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.

REPLY 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

Ontario County Clerk's Index No. 100932

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

Other Authorities:

ARGUMENT IN REPLY

I. DESPITE WELL SETTLED PRECEDENT THAT THE STATUTORY REQUIREMENTS OF RPTL ARTICLE 11 BE STRICTLY ADHERED TO, THE TRIAL COURT HAS NOW IMPOSED NOTICE REQUIREMENTS OUTSIDE OF THE FOUR CORNERS OF THE STATUTE.

The Fourth Department has consistently held that because the result of an *in rem* tax foreclosure proceeding is divestiture of title to property, "all formal requirements governing tax sale proceedings must be scrupulously satisfied." See e.g. Matter of County of Seneca (Maxim Devel. Group), 151 A.D.3d 1611, 1612 (4th Dep't 2017); Matter of City of Utica (Suprunchik), 169 A.D.3d 179, 182 (4th Dep't 2019). However, the decision below now requires a taxing authority to look outside the formal requirements of the statute and ascertain the next of kin of a deceased taxpayer, or to petition the Surrogate's Court for the appointment of a personal representative where it is revealed that an interested party is deceased at the eleventh hour of the proceedings. This requirement is nowhere to be found in RPTL Article 11 and defies the nature of legal proceedings based upon *in rem* jurisdiction.

The plain language of RPTL §1120 states that proceedings to foreclose tax liens are *in rem*, as opposed to *in personam*. In contrast, RPTL §990 (which was not to remedy elected here), authorizes taxing authorities to elect to proceed *in personam* against delinquent taxpayers for the imposition of a money judgment for

unpaid taxes. Based upon the trial court's error in conflating the requirements of *in rem* jurisdiction with *in personam* jurisdiction, and Respondent-Appellant's amplification of this error in her brief, 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).

One of the key procedural differences between proceedings brought *in rem* (against a thing) as opposed to proceedings brought *in personam* (against a person) is that 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 action brough *in rem* personal

service of process upon infant parties having interest in subject real property held not essential to attaching of jurisdiction).

The County's appellate brief delineates the history of the notice requirements outlined in RPTL §1125, as shaped by United States Supreme Court precedents of Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983) and Jones v. Flowers, 547 U.S. 220 (2006), as well as the New York Court of Appeals precedents of Matter of Orange County Comm'r. of Fin. (Helseth), 18 N.Y.3d 634, 639 (2012); MacNaughton v. Warren County, 20 N.Y.3d 252 (2012); Kennedy v. Mossafa, 100 N.Y.2d 1, 9 (2003); and Matter of Harner v. County of Tioga, 5 N.Y.3d 136, 140 (2005). Based upon these long lines of cases, the New York State Legislature has developed the statutory framework for a taxing authority to provide 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.

Because the Property is located within the state, *in rem* jurisdiction over it has attached. Thus, the court must analyze whether the notification procedures outlined by RPTL Article 11 constitute notice reasonably calculated under all the circumstances to apprise interested parties of the pending in rem tax foreclosure action. Based upon Supreme Court and Court of Appeals precedent, the New York

State Legislature has exhaustively delineated the steps that a taxing authority must take to send statutory notices to interested parties to a tax foreclosure proceeding. There are several pivotal points in the statutory process. As discussed previously, interested parties entitled to notification of pending foreclosure proceedings must be ascertained from the public record as of the date of the filing of the list of delinquent taxes. RPTL §1122.

RPTL §1125 delineates the additional steps the taxing authority must take if the statutory notices sent by certified mail and first-class mail are returned indicating that the notices were not received at the addresses to which they were sent. Specifically, the statutory notices "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." RPTL §1125(1)(b)(i). The statute further states that in the event both the certified mailing and the first-class mailings are returned, then the taxing authority "shall attempt to obtain an alternative mailing address from the United States postal service." Id. See Wilczak v. City of Niagara Falls, 174 A.D.3d 1446 (4th Dep't 2019).

In the event the taxing authority is able to ascertain an alternate address, then the statutory notices shall be mailed to the alternate address by both certified mail and first-class mail. RPTL §1125(1)(b)(ii). In the event no alternate address is

found, then "enforcing officer shall cause a copy of such notice to be posted as provided herein on the property to which the delinquent tax lien relates." RPTL §1125(1)(b)(iii).

Of course, none of the additional notification steps became relevant in the proceedings brought against the Property, since certified mail receipts established that three copies of the statutory notices were received at the Property on October 3, 2006 (R.693-695), and none of the first-class mailings had been returned to the County.[1] Accordingly, there was no indication that would have required any additional steps to ascertain an alternate mailing address or to post a notice at the Property as required by RPTL §1125. Based upon the plain language of RPTL §1125, the County was under no statutory obligation to investigate the need for further notices to be sent to the Property, since the certified mail receipts were returned indicating delivery to the Property.

The record below demonstrates that the County may have found out in late December 2006 or early January 2007 that James Hetelekides had died. (R. 471-

[1] 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 2009). Under the pre-Flowers version of RPTL §1125, when a foreclosure proceeding was initiated, enforcement officers were required to send notice to the owner only by certified mail, and to other parties only by either certified or regular mail (former RPTL §1125(1)). The post-Flowers version of RPTL §1125 become effective for proceedings commenced after 120 had elapsed since it was signed into law on July 26, 2006. Because the proceedings applicable to the Property had been commenced by the filing of the list of delinquent taxes in November 2005, the pre-Flowers version of RPTL §1125, requiring only a certified mailing, applied to these proceedings. It was the County's practice to send the required notices by both certified mail return receipt requested and by first class mail beginning in 2005.

472) The trial court erroneously held that the County was obligated to petition the Surrogate's Court for the appointment of a personal representative and then move the Supreme Court for a substitution of parties at that stage of the process. Rather, the trial court should have focused on whether the County's actions were reasonable under the circumstances.

Respondent-Appellant improperly conflates the additional attempts by the County Treasurer to contact an owner or manager of the restaurant business at the Property with the required notification procedures outlined under RPTL §1125. Under RPTL §1125, based upon the return of signed certified mail receipts, indicating delivery of the statutory notices to the Property, as well as no indication that the first-class mailings had been returned as undeliverable, the County was not obligated to engage in any further notification attempts. County staff was not obligated to meet in late December 2006 / early January 2007 to review properties that were still unredeemed. The County Treasurer was not obligated to call the restaurant at the Property on January 9, 2007. The County Treasurer was not obligated to call the restaurant at the Property again on January 10, 2007. The County Treasurer was not obligated to visit the restaurant at the Property on January 11, 2007.

Contrary to Respondent-Appellant's assertions, the fact that a restaurant employee had signed the certified mail receipts and the name did not match that of

the owner is of no avail. Indeed, there is no requirement that the addressee signs the certified mail receipt. Barnes v. McFadden, 25 A.D.3d 955 (3d Dep't 2006) (certified mail receipt signed by property owner's 16 year-old granddaughter). Furthermore, certified mail that is returned as "unclaimed" satisfies the notice requirements of RPTL §1125. Harner, 5 N.Y.3d at 140; Matter of Foreclosure of Tax Liens by County of Ontario (Helser), 72 A.D.3d 1636 (4th Dep't 2010). It is certainly reasonable for the County to assume that, by the certified mail receipt indicating delivery of the notice to an individual at the location of an operating business, the notice would be given to the owner or manager of the business. Even after learning of James Hetelekides' death, nearly 3 months after the statutory notices were mailed to and received at the Property, it was reasonable for the County to expect that individuals responsible for administering estates would collect mail addressed to their decedent. Bender v. City of Rochester, 765 F.2d 7, 11 (2d Cir. 1985)

Respondent-Appellant urges the court to ignore certain facts regarding the circumstances surrounding notification of the pending *in rem* foreclosure proceedings at the Property. The record clearly established that during October 2007, Hetelekides worked at the Property on a daily basis, often for the majority of 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 works at the restaurant and has not been terminated. (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 Hetelekides, as she was always there. (R. 172-173) Barb Schenk testified that if Hetelekides was not there, then mail would be left on a ledge between the kitchen and the dining area of the restaurant for Hetelekides to retrieve. (R. 398) After Demetrios Hetelekides passed away, Respondent-Appellant was in charge of the operations at the restaurant. (R. 397, 401) Although Hetelekides has denied having seen the statutory notices prior to this lawsuit, mere denial of receipt is insufficient to rebut the presumption that these notices were delivered. Wilczak, 174 A.D.3d at 1448.

The trial court also erred in invalidating the statutory notices, on the ground they were addressed to the record owner who had recently died. Where a statutory foreclosure notice correctly describes a property by location, dimensions and tax map number, an error in identification of the property owner does not invalidate the entire notice. Key Bank of Central New York v. County of Broome, 116 A.D.2d 90, 92 (3d Dep't 1986) (argument rejected that error in identifying property owner on statutory foreclosure notice invalidated entire notice. "[W]e note that it runs counter to the accepted principle that real estate taxes are levied upon the

property; hence, it is the identification of the property, not the name of the owner, that is imperative.") The naming of the owner on the statutory notices, if erroneous, would not invalidate the statutory notice.

The cases relied upon by Respondent-Appellant are inapposite to the case at bar. Orra Realty Corp. v. Gillen, 46 A.D.3d 649 (2d Dep't 2007) involved a tax sale under former RPTL §1464. RPTL §1464 is a similar statute to tax sales under former RPTL Article 10, under which a taxing authority may 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.

Yagan v. Bernardi, 256 A.D.2d 1225 (4th Dep't 1998) involved a notice procedure under which only those requesting to be notified of pending tax foreclosure proceedings would be issued notice. Such "request by notice" procedures were invalidated by the Court of Appeals in McCann v. Scaduto, 71 N.Y.2d 164 (1987). Yagan, 256 A.D.2d at 1226.

The notification procedures outlined in Real Property Tax Law Article 11 have been developed and amended since its inception in the early 1990s to address precedent from the highest courts of the United States and in the State of New York to assure that notice, reasonably calculated to inform interested parties of a pending tax foreclosure proceeding, is given. This well-developed statutory framework does not require any further steps where a taxing authority may learn at the eleventh-hour that a property owner has died. Indeed, where the notice adequately describes the property and the notices are received at the property, due process requirements are fulfilled. Accordingly, the decision, order and judgment below must be reversed.

II. HETELEKIDES' CAUSES OF ACTION UNDER 42 USC §§1983 AND 1988 WERE PROPERLY DISMISSED.

A. Hetelekides Failed to Demonstrate Facts That Would Support a Cause of Action Under Section 1983 Against the County.

A cause of action 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); Smith v. County of Livingston, 69 A.D.2d 993, 995 (4th Dep't 1979); Kolko v. City of Rochester, 93 A.D.2d 977 (4th Dep't 1983); Carattini v. Grinker, 178 A.D.2d 307 (1st Dep't 1991); Rossi v. City of Amsterdam, 274 A.D.2d 874, 877 (3d Dep't 2000); Harris v. City of New York, 153 A.D.3d 1333 (1st Dep't 2017).

In order 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).

In addition, it is well settled that a municipality cannot be held liable under Section 1983 based solely on the doctrine of respondeat superior or vicarious liability based upon the actions of its employees. Harris, 153 A.D.3d at 1333; Hudson Valley Marine, 79 A.D.3d at 703 ("A municipality is not liable under 42 USC §1983 for an injury inflicted solely by its agents"); Matter of Alex LL. V. Dep't of Social Svcs. Of Albany County, 60 A.D.3d 199, 205 (3d Dep't 2009).

B. 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 Respondent-Appellant 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 trial court demonstrated that, contrary to Hetelekides' claims, 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 conveniently ignores that, despite being represented by counsel, she failed to avail herself to the remedies afforded by RPTL §1131 which would have permitted her to seek vacatur of the default judgment of foreclosure. Rather, Hetelekides sought redress through the County's Board of Supervisors to permit a late redemption of the Property, despite the fact that the Board of Supervisors had never granted such relief to a defaulting taxpayer. (R. 231, 372-373) Respondent-Appellant points 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, Respondent-Appellant cannot demonstrate that any alleged policy is "widespread."

Respondent-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 Northern District of New York 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. In this matter, the record demonstrates delivery of the statutory notices to the Property in early October 2007, and therefore no further obligations to ascertain an alternate means of notice arose either under statutory or other requirements for procedural due process.

Respondent-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. Respondent-Appellant's first attorney sent a letter to the Ontario County Board of Supervisors, which stated:

> [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.
>
> and

> 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.
>
> and
>
> [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 Respondent-Appellant's submissions to the Ontario County Board of Supervisors does she deny having received the statutory foreclosures notices, nor does she allege that she was given incorrect information by a County employee regarding taxes due. (R. 37-39; 673-675) In fact, through counsel, Respondent-Appellant acknowledges the efforts taken by the County Treasurer's office in sending the statutory foreclosure notices and attributes the failure to timely redeem the Property to her mistaken reliance upon other family members who were working alongside her at the business. (R. 716)

Respondent-Appellant also ignores the fact that 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, Respondent-Appellant failed to avail herself to this state law remedy in a timely manner.

Fast forwarding from May 2007 until September 2007, Respondent-Appellant retained a new lawyer and also presented a new argument regarding the tax foreclosure of the Property in her Notice of Claim. There, for the first time, Respondent-Appellant argues that notice of the pending tax foreclosure was defective on the ground that the County should have "sought and obtained the appointment of a fiduciary so as to satisfy procedural due process in relationship to the conduct of the sale." (R, 37-39) As previously discussed, this argument not only lacks merit, but was never raised by Respondent-Appellant in her dealings with the County from the expiration of the redemption deadline in January 2007 until the auction sale of the Property in May 2007. (R. 37-39; 673-675)

Fast forwarding again from September 2007 until April 2008, Respondent-Appellant now presents, for the first time, a new story regarding her alleged contact with employees from the County and from the Town of Hopewell prior to the expiration of the redemption deadline. These allegations were never presented on Respondent-Appellant's behalf during her dealings with the County between the expiration of the redemption deadline in January 2007 and the date of the auction sale in May 2007. (R. 37-39; 673-675)

The record is absolutely devoid of any evidence that the County was somehow aware of any issues pertaining to the statutory foreclosure notices that were issued with respect to the Property prior to the expiration of the redemption deadline in January 2007 or prior to the auction sale of the Property in May 2007. Indeed, the record amply demonstrates that 6 copies of the statutory notices were received at the Property, where Respondent-Appellant and her son worked on a daily basis, and none of the notices were returned to the County by the United States Postal Service indicating that the notices were undeliverable or unclaimed. (R. 352-357, 436, 544, 693-699).

Under the status of the law at the relevant time, Matter of Foreclosure of Tax Liens by County of Orange (Goldman), 165 A.D.2d 1112 (2d Dep't 2018) had not been decided. The status of the law at the time was dictated by Kennedy, 100 N.Y.2d at 1, Harner, 5 N.Y.3d at 136 and Barnes, 25 A.D.3d at 955, which all upheld that a taxing authority's obligations to take additional steps to provide notice only arises when the mailings are returned indicating that a notice was undeliverable. There was no requirement to take additional steps when it is revealed several months after statutory notices are received at the property that an interested party is deceased.

Aside from pure speculation that is wholly unsupported by the facts in this record, Respondent-Appellant has 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 42 U.S.C §1983. Accordingly, Hetelekides' Section 1983 claims, and related requests for attorneys' fees under 42 U.S.C. §1988, against the County were properly dismissed.

C. Respondent-Appellant Failed to Demonstrate Facts That Would Support a Section 1983 Cause of Action Against Baxter.

Respondent-Appellant has failed to identify conduct by Baxter that is actionable under Section 1983. 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"); Matter of 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.")

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).

Respondent-Appellant attacks Baxter for attempting to notify an owner or someone in control of the Akropolis Restaurant of the impending tax foreclosure by leaving 2 phone messages and paying a personal visit at the restaurant in the week preceding the redemption deadline. (R. 365-368) Respondent-Appellant's position in this regard embodies the philosophy that "no good deed shall go unpunished," and disregards RPTL §1125(4), which provides as follows:

> (a) Nothing contained herein shall be construed to preclude the enforcing officer from issuing, at his or her

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

Baxter called the Akropolis Restaurant twice and left messages on January 9, 2007 and January 10, 2007. (R. 365-368) Having received no return phone calls, Baxter personally went to the Akropolis Restaurant and left a business card with a waitress asking for an owner, manager "or someone in control" to contact him. (R. 368) Baxter engaged in these additional efforts, despite the fact that the certified mailings of the statutory notices were actually delivered to the Property and none of the first-class mailings of the statutory notices were returned to the County. The County and Baxter received no indication that the address used for the statutory foreclosure notices was not a valid one.

Respondent-Appellant nitpicks Baxter's additional notification attempts on the ground that he did not ask for someone from Geo-Tas, Inc. or for a member of

the Hetelekides family by name during these additional notification attempts. However, these attacks are speculative at best. The fact remains that Baxter left messages and visited the restaurant and stressed the importance that some "in charge" of the restaurant contact him. (R. 366-368) If the employee failed to relay the message, or if the employee did relay the message and it was subsequently ignored is no fault of the County's. Nonetheless, these allegations do not support any finding, that Baxter's conduct in this regard rose to the level necessary to be actionable under 42 U.S.C. §1983. Accordingly, Respondent-Appellant's Section 1983 claims, and related requests for attorneys' fees under 42 U.S.C. §1988, against Baxter must be dismissed.

D. Respondent-Appellant Claims Under Section 1983 Against Baxter Are Barred by Qualified Immunity.

In addition, 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 at 208 (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). See also Lucas v. Devlin, 139 A.D.3d 1196 (3d Dep't

2016); Watson v. City of Jamestown, 56 A.D.3d 1289, 1292 (4th Dep't 2008); Colao v. Mills, 39 A.D.3d 1048, 1050 (3d Dep't 2007).

Although Respondent-Appellant's notice of claim and complaint do not specify the purported actions of Baxter that Respondent-Appellant claimed to be subject to Section 1983, at trial it became clear that Respondent-Appellant's claims swirled around Baxter's additional notification attempts of the impending redemption deadline at the Akropolis Restaurant, as authorized by RPTL §1125(4).

As discussed above, 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. Generally, County staff will review unredeemed parcels several weeks prior to the expiration of the redemption deadline to determine if any properties may benefit from an additional informal notice. (R. 363-364) Such factors include whether a property contains an operating business, whether a property is owned by an elderly person or whether a property is not encumbered by a mortgage. (R. 364-365) Town supervisors are provided with a list of properties within their towns that are subject to tax foreclosure so that the supervisor may reach out to a property owner if he or she knows them. (R. 232-234; 241-242) Each of these informal procedures have the same goal – to make

sure properties are redeemed prior to the expiration of the deadline, and not subjected to auction. (R. 364)

In this matter, Baxter exercised his statutorily vested discretion and made additional notification attempts to advise interested parties of the pending in rem tax foreclosure of the Property in 2007. 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) These attempts took place before the redemption deadline and were intended to lead to a timely redemption of the Property. The record is completely devoid of any facts that would demonstrate that these actions were undertaken to deprive Respondent-Appellant of her statutory or constitutional rights. Accordingly, to the extent any of Respondent-Appellant's claims under Section 1983 derive from Baxter's exercise of his discretion, they are barred by qualified immunity and were properly dismissed.

E. Respondent-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.

At trial, Respondent-Appellant alleged 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, the Supreme Court

has directed that all 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). See also NRP Holdings, LLC, 916 F.3d at 191 ("Thus, 'officials outside the legislative branch' may be entitled to legislative immunity when 'they preform legislative functions' . . . Analysis of the function at issue is therefore critical to a determination whether legislative immunity will shield a defendant.") (*Citations omitted*).

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.)

Respondent-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 protecteded 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, Respondent-Appellant was requesting the ability to re-purchase the Property outside of the auction process, which required legislative approval under RPTL §1166. (Respondent-Appellant's Exhibit 12) Accordingly, any actions taken by Baxter with respect to Respondent-Appellant's request under RPTL §1166 were "legislative in form" and meet this requirement enunciated by the Second Circuit in NRP Holdings.

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 Respondent-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 Respondent-Appellant's request for an exception under RPTL §1166 fall under a legislative act, it is entitled to legislative immunity and is therefore not actionable under Section 1983.

III. 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 order and judgment below awarded Respondent-Appellant prejudgment interest under CPLR §5001 at the rate of 9% beginning on May 9, 2007. (R. 11) Through January 2020, total interest would exceed trial court's damages award of $138,656.83, indemnifying Respondent-Appellant for the lost use of her money during that period of time. Because this award of statutory interest fulfills the purpose of indemnifying Respondent-Appellant for the cost

incurred by the lack of use of her funds for a period of time, her claims for the borrowing costs she incurred through Canandaigua National Bank were not a proper item of damages in this regard, and her request for reimbursement of this amount was properly denied by the trial court.

IV. THE COUNTY'S POLICY ARGUMENTS REGARDING THE APPLICATION OF GOLDMAN TO THE IN REM PROCESS ARE PROPERLY RAISED ON APPEAL.

The trial court relied heavily upon the 2018 Second Department decision in Goldman in rendering its decision below. The Goldman court further analyzed arguments raised by the taxing authority regarding the additional burdens to investigate the identities and location of the next of kin of deceased taxpayers. Goldman, 165 A.D.2d at 1121-1122. Indeed, although Goldman was decided approximately 1 month before the commencement of trial in this action, the Goldman case was not presented to the trial court by Respondent Appellant. (R. 764-769). Rather, the trial court raised the Goldman case *sua sponte* after post-trial submissions had been filed by the parties, and gave the parties to submit further briefs to address the Goldman decision. Because these arguments are a central part of the Goldman decision and because the Goldman decision was integral to the trial court's decision, these arguments are properly before this court on appeal.

no precedential value. Jones v. Town of Carroll, 158 A.D.3d 1325, 1328 (4th Dep't 2018).

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
September 21, 2020

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.

Type. A proportionally spaced typeface was used, as follows:

Name of typeface: New Times Roman
Point size: 14
Line spacing: Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service and this statement is 6,529.

Dated: September 21, 2020