitutional sense").

Appellant attacks Baxter for a memo presented to the County Board of Supervisors, but ignores the fact that her claims objectional County "policy" was its application of RPTL Article 11 to the letter of the law, uniformly to all properties involved in the foreclosure process. The drafting of a memo in a legislative context cannot be said to rise to egregious conduct in a constitutional sense.

### C. Appellant's Section 1983 Claims Against Baxter Are Barred by Qualified Immunity.

Baxter cannot be found liable under Section 1983 as his actions as County Treasurer are protected by qualified immunity. "Qualified immunity protects government officials from liability for damages when performing discretionary duties 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Matter of Alex LL, 60 A.D.3d 199, 208 (3d Dep't 2009) citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). See also Watson v. City of Jamestown, 56 A.D.3d 1289, 1292 (4th Dep't 2008).

Although at trial, Appellant's Section 1983 claims against Baxter pertained to additional notification attempts of the impending redemption deadline at the restaurant in January 2007. However, her brief abandons this claim and instead attacks Baxter's memo presented to the Board of Supervisors in the Board's consideration of Appellant's request for a late redemption of the Property.

To the extent these claims involve Baxter's additional notification attempts, Baxter was vested with discretion pursuant to RPTL §1125(4), under which the county treasurer as enforcing officer may issue additional written or informal notices to interested parties regarding pending in rem tax foreclosure proceedings. Baxter exercised this statutorily vested discretion and made additional notification attempts to advise interested parties of the pending in rem tax foreclosure of the Property. This included calling the restaurant business twice and leaving messages with staff, as well as personally visiting the restaurant and leaving his business card with staff with a request than an owner or manager contact him. Baxter stressed to the restaurant employee that his request involved an important matter. (R. 365-368) The record is devoid of any facts that would demonstrate that these actions were undertaken to deprive Appellant of her statutory or constitutional rights. Accordingly, to the extent any of Appellant's claims under Section 1983 derive from Baxter's exercise of his discretion, they are barred by qualified immunity and were properly dismissed.

### D. Appellant Claims Against the County and Baxter As They Pertain to Her Request Before the Ontario County Board of Supervisors Are Barred by Legislative Immunity.

Appellant has alleged that her Section 1983 causes of action arising from her request before the Ontario County Board of Supervisors to permit a repurchase of

the Property pursuant to RPTL §1166. However, actions "taken in the sphere of legitimate legislative activity" are to be accorded absolute legislative immunity. NRP Holdings, LLC v. City of Buffalo, 916 F.3d 177, 191 (2d Cir. 2019) (*citing* Bogan v. Scott-Harris, 523 U.S. 44, 49 (1998)). "Legislative immunity shields from suit not only legislators, but also officials in the executive and judicial branches when they are acting in a legislative capacity." State Employees Bargaining Agent Coalition v. Rowland, 494 F.3d 71, 82 (2d Cir. 2007).

The Second Circuit has developed a two-part test for determining whether an act is legislative, namely: (a) whether the defendants' actions "were legislative in form, i.e., whether they were integral steps in the legislative process;" and (b) whether defendants' actions "were legislative in substance, i.e., whether the actions bore all the hallmarks of traditional legislation, including whether they reflected discretionary, policymaking decisions implicating the budgetary priorities of the government and the services the government provides to its constituents." NRP Holdings, LLC, 916 F.3d at 191-192 (*citing* State Employees Bargaining Agent Coalition, 494 F.3d at 89.)

Appellant alleged that the Baxter's presentation before the Board of Supervisors meeting in March 2007 to consider a resolution offered in support of permitted her to repurchase the Property under RPTL §1166 is somehow actionable under Section 1983. Baxter's presentation is not only non-actionable under Section

1983 (meeting the level of arbitrary and irrational in a constitutional sense), but is also protected by legislative immunity. Baxter's presentation before the Board of Supervisors meets 2-part test set forth in NRP Holdings. It is undisputed that the proceedings before the Board of Supervisor were brought pursuant to RPTL §1166, which addresses the County's ability to dispose of property acquired by way of tax foreclosure. RPTL §1166 provides as follows:

> 1. Whenever any tax district shall become vested with the title to real property by virtue of a foreclosure proceeding brought pursuant to the provisions of this article, such tax district is hereby authorized to sell and convey the real property so acquired . . . either with or without advertising for bids, notwithstanding the provisions of any general, special or local law.
>
> 2. No such sale shall be effective unless and until such sale shall have been approved and confirmed by a majority vote of the governing body of the tax district, except that no such approval shall be required when the property is sold at public auction to the highest bidder.

The County's usual process is to sell foreclosed properties at public auction, which then obviates the need for Board of Supervisors' approval under RPTL §1166(2). (R. 610-612) However, Appellant was requesting the ability to re-purchase the Property outside of the auction process, which required legislative approval under RPTL §1166. (R. 613) Accordingly, any actions taken by Baxter with respect to this request were "legislative in form" and meet this prong of the NRP Holdings test.

Secondly, Baxter's actions with the Board of Supervisors with respect to the proposed resolution that had been introduced pursuant to RPTL §1166 to allow the Appellant to purchase the Property prior to the scheduled auction were also legislative in substance. Baxter was present at the meetings of the Financial Management Committee and the full Board of Supervisors when this matter was discussed. (R. 507-512) Baxter submitted a memo to the Board of Supervisors, which outlined policy considerations in allowing exceptions to occur after the expiration of the redemption deadline, such as increased work load for the Treasurer's Office in managing the in rem process, as well as addressing requests from other foreclosed property owners who were requesting the same exception. (R. 609) As such, Baxter in his role as County Treasurer was discussing "traditional legislation," including "discretionary, policymaking decisions implicating the budgetary priorities of the government and the services the government provides to its constituents." See NRP Holdings, 916 F.3d at 191-192. Accordingly, because Baxter's and the County's actions with respect to Appellant's request for an exception under RPTL §1166 fall under a legislative act, they are entitled to legislative immunity and are not actionable under Section 1983.

Accordingly, the Fourth Department properly upheld the trial court's dismissal of Appellant's causes of action under Sections 1983 and 1988.

## V.THE TRIAL COURT PROPERLY DENIED RESPONDENT-APPELLANT'S REQUEST FOR BORROWING COSTS.

The purpose of CPLR §5001 is to pay to a successful plaintiff the cost of the loss of use of money for a specified period of time and to indemnify a successful plaintiff for the nonpayment of what is due to them. Love v. State 78 N.Y.2d 540, 544 (1991) (Prejudgment interest represents the "cost of having the use of another person's money for a specified period. . . It is intended to indemnify successful plaintiffs for the nonpayment of what is due to them."); New York State Higher Educ. Svcs. Corp. v. Laudenslager, 161 Misc. 2d 329, 331 (App. Term 1st Dep't 1994) (same).

Here, the trial court judgment awarded Appellant prejudgment interest under CPLR §5001 at the rate of 9% beginning on May 9, 2007. (R. 11) Through December 23, 2019, the date of the order and judgment, 12 years 7 months and 14 days had elapsed, which would have resulted in an award of interest of $157,544.49, indemnifying Appellant for the lost use of her money during that period of time.

Appellant's argument that she had to borrow money at a higher rate of interest is misleading. According to the evidence she presented in support of her claim, she had incurred $33,751.58 in interest through November 30, 2018 (R. 549), which is only a small fraction of what she would have been awarded in statutory interest.

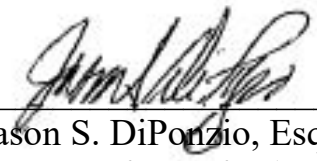
Accordingly, because an award of statutory interest would have indemnified Appellant for the cost incurred by the lack of use of her funds during the relevant time period, her request for reimbursement of borrowing costs was properly denied.

## CONCLUSION

For the foregoing reasons, the County and Baxter respectfully request that the Fourth Department's order be affirmed in its entirety, and that the Goldman and Schenectady cases be overruled.

Dated: Rochester, New York
March 28, 2022

Respectfully Submitted,



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## CERTIFICATE OF COMPLIANCE

Under 22 N.Y.C.R.R. §500.13 (c), I certify that:

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