To be Argued by:
MARY JO S. KORONA
(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, Deceased,

Plaintiff-Respondent-Appellant,

– against –

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

Defendants-Appellants-Respondents.

REPLY BRIEF FOR PLAINTIFF-RESPONDENT-APPELLANT

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Ontario County Clerk's Index No. 100932

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ARGUMENT

Mrs. Hetelekides submits this reply brief in support of her Cross-Appeal. The trial court should have found the County Appellants liable under 42 U.S.C. § 1983 (municipality liability for deprivation of due process rights) and § 1988 (permitting prevailing party attorney fees as part of costs) and should have awarded Mrs. Hetelekides compensatory damages for her borrowing costs incurred as a direct result of the County Appellants' unlawful misconduct.

I. The County Appellants Violated Mrs. Hetelekides' Rights Protected by 42 U.S.C. 1983.

In opposing the Cross-Appeal, the County Appellants ignore the trial record, including Baxter's admission that he possessed actual knowledge of James Hetelekides' death well in advance of the redemption date, as well as County Attorney Gary Curtiss' strategy email [R. 678] that described a plan to withhold material information from the Ontario County Board of Supervisors.

A. The County Appellants Implemented an Unconstitutional Policy.

The Record establishes that the County Appellants engaged in deliberate and egregious municipal misconduct that included a refusal to permit Mrs. Hetelekides the opportunity to redeem the Property and conduct of an auction sale despite the fact that they possessed actual knowledge that the taxpayer could not have received the statutory notices. The trial record supports that the County

Appellants engaged in these acts to obtain a windfall of $138,656.83. R. 17 [Decision, p 6].

Further, the County Appellants misstate the applicable standard and argue that Mrs. Hetelekides was required to demonstrate a "widespread" policy to support her 42 U.S.C. 1983 claim. Doc. No. 12, pp 12-13. As set forth in Plaintiff Respondent-Appellant's brief [Doc. No.10], 42 U.S.C. 1983 "[l]iability may even be imposed for a single act, as long as it is the act of an official authorized to decide policy in that area." *Town of Orangetown v. Magee*, 88 NY2d 41, 49 (1996) (revocation of permit by building inspector established claim for damages pursuant to 42 U.S.C. 1983); Doc. No 10, p 59. There is no dispute that Gary Baxter, as County Treasurer, was Ontario County's official authorized to decide policy relating to *in rem* foreclosure actions. His decisions and actions relating to the subject property, made and conducted with the advice and counsel of Ontario County Attorney's office, constituted Ontario County policy. *See* Doc. No. 10, pp 54, 59-60.

The County Appellants argue against application of 42 U.S.C. § 1983 on the basis of an inaccurate recitation of the facts presented in *Nelson v. Ulster County*, F. Supp.2d 345 (N.D.N.Y. 2010) ("*Nelson*"), stating that after the foreclosure notices were returned as undeliverable, Ulster County took "*no*

further steps to ascertain an alternate mailing address to send additional copies." Doc. No. 12, p 13 (emphasis added). But, in *Nelson*, Ulster County undertook precautions that the County Appellants in this case failed to implement in direct derogation of obligations to protect rights protected by Section 1983:

> Ulster County checked the Ulster County Surrogate's Court for any death notice of the Nelsons.

Nelson, 789 F. Supp. 2d at 351. By contrast, Ontario County's argument on appeal expressly rejects the importance of such precautions notwithstanding actual knowledge of the death of James Hetelekides. Instead, Ontario County argues that requiring a search of Surrogate's Court records would be "extraordinary and burdensome." Doc. No. 6, County Brief, p 42. Notably, the County Appellants failed to cite to any part of the trial testimony that supports their contention that such a precaution would have been burdensome and/or extraordinary.

The County Appellants also argue that *Nelson* is distinguishable because "the record demonstrates delivery of the statutory notices to the property." Doc. No. 12, p 13. In other words, the County Appellants seek to rely upon a presumption that is not available in this case precisely because the County Appellants possessed actual knowledge that the statutory notices had failed. Doc. No 10, Hetelekides Brief, pp 28-29. Thus, the County Appellants fail to

recognize the requirements of due process. In *Nelson*, the court denied summary judgment on the plaintiffs' 42 U.S.C. 1983 claims finding that "the evidence is such that a reasonable jury could find that Ulster County had a constitutionally deficient policy, custom, or practice that caused the Nelsons to be deprived of their property without due process of law." *Nelson*, 789 F. Supp. 2d at 356. Here, the trial court, as fact finder, should have found that the County Appellants violated Mrs. Hetelekides' constitutional rights and awarded damages.

The County Appellants do not dispute that Gary Baxter and the Ontario County Attorney knew in December 2006 that James Hetelekides had passed away yet nevertheless applied for a default judgment. R. 471-72 [Baxter Testimony]. Nor do they dispute that Baxter and the Ontario County Attorney planned to and in fact succeeded in influencing the Ontario County Board of Supervisors through the deliberate withholding of material information about the information that they elected to disregard. R. 475-80 [Baxter Testimony].

Instead of addressing egregious decision-making, the aim of which was the deprivation of due process rights, the County Appellants cite to a presentation to the Ontario County Board of Supervisors by Attorney John Tyo. Notably, the County Appellants cite no legal authority supporting their assertion that Mr. Tyo's presentation relieves them from or is in any way relevant to their

unlawful conduct. The trial evidence establishes that Baxter and the County Attorney willfully withheld information from and mislead the Board of Supervisors. R. 678 [Ex. 14 Curtiss Email: "we successfully prevented them from discussing any individual properties"]; R. 609 [Ex. 10 Baxter Memo: "Ms. Hetelekides herself signed for the foreclosure notice"].

To further distract the Court from their own conduct, the County Appellants cite to the Complaint filed in April 2008 and contend that, Mrs. Hetelekides created "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." Doc. No. 12, p 15-16. This argument is undercut by Exhibit M, evidence introduced at trial by the County Appellants. Exhibit M is an email from Ontario County Treasurer employee, Stephanie Cook, dated April 17, 2007, which establishes that Mrs. Hetelekides complained about misinformation imparted by the County Treasurer's Office regarding taxes owed, at least as early as April 17, 2007:

> Kristine Hetelekides was just in here asking for my name and Chrisann. She stated that she came in before January 12th and asked me if there were any delinquent taxes for the Akropolis Restaurant and I told her there were no taxes due and sent her to the Town of Hopewell.

R. 704. Mrs. Hetelekides' complaint to Stephanie Cook occurred less than three

weeks after the Board of Supervisors voted against the very resolution that would have allowed Mrs. Hetelekides to purchase the Property for more than the tax arrearage [R. 672-675]; well in in advance of the foreclosure auction [R. 545 ¶ 19], and one year before the date the County Appellants cite to in their opposition brief. Doc. No. 12, p 15. The Record demonstrates that the Board of Supervisors defeated the resolution, based upon misleading information that Baxter and Curtiss deliberately withheld so as to influence reasoned decision making. R. 678 [Ex. 14, Curtiss Email]; R. 609 [Ex. 10, Baxter Memo].

The County Appellants further argue that they were unaware of any notice issues because the mailings were not returned as undeliverable. Doc. No. 12, p 16. But this argument must be rejected as false because the County Appellants admitted to actual knowledge of the failed notices as early as December 2006. R. 472 [Baxter Testimony, admitting James Hetelekides' death "was discussed" in December 2006 meeting and "that his wife was still alive and running the business"].

The trial evidence conclusively establishes that Baxter and Ontario County officials learned that James Hetelekides died before the notices of foreclosure were sent to him and identified the Property as requiring notice before the deadline. R. 471-72 [*Id.*]. After learning this information, Baxter failed

to provide notice before the redemption deadline. Instead, Baxter made two phone calls the week of the deadline and visited the Property for "three minutes" on the afternoon before the deadline. R. 368 [Baxter Testimony], R. 700 [Ex. H, Manilla Folder]. When Baxter visited the Property on January 11, he did not bring a copy of the foreclosure notice with him, did not bring the certified mail receipt cards, and left without posting the Property or speaking with anyone about the impending foreclosure. R. 469-70 [Baxter Testimony]. Despite knowing that Mrs. Hetelekides was the record Property owner's widow, he did not ask to speak with her. R. 472-73 [Baxter Testimony].

Now conceding that *Matter of Foreclosure of Tax Liens*, 165 AD3d 1112 (2d Dept. 2018), *lv. dismissed*, 35 NY3d 998 (2020) controls, the County Appellants argue "the status of the law at the time" did not require them to take "additional steps" after learning the subject property owner was deceased. Doc. No. 12, p 16. This argument borders on being fantastical because it is premised upon the notion that the County was without the resources to develop a strategy that would protect against due process violations. The Record establishes that the Treasurer and the County attorney collaborated and implemented a plan to simply visit the Property in the afternoon the day before the redemption date. R. 603-604 [Ex. 6, Jan. 3, 2007 email]; R. 276 [Baxter Deposition Testimony]; R.

470 [Baxter Testimony]. No effort was made to speak with Mrs. Hetelekides (acknowledged as the Property Owner's widow) and/or post the Property. R. 470-73 [Baxter Testimony]. These alleged efforts did not satisfy due process. *See Akey v. Clinton Cty.*, 375 F.3d 231, 235 (2d Cir. 2004) (reasonably calculated notice is notice by means such as one desirous of *actually informing* the property owner of the foreclosure proceeding) (emphasis added).

B. Appellant Baxter was Sued in His Official Capacity.

Gary Baxter was sued in his official capacity as Ontario County Treasurer. R. 24-35 [Summons and Complaint]. Therefore, for the same reasons as set forth above, the trial court should have found the County Appellants liable under 42 U.S.C. § 1983. *See Brandon v. Holt*, 469 U.S. 464, 471–72 (1985) ("a judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents").

As established at trial, Gary Baxter was personally involved in both the development and unfair implementation of the unconstitutional policy depriving Mrs. Hetelekides of her constitutional rights and should have been found liable under 42 U.S.C. 1983. Baxter identified the Property as requiring notice of the tax redemption deadline [R. 603-04]; failed to provide notice; [R. 470]; rejected Mrs. Hetelekides' offer to pay the tax arrearage [R. 369-70]; and

deliberately misled the County Board of Supervisors [R. 609, R. 678].

Notwithstanding, the County Appellants argue that Gary Baxter is immune from liability on the basis of RPTL 1125(4), which authorizes a taxing authority to give taxpayers duplicate or discretionary notices. Doc. No. 12, p 18-20. The statute does not relieve Baxter of the duty to ensure due process in the exercise municipal authority and it is not a defense to Mrs. Hetelekides' claims.

The County Appellants cite to Mr. Baxter's two phone calls and three-minute visit to The Akropolis the week of the tax redemption deadline as a "good deed." *Id.* at p 18. Due process requires more than a "good deed" and in fact the trial record establishes that the Treasurer's visit could not be described as a "good deed". According to Baxter, the purpose of his three-minute visit on the afternoon of January 11, the day before the tax redemption deadline, was to allow the owner to redeem the Property out of foreclosure. R. 468-70 [Baxter Testimony]. Yet, he knew the property owner was dead and that Mrs. Hetelekides was the widow of the Property owner but expressly decided against asking for Mrs. Hetelekides or to speak with anyone about the impending foreclosure. R. 470-72 [Baxter Testimony "It was discussed . . . that his wife was still alive and running the business."]. When Mrs. Hetelekides appeared at Baxter's office with his business card, just two business days later, Baxter told

her "the restaurant has been cut off; the County will now be selling it at a foreclosure sale." R. 370-71 [*Id.*].

Contrary to Appellants' contention that Mrs. Hetelekides' complaints amount to mere "nitpicking" [Doc. No. 12, pp 18-20], this Court should hold the County Appellants financially responsible for their deliberate failure to afford Mrs. Hetelekides the due process protections to which she was entitled in the exercise of their authority to conduct *in rem* foreclosure proceedings.

C. The County Appellants Waived Immunity.

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

The County Appellants failed to plead qualified or legislative immunity

as affirmative defenses and are therefore barred from relying upon these defenses. R. 84-90 [Answer].

D. Immunity from 42 U.S.C. 1983 is Only Available to Government Officials Sued in Their Individual Capacities.

Even if the County Appellants had pleaded the defenses of qualified and legislative immunity, neither applies to claims asserted under § 1983. "[U]nlike various government officials, municipalities do not enjoy immunity from suit—either absolute or qualified—under § 1983." *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 166 (1993) (protection against municipal liability does not encompass immunity from suit).

Mrs. Hetelekides sued Ontario County and Baxter, in his official capacity, as County Treasurer. R. 24-35 [Complaint]. Accordingly, the immunity doctrines asserted by the County Appellants in opposition to the Cross-Appeal are inapplicable. *See Baines v. Masiello*, 288 F. Supp. 2d 376, 383-84 (W.D.N.Y. 2003) (finding legislative immunity is a personal defense, it cannot be asserted by a municipal entity or by municipal officers "sued in their official capacities").

II. The Trial Court Erred in Declining to Award Borrowing Costs.

Finally, the County Appellants contend that Mrs. Hetelekides' "borrowing costs she incurred through Canandaigua National Bank were not a proper item of damages." Doc. No. 12, p 27. But the stipulated record establishes

that Mrs. Hetelekides incurred borrowing costs as a direct result of and in response to an unlawful foreclosure auction. Thus, she became indebted to CNB for a loan on June 1, 2007, the same date the deed was filed transferring Ontario County's interest in the Property to Mrs. Hetelekides, after the auction and bid assignment. R. 545 [Ex. 1, Stipulation ¶¶ 19-22]. For the reasons cited in Plaintiff Respondent-Appellant's brief, Mrs. Hetelekides is entitled to recover her borrowing costs incurred because of the CNB Loan to be made whole. Doc. No 10, Hetelekides Brief, pp 63-64; *see also Franklin Corp. v. Prahler*, 91 AD3d 49, 54 (4th Dept. 2011) ("the purpose of awarding damages in a tort action is to make the plaintiff whole").

CONCLUSION

Mrs. Hetelekides requests that the Court grant the Cross Appeal in furtherance of an award of damages and attorneys' fees pursuant to 42 U.S.C. §§ 1983 and 1988 and damages for the CNB borrowing costs.

Dated: September 30, 2020
Rochester, New York

Respectfully submitted,

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