*To be Argued by:*
JASON S. DIPONZIO
*(Time Requested: 15 Minutes)*

# New York Supreme Court

## Appellate Division—Fourth Department

**Docket No.:**
**CA 20-00680**

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

*Plaintiff-Respondent-Appellant,*

– against –

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

*Defendants-Appellants-Respondents.*

**BRIEF FOR DEFENDANTS-APPELLANTS-RESPONDENTS**

JASON S. DIPONZIO, ESQ.
*Attorney for Defendants-Appellants-Respondents*
950 Reynolds Arcade
16 East Main Street
Rochester, New York 14614
(585) 530-8515
jdiponzio@diponziolaw.com

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## QUESTIONS PRESENTED

1) Did the trial court err in finding that Defendants-Appellants did not comply with the notice requirements of RPTL §1125, where Defendants-Appellants 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-Appellants?

Answer: The trial court vacated in the *in rem* tax foreclosure proceedings below and awarded damages to Plaintiff-Respondent.

2) Did the trial court err in denying Defendant-Appellant's motion for summary judgment seeking dismissal of the complaint, where Plaintiff-Respondent did not seek vacatur of a default judgment of foreclosure within the period of limitations of RPTL §1131, did not demonstrate a jurisdictional defect, and did not demonstrate a cause of action under 42 U.S.C. §1983?

Answer: The trial court denied Defendant-Appellants' motion for summary judgment.

## STATEMENT OF FACTS

This appeal arises from an action to set aside *in rem* tax foreclosure proceedings commenced by the Defendant-Appellant-Respondent County of Ontario (the "County") pursuant to N.Y. Real Property Tax Law ("RPTL") Article 11 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 records of the Ontario County Clerk, the Property was owned by "James Hetelekides" as of January 1, 2005, and according to the tax records maintained in the Town of Hopewell, the Property was assessed to "James Hetelekides" and "Geo-Tas, Inc." (R. 679-680) James Hetelekides and Demetrios Hetelekides were the same person. (R. 118) Geo-Tas, Inc. was a corporate entity owned by James Hetelekides. (R. 536) James Hetelekides and his wife, Plaintiff-Respondent Krystalo Hetelekides ("Hetelekides"), 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, 2015. (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 issue here, 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 included on the List of Delinquent Taxes for which tax liens remain unpaid for 21 months after the lien date. The enforcement officer serves statutory notices of foreclosure pursuant to RPTL §1125 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. Such interested parties consist of owners and any other persons whose right, title or interest would be affected by the expiration of the redemption period, and could be ascertained from the public record as of the date of the filing of the List of Delinquent Taxes, in this matter being 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) With respect to the Property, Crossroads prepared this report on August 31, 2005, and then re-certified through May 31, 2006. (R. 680) This period would have necessarily included the time at which the List of Delinquent Taxes would have been filed in November 15, 2005 (R. 89, 187, 323) According to this 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. (R. 543) Probate proceedings for James Hetelekides' estate were not filed in Ontario County Surrogate's Court until February 2007. (R. 43)

After the filing of 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 by ordinary first class mail to "James

Hetelekides," "Geo-Tas, Inc." and "Hetelekides James" (6 notices total), addressed to 4025 State Route 5&20, Canandaigua, New York 14424. (R. 341-342, 354-355, 681-692) The certified mailings were received at the Property on October 3, 2007 and were signed for by Barb Schenk, an employee of the restaurant operated at the Property. (R. 120, 395, 693-695)

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

The notices of foreclosure proceedings will also explain, in multiple places, that the failure to redeem the property prior to the expiration of the redemption period will result in the parties' 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 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, Hetelekides 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, Hetelekides would work most of the day, taking breaks to go home for meals. (R. 534-535) Hetelekides' adult son also worked at the restaurant business at the Property during this period. (R. 399-400)

In late December 2006 – early January 2007, the County Treasurer met with several staff to review which delinquent tax parcels had not yet been redeemed, and to organize additional notification attempts, such as phone calls or personal visits, to interested parties for unredeemed delinquent tax parcels. (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) During this period, Baxter may have 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, and 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, and 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 call Baxter back. (R. 367-368)

Not having heard back from his 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 prior to 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. Hetelekides left a voice mail message at the County Treasurer's office on that date. (R. 544)

Hetelekides 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 named Stephanie if the taxes for the restaurant property had been paid. (R. 121-123) Hetelekides alleged that she was told that the real estate taxes for the restaurant property had been paid. (R. 122) However, tax receipts produced at trial demonstrated that Hetelekides 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) For both of these tax payments, payments would have been made 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)

Hetelekides also testified that she went to the Town of Hopewell to inquire about the real estate taxes due for the Property, and that an employee of the Town of Hopewell told her that taxes were due for the restaurant property and further assisted Hetelekides in making a phone call to the County Treasurer's Office. (R. 148) Hetelekides testified that she spoke with an employee of the County Treasurer's Office and was told that the taxes had been paid. (R. 148) Karen Carson, an employee of the Town of Hopewell, testified that she did assist Hetelekides on one occasion in placing a call to the County Treasurer's office, but that she left the room

and did not hear the contents of the conversation. (R. 305, 306, 309) Ms. Carson testified that she did not look up the status of the taxes due at the Property. (R. 306) Records indicate that the Town of Hopewell offices were open on January 15, 2007 (Martin Luther King Jr. Day), and that Carson worked that day, being the same day when Hetelekides left a voice mail message at the County Treasurer's office. (R. 313-314, 379, 701-702)

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

Stephanie Seeley, who was employed as a clerk in the County Treasurer's office during the 2006-2007 time frame testified that the first time she saw Hetelekides in the County Treasurer's Office was on January 16, 2007. (R. 411-412, 704) Ms. Seeley further testified as to the procedure of the County Treasurer's office with respect to inquiries made regarding delinquent tax parcels. (R. 409-410) A manila folder is maintained for each parcel and each time there is an inquiry regarding the tax parcel, staff will note the date and the substance of such inquiry.

(R. 410) The manila folder for the Property notes no inquiry regarding the Property prior to January 16, 2007. (R. 700)

On February 8, 2007, a default judgment of foreclosure was filed in the Ontario County Clerk's office. (R. 705-707) Pursuant to RPTL §1131, an aggrieved party could file 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, Hetelekides failed to file such an application.

In February 2007, Hetelekides' 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, Hetelekides' attorney submits correspondence in support of this request, stating the following:

> "we 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"
>
> "we 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 this request for a late redemption of the Property on March 29, 2007. (R. 674-675)

On May 9, 2007, a public auction of the delinquent tax parcels, including the Property, is conducted in accordance with RPTL §1166. (R. 545) The Property was auctioned for $160,000 to an individual personally known by the Hetelekides. (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. Hetelekides 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

Hetelekides commenced this action on April 11, 2008 alleging the following as bases underlying her requests for relief: (1) that the County was under an obligation to petition Surrogate's Court for the appointment of a personal representative for James Hetelekides' estate in order to serve statutory notices; (2) that Hetelekides 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 in rem tax foreclosure of the Property; and (4) that the Hetelekides was given incorrect information regarding the delinquent tax amounts due in order to redeem the Property. (R. 24-35) Hetelekides sought the following relief:

(1) damages for alleged due process violations, including: (a) a declaration that the County was without jurisdiction to conduct the auction sale with respect to the Property; (b) vacatur of the default judgment of foreclosure; (c) recovery by the Hetelekides of the purchase price; (d) a declaration that the Hetelekides 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)

The County filed a motion to dismiss this action pursuant to CPLR §3211, which was denied in November 2008 and affirmed without opinion by this court in February 2010. (R. 807-813) The County and Baxter answered the complaint in December 2008. (R. 84-90) The County and Baxter filed a motion for summary judgment pursuant to CPLR §3212 in February 2018. (R. 795-796) Supreme Court denied the County's motion in July 2018. (R. 793-794)

This action was tried before the Honorable John J. Ark on December 12-13, 2018 and January 12, 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 Demetrios Hetelekides, that the County did not comply with the notice requirements of RPTL §1125. (R. 8-23) In rendering its decision, the trial court relied largely upon Matter of Foreclosure of Tax Liens by County of Orange (Goldman), 165 A.D.3d 1112 (2d Dep't 2018), stating that because James Hetelekides had died on August 1, 2006, the tax foreclosure proceedings against the Property were null from its inception. (R. 20) The trial court awarded Hetelekides $138,656.83, plus statutory interest of 9% from May 7, 2007. (R. 10-11) The trial court further dismissed Hetelekides' claims for damages under 42 U.S.C. §1983 and for borrowing costs she incurred. (R. 10)

This appeal ensued.

## STANDARD OF REVIEW

This court reviews the trial court's decision, order and judgment after a bench trial *de novo*, and has authority as broad as the trial court, and may render the judgment it finds warranted by the facts. Northern Westchester Professional Park Assocs. v. Bedford, 60 N.Y.2d 492, 499 (1983); Sweetman v. Suhr, 159 A.D.3d 1614, 1615 (4th Dep't 2018).

## ARGUMENT

### I. THE TRIAL COURT'S DECISION AND ORDER ARE CONTRARY TO 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 Orange County Comm'r. of Fin. (Helseth), 18 N.Y.3d 634, 639 (2012); Kennedy v. Mossafa, 100 N.Y.2d 1, 9 (2003); Matter of Harner v. County of Tioga, 5 N.Y.3d 136, 140 (2005). 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 in 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

defendant's belief that notice was received is objectively reasonable under the circumstances. Miner, 541 F.3d at 472.

In Miner, a taxpayer denied having received notice of pending in rem tax foreclosure proceedings. Id. at 468. However, none of the certified mailings of the notice of the foreclosure proceedings had been returned to the County, and in fact, a certified mail receipt bearing an illegible signature had been returned to the County. Id. United States Postal Service records also verified the delivery of the certified mailing. Id. Given these circumstances, the Second Circuit upheld the District Court's finding that the County reasonably believed that the notice of foreclosure had reached the taxpayer, and that due process required no further notification attempts. Id. at 472. Compare Jones v. Flowers, 547 U.S. at 220 (where sole notice of foreclosure proceedings, being a certified mailing of a notice of foreclosure, was returned to the enforcing officer, the United States Supreme Court determined that due process required "additional steps" to be taken to notify interested parties of pending foreclosure, leaving it up to the states to determine what additional steps were required.)

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 complied with the previous requirements of superseded RPTL §1125, and provided the additional notice requirement of a first class mailing. As will be discussed below, the trial court's finding that the County did not comply with the requirements of RPTL §1125 was error and must be reversed.

### A. The Trial Court's Decision Ignores the Requirements of RPTL §1125(a) In Determining Parties Entitled to Notice of Pending Foreclosure Proceedings.

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 . . .

Although the trial court made reference to the operative time for the foreclosing municipality to identify parties entitled to notice under RPTL §1125(a), the trial court's decision ignored this statutory directive. Here, the County contracted with Crossroads Abstract in order to ascertain parties entitled to notice under RPTL §1125 (R. 211-212; 680-681). The Crossroads report pertaining to the Property was prepared on August 31, 2005, and then re-certified through May 31, 2006. (R. 680). This period would have necessarily included the time at which the List of Delinquent Taxes would have been filed in November 15, 2005 (R. 89, 187, 323). According to the property report, the interested parties were identified as James Hetelekides, Hetelekides James and Geo-Tas, Inc.. (R. 680-681) Geo-Tas, Inc. was a corporate entity owned or controlled by James Hetelekides.

In this case, the List of Delinquent Taxes was filed on November 14, 2005, and the Crossroads report was re-certified thorough May 31, 2006. James Hetelekides was still alive on both of those dates and any purported testamentary interest held Hetelekides had not yet arisen. See Barnes, 25 A.D.3d at 957 ("we note at the outset that because petitioner's interest in the property did not arise until after decedent's death, she plainly was not an 'interested person' within the meaning of RPTL §1125 as her interest in the property was not a matter of public record as of the date the List of Delinquent Taxes was filed.") A search of the Surrogate's Court's records at any relevant time would not have revealed any information, since Hetelekides' probate petition was not filed until February 23, 2007, after the expiration of the redemption period.

James Hetelekides' death subsequent to the filing of the List of Delinquent Taxes did not impose further statutory or constitutional obligations upon the County to fulfill due process notice requirements in this instance. Accordingly, the trial court's finding that the notices given in this matter violated the due process requirements of RPTL §1125 were erroneous and must be reversed.

### B. The Trial Court's Decision Ignores the Directives of RPTL §1125 as to Events that Require a Municipality to Ascertain Further Information about an Interested Party.

The Court of Appeals has set forth the requirements imposed on foreclosing municipalities, and the responsibilities of property owners, in a series of decisions, all of which are inconsistent with the trial court's decision in this matter. These cases make clear that a foreclosing municipality's duty to search for names of persons to receive notice is limited by statute, and that the municipality need not search beyond the public record. See e.g. Congregation Yetev Lev D'Satmar v. County of Sullivan, 59 N.Y.2d 418 (1983); Kennedy, 100 N.Y.2d at 1; MacNaughton v. Warren County, 20 N.Y.3d 252 (2012). Furthermore, this duty to search the public record does not arise unless the certified and first-class mailings sent under RPTL §1125 are returned, indicating an infirmity with the address.

In Congregation Yetev Lev D 'Satmar v. County of Sullivan, the plaintiff claimed the parcel at issue by adverse possession and its name did not appear as the owner in the real property records or the tax rolls. Congregation Yetev Lev D'Satmar, 59 N.Y.2d at 418, A county official mailed notice to the corporation listed as owner in the tax and real property records, but not to the plaintiff. Id. The County sold the property at a tax auction. The Court of Appeals upheld the sale,

holding that "the Fourteenth Amendment . . . requires the assessor to give personal notice to all parties readily ascertainable who have a substantial interest in the property and the assessor is charged with knowledge of facts which an examination of the real property and tax records reveals." Id. at 425. Given that the tax and real property records contained no evidence that the plaintiff owned the property, and given that the authorities were "not required to make extraordinary efforts to discover the identity and whereabouts of the owner," the tax sale was valid. Id. at 426. The Court of Appeals summarized that "due process requires only notice to one who has a substantial interest in the property and is identifiable." Id.

In Kennedy, the property owner owned a vacant parcel in the Town of Newburgh, and had moved in 1991. Kennedy, 100 N.Y.2d at 1. However, the Town continued to list the owner's former address in its records and from 1983 through 1998, and relevant tax bills were sent to the former address. In 1997, the foreclosing municipality served and filed a foreclosure petition, and mailed it to the owner at the owner's prior address. The Postal Service returned the notice, with the notation "not deliverable as addressed unable to forward." The Court of Appeals held that notice must be reasonably calculated to apprise the interested party of the foreclosure action. Id. at 9 ("[t]he key word is 'reasonably,' which balances the interests of the State against the rights of the parties.") The Court of Appeals went

on to hold that if the notice is returned as undeliverable, the tax district should conduct a reasonable search of the public record, which contains more than the Town tax roll, but "does not necessarily require searching the Internet, voting records, motor vehicle records, the telephone book or other similar resource." Id. at 10. The Court of Appeals held that the County gave sufficient notice, and that no further search was required since there was no evidence that a search of the public record would have yielded the new address. Id.

In MacNaughton v. Warren County, a property owner moved from South Orange, New Jersey to Millburn, New Jersey, without notifying the taxing authorities in Warren County, New York, where the taxpayer owned real property. MacNaughton, 20 N.Y.3d at 255. The real property taxes became delinquent and Warren County commenced *in rem* tax foreclosure proceedings against that property. Id. Warren County sent a number of notices to the South Orange address, and eventually foreclosed. The plaintiff challenged the foreclosure, arguing, among other things, that, if the County had searched the public records of Essex County, New Jersey, where his prior and current addresses were, then the County would have found the correct address. Id. at 258. The Court of Appeals rejected that argument, holding that requiring such a search "would put too great a burden on the taxing authority. It is one thing to require a search of records in the

taxing authority's own county - 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." Id.

Appellate courts have applied these Court of Appeals decisions 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., Matter of Foreclosure of Tax Liens by Ontario County (Helser), 72 A.D.3d 1636, 1637 (4th Dep't 2010) ("knowledge that respondent was incarcerated cannot be imputed to petitioner"). Matter of Foreclosure of Tax Liens by County of Schuyler (Solomon), 83 A.D.3d 1243 (3d Dep't), *lv to app dismissed,* 17 N.Y.3d 850 (2011) ("a reasonable search of the public record includes a search of land records contained in the offices of the County Clerk and Surrogate, but does not necessarily require either an internet search or a search of records of the Supreme Court or County Court.") See also Lakeside Realty LLC v. County of Sullivan, 140 A.D.3d 1450 (3d Dep't 2016) (argument that due process required county to search Department of State's website rejected); In re Foreclosure of Tax Liens by County of Broome (Castle Heights, LLC), 50 A.D.3d 1300, 1302 (3d Dep't 2008) (Where principal of

corporate owner was deceased, arguments that a search of Department of State records would have identified principal, and a search of Surrogate's Court records under deceased principal's name would have revealed a party in interest were rejected as beyond the scope of what is required by statute); Matter of Foreclosure of Tax Liens by County of Erie (Jensen), 278 A.D.2d 814 (4th Dep't 2000) ("[a]lthough the County had several other addresses listed for the owners, there was no indication that the County had actual knowledge of the correct address").

In other words, appellate courts have consistently made clear that a foreclosing municipality need only search the public record to determine the names and addresses of persons with an interest in a tax-delinquent parcel when the statutory notices required by RPTL §1125 are returned indicating that an address is not valid. Furthermore, the "public record" is limited concept, and does not include every document in a file cabinet or database of other governments, and does not include the Internet or other sophisticated technological tools.

The facts at trial demonstrated that the County's procedures satisfied due process requirements outlined in RPTL §1125 and upheld in longstanding Court of Appeals precedent. Here, the necessary interested parties were identified as of the date of the filing of the List of Delinquent Taxes in November 2005, and the required statutory notices of the in rem tax foreclosure proceedings were mailed both by

certified mail return receipt requested and by first class mail directly to the Property. 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).

There was no indication whatsoever that the statutory notices had not been received at the Property and therefore, nothing had been triggered to require the County to engage in any further efforts in order to locate an owner or interested party.

Hetelekides has denied receipt of the notice even though the certified mail receipts was signed for by an employee at the Property. See Nelson v. City of New York, 352 U.S. 103, 107-108 (1956) (Arguments that property owner did not receive notices due to concealment by employee rejected. "It 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, Hetelekides testified that during the period in question, she herself worked at the Property on a daily basis, oftentimes for most of the working day, because she liked to have the company of the staff and customers at the restaurant. Hetelekides' adult son also worked at the Property on a daily basis.

Furthermore, even if these mailing had been returned to the County after being mailed in October 2006, a further search of the public record would not have revealed that Mr. Hetelekides had died in August 2006. No probate proceeding was filed in Ontario County Surrogate's Court until February 2007 and letters testamentary were not issued to Hetelekides until June 2007. Regardless, the statutory notices were received at the Property, being an operating business where Hetelekides and another family member worked in the day-to-day operations. See Pompe v. City of Yonkers, 179 A.D.2d 628, 630 (2d Dep't 1992), *lv to appeal denied* 81 N.Y.2d 706 (1993), *cert. denied* 510 U.S. 871 (1993).

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, thereby demonstrating actual notice of the proceedings, the

County was under no further obligation to undertake additional notification procedures. The trial court's finding of due process violations find no evidentiary support in the record and must be reversed.

## II. THE TRIAL COURT'S DECISION IS INCONSISTENT WITH RULES OF STATUTORY CONSTRUCTION.

The Court of Appeals has consistently held statutes must be read so as to put the Legislature's intent into effect. Desrosiers v. Perry Ellis Menswear, LLC, 30 N.Y.3d 488 (2017), ("[i]n matters of statutory interpretation, our primary consideration is to discern and give effect to the Legislature's intention." See also Walsh v. New York State Comptroller, 34 N.Y.3d 520 (2019) ("[w]hen presented with a question of statutory interpretation, a court's primary consideration is to ascertain and give effect to the intention of the Legislature"); Nadkos, Inc. v. Preferred Contractors Ins. Co. Risk Retention Group, LLC, 34 N.Y.3d 1, 7 (2019) ("[w]hen presented with a question of statutory interpretation, a court's primary consideration is to ascertain and give effect to the intention of the Legislature"); Anonymous v. Molik, 32 N.Y.3d 30, 37 (2018) ("[i]t is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature").

### A. The Trial Court Ignored the Plain Meaning of RPTL §1125.

In this matter, the trial court ignored the plain language of Article 11 by adding a new set of rules set forth nowhere therein. A statute's text is the main source from which Legislative intent should be derived. Desrosiers, 30 N.Y.3d at 494 ("[t]he statutory text is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning.") See also, Walsh, 30 N.Y.3d at 520 ("[w]e have long held that the statutory text is the clearest indicator of legislative intent, and that a court should construe unambiguous language to give effect to its plain meaning"); Flores v. Lower East Side Service Center, Inc., 4 N.Y.3d at 368 (2005) ("[a]s the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof.")

Stated another way, a reviewing court "will not add words to a statute which has a rational meaning as written." Richmond Constructors v. Tishelman, 61 N.Y.2d 1, 6 (1983), *citing* Palmer v. Spaulding, 299 N.Y. 368, 372 (1949) ("[i]t is a strong thing so to read into a statute words which are not there and, in the absence of a clear necessity, it is a wrong thing to do").

Here, the trial court inferred the provisions of CPLR §1015 in either substituting a personal representative after a party has died or only commencing an action once a personal representative has been appointed. This imposes new requirements into RPTL Article 11, which is inconsistent with Court of Appeals precedent.

The CPLR defines its role in relation to other New York statute in CPLR §101, which provides that: "[t]he civil practice law and rules shall govern the procedure in civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute." "There should be no resort to the CPLR in instances where the RPTL expressly covers the point in issue." Matter of Westchester Joint Water Works v. Assessor of the City of Rye, 27 N.Y.3d 566, 575 (2016) *citing* W.R. Grant Co. v. Srogi, 52 N.Y.2d 496, 514 (1981).

Appellate courts in New York, including this court, have applied this to proceedings brought under the Real Property Tax Law. See e.g. Matter of Foreclosure of Tax Liens by County of Wayne (Schenk), 169 A.D.3d 1501, 1503 (4th Dep't 2019) (Refusing to apply extensions of time authorized by CPLR §2004 to statute of limitations under RPTL §1131.) See also Youngs v. Bradley, 237 A.D.2d 700, 701 (3d Dep't 1997) (Arguments that filing requirements of CPLR §306-b applied to in rem proceedings under RPTL Article 11 rejected. "[W]e find it

clear that the procedure required to be utilized for actions of this kind is regulated by inconsistent statute."); Matter of Endicott Johnson Corp. v. Assessor, Town of Union, 209 A.D.2d 759 (3d Dep't 1994) (Tax certiorari proceeding under 1993 version of RPTL Article 7 authorized commencement by service. Commencement by filing requirements of CPLR held not to govern tax certiorari proceeding. "These provisions being inconsistent with those of the CPLR, the latter does govern this proceeding.")

The Legislature drafted RPTL §1125(a) using clear language: "A foreclosing municipality must mail notice to (i) each owner and 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 . . . (ii) any other person who has filed a declaration of interest pursuant to section eleven hundred twenty-six of this title which has not expired, and (iii) the enforcing officer of any other tax district having a right to enforce the payment of a tax imposed upon any of the parcels described upon such petition."

Nothing in Article 11 requires a foreclosing municipality to look beyond the public record to determine whether property owners are deceased, and to then search

for unknown heirs and commence a proceeding under the Surrogate's Court Procedure Act. Nevertheless, the trial court has, in essence, determined: (1) that a foreclosing municipality that obeys Article 11 strictly when a property owner has died is "suing" a dead person; (2) that a plain-meaning application of Article 11 to allow a proceeding to go forward when there is a deceased owner would be inappropriate; and 3) the statute may not be read consistently with its plain meaning, but rather a requirement of CPLR 1015, namely substituting a personal representative, must be read into RPTL §1125, even if, as here, the death of an interested person occurs many months after the date of the filing of the List of Delinquent Taxes. These interpretations by the trial court are against well-settled rules of statutory construction and were made in error.

### B. The Trial Court Disregarded the Nature of Article 11 as an In Rem Proceeding and Notification Procedures Developed By the Legislature and Case Law.

The history of notice in *in rem* proceedings does not suggest that such proceedings must be halted if one of the persons affected has died. See In re the Mary, 13 U.S. 126, 144 (1815) ("[w]here these proceedings are against the person, notice is served personally, or by publication; where they are in rem notice is served upon the thing itself. This is necessarily notice to all those who have any interest in

the thing, and it is reasonable because it is necessary, and because it is the part of common prudence for all those who have any interest in it, to guard that interest by persons who are in a situation to protect it." Id. at 144. The United States Supreme Court has previously upheld a tax foreclosure framework which provided for notice by publication only upon nonresident owners of land. Ballard v. Hunter, 204 U.S. 241, 254-55 (1907).

Of course, the notification methods required in *in rem* proceedings have been modified and statutory notification procedures in tax foreclosure stem from the United States Supreme Court decision in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). Mullane involved a common trust fund, which the Court defined as "pooling small trust estates into one fund for investment administration." Mullane, 339 U.S. at 308. The trust company was obligated to issue accountings which had to be approved by a judge and this determination would be binding as to any matter set forth in the account upon everyone having any interest in the pooled trust fund. Id. at 309. The Court found that this result could deprive beneficiaries of property rights. Id. at 313.

Pursuant to statute, the trust company gave notice of this application to multiple trust beneficiaries by publication in a newspaper. Id. The Court found this notice to be inadequate as to persons with known residences and held that due

process required the trust company to mail notice to the record addresses of such persons. Id. at 318. However, the Court emphasized that there were limits to the trust company's obligation to give notice, especially to unknown persons. Id. at 317 ("This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning . . . Those beneficiaries represented by appellant whose interests or whereabouts could not with due diligence be ascertained come clearly within this category. As to them statutory notice [by publication] is sufficient.") The Court further added "[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.

In more recent cases involving tax foreclosure proceedings, notice by publication only has been rejected. See Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983). See also McCann v. Scaduto, 71 N.Y.2d 164 (1987). The mailing of one certified mail notice that is returned is also insufficient. Jones, 547 U.S. at 220. However, in each case, the Court made clear that a rule of reason limited the obligations of the foreclosing municipality. The Jones Court rejected the idea that the foreclosing municipality 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 the Court found to be excessive. Jones, 547 U.S. at 236. The Mennonite Court stated 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.

Nothing in the above line of cases suggests that a foreclosing municipality must search out unknown heirs or ascertain whether an interested party has died. Here, the trial court in effect assumed that the Legislature must have meant to force foreclosing municipalities to search beyond the public record to determine if an interested party has died after the List of Delinquent Taxes has been filed.

Indeed, this court has recognized that real property tax foreclosure proceedings are based upon *in rem* jurisdiction insofar as 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).

Given the history of in rem proceedings, and given that the Legislature allows interested parties to protect themselves by filing notices with the enforcing officer or by filing Surrogate's Court proceedings, the proper interpretation of Article 11 is that it means what it says, and that notice to persons reasonably ascertainable from the public record is sufficient notice. Accordingly, RPTL Article 11 should be interpreted as written, without resort to the CPLR. Therefore, the decision and order of the trial court must be reversed.

## III. THE TRIAL COURT'S RELIANCE UPON THE GOLDMAN CASE WAS MISPLACED.

The trial court relied 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) in support of 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.

It is well settled that judicial decisions from other Appellate Divisions are not binding on this Court. Mountain View Coach Lines v. Storms, 102 A.D.2d 663, 664 (2d Dep't 1984). While decisions of other Appellate Divisions may be accepted as persuasive authority, this court is free to reach a contrary result. Id.

See also Vanderhoef v. Silver, 112 A.D.3d 1174, 1175 (3d Dep't 2013); Shoback v. Broome Obstetrics & Gynecology, P.C., 2020 NY Slip.Op. 03447 (3d Dep't 2020) ("we are free to reach a contrary result if we disagree with such court's legal analysis.")

### A. The Goldman Decision Is Contrary to Well Settled Precedent from the Third Department and the Second Circuit.

As discussed above, well-settled principles of notice requirements in tax foreclosure proceedings from the Supreme Court and the Court of Appeals run contrary to the requirements forced by the Goldman court.

In addition, the arguments raised in Goldman have been previously considered and rejected by the Third Department and by the Second Circuit. See Matter of Foreclosure of Tax Liens by County of Broome, 50 A.D.3d at 1300; Barnes v. McFadden, 25 A.D.3d 955 (3d Dep't 2006). See also Bender v. City of Rochester, 765 F.2d 7 (2d Cir. 1985).

In County of Broome, as discussed above, notices of pending foreclosure proceedings mailed to the corporate taxpayer were returned to the County as undeliverable. County of Broome, 50 A.D.3d at 1301. Unbeknownst to the county, the sole member of the corporate taxpayer had died in 2002. Id. The Third Department rejected the corporate taxpayer's arguments that the County's

notice attempts were inadequate to meet the requirements of due process, and further rejected the taxpayer's arguments that the County should have taken further steps, such as searching the record of the Department of State. Id. at 1302 ("due process does not require the municipality to go to such lengths to find information that the taxpayer is obligated to keep updated with the taxing authority.")

In Barnes, tax foreclosure notices were sent to the property owner at his daughter's address, which was where the property owner was living because he was allegedly suffering from dementia at the time. Barnes, 25 A.D.3d at 956. 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 claims 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 reasoning that: (1) the County did not know when the notices were sent that the property owner was incompetent; and (2) the petitioner was not an "interested person" as defined by RPTL 1125 insofar as her interest in the property was not a matter of public record as of the date 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, despite the fact that he passed away after the mailing of the required statutory foreclosure notices. Id.

In Bender, the taxpayer died in December 1979 and tax foreclosure proceedings were instituted in November 1982. Bender, 765 F.2d at 9. The taxpayer's estate argued that the City should have ascertained the taxpayer's distributees to put them on notice of the pending foreclosure proceedings, however, these arguments were rejected by the Second Circuit. Id. at 11. Specifically, the Second Circuit held that to require the taxing authority to search the records of the Surrogate's Court to ascertain the names of distributees would be onerous, and that it is also reasonable for the taxing authority to "expect that those appointed to administer estates that include real property would place something on the land record to put the world on notice of the owner's death and would also obtain mail addressed to their decedent." Id. at 17. See also 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.")

As of the filing of the List of Delinquent Taxes in November 2005, all legal interests had been ascertained pertaining to the Property, and the parties entitled to

notice under RPTL Article 11 had been ascertained. In October 2006, notices of the pending foreclosure proceedings were sent and received at the Property. Simply stated, the County fulfilled all due process requirements imposed by RPTL Article 11 and was under no duty to take any further steps to send any further notices, above and beyond the six (6) notices already received at the Property. There was absolutely nothing to indicate to the County that the foreclosure notices were not received at the delinquent tax parcel, thereby triggering a further duty to ascertain an alternate mailing address under RPTL §1125. Indeed, Hetelekides and her adult son worked at the Property on a daily basis during the relevant time frame. See Bender, 765 F.2d at 11 (it is reasonable for the taxing authority to expect that those appointed to administer estates would obtain mail addressed to their decedent).

The County followed the notice requirements of RPTL §§1124 and 1125 to the letter, and the Court of Appeals has repeatedly reviewed the notice provisions of RPTL §§1124 and 1125, and has held that the statutory notices required by RPTL §§1124 and 1125 fulfill the requirements of notice reasonably calculated, under all the circumstances, to apprise interested parties of the pending foreclosure action, and provide an opportunity to appear and be heard. See e.g. Kennedy, 100 N.Y.2d at 1; Harner, 5 N.Y.3d at 136; MacNaughton, 20 N.Y.3d at 252. The Goldman case went

against well-settled precedent from the Court of Appeals, the Third Department and the Second Circuit and should not be followed in this regard.

### B. The Goldman Court Relied Upon Case Law Inapposite to RPTL Article 11.

As was recognized by Justice Scheinkman in his dissenting opinion in Goldman, the majority 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. Initally, the Goldman court relied upon Matter of Foreclosure of Tax Liens by County of Orange (Al Turi Landfill, Inc.), 75 A.D.3d 224 (2d Dep't 2010) in support of its position that a tax foreclosure proceeding is commenced against record owners of a subject parcel. Id. at 1117. However, as Justice Scheinkman recognized, the Al Turi Landfill case involved a different method of enforcing tax liens, namely by seeking to impose personal liability upon property owners and then levy against their personal property, which would require *in personam* jurisdiction. Id. at 1125-1126.

The Goldman panel relied upon four other cases in an attempt to show that *in rem* proceedings were consistent with the interpretation that the panel placed on the statute. None of these cases is applicable. The only appellate case on which the panel relied was NYCTL 2004-A Trust v. Archer, 131 A.D.3d 1213 (2d Dep't 2015),

which did not even construe Article 11. Rather, the case involved the distribution of surplus moneys after a tax foreclosure sale in an action that had been commenced by a summons and complaint with specific named defendants. Id. The appeal was from an Order which granted a motion to vacate a Referee's Report to distribute surplus moneys, and denied a cross-motion to confirm the report. 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 substituted for the deceased defendant pursuant to CPLR §1015. The court held that the failure to effect a proper substitution for the deceased defendant in the action divested the Court of jurisdiction to determine the motions relating to the referee's report. Id.

None of this has any relevance to the issues of whether the constitution or statutory text requires a municipality foreclosing under RPTL Article 11 to ascertain whether an interested party has died after the filing of the List of Delinquent Taxes. As Justice Scheinkman correctly stated, "that case was a tax foreclosure case. But the issue 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." Goldman, 165 A.D.3d at 1126. Therefore, Archer is distinguishable, and does not support the Second Department's position.

For similar reasons, NYCTL 2009-A Trust v. 706 Fourth Avenue, LLC, 39 Misc.3d 1202, 971 N.Y.S.2d 73, (Sup. Ct., Kings Co., March 25, 2013) is also distinguishable. This case also does not deal with an *in rem* proceeding under Article 11, but rather a foreclosure of a tax lien under 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 the tax lien and that persons whom the plaintiff believes or has reason to believe has an interest in the property shall be named as a party defendant to such plenary action.

The two other cases cited by the panel for the proposition that courts apply the principles of stay by death in *in rem* cases are also inapposite. See East Harlem Pilot Block Building 1 Housing Development Fund Corp., Inc. v. Serrano, 153 Misc.2d 776 (Civ. Ct., New York County 1992), and 100 West 72nd Street Assocs. v. Murphy, 144 Misc.2d 1036 (Civ. Ct., New York County 1989). Both cases deal with landlord-tenant matters involving individual properties, not tax foreclosure, and certainly not an *in rem* proceeding under Article 11.

The cases relied upon by the Goldman court are not applicable to this matter. Here, the statutory framework outlined by Article 11 was followed by the County to

the letter. All interested parties as of the date of filing the List of Delinquent Taxes were ascertained and statutory notices were issued by certified mail and first-class mail. There was no indication that the statutory notices had not been received at the Property. On the contrary, the certified mailings were signed for and 3 certified mail receipts bearing the same signature confirmed delivery at the Property.

## IV. EFFORTS TO ASCERTAIN INTERESTED PARTIES AFTER AN INTERESTED PARTY DIES AFTER THE FILING OF THE LIST OF DELINQUENT TAXES CONSTITUTES EXTRAORDINARY AND BURDENSOME EFFORTS.

The directive of the trial court, which appears nowhere in Real Property Tax Law Article 11, now creates considerable burdens for foreclosing municipalities. In order to commence an estate proceeding under Surrogate's Court Procedure Act §1002, the County must see to it that process issues 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 §4-1.1 the lists distributees of an intestate's estate, including in declining order a spouse, descendants, parents, siblings, grandparents, etc. In this instance, it is now known that James Hetelekides was

survived by a wife and 3 children. Therefore, according to EPTL §4-1.1(a)(1), had he been intestate, his estate would be shared by his spouse and his 3 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.")

Surrogate's Court Procedure Act §1001 sets forth the order of priority for granting letters of administration to distributees, starting with a spouse, and going to children, grandchildren, and so forth. 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).

According to SCPA §1201, the office of Public Administrator has been established for the counties of Erie, Monroe, Nassau, Onondaga, Suffolk and Westchester. For all other counties, including Ontario County, SCPA §1219 establishes that the chief fiscal officer of the county shall fulfill the role of Public Administrator. By statutory decree, the County Treasurer is the chief fiscal officer of the County. County Law §550(1). In addition, the County Treasurer serves as the enforcing officer in tax enforcement proceedings. Real Property Tax Law §1102(3).

In situations where the County Treasurer winds up as the administrator of an estate of an interested person as defined by RPTL §1125, 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 was appointed as administrator of estate in which a delinquent tax parcel was an estate asset, however, Surrogate prohibited the 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).

A public administrator as administrator of an estate is expected to perform "a diligent search" and to "safeguard the interests of [the] family by having access to all of the decedent's papers and being able to expeditiously and diligently explore any leads that might result in ascertaining the entire family tree on both sides of the family." In re Estate of Giganti, 158 Misc.2d 1050 (Surr. Ct., Bronx Co. 1994).

In this instance, upon learning that James Hetelekides had died in late December 2006/early January 2007, the County would have had to have researched if James Hetelekides had ever executed a Will and also would have had to have researched his family tree. This would necessarily require, at the very least, an investigator who would presumably need to perform an internet search, and perhaps even interview neighbors. Given the privileged nature of attorney-client matters, 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.

This requirement is far beyond anything that the Court of Appeals has required in tax foreclosure proceedings. Where searches of the internet, telephone records and income tax records has been held to be extraordinary efforts not required by RPTL §1125, the trial court is now requiring a full blown proceeding in Surrogate's Court, complete with investigations into possibly difficult facts to ascertain regarding a person's family tree and whether they had ever executed a Will. The nominated executor and all beneficiaries named in the Will as well as all distributees of the deceased person would need to be located in order to be cited in a pending Surrogate's Court proceeding. The end result of such a Surrogate's Court proceeding would be the appointment of a county treasurer who would be conflicted out of pursuing *in rem* tax foreclosure against estate property. Such requirements would not only be expensive and burdensome, but would also wind up as 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 Court of Appeals and United States Supreme Court precedent.

## V. THE TRIAL COURT'S DECISION IS BASED UPON FACTUAL AND LEGAL ERRORS.

According to CPLR §4213(b), the trial courts decision shall state the facts it deems essential. In this matter, the trial court made several findings which were erroneous.

Initially, the trial court decision references an inquiry made at the County Treasurer's office by Hetelekides while she was paying her "house taxes" after James Hetelekides passed away, and allegedly being told that the taxes for the Property had been paid. At trial, Hetelekides testified that she went to pay the taxes that came due after her husband died on August 1, 2006 and that to her recollection, this happened in December 2006. (R. 124, 136) She further testified that the amount of taxes she was "around $3,000." (R. 124) Hetelekides had no receipt, canceled check or other evidence showing when she would have paid these "house taxes," thereby giving a time frame during which she made this inquiry. (R. 127)

Technically, the next property tax bill that would have come due after August 1, 2006 would have been the school tax bill that had been issued in October 2006. (R. 436) If this school tax bill had remained unpaid, it would not have been turned over to the County for collection until the following January 1st. (R. 436) The next town and county tax bill would have become due on January 1, 2007. (R. 132)

Towns are barred by statute from accepting town and county tax payments before the warrant date, and the county is unable to collect any tax until a delinquent tax bill is turned over for enforcement sometime in April. (R. 131-132)

Nonetheless, the County produced tax receipts for tax payments made for Hetelekides' residence in the Town of Canandaigua in 2006 and 2007. (R. 747-749). These tax receipts show that the town and county tax bill that came due on January 1, 2006 was paid on January 24, 2006 (R. 747). The school tax bill that came due on September 1, 2006 were paid on October 31, 2006. (R. 748). The town and county tax bill that came due on January 1, 2007 was paid on January 23, 2007, which was after the redemption deadline of January 12, 2007. (R. 749). The town and county tax bills paid were a little over $900, and the school tax bill that was paid was a little over $600, not the $3,000 as Hetelekides recalled. These tax receipts do not support a finding of an alleged inquiry made in December 2006.

Even if Hetelekides' allegations were accepted as true, they amount to a defense of "equitable estoppel" and do not provide grounds for relief. It is well settled 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) *citing* Pless v. Town of Royalton, 81 N.Y.2d 1047, 1049 (1993)). See also Wilson v. Neighborhood

Restore Housing, 129 A.D.3d 948, 949 (2d Dep't 2015); Notaro v. Power Auth. Of the State of New York, 41 A.D.3d 1318 (4th Dep't 2007); Matter of Grella v. Hevesi, 38 A.D.3d 113 (3d Dep't 2007); Matter of Atlantic States Legal Found. V. New York State Dep't of Envtl. Cons., 119 A.D.3d 1172 (3d Dep't 2014). Although an exception to the general rule exists where there has been a showing of fraud, misrepresentation 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; Notaro, 41 A.D.3d at 1319; Wilson, 129 A.D.3d at 949; Grella, 38 A.D.3d at 117.

This rule has been applied in the in rem tax foreclosure context in two Appellate Division cases. In Village of Flesichmanns, a mortgagee bank filed a motion to vacate a default in rem tax foreclosure judgment, claiming that its mortgage processor contacted the municipality prior to the expiration of the redemption deadline, and was incorrectly advised that the taxes had already been paid. Village of Fleischmanns, 77 A.D.3d at 1148. The Third Department equated this claim to the defense of equitable estoppel and rejected the assertion that reliance on allegedly erroneous advice did not present a meritorious defense to the foreclosure proceedings. Id.

In Wilson, a foreclosed property owner moved to set aside the foreclosure judgment past the applicable statute of limitations, and argued that the City of New York should be estopped from asserting a statute of limitations defense based upon an erroneous representation made by a city employee. Wilson, 129 A.D.3d at 949. The Second Department rejected this argument, following the long-standing principal that equitable estoppel is not available against a municipality performing a governmental function, and that erroneous advice by a municipal employee will not give rise to an exception from this general rule. Id.

Furthermore, Hetelekides engaged counsel in January 2007 to represent her in this matter. Hetelekides' counsel made a lengthy presentation in February 2007 before the Ontario County Board of Supervisors requesting that they accept a late redemption of the Property. Nowhere in this presentation is any mention of incorrect information being given by a County employee. (R. 714-717) Hetelekides' Notice of Claim, served in September 2007, also makes no mention of erroneous information being given by a County employee. (R. 37-40) Furthermore, Stephanie Seeley, a County employee during the relevant time, testified as to the only interaction she had with Hetelekides was on January 16, 2007, after the redemption deadline expired. (R. 411-412, 417-418) The County Treasurer's office had no record of any prior interaction with Hetelekides. (R. 700)

The trial court further made an erroneous finding that Hetelekides had engaged with Karen Carson, an employee at the Town of Hopewell, stating that Carson assisted Hetelekides in ascertaining the status of the taxes for the Property on one occasion, and then assisting Hetelekides in calling the County Treasurer's Office on another, and that these interactions took place before January 9, 2007. (R. 14-15) Carson recalled only one interaction with Hetelekides during the relevant time frame and specifically stated that she did not look up the status of the taxes. (R. 305-306, 309) The evidence at trial did establish that Hetelekides did leave a voice mail message at the County Treasurer's office on January 15, 2007, after the expiration of the redemption deadline and when the County Treasurer's office was closed for the Martin Luther King, Jr. holiday. The evidence at trial further established that the Town of Hopewell offices were open on Martin Luther King, Jr. Day in 2007, and that Carson had worked that day. It could very well have been the case that Carson's one interaction with Hetelekides was on Martin Luther King Day, the day Hetelkides left a voice mail message at the County Treasurer's office.

The trial court further erred relying upon Wendover Financial Svcs. v. Ridgeway, 93 A.D.3d 1156 (4th Dep't 2012), in support of its position that the personal representative of an estate must be sued. However, the Wendover case involved an action to foreclose a mortgage, in which necessary party defendants are

delineated in RPAPL §1311. Being a plenary action, a mortgage foreclosure action has limited applicability to an *in rem* tax foreclosure proceeding.

Here, the parties entitled to notice, and the time at which those parties must be ascertained, are clearly outlined by RPTL §1125(a). An *in rem* tax foreclosure proceeding is not brought as a plenary action with named party defendants, but rather is a special proceeding in which those parties entitled to notice are delineated by RPTL §1125.

Finally, the trial court erred in denoting the "commencement" date as when the County filed its application for default judgment. (R. 19) This was error. According to RPTL §1123, an *in rem* tax foreclosure proceeding is commenced by the filing of the petition for foreclosure in the county clerk's office. This was done on October 2, 2006. In addition, the filing of the List of Delinquent Taxes has the same effect as the filing of a notice of pendency pursuant to CPLR Article 65. Specifically, CPLR §6501 provides that "[a] person whose conveyance or incumbrance is recorded after the filing of the notice is bound by all proceedings taken in the action after such filing to the same extent as a party." Accordingly, it was error for the trial court to focus upon the date of the filing of the application for default judgment in February 2007.

## VI. THE TRIAL COURT'S DECISION WILL LEAD TO PERMANENT CLOUDS ON TAX TITLES IN FUTURE FORECLOSURE PROCEEDINGS.

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 trial court's decision is inconsistent with Court of Appeals precedent as stated in Melahn. When a municipality forecloses on a property owner, the municipality will not always be certain that the person has not died before or during the course of the proceeding. The end result will be that municipalities and purchasers will be repeatedly damaged due to trying to ascertain facts that would be nearly impossible to ascertain from the public record at any given time during the proceedings. Given the trial court's determination, interested parties arising from deceased owners could turn up at any time, untroubled by the one-month statute of limitations in RPTL §1131 or the two-year statute of limitations in RPTL §1137,

even if the municipality gave notice to all persons in the public record, including the Surrogate's Court. These unknown parties could appear years after a sale made in good faith and overturn the settled expectations of a property owner. In the alternative, a title insurer or prospective purchaser could discover some long-ago death and render a parcel unmarketable. A municipality cannot possibly determine whether thousands of owners or lienors are all alive during the two-year course of a proceeding set forth by the Legislature. The trial court's decision in this case will exacerbate the difficulty for purchasers to obtain title insurance, and will make it more difficult for municipalities to return delinquent parcels to the tax rolls. Accordingly, the trial court's decision must be reversed.

## VII. THE TRIAL COURT ERRED IN DENYING THE COUNTY'S MOTION FOR SUMMARY JUDGMENT.

In 2018, the County filed a motion for summary judgment seeking dismissal of the complaint. The motion was decided in July 2018, prior to the Second Department's decision in Goldman.

### A. Hetelekides' Request to Vacate the Default Judgment of Foreclosure Was Untimely.

It is well settled that applications to vacate default judgments in real property tax foreclosure proceedings are governed by RPTL §1131, which requires that such applications be made within thirty (30) days of entry of the default judgment. See

Matter of Foreclosure of Tax Liens by County of Ontario (Duvall), 169 A.D.3d 1508 (4th Dep't 2019); Matter of Foreclosure of Tax Liens by County of Oswego, 175 A.D.3d 1843 (4th Dep't 2019); Schenk, 169 A.D.3d at 1502.

Here, the default judgment of foreclosure was entered in the Ontario County Clerk's Office on February 8, 2007, requiring any application to vacate the default judgment to be filed on or before March 10, 2007. Hetelekides retained counsel in January 2007, after she was advised that she could no longer redeem the Property. Hetelekides executed a probate petition on February 23, 2007 and appeared before the Financial Management Committee for the County's Board of Supervisors on February 28, 2007, both with the assistance of counsel.

Despite having retained counsel for nearly two months prior to the March 10, 2007 deadline, Hetelekides never filed an application to vacate the default judgment pursuant to RPTL §1131, under which the focus would have been whether she had a meritorious defense to the proceedings, a reasonable excuse for her default or if vacatur was warranted in the interests of justice. See County of Ontario v. Lundquist 1996 Living Trust, 155 A.D.3d 1567 (4th Dep't 2017). However, such an application would have needed to have been filed before the March 10, 2007 statute of limitations, which Hetelekides failed to do.

It is well settled that statutes of limitations represent the balance struck by the Legislature between the competing concerns of plaintiffs in being afforded reasonable time to bring their claims and of defendants in not having to resist stale claims. Matter of Depczynski v. Adsco/Farrar and Trefts, 84 N.Y. 2d 593,596-597 (1994). See also, Cerio v. Charles Plumbing and Heating, Inc., 87 A.D. 2d 972 (4th Dep't 1982). With respect to in rem tax foreclosure proceedings, property owners have an interest in protecting property rights, while taxing authorities have an interest in the timely collection and enforcement of unpaid real property taxes. Matter of Bouchard, 29 A.D.3d 79, 84 (3d Dep't 2006). In providing a thirty day period within which an interested party may file an application to vacate a default judgment pursuant to RPTL §1131, the legislature struck this balance between property owners and taxing authorities, and provided a statutory mechanism for taxpayers who may have had a reasonable excuse for their default and a meritorious defense to an underlying tax foreclosure proceeding, while permitting a taxing authority to move forward with the process without being forced to reopen such claims after a delinquent tax parcel has been foreclosed and subsequently sold at auction.

Hetelekides knew or should have known that in order to seek vacatur of the default judgment, she was required to file such an application on or before March

10, 2007. Because no such application was ever filed, all claims requesting vacatur of the underlying default judgment should have been dismissed on summary judgment, or alternatively, after trial.

### B. Hetelekides Did Not Demonstrate a Jurisdictional Defect to Set Aside the Tax Deed Pursuant to RPTL §1137.

Given that the statute of limitations for vacatur of the default expired, and since the deed after the auction sale was issued and recorded, the crux of Hetelekides' claims are whether grounds exist to warrant setting aside the deed pursuant to RPTL §1137. Such applications require the taxpayer or other interested party to demonstrate a jurisdictional defect in the underlying in rem tax foreclosure proceedings. See Land v. County of Ulster, 84 N.Y.2d 613, 616 (1994); Matter of Byrnes v. County of Saratoga, 251 A.D.2d 795, 797 (3d Dep't 1998). As discussed above, Hetelekides failed to demonstrate a jurisdictional defect in the underlying proceedings to warrant setting aside the deed pursuant to RPTL §1137.

### C. Hetelekides Did Not Demonstrate a Cause of Action Under Section 1983.

To hold a municipality liable under 42 U.S.C. §1983, the plaintiff must 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).

The record before the court on summary judgment demonstrated, contrary to Hetelekides' claims, that no such "policy" exists where the County conducts auction sales under circumstances where property owners have demonstrated a failure on the part of the County to comply with notice requirements. Initially, Hetelekides pointed to no other case or example where the County has conducted an auction sale where it has been "demonstrated" that it failed to comply with the notice provisions of RPTL §1125. Absent such proof, Hetelekides could not demonstrate that any alleged policy is "widespread."

Secondly, Hetelekides completely disregarded 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. Hetelekides' first attorney sent a letter to the County Board of Supervisors which did not allege any wrongdoing on

the part of the County, but rather suggested that the failure to timely redeem the Property was due to Hetelekides' misplaced reliance upon her family members working alongside her in the restaurant business, and further recognized the additional efforts engaged in by the County Treasurer to speak with someone at the restaurant business prior to the redemption deadline.

Hetelekides' Section 1983 claims should have also been dismissed on summary judgment since she had a state law remedy available to her under RPTL 1131 and could have filed an application to vacate the default judgment of foreclosure within 30 days of the entry of the default judgment. Though represented by counsel during this time frame, she failed to avail herself to this state law remedy within a timely manner.

Hetelekides' claims against Baxter should have also been dismissed. In order to be actionable under Section 1983, conduct by an individual government actor must be "arbitrary or irrational in the constitutional sense." Bowen v. Nassau County, 135 A.D.3d 800, 801 (2d Dep't 2016) ("Substantive due process . . .does not forbid governmental actions that might fairly be deemed arbitrary and capricious and for that reason correctable in a state court lawsuit seeking review of administrative action. 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"); Loudon House LLC v. Town of Colonie, 123 A.D.3d 1406, 1409 (3d Dep't 2014) ("nothing in the record suggests that the actions of the Town Board rose to the level of a constitutional violation, i.e., that they were so outrageously arbitrary as to constitute a gross abuse of governmental authority.")

Hetelekides alleged that Baxter "developed a policy of identifying property owners that likely did not receive notification of an imminent foreclosure and auction sale," and then "arbitrarily chose how and when to contact these property owners." This argument ignores RPTL 1125, which vests the Treasurer with discretion to issue additional formal or informal notices of a pending foreclosure proceeding, and further states that "the failure of the enforcing officer to mail any such discretionary notice, or the failure of an intended recipient to receive such a notice, shall not invalidate any tax or prevent the enforcement of the same as provided by law."

Hetelekides' interpretation of the record on summary judgment failed to establish any conduct by Baxter that is "so egregiously arbitrary as to constitute a gross abuse of governmental authority." Bowen, 135 A.D.3d at 801. Rather, the

record demonstrated that Baxter engaged in additional efforts to impress upon interested parties in unredeemed delinquent tax parcels the pendency of the approaching redemption deadline, and the consequences of failing to timely redeem the parcel. Baxter engaged in these additional efforts, despite the fact that the certified mailings of the statutory notices were actually delivered to the Property. The County and Baxter received no indication that the address used for the statutory foreclosure notices was invalid.

Furthermore, the evidence on summary judgment undercuts Hetelekides' claims of any intention that the County's or Baxter's actions were motivated by a "mean-spirited intention to discriminate against owners of property that had previously been the subject of a foreclosure proceeding and/or property of a certain assessed value." Indeed, the auction booklet shows that of the 28 properties auctioned in 2007, 21 of the auction parcels had assessed values of $30,000 or less, and 14 parcels had an assessed value of $15,000 or less. In other words, 75% of the auction parcels had assessed values of $30,000 or less, and 50% had assessed values of $15,000 or less. Two of these parcels were landlocked, and many were in desperate states of disrepair.

The record on summary judgment was devoid of any evidence that the County or Baxter had enacted a "widespread" policy, or egregious conduct upon which

liability under Section 1983 could be predicated. Accordingly, Hetelekides' Section 1983 claims, and related requests for attorneys' fees under 42 U.S.C. §1988, should have been dismissed on summary judgment.

## CONCLUSION

For the foregoing reasons, the County and Baxter respectfully request that the trial court's Decision and Order be reversed and that this court enter judgment dismissing the complaint in its entirety.

Dated: Rochester, New York
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Jason S. DiPonzio, Esq.
*Attorney for Defendants-Appellants*
Office and Post Office Address
950 Reynolds Arcade Building
16 East Main Street
Rochester, New York 14614
Telephone: (585) 530-8515

## PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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