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.

BRIEF FOR PLAINTIFF-RESPONDENT-APPELLANT

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COUNTERSTATEMENT OF QUESTIONS INVOLVED

1. Did the trial court properly determine that the Defendants-Appellants-Respondents failed to properly notify the property owner of impending foreclosure proceedings?

Answer: Yes. The trial court properly determined that Defendants-Appellants-Respondents' alleged notice was defective. R. 18 [Decision, p 7].

2. Did the trial court properly determine that the foreclosure proceeding was a nullity?

Answer: Yes. The trial court properly determined that the foreclosure proceeding was a nullity. R. 19 [Decision, p 8].

3. Did the trial court properly deny Defendants-Appellants-Respondents' motion for summary judgment based upon factual discrepancies and credibility ambiguities?

Answer: Yes. The trial court properly denied the motion. R. 794 [Decision and Order].

4. Did the trial court err in declining to award the borrowing costs incurred by Plaintiff-Respondent-Appellant Krystalo Hetelekides through a loan she obtained to purchase the subject property after it was auctioned by Ontario County?

Answer: Yes. The trial court erred in declining to award these compensatory damages. R. 22 [Decision, p 11].

5. Did the trial court err in dismissing Plaintiff-Respondent-Appellant Krystalo Hetelekides' claims brought under 42 U.S.C. 1983 and 1988?

Answer: Yes. The trial court erred in dismissing these claims. R. 21-22 [Decision, pp 10 - 11].

COUNTERSTATEMENT OF NATURE AND FACTS OF THE CASE

Plaintiff-Respondent-Appellant Krystalo Hetelekides, Individually and as the Executrix of the Estate of Demetrios Hetelekides a/k/a Jimmy Hetelekides commenced this lawsuit in 2008 to recover against the Defendants-Appellants-Respondents County of Ontario and Gary G. Baxter, as Treasurer of the County of Ontario (together the "County Appellants") based upon the unlawful taking of real property located at 4025 Routes 5 and 20, in the Town of Hopewell, Ontario County, New York (the "Property"). R. 25- 35 [Complaint].

Mrs. Hetelekides is the widow of Demetrios Hetelekides, who was also called James and Jimmy. R. 118 [Plaintiff's Testimony]. At the time of Mr. Hetelekides' death, he was the sole owner of the Property. R. 544 [Ex. 1 Stipulation ¶ 5]. Following his death, the County Appellants sought and obtained a default judgment against Mr. Hetelekides and took title to the Property. R. 545 [Ex. 1 Stipulation ¶ 14]. The past due taxes totaled $21,343.17. R. 182 [Baxter Testimony]; R. 608 [Ex. 9, Treasurer's Report]. Ontario County then auctioned the Property for $160,000 and retained the full amount, representing a windfall surplus of $138,656.83 more than the past due taxes. R. 545-46 [Stipulation ¶¶ 22-23]; R. 17 [Decision, p 6].

On October 30, 2019, after over a decade of litigation including a prior appeal to the Appellate Division Fourth Department and a bench trial spanning three days, the trial court found in favor of Mrs. Hetelekides R. 12-23 [Decision]. The trial court found that the County Appellants failed to comply with notice requirements and that the foreclosure proceeding "was null from its inception" because it was commenced after Mr. Hetelekides died. R. 20 [Decision, p 9].

Faced with losing the illegally obtained windfall, the County Appellants appeal the trial court's findings. R. 1-2 [Notice of Appeal]. The County Appellants advance arguments emphasizing form over substance, minimizing the gravity of their actions, and utterly disregarding due process.

Mrs. Hetelekides cross-appeals from all aspects of the trial court's order that did not find in her favor. R. 4-5 [Notice of Cross Appeal].

Background

Mrs. Hetelekides was born in Greece. R. 111. [Plaintiff's Testimony]. In Greece, she completed schooling through the sixth grade and then began work as a seamstress. R. 112. In 1967, when she was seventeen years old, Mrs. Hetelekides met her husband, James. R. 111. They married and she moved with him to the United States. R. 113.

James and his brothers operated restaurants in Rochester and Avon, New

York throughout the 1970s. R. 113-14. Mrs. Hetelekides worked at Hickey Freeman and Bausch & Lomb in Rochester. R. 114. Around 1980, Mr. and Mrs. Hetelekides moved to Canandaigua to operate the Town and Country Restaurant. R. 114-15.

In 1985, they opened The Akropolis restaurant in the Town of Hopewell, located on the Property. R. 115-16. James was responsible for handling The Akropolis' bills and paperwork. R. 117.

On August 1, 2006, after twenty years of operating The Akropolis, James Hetelekides died at only 68 years old. R. 543 [Ex. 1 Stipulation ¶ 1]; R. 117-18 [Plaintiff's Testimony]. His death was reported by the Messenger Post newspaper on August 13, 2006. R. 605 [Ex. 7].

Past Due Property Taxes

When James passed, real property taxes were owed on the Property. R. 544 [Ex. 1 Stipulation ¶ 6]. The total amount of past due taxes, including penalties and interest, for the tax years 2005 and 2006, was $21,343.17. R. 182 [Baxter Testimony]; R. 608 [Ex. 9, Treasurer's Report].

On October 2, 2006, over two months after James died, the County Appellants sent notices of pending *in rem* tax foreclosure proceedings by certified mail to "James Hetelekides", "Hetelekides James" and "Geo-Tas, Inc." to the

Property. R. 544 [Ex. 1 Stipulation ¶ 6]. The County Appellants did not address any notice to Krystalo Hetelekides. R. 681-692 [Exs. B - C, Foreclosure Notices].

A restaurant waitress named Barbara Schenk signed the certified mail receipt cards for "James Hetelekides", "Hetelekides James" and "Geo-Tas, Inc." R. 544 [Ex. 1 Stipulation ¶ 8-9]; R. 693-95 [Ex. D, Certified Mail Records]. Ms. Schenk did not remember signing the certified mail receipt cards. R. 398 [Schenck Testimony]. The record Property owner, James Hetelekides, could not have received these notices because he had already passed away. R. 543 [Ex. 1 Stipulation ¶ 1].

The County Appellants' Records Improperly Listed Geo-Tas as the Record Property Owner

It is undisputed that Mr. Hetelekides solely owned the Property and Geo-Tas was not in title to the Property. R. 544 [Ex. 1 Stipulation ¶ 5]. Yet, Ontario County Treasurer Gary Baxter's records incorrectly reflect Geo-Tas as the owner of the Property. R. 608 [Ex. 9, Treasurer's Report]; R. 208-09; R. 365 [Baxter Testimony]; R. 603-04 [Ex. 6, Baxter Jan. 3, 2007 Email]; R. 115 [Ex. A, Manilla Folder]. The Treasurer's Report dated January 16, 2007 listed Geo-Tas, Inc. as the Property owner. R. 608 [Ex. 9]. Upon reviewing the Treasurer's Report, Baxter testified that it indicated the owner of the Property was Geo-Tas. R. 208 [Baxter Testimony].

Mrs. Hetelekides had no interest in Geo-Tas, and her deceased husband was the sole shareholder. R. 535-36 [Plaintiff's Deposition Testimony].

Ontario County Told Mrs. Hetelekides that the Property Taxes Were Paid

The County Appellants issued residential tax bills on or about January 1, 2007. R. 130-31 [Baxter Testimony]. After receiving her bill, Mrs. Hetelekides visited the Ontario County Treasurer's office and inquired whether any taxes were owed on the Property[1]. R. 121-22 [Plaintiff Testimony].

While at the Treasurer's office, Mrs. Hetelekides asked an individual named Stephanie whether any taxes were owed on the restaurant. R. 126-29 [*Id.*]. Mrs. Hetelekides told Stephanie the Property's address and provided three names: Demetrios, Jimmy, and James Hetelekides. R. 128-29. [*Id.*]. Stephanie told Mrs. Hetelekides that the taxes on the Property were paid, and that her husband must have paid the taxes before he died. R. 122, 128 [*Id.*].

Mrs. Hetelekides then inquired about the taxes at the Town of Hopewell because she remembered that her husband used to pay taxes there sometimes. R. 142-43 [*Id.*]. A Hopewell employee told Mrs. Hetelekides that money was owed on the restaurant and they could not accept payment at the Town of

[1] While the County Appellants dispute Mrs. Hetelekides' testimony regarding her attempts to inquire about taxes owed, the trial court, after weighing the credibility of the witnesses, adopted these facts. R. 14-16 [Decision].

Hopewell. R. 143-44. Mrs. Hetelekides then returned to the County Treasurer's office and was again told that the taxes were paid. R. 145. Hopewell employee Karen Carson helped Mrs. Hetelekides make a phone call to the County Treasurer's office regarding the restaurant taxes and she believes she spoke with someone. R. 306 [Carson Testimony]. Mrs. Hetelekides recalls an individual named Gary, who was not Mr. Baxter, picked up the phone. R. 147. [Plaintiff's Testimony]. This occurred before Mrs. Hetelekides saw Gary Baxter's business card. R. 147-48. After the phone call, Mrs. Hetelekides returned to the County Treasurer's office and she was again told the taxes were paid. R. 149. [*Id.*].

The County Appellants Knew of James Hetelekides' Death and that Notice Had Not Been Received

In December 2006, Baxter met with Ontario County Attorney, Gary Curtiss, Esq. and the Treasurer's office staff to review properties that were slated for public auction unless past due taxes were paid for by the redemption date of January 12, 2007. R. 363-64 [Baxter Testimony]; R. 603-04 [Ex. 6 Baxter Jan. 3, 2007 Email]. Appellant Baxter and Ontario County officials reviewed these properties to "see if there's been proper notification" and see "if there's anything sticking out that should be taken care of." R. 364 [Baxter Testimony].

At this meeting, Baxter and County employees reviewed the entire file relating to the Property. R. 466-67 [Baxter Testimony]. The certified mailing

return receipt cards were not signed by the Property owner, and the signatures on the cards in no way indicated that they were signed by Mr. Hetelekides or anyone with any authority to sign and accept certified mail. R. 693-95 [Ex. D, Certified Mail Records].

Appellant Baxter admitted he knew the Property owner, James Hetelekides, had died[2]. R. 471-72 [Baxter Testimony]. During the December 2006 meeting, County employees, including County Attorney Gary Curtiss and Appellant Baxter discussed James Hetelekides' death. *Id.* At this same meeting, Baxter and County employees determined that the Property required notice of the foreclosure proceeding and Baxter distributed an email to his staff reflecting this determination. R. 603-04. Ex. 6 Baxter Jan. 3, 2007 Email].

The County Appellants Did Not Utilize Reasonable Efforts to Notify the Property Owner

The redemption deadline set by the Treasurer for payment of taxes was January 12, 2007. R. 544 [Ex. 1 Stipulation ¶ 10]. Despite knowing that James Hetelekides had passed away, that he had a wife, and concluding proper notice was lacking, Baxter did not attempt to contact the Property until he placed

[2] Baxter's trial testimony admission revealed for the first and only time that he had provided incorrect information in his Verified Answers to Interrogatories sworn to July 28, 2011 in which he stated he learned of James Hetelekides' death, on or about January 18, 2007. R. 1079-91 [Verified Answers to Interrogatories, *see* answer to #12, on R. 1087].

phone calls on January 9 and 10, 2007. R. 365-68 [Baxter Testimony]; R. 700 [Ex. H, Manilla Folder]. Baxter never asked for Mrs. Hetelekides or anyone with the surname of Hetelekides. R. 368. [Baxter Testimony].

By contrast, Baxter and County employees contacted other property owners facing foreclosure and requiring additional notification (including those personally known to them) as early as January 3, and these properties avoided foreclosure. R. 261-63 [Baxter Deposition pp 172-173; 279-81].

When Baxter telephoned The Akropolis on January 9 and 10, he did not ask who he was speaking with, and did not state that the Property was facing foreclosure. R. 277-78 [Baxter Deposition]; R. 366-67 [Baxter Testimony].

On January 11, 2007, at 1:30 in the afternoon, the day before the deadline, Baxter for the first time went to the Property and asked for the owner, manager, or someone in charge. R. 368. [Baxter Testimony]. According to Baxter, the purpose of this visit was to allow the owner to redeem the Property out of foreclosure. R. 469-70. [Baxter Testimony]. But Baxter did not take a copy of the foreclosure notice and did not take the certified mail return receipt cards with him to the Property. *Id.* Baxter stayed at the Property for "3 minutes" and left without speaking to anyone about the impending foreclosure. R. 368 [Baxter Testimony]. During the 3-minute visit on January 11, 2007, Baxter did not ask

to speak with any member of the Hetelekides family even though he understood that James Hetelekides was married and that "his wife was still alive and running the business." R. 472-73 [*Id.*]. Baxter also did not ask to speak with Barb Schenk, even though he had recently reviewed the certified mail receipt cards. R. 519 [*Id.*].

Despite their determination that the Property required notice, the County Appellants made no other attempts to visit the Property or otherwise contact Mrs. Hetelekides to advise of the proceeding or the January 12 redemption date. R. 700 [Ex. H, Manilla Folder].

The County Appellants Refused to Accept Payment Two Business Days Later

Mrs. Hetelekides found Baxter's business card at The Akropolis following his January 11 visit. R. 149-51 [Plaintiff's Testimony]. After finding the business card, she returned to the County Treasurer's office on January 15, 2007 and found that it was closed for Martin Luther King, Jr. Day. R. 151-52 [*Id.*]; R. 544 [Stipulation ¶ 11]. On the same day, Mrs. Hetelekides called the County Treasurer's office and left a voicemail message. R. 544 [Stipulation ¶ 12]. Her voicemail message referenced her previous attempts to pay taxes and the misinformation provided by Stephanie. R. 151-52 [Plaintiff's Testimony]. The County Appellants failed to retain the voicemail message even though Baxter

and County employees were aware of the need to do so. R. 266-67. [Baxter Deposition Testimony].

On January 16, 2007, just two business days after Baxter left his business card at The Akropolis, and the first business day after the County's self-imposed deadline, Mrs. Hetelekides returned to the County Treasurer's office and offered to pay the taxes owed on the Property. R. 544 [Stipulation ¶ 13]. Baxter refused to accept payment. R. 152-53 [Plaintiff's Testimony]. Baxter and County officials previously refused to accept a different taxpayer's tender because it lacked a late fee totaling $24.74. R. 242-44 [Baxter Testimony discussing Middlebrook property]. Baxter and County officials started foreclosure proceedings against this property because it failed to pay the $24.74 late fee. *Id.*

Here, the County Appellants determined the Property needed additional notice because they knew James Hetelekides passed away. R. 603-04. [Ex. 6 Baxter Jan. 3, 2007 Email]. But they never provided any such notice. Instead, Baxter made two phone calls and visited The Akropolis for three minutes on the day before the deadline. R. 700 [Manilla Folder]; R. 368 [Baxter Testimony]. Baxter claims he visited the restaurant to allow the Property owner to redeem the Property out of the foreclosure process. R. 469 [Baxter Testimony]. But he never asked for Mrs. Hetelekides or any member of the Hetelekides family. R.

471-73 [Baxter Testimony]. Baxter did not post the Property and left the restaurant without speaking to anyone about the impending foreclosure. R. 368, 470 [*Id.*].

Despite Knowing of James Hetelekides' Death, The County Appellants Applied for a Default Judgment

Despite knowing of James Hetelekides' death and identifying the Property as requiring notice, and providing no notice, the County Appellants, on February 1, 2007, applied for a default judgment pursuant to Real Property Tax Law §§ 1131 and 1136. R. 708 [Ex. O, Schedule A to Default Judgment]. On February 7, 2007, Hon. Craig J. Doran signed a Default Judgment pursuant to RPTL § 1136 granting the County title to and possession of the Property as well as other parcels. R. 705-07 [Ex. N, Default Judgment]. The Default Judgment was entered on February 8, 2007. R. 705 [*Id.*].

The default judgment application was based upon an "Affidavit of Posting, Service and Publication" executed by Defendant Baxter. R. 696-99 [Exs. F and G Affidavit and Certified Mailing List]. The attachment to the Affidavit contains a notarized statement by Defendant Baxter that "Notices were mailed to each owner by certified mail, and to all others by ordinary first-class mail." R. 698 [Ex. G]. Baxter did not personally mail any notice and was not qualified to submit such an affidavit. R. 213-14 [Baxter Testimony]. Baxter's

basis for believing notices were sent by regular and certified mailing was the presence of check marks on Defendant's Exhibit A that he did not personally make. *Id.* These checkmarks in no way indicate that any mailing was sent out on any particular date. *Id.*, R. 679-80 [Ex. A, Crossroads Report].

Baxter's Affidavit does not differentiate between owners and "all others." 696-99 [Exs. F and G Affidavit and Certified Mailing List]. The County Appellants' records incorrectly identified the Property owner as "Geo-Tas." R. 608 [Ex. 9, Treasurer's Report]; R. 710 [Ex. O, Schedule to Default Judgment].

Baxter was first appointed Ontario County Treasurer in November 2005. R. 434 [Baxter Testimony]. He was elected to the position of County Treasurer for the term beginning January 1, 2006. *Id.* Baxter supervised an office of three people, one of which was part time. R. 345, 460 [Baxter Testimony]. At no time did Baxter implement any written instructions to ensure accuracy of his staff's work relating to *in rem* foreclosure proceedings. R. 460-61 [*Id.*].

Baxter and Ontario County Employees Intentionally Withheld Material Information from the Board of Supervisors in Furtherance of a Plan to Frustrate Mrs. Hetelekides' Efforts to Explain Her Circumstances and Redeem the Property Pursuant to RPTL 1166

After visiting the County Treasurer's office on January 16, 2007, Mrs. Hetelekides immediately retained attorney John Tyo, Esq. to represent her

interests before the Board of Supervisors. R. 153 [Plaintiff's Testimony]; R. 545 [Stipulation ¶¶ 15 and 16].

Pursuant to RPTL 1166, the County Board of Supervisors was authorized to allow Mrs. Hetelekides to buy the Property directly from Ontario County, instead of at public auction.

On February 28, 2007, Mrs. Hetelekides' attorney presented to the County's Financial Management Committee and demonstrated her ability to pay the past due taxes by presentment of a money order dated January 25, 2007 in the amount of $25,000. R, 545 [Stipulation ¶ 16]; R. 607 Ex. 8 [CNB Money Order].

As Mrs. Hetelekides' attorney pursued a strategy of allowing her to purchase the Property directly from the County, Baxter and County employees purposefully misled the County Board of Supervisors and withheld information material to informed decision-making. This was documented by a January 26, 2007 email[3] written by Ontario County Attorney Gary Curtiss about he and Baxter's presentation to the Board of Supervisors the prior evening. R. 678 [Ex. 14, Curtiss Email]. The subject line of the email is "Parcel 287 update" which

[3] This email was sent six days before the County Appellants applied for a default judgment, on February 1, 2007. R. 708 [Ex. O, Attachment A to Default Judgment].

refers to the Property. *Id.* Curtiss wrote that he and Baxter "successfully prevented [the Board of Supervisors] from discussing any individual properties." *Id.* Curtiss added:

> We need to pull everyone together to discuss how we present this to the committee – it's an opportunity for us to set the tone for what I expect will be requests for exceptions for the restaurant[.]

Id. On March 6, 2007, Baxter sent a memo to all Ontario County Supervisors about Mrs. Hetelekides' request to purchase the Property directly from the County. R. 609 [Ex. 10 Baxter Memo]. Baxter's memo makes a blatant misrepresentation, stating that Mrs. Hetelekides "herself signed for the foreclosure notice that was delivered by mail." *Id.* Baxter also falsely claimed that "we have done everything required by law and then some." *Id.*

Baxter never made any other written report to the Board of Supervisors about the Property. R. 522 [Baxter Testimony]. Baxter never disclosed to the Board of Supervisors that he had identified the Property as requiring notice. R. 522 [Baxter Testimony]; R. 609 [Ex. 10 Baxter Memo]. Baxter did not disclose that the mailing receipt cards were not signed by the Property owner, who had already passed away, but instead a restaurant waitress. *Id.*

Baxter never disclosed to the Board of Supervisors that Mrs. Hetelekides

offered to pay the past due taxes on the first business day after the redemption date and just five days after he left his card at the Property. *Id.* Baxter never disclosed that when he visited the Property ostensibly to provide notice, he did not ask for a member of the Hetelekides family, did not mention the impending foreclosure, and left after three minutes. *Id.* Baxter did not disclose to the Board of Supervisors that his visit came the afternoon of the day before the deadline. *Id.*

Instead, Baxter misled the Supervisors by stating that allowing Mrs. Hetelekides to redeem the Property for more money than the taxes and penalties owed "could cost the County thousands of dollars in the future." R. 609 [Ex. 10 Baxter Memo].

On March 29, 2007, Supervisor Mary Green introduced Resolution 188-2007 to the Ontario County Board of Supervisors that would have allowed Mrs. Hetelekides to purchase the Property back from the County for $30,786.00 (significantly more than the past due taxes of $21,343.17). R. 545 [Stipulation ¶ 17]. Resolution 188-2007 did not pass. *Id.* ¶18.; R. 637-75 [Ex. 12, Meeting Minutes]. The Supervisors who voted on the Resolution were misled by Appellant Baxter.

Foreclosure Auction and Damages

On May 9, 2007, the County publicly auctioned the Property. R. 545 [Stipulation ¶ 19]. The Property's 2006 assessed value was $289,300.00, making it the most valuable property advertised for auction. R. 582 [Ex. 5, Auction Booklet]. There was active bidding on the Property, which was ultimately sold to Pavlos Panitsidis for $160,000, who then assigned his bid to Mrs. Hetelekides. R. 545 [Stipulation ¶¶ 20 and 21].

Mrs. Hetelekides paid the bid price with funds from a $50,000 loan from Canandaigua National Bank dated June 1, 2007, with an initial variable rate of 9.78% interest. R. 547-74 [Ex. 2, Holman Aff. ¶¶ 2 and 4]. The remaining $110,000 consisted of money Mr. Panitsidis collected from friends and members of the community to help Mrs. Hetelekides retain the restaurant. R. 159-60 [Plaintiff's Testimony]. Mrs. Hetelekides repaid these individuals. *Id.* As of December 3, 2018, the principal balance of the loan was $17,589.88, meaning that Mrs. Hetelekides had paid $32,410.12 in principal. R. 549 [Ex. 2, Holman Aff. ¶ 7]. Additionally, the total interest payments made by Mrs. Hetelekides through November 30, 2018 was $33,751.58. *Id.* In total, at the time of trial, Mrs. Hetelekides made $66,161.70 in payments to Canandaigua National Bank based on the loan she was forced to take out by Defendants' action. *Id.* As of

November 30, 2018, just before the trial began, Mrs. Hetelekides' damages were $172,408.41, consisting of the $50,000 Principal Loan Amount from CNB, $33,751.58 in interest paid to CNB, $110,000 in repayment of the funds collected by Mr. Panitsidis. The $172,408.41 reflects a reduction of the $21,343.17 in taxes owed on the Property as of January 6, 2007. R. 182 [Baxter Testimony].

The Decision

Following a three-day bench trial, the Court issued a Decision, Judgment, and Order finding that the foreclosure proceeding was a nullity from its inception based upon defective notice and because the County Appellants commenced a lawsuit against a deceased person, James Hetelekides. R. 12-23 [Decision].

The trial court awarded damages "in the amount of the difference between the unpaid tax arrearage and tax sale price of $160,000." R. 23 [*Id.*]. The trial court further awarded interest of nine percent on that amount pursuant to CPLR 103(a), 5001(a), and New York General Municipal Law 3-a. *Id.*

The trial court declined to award damages for the borrowing costs Mrs. Hetelekides incurred under the Canandaigua National Bank loan and dismissed Plaintiffs' 42 U.S.C. 1983 and 1988 claims. R. 22-23 [*Id.*].

The County Appellants appeal the decision and seek to keep the profit it made from auctioning the Property in violation of Plaintiffs' rights. R. 1-2 [Notice of Appeal]. Mrs. Hetelekides cross-appeals from all aspects of the trial court's order that did not find in her favor. R. 4-5 [Notice of Cross-Appeal].

STANDARD OF REVIEW

Following a nonjury trial, the Court "must give due deference . . . to the [trial] court's evaluation of the credibility of the witnesses and quality of the proof, and review the record in the light most favorable to sustain the judgment." *Mosley v. State*, 150 AD3d 1659, 1660, (4th Dept. 2017) (internal citations omitted) (affirming trial court's finding that defendant was 75% liable for accident based upon fair interpretation of evidence).

"On a bench trial, the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence" *Black v. State*, 125 AD3d 1523, 1525 (4th Dept. 2015) (internal quotation omitted) (giving due deference to the trial court and finding the fair interpretation of the evidence supported the determination that defendant breached its duty).

The trial court properly determined that the County Appellants failed to give proper notice of the foreclosure proceeding and its determination should be affirmed.

ARGUMENT

I. The Appellate Court Should Uphold the Trial Court's Finding that the Tax Foreclosure Proceeding Was a Nullity From its Inception

A. The County Appellants Failed to Notify the Property Owner

The County Appellants argue that the alleged notice was sufficient purely because the procedures of RPTL 1125 were followed, with no consideration of any of the facts about this extraordinary foreclosure. This is a narrow and indefensible interpretation of the notice requirements. The interests of the County Appellants in efficiently collecting taxes "must be balanced with the property rights of individuals which may be extinguished forever if they default in a tax foreclosure proceeding." *Matter of Foreclosure of Tax Liens (Goldman)*, 165 AD3d 1112, 1122 (2d Dept. 2018), *leave denied*, 35 N.Y.3d 998 (2020). Accordingly, in *in rem* foreclosure proceedings, taxing authorities are required to "satisfy the requirements of due process." *Nelson v. Ulster Cty.*, 789 F. Supp.2d 345, 353 (N.D.N.Y. 2010) (internal quotation omitted)

The trial record conclusively establishes that Gary Baxter and Ontario County officials learned of James Hetelekides' death before the tax redemption

deadline and before they sought a default judgment against him. R. 471-72 [Baxter Testimony]. Ignoring these fundamental facts, the County Appellants argue they "fulfilled [their] statutory and constitutional due process obligations by sending the required notices to the Property." [Appellants' Brief, p 25]. The Appellants' insistence that they fulfilled their obligations despite knowledge of James Hetelekides' death is misguided and reflects a misconception about the requirements of due process.

The Appellants ignore the facts established at trial and argue simply that the October 2006 mailings, sent two months after James Hetelekides died, were sufficient. To support their assertion that the County's mailings to the Property constituted sufficient notice to satisfy due process, the County Appellants rely upon *Miner v. Clinton County*, 541 F.3d 464 (2d Cir. 2008). But in so doing, they overlook the key finding that led to the Second Circuit's affirmation in *Miner*: "there is no evidence presented from which a reasonable fact finder could conclude that Defendants had any reason to believe that the Plaintiffs had not received the Notice." *Id.* at 469-70 (trial court citation omitted). Here, Baxter's testimony established that he and Ontario County officials learned of James Hetelekides' death before the tax redemption deadline and before they submitted an application for entry of a default judgment. R. 471-72. The evidence shows

that the Property was specifically identified as requiring notice. R. 603-04 [Ex. 6 Baxter Jan. 3, 2007 Email].

Miner reviewed appeals of two decisions involving claims under 42 U.S.C. 1983 in relationship to Clinton County's enforcement of foreclosure proceedings, including *Tupaz* (the case of the illegible signature, a decision cited by County Appellants). *Id.* at 464. The *Tupaz* litigation lasted for years and was previously considered by the Second Circuit in *Luessenhop v. Clinton County*, 466 F.3d 259, 272 (2d Cir. 2006). There, the property owners disputed that they received the county's foreclosure notice sent by certified mail. *Id*. at 263. The signature box on the return mail receipt had a line drawn through it and could not be attributed to the property owners. *Id.* The District Court determined that the notice did not violate due process. *Id.* at 271.

The Second Circuit reversed because the trial court:

> never made a specific finding regarding whether the County thought the Tupazes received the letter. This is a subtle but important distinction. Moreover, the question whether the County thought that the Tupazes had received the item of certified mail is a disputed question of fact, and each side should be permitted to marshal its evidence on this issue.

Id. at 272. By the time *Tupaz* again reached the Second Circuit in *Miner*, the Court had considered additional evidence and determined a reasonable fact

finder could not conclude "that Defendants had any reason to believe that the Plaintiffs had not received the Notice." *Miner*, 541 F.3d at 469-70 (trial court citation omitted).

In this case, the *Miner* findings are not possible because, in fact, the opposite is true. The Record reveals that Gary Baxter and Ontario County officials learned of James Hetelekides' death before the tax redemption deadline[4] and yet pressed forward. At trial, Baxter testified about his visit to the Property and explained that he would not have asked for James Hetelekides because he knew he had passed away:

> Q: Did you tell Mr. Curtiss that you didn't ask to speak with James Hetelekides?
>
> A: I would not have asked to speak with James Hetelekides, so that answer would be no.
>
> Q: So why wouldn't you have asked that?
>
> A: He's passed away.
>
> Q: Did you know that the day you were there, Mr. Baxter?
>
> A: I do believe so.
>
> Q: You knew on the day you were there, on January 11th, that Mr. Hetelekides had passed away?

[4] Appellants' brief includes a statement to the effect that the Treasurer "may have learned that James Hetelekides had died" but this statement misrepresents the Treasurer's clear trial testimony. [Appellants' Brief, p 6].

A: Correct.

R. 471 [Baxter Testimony]. Baxter went on to testify that Mr. Hetelekides' death was discussed in a December 2006 meeting with the Ontario County Attorney: "It was discussed in that meeting that there was – that his wife was still alive and running the business." R. 472 [*Id.*].

The Record establishes that Baxter and Ontario County officials learned of James Hetelekides' death at least as early as December 2006. It is undisputed that Mr. Hetelekides died on August 1, 2006. R. 543 [Pl. Ex. 1, Stipulation ¶ 1]. It was therefore impossible for Mr. Hetelekides, the property owner, to receive notices of *in rem* tax foreclosure proceedings that were sent on October 2, 2006. R. 544 [*Id.* at ¶ 8].

While Appellants maintain they followed the RPTL, "due process entails further responsibility when the government becomes aware prior to the taking that its attempt at notice has failed." *Jones v. Flowers*, 547 U.S. 220, 227 (2006) (finding the state needed to take additional reasonable steps to notify taxpayer he was about to lose his property).

Despite knowing James Hetelekides died and identifying the Property as requiring additional notice at least as early as December 2006, the County Appellants made no attempts to contact the Property until the week of the tax

redemption deadline. R. 700 [Ex. H, Manilla Folder].

"'[A]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Akey v. Clinton County*, 375 F.3d 231, 235 (2d Cir. 2004) (*quoting Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 [1950]).

Baxter's phone calls on January 9 and 10, and his 3-minute visit on January 11, the afternoon before the deadline, were not reasonably calculated to apprise interested parties of the foreclosure proceeding. *See Akey*, 375 F.3d at 235 (reasonably calculated notice is notice by means "such as one desirous of actually informing the [property owner] might reasonably adopt to accomplish it."); *Yagan v. Bernardi*, 256 AD2d 1225, 1226 (4th Dept. 1998) (three-weeks' notice was insufficient time to afford realistic opportunity to produce funds to avoid forfeiture of title and violated due process).

While the County Appellants cite to several distinguishable cases, the facts show that the analysis was quite simple – namely that proper notice was lacking. The County Appellants knew the Property owner, James Hetelekides, died and could not have received the notices sent two months following his passing. R.

471 [Baxter Testimony]. Further, the County Appellants' decision to wait until the week of the redemption date to make informal contact with staff of The Akropolis, without even explaining the impending foreclosure proceeding, did not satisfy due process.

B. The Trial Court Properly Applied RPTL 1125

The trial court's decision recognizes the County Appellants' concession (asserted in appellants' post -trial supplemental briefing) that the Property vested in Mrs. Hetelekides on August 1, 2006, the date of her husband's death. R. 18 [Decision, p 7]. The County Appellants seize upon this point and argue that the trial court thereby "ignored" the "statutory directive" and "plain meaning" of RPTL 1125(a) and erred in nullifying the foreclosure process based upon a finding that the property owner was dead prior to the date the statutory notices were mailed (October 2, 2006), when the Court should have been guided by the fact that the property owner had not passed away on the date the list of owners of delinquent properties was compiled. Appellants' Brief, pp 16-34. Thus, Appellants argue that the only relevant facts to be plucked from the trial record are those concerning the date the list of delinquent properties was compiled and the date of the property owner's death.

The County Appellants' argument is misguided in that the Decision's reference to their concession was made in relationship to the facts established at trial and accepted as credible by the trial court that: by the time foreclosure notices were mailed the Property owner had passed away; the County Appellants possessed actual knowledge, admittedly as early as December 2006 [R. 471-72] of the Property owner's death; foreclosure notices could not have been received by James Hetelekides because he had passed way and in fact had not been signed for by either the property owner or his wife; the Property owner's wife was alive; and notice in addition to the notices mailed on October 2, 2006 was thereby required. R. 13-14 [Decision].

By contrast, in *Barnes v. McFadden*, 25 AD3d 955, 957 (3d Dept. 2006), cited by County Appellants in support of their argument, the decedent property owner "received actual notice of foreclosure proceeding via certified mail" before his death. Further, the enforcing treasurer was allowed to rely on a "presumption that such notice was in fact received" because the "record failed to disclose that respondent knew or should have known that decedent allegedly was incompetent[.]" *Id.*

The County Appellants cannot rely on a presumption of notice after they learned notice failed. The County Appellants' formalistic "statutory directive"

and "plain meaning" arguments are advanced so as to influence the Court to overlook their purposeful misconduct in furtherance of their rabid-like quest to foreclose on Property and reap a significant financial windfall at the expense of Mrs. Hetelekides.

The failure to provide notice, notice that was reasonable in view of the County Appellants' actual knowledge, such as making a legitimate effort to contact the property owner's widow by letter, telephone and/or posting the property during the 3 minute visit to the property on January 11, 2007, violated due process, a violation that requires a declaration that the entire proceeding be declared a nullity.

The fact that the trial court's nullity declaration is articulated within the context of the date of Mr. Hetelekides' death [R. 18-20, Decision] does not exclude a nullity finding and/or call for reversal of the nullity declaration. In fact, the Court's nullity declaration expressly recognized that the proceeding was commenced before the property owner's death and that a nullity declaration was called for because "Defendants failed to properly substitute a party (CPLR 1015; *Goldman* 165 AD3d at 1116"). R. 20 [Decision, pg. 9, footnote 3].

Moreover, in declaring a nullity, the trial court considered a trial record that evidences municipal conduct violative of constitutional obligations. R. 19

[R. 19, Decision, p, 8, footnote 2 (referencing invalidating jurisdictional defects and municipal constitutional obligation)]. The trial court's decision is replete with citations to the trial record including facts about: Mrs. Hetelekides' efforts to determine whether taxes were due, the confusing and incorrect information imparted to her by the Town of Hopewell and the County Treasurer's office; and her offer to pay any past due taxes.

The County Appellants acknowledge that the scope of this Court's review includes the authority to render judgment warranted by the facts [Appellants' Brief, p 13] but urge the Court to ignore the trial record in furtherance of their reliance upon very narrow "statutory directive" and "plain meaning" arguments that depend solely upon the date on which the County Appellants prepared the list of owners of properties delinquent in the payment of property taxes. In other words, the County Appellants contend that the Court should disregard a trial record that paints a clear portrait of purposeful governmental decision-making, on the part of the County and the Treasurer, to move forward with the foreclosure despite actual knowledge that neither the property owner nor his wife had been provided notice.

The County Appellants argue that they should not have been required to take "extraordinary efforts . . . to locate the whereabouts of an interested party"

[Appellants' Brief, p 22], but fail to acknowledge that they had already located Mrs. Hetelekides and knew she was running the restaurant. R. 472 [Baxter Testimony]. In support of this argument, the County Appellants primarily rely upon three distinguishable Court of Appeals cases that each recognize the significance of due process. *See Congregation Yetev Lev D'Satmar, Inc. v. Sullivan Cty.*, 59 NY2d 418, 425 (1983) (recognizing due process required assessor to give personal notice to all parties readily ascertainable who have a substantial interest in the property); *Kennedy v. Mossafa*, 100 NY2d 1, 9 (2003) (rejecting view that enforcing officer's obligation is "always satisfied" by sending the notice to the address listed in the tax roll); *MacNaughton v. Warren Cty.*, 20 NY3d 252, 258 (2012) (recognizing due process but finding requiring taxing authority to search property records of New Jersey county was "too great a burden").

None of these cases, which recognize a taxing authority's due process obligations, excuse the County Appellants' misconduct. Notice under RPTL 1125 must be analyzed through a due process lens. The facts adduced at trial establish that instead of developing a curative strategy and implementing clear and simple remedies, remedies that would not have halted the process, as argued by County Appellants [Appellants' Brief, p 30] and ignoring the fact that both the Town of Hopewell and the County Treasurer's office had provided Mrs.

Hetelekides with confusing and incorrect information about the payment of real property taxes, the County Appellants refused the payment offer in favor of moving forward with the foreclosure.

Stunningly, the County Appellants sought to cover up the actual knowledge of material defect by planning to withhold material information about The Akropolis from the Ontario County Board of Supervisors. There can be no question that the County Attorney considered the factual information about the Property owner's death, the Treasurer's three-minute visit to the Property on January 11, 2007 and Mrs. Hetelekides' efforts to pay the taxes, to be material, as evidenced by his January 26, 2007 email. R. 678 [Ex. 14 Curtiss Email (County attorney and Treasurer conspired and planned a presentation that failed to include information about the proceeding as it related to the Property so as to discourage inquiry by the members of the Board of Supervisors, even though the County Attorney himself expected that such information would lead to inquiry)].

The plan to withhold material information paved the way for the application for entry of default judgment and conduct of the foreclosure sale. As addressed in Argument Sections I(A), II(B), II(C), and III(A) of this brief, such conduct violated due process and 42 U.S.C. §1983, a statute expressly adopted

to remedy the sort of governmental conduct admitted to during the trial in this case R. 471 [Baxter Testimony (admission of actual knowledge of Property owner's death before the redemption date)].

C. The Trial Court Properly Relied Upon *Goldman*

In addition to finding that the County Appellants failed to comply with RPTL 1125, the trial court determined "the foreclosure proceeding was a nullity because the [County Appellants] commenced the foreclosure proceeding against a deceased party." R. 19 [Decision].

In reaching this decision, the trial court cited *Matter of Foreclosure of Tax Liens (Goldman)*, 165 AD3d 1112 (2d Dept. 2018). There, the Second Department upheld the trial court's dismissal of a tax foreclosure proceeding because the enforcing county, with knowledge of the taxpayer's death, failed to substitute a personal representative of the deceased party's estate. *Id.* at 1117.

Procedurally, the Second Department found that the proceeding "was a nullity from its inception" because "the record owners of the subject property had died before this proceeding was commenced against them." *Id.* The Second Department further held that "even if the proceeding had been properly commenced against the record owners . . . once the County and the Supreme Court were made aware of their deaths, it was incumbent upon the County to

substitute a personal representative of the deceased parties' estates before the matter could proceed." *Id.* (*citing* CPLR 1015(a), 1021, *Singer v. Riskin*, 32 A.D.3d 839 [2d Dept. 2006]).

The trial court properly relied upon *Goldman*. The County Appellants possessed actual knowledge of the Property owner's death at least as early as December 2006 and yet sought a default judgment against him and Geo-Tas in February 2007. *Goldman* expressly recognized the Court's role to safeguard the due process rights of those whose property is threatened by ensuring notice in tax foreclosure proceedings. These proceedings allow counties to "realize a substantial windfall if a landowner defaults in a tax foreclosure proceeding" even in cases "where the taxes owing represent only a small fraction of the value of the land." *Goldman*, 165 AD3d at 1122-1123 (internal citations omitted). Thus, protection of due process rights by the Court is "imperative." *Id.* at 1123.

The County Appellants' brief includes several pages the aim of which is to persuade this Court that the trial court's reliance upon *Goldman* was misplaced and that this Court is not bound by the decision and yet, the briefing omits the history that the Court of Appeals, upon its own motion, denied the subject county's motion for leave to appeal *Goldman*. *See Foreclosure of Tax Liens v. Goldman*, 35 NY3d 998 (2020) ("On the Court's own motion, appeal dismissed

. . . upon the ground that no substantial constitutional question is directly involved").

The County Appellants argue that *Goldman* is contrary to "well settled precedent" and cite to three decisions that are legally and factually distinguishable. [Appellant's Brief, pp 35-39]. The first decision, cited by the County Appellants, *Matter of County of Broome*, 50 AD3d 1300, 1302 (3d Dept. 2008) notes that "due process turns on a case-by-case analysis that measures the reasonableness of a municipality's actions in seeking to provide adequate notice" and explains steps that the defendant County made that went beyond those in this case. There, the Court determined that the County's action steps (making an additional search and mailing after receiving "undeliverable notifications") satisfied due process. *Id.* Here, the County learned that notice had been received by a person with the name of "Barbara Schenck" (a waitress), a name that bore no resemblance to the name "Demetrios Hetelekides" or "James Hetelekides", yet the County took no further action until the week immediately prior to the redemption date and, as the trial court conclusively found:

> None of these attempts resulted in the [County Appellants] communicating directly with [Mrs. Hetelekides], and the [County Appellants] provided no notice of the foreclosure pendency in any of those

communications.

R. 19, Decision.

In *Matter of Barnes v. McFadden*, 25 AD3d 955 (3d Dept. 2006), discussed above, the decedent was incompetent and suffering from dementia. *Id.* at 956. The record established that the decedent's 16-year-old granddaughter signed the mailing receipt and handed the foreclosure notice to decedent, who "received actual notice of the proceeding[.]" *Id.* at 956, 957. Significantly, the "record fail[ed] to disclose that [the enforcing treasurer] knew or should have known that decedent allegedly was incompetent." *Id.* at 957. In this case, James Hetelekides could not have received the foreclosure notice because he died two months before the mailings; the County Appellants never addressed a foreclosure notice to Mrs. Hetelekides; and unlike the Treasurer in *Barnes*, the County Appellants knew that James Hetelekides had died and identified the Property as requiring notice.

The County Appellants also rely upon *Bender v. City of Rochester*, 765 F2d 7 (2d Cir. 1985). The County Appellants mischaracterize the decision, claiming that "the Second Circuit held that to require the taxing authority to search the records of the Surrogate's Court to ascertain names of distributees would be onerous." Appellant's Brief, p 37. But the decision actually states the opposite:

"Such inquiry would not be an onerous task; it would normally be performed by a competent title searcher in connection with a sale of the property, at least where circumstances present some basis for suspecting that the record owner has died." *Bender*, 765 F2d at 11. The Second Circuit ultimately ruled that under the circumstances of that case, it did "not believe the names of the distributees were reasonably ascertainable" and that the City met its due process obligations without having to search Surrogate's Court records. *Id.* at 12. But here, the Record establishes that the County Appellants knew that James Hetelekides had died and that Mrs. Hetelekides was operating the restaurant at the Property. R. 469 [Baxter Testimony]. The court's decision acknowledges the County Appellants' admission that "the Property immediately vested in [Mrs. Hetelekides] upon Mr. Hetelekides' death. R. 18. Despite the County Appellants' determination that the Property required additional notice, they provided none, and never contacted Mrs. Hetelekides.

Contrary to the County Appellants' contention, *Goldman* is consonant with persuasive authority, such as *Orra Realty Corp. v. Gillen, et al.* 46 AD3d 649 (2d Dept. 2007), *leave to appeal denied*, 10 NY3d 712 (2008). In *Orra*, the plaintiff sought to declare a tax deed null and void under RPAPL Art. 15. The Court

granted the relief because the foreclosure sale was conducted with knowledge that the taxpayer had passed away:

> Notwithstanding its knowledge of the decedent's death, GLT did not petition the Surrogate's Court for the appointment of an administrator, as it could have done pursuant to SCPA 1402 (1)(b).

Orra at 651. The Court ruled that under the facts of that case, the means selected for providing notice were not reasonably calculated to apprise the interested parties of the pendency of the tax sale and transfer and afford them an opportunity to redeem the outstanding tax lien. *Id.* (*citing Covey v Town of Somers,* 351 U.S. 141 [1956]).

The trial court properly applied *Goldman* and the Court is not bound by the distinguishable decisions relied upon by the County Appellants.

D. The County Appellants Overstate Alleged Burdens Imposed by the Trial Upon Taxing Authorities to Excuse Clear Violations of Due Process

The County Appellants insist that the trial court's instruction to ascertain interested parties after a property owner dies "creates considerable burdens for foreclosing municipalities." Appellants' Brief, p 42. This argument must be rejected because the trial court's finding is consistent with fundamental due process principles. Before taking an action that will interfere with a property interest, a government "must provide notice reasonably calculated, under all

circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection." *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 795, (1983) (internal quotation omitted) (neither notice by publication and posting, nor mailed notice to the property owner, are means such as one desirous of actually informing the mortgagee might reasonably adopt to accomplish it).

Contrary to County Appellants' contention, there is nothing extraordinary about requiring actual notice to Mrs. Hetelekides based upon the actual knowledge possessed by the County Appellants. R. 472-73 [Baxter Testimony]. This is not a matter in which decedent's heirs were unknown; rather the facts establish that the County identified Mrs. Hetelekides and deliberately decided against providing her with any notice of the foreclosure proceeding. "Accordingly, even if principles of state law did not independently require the County to name and provide notice to the representative of the deceased owners' estates, the notice provided here was constitutionally insufficient to permit the Supreme Court to exercise personal jurisdiction over the record owners' successors in interest." *Goldman*, 165 AD3d at 1122.

E. The Trial Court's Decision was Supported by the Evidence

The County Appellants argue that the trial court made erroneous findings

based upon Mrs. Hetelekides' testimony about her inquiries as to whether taxes were owed on the Property in January 2007, before the redemption date deadline. County Appellants fail to identify the appropriate standard for reversing the trial court's finding, which they cannot meet. "On a bench trial, the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under *any fair interpretation of the evidence.*" *Black v. State*, 125 AD3d 1523, 1525 (4th Dept. 2015) (emphasis added) (internal quotation omitted).

None of the County Appellants' arguments on this point refute that they knew of James Hetelekides' death at least as early as December 2006, identified the Property as requiring additional notice, failed to give such notice, and applied for a default judgment against James Hetelekides six months after he died.

The trial court concluded that Mrs. Hetelekides' trial testimony was credible, that after receiving her residential tax bill, she visited the Ontario County Treasurer's office and inquired whether any taxes were owed on the Property. R. 121-22 [Plaintiff Testimony]. The County Appellants attempt to undercut this testimony, arguing that Mrs. Hetelekides incorrectly stated the amount owed on her house taxes and when she paid them. Appellants' Brief, pp

46-47.

The fact that Mrs. Hetelekides may have misremembered the amount of taxes owed on her home from the prior decade does not call for disregard of the trial court's finding. Mrs. Hetelekides testified that she could not remember whether the tax bill came in December 2006 or January 2007 and testified it was "about that time." R. 142. This testimony is consistent with Baxter's testimony that residential tax bills were sent around January 1, 2007. R. 130 and that taxpayers mistakenly attempt to pay residential taxes at his offices and that these taxpayers may make other inquiries to his staff. R. 522-23

Further, the fact that County employee Stephanie Seeley testified that she did not interact with Mrs. Hetelekides until after the deadline does not support disregard of the trial court's finding, especially considering Mrs. Hetelekides testimony that an individual named Stephanie told her the taxes were paid. R. 122 [Plaintiff's Testimony]. In an email dated April 17, 2007, Ms. Seeley wrote that Mrs. Hetelekides "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 [Ex. M, Seeley Email]. While Ms. Seeley stated Mrs. Hetelekides' assertion was incorrect, the trial court was empowered to weigh the credibility of Ms. Seeley's

testimony. *See Claridge Gardens, Inc. v. Menotti*, 160 AD2d 544, 544–45 (1st Dept. 1990) (trial court's conclusions should not be disturbed on appeal unless they could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses).

Karen Carson's testimony also does not refute Mrs. Hetelekides' testimony or the findings of the Court. Hopewell employee Karen Carson confirmed that she helped Mrs. Hetelekides make a phone call to the County regarding the restaurant taxes and she believes she spoke with someone. R. 306 [Carson Testimony]. Just because that "could very well have been" Martin Luther King, Jr. Day as claimed by the County Appellants, the trial court was not compelled to conclude that the call could only have been made on that day. Appellant's Brief, p 50. Carson also testified that the encounter could have been on the redemption date, January 12, the Friday before Martin Luther King, Jr. Day. R. 307 [Carson Testimony]. At trial, the County Appellants only submitted evidence of Carson's work records from January 14, 2007 – January 27, 2007 but not for any earlier dates in January. R. 313 [*Id.*]. R. 701 [Ex. I, Time Report]. Thus, the Carson time report record does not refute Mrs. Hetelekides' testimony about her interactions at the Town of Hopewell before the deadline.

The County Appellants also argue Attorney John Tyo did not mention Mrs. Hetelekides' attempts to inquire about taxes in a letter that he authored and directed to the Ontario County Financial Management Committee. There is no testimony concerning the substance of this letter and it does not refute Mrs. Hetelekides' testimony or the trial court's determinations. R. 387-91 [Tyo Testimony].

Citing the doctrine of equitable estoppel, the County Appellants contend that the misinformation provided to plaintiff is irrelevant. The County Appellants fail to cite any comparable cases but rely primarily upon two decisions relating to foreclosures: *Matter of Village of Fleischmanns v. Delaware Natl. Bank of Delhi*, 77 AD3d 1146 (3d Dept. 2010); and *Wilson v. Neighborhood Restore Hous.*, 129 AD3d 948 (2d Dept. 2015).

Fleischmanns is distinguishable because the property owner "received the statutorily required notice pursuant to RPTL Article 11 and conceded that it had actual notice of the foreclosure proceeding." 77 AD3d at 1148. Similarly, in *Wilson*, there appeared to be no dispute that that Plaintiff, who owed twelve years of back taxes, did not have notice of the redemption period. 128 AD3d at 949. Rather, it appears Plaintiff argued there was a "promise" to delay the redemption period. *Id.*

Here, it is undisputed that James Hetelekides never received notice of the foreclosure proceeding because he had already died. There is also no claim that the County Appellants ever addressed notices to Mrs. Hetelekides or attempted to contact her at all about the Property until Baxter's phone calls and visit the week of the deadline. The trial court properly relied on these facts in ruling against the County Appellants.

Finally, the County Appellants argue that the trial court erred in finding that the commencement date was the date the County filed its application for a default judgment and maintain that the proper commencement date was when the petition for foreclosure was filed in the County Clerk's office on October 2, 2006. Appellants' Brief, p 51. This argument does not call for reversal because it is undisputed that James Hetelekides died on August 1, 2006, two months before the petition was filed. Irrespective of the date of commencement, it is undisputed that the County Appellants pursued a foreclosure proceeding and sought a default judgment with actual knowledge that the Property owner had not received notice.

F. The County Appellants Overstate the Implications of the Trial Court's Decision in Relationship to Future Foreclosure Proceedings

Relying on *Melahn v. Hearn*, 60 NY2d 944 (1983), the County Appellants advance a policy argument that the trial court's Decision will lead to permanent

clouds on tax titles in future foreclosure proceedings. Appellants' Brief, pp 52-53. The trial court's decision does not impose new and/or different requirements upon municipalities. The County Appellants were always required to give proper notice and failed to accomplish that here. *See Matter of City of Utica (Suprunchik)*, 169 AD3d 179, 182 (4th Dept. 2019) (the failure to substantially comply with the requirement of providing the taxpayer with proper notice constitutes a jurisdictional defect); *Goldman*, 164 AD3d at 1122 (interests of the County must be balanced with the property rights of individuals which may be extinguished forever if they default in a tax foreclosure proceeding).

Of note, the *Melahn* appellant did not raise due process arguments in the lower court and thus it was not preserved for the Court's review. *Melahn*, 60 NY2d at 945.

Similarly, this policy argument was not argued at trial or during the summary judgment phase. R. 775-92 [Defendants' Proposed Findings of Fact and Conclusions of Law]; R. 797-805 [DiPonzio Affirmation in Support of Summary Judgment]. This argument should not be heard on appeal. *See Plaza Drive Grp. of CNY, LLC v. Town of Sennett*, 115 AD3d 1165, 1166–67 (4th Dept. 2014) (alternative theory raised for the first time on appeal not properly before the Court).

II. The Trial Court Properly Denied the County Appellants' Motion for Summary Judgment.

In 2018, the County Appellants unsuccessfully moved for summary judgment seeking dismissal of Mrs. Hetelekides' Complaint. R. 793-94 [Decision]. The trial court "found both factual discrepancies and credibility ambiguities that [could] only be resolved at a hearing." *Id.* For the reasons set forth below, the Court should affirm this denial.

"A party moving for summary judgment must demonstrate that 'the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment' in the moving party's favor." *Jacobsen v. New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014) (citing CPLR 3212[b]). "Thus, the proponent of a summary judgment motion must make prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Id.* (*quoting Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986).

"This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party and every available inference must be drawn in the non-moving party's favor." *Palumbo v. Bristol-Myers Squibb Co.*, 158 AD3d 1182, 1183–84 (4th Dept. 2018) (internal

quotation omitted) (concluding defendant failed to meet burden on statute of limitations defense).

The trial court appropriately denied the County Appellants' motion because they failed to meet their burden and because, at minimum, questions of fact remained.

A. The Lawsuit Was Timely Commenced and Not Barred by RPTL 1131

The County Appellants first argue that Mrs. Hetelekides' requested relief was barred by the thirty-day statute of limitation imposed by RPTL 1131.

This argument seeks to relitigate an issue decided by the trial court and affirmed by the Appellate Division. *See Hetelekides v. County of Ontario*, 70 AD3d 1407 (4th Dept. 2010). In 2008, the County Appellants moved to dismiss the case under CPLR 3211(a)(7) arguing that "plaintiff's only remedy would have been to re-open the default judgment" and that remedy was time-barred. R. 808 [Nov. 7, 2008 Decision]. Recognizing that Mrs. Hetelekides "has shown due diligence in pursuing her rights" against the County Appellants, the trial court properly denied the motion, finding Mrs. Hetelekides timely "commenced the instant action contesting the validity of the tax foreclosure sale, within the applicable two-year statute of limitation." R. 812 [*Id.*]. This Court unanimously affirmed the trial court. R. 813 [Order dated Feb. 11, 2010].

Now, twelve years later, the County Appellants make the same argument, claiming that Mrs. Hetelekides was required to make an application to vacate the default judgment within thirty days of its entry, by March 10, 2007. Appellants' Brief, pp 53-54. This argument should be rejected because it was previously decided. *See GG Managers, Inc. v. Fidata Tr. Co. New York*, 215 AD2d 241, 241 (1st Dept. 1995) (prior decision denying motion to dismiss on the same statute of limitations grounds raised on the pending appeal barred its re-litigation). Notably, for over a decade, the parties have litigated claims that County Appellants now argue were time-barred on March 10, 2007. *Cf. Martin v. City of Cohoes*, 37 NY2d 162, 165 (1975) (parties to civil litigation may consent by their conduct to the law to be applied).

When reviewing the summary judgment motion, the trial court reviewed information relating to the Board of Supervisors vote and denied the County Appellants' motion. R. 1231-1237 [Hetelekides Aff. with Exhibits]; R. 1241-1268 [Curtiss Aff. with Exhibits]; R. 1269-71 [Supp. Hetelekides Aff.].

The trial revealed that during the thirty-day period in which the County Appellants claim that Mrs. Hetelekides was required to commence her action, Baxter and other Ontario County officials were engaged in a strategy to keep information from the Board of Supervisors who were slated to vote upon

allowing her to repurchase the Property under RPTL 1166. R. 678 [Ex. 14, Curtiss Email]; R. 609 [Ex. 10, Baxter Memo]. On March 6, 2007, Baxter sent a memo to all Ontario County Supervisors about Mrs. Hetelekides' request to purchase the Property directly from the County and incorrectly represented that Mrs. Hetelekides "herself signed for the foreclosure notice that was delivered by mail." R. 609. On March 29, 2007 the Board of Supervisors voted down Resolution 188-2007 that would have allowed Mrs. Hetelekides to purchase the Property back from the County. R. 1267-68 [Meeting Minutes]. This occurred 19 days after expiration of the 30-day deadline relied upon by the County Appellants.

The trial court properly denied summary judgment on the statute of limitations ground asserted by the County Appellants.

B. Mrs. Hetelekides Submitted Evidence of Jurisdictional Defects and Due Process Violations by the County Appellants.

The County Appellants also argue that Mrs. Hetelekides "failed to demonstrate a jurisdictional defect in the underlying proceeding to warrant setting aside the deed pursuant to RPTL 1137." Appellants' Brief, p 56.

At the summary judgment phase, like now, the County Appellants relied upon based upon mailings to James Hetelekides and Geo-Tas, Inc. on October 2, 2006 to establish compliance with all statutory notice requirements. R. 1143

– 1187 [Baxter Aff. with Exhibits]. The County Appellants further argued that "actual notice" of the proceedings occurred on October 3, 2006, even though James Hetelekides died on August 1, 2006, and no notice was addressed to Mrs. Hetelekides, and the certified mailings were not signed by Mrs. Hetelekides. R. 1149 [Baxter Aff. ¶ 25].

The trial court correctly found factual and credibility issues that precluded summary judgment. R. 794 [Aug. 6, 2018 Decision].

In opposition to the motion, Mrs. Hetelekides submitted evidence that James Hetelekides could not have received notice because he died on August 1, 2006 R. 1190 [Korona Aff. ¶ 4]; R. 1231 Hetelekides Aff. ¶ 2] and that Mrs. Hetelekides did not see any of the County Appellants' notices, which she did not sign for, and was not otherwise informed of a tax delinquency before the redemption deadline. R. 1190 [Korona Aff. ¶ 4]; R. 1232 Hetelekides Aff. ¶ 5].

In further opposition, and citing to relevant deposition testimony, Mrs. Hetelekides asserted that Baxter formed the belief that notice had not been received at the Property and that he included it on a list of parcels requiring notification. R. 1190-91 [Korona Aff. ¶¶ 6-9]; R. 929-32 [Baxter Testimony]; R. 1195-96 [Ex. D to Korona Aff]. It was further argued that despite listing the Property as requiring notice, Baxter made no attempt at notification until the

week of the deadline and did not visit the Property until January 11, 2007, the day before. R. 1191 [Korona Aff. ¶ 9]; R. 917-21 [Baxter Testimony].

Mrs. Hetelekides argued in opposition to the motion that, at minimum, there were triable issues of fact as to whether the County Appellants believed its notices failed and whether they took reasonable steps to correct that failure and whether Baxter's alleged notification attempts from January 9-11 were sufficient attempts to apprise the property owner of the redemption date and foreclosure proceeding. *See Akey*, 375 F.3d at 235 (reasonably calculated notice to satisfy due process is notice by means such as one desirous of actually informing the property owner might reasonably adopt to accomplish it).

As it would turn out, the trial exposed material facts including County Appellants' actual knowledge the taxpayer's death and trial testimony directly contrary to the Treasurer's sworn response to an interrogatory about the date he learned of the Property Owner's death. R. 471-72 [Baxter Testimony]; R. 1079-91 [Verified Answers to Interrogatories, see #12, on R. 1087].

C. Evidence Supporting Relief Pursuant to 42 U.S.C. § 1983 (Municipal Misconduct) and § 1988 (Attorney Fees and Costs)

A municipality may be liable under 42 U.S.C. § 1983 "when execution of a government's policy or custom, whether made by its lawmakers or by those

whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Nelson v. Ulster Cty.*, 789 F. Supp. 2d 345, 355 (N.D.N.Y. 2010) (finding "evidence is such that a reasonable jury could find that Ulster County had a constitutionally deficient policy, custom, or practice that caused the plaintiffs to be deprived of their property without due process of law").

In opposition to the summary judgment motion, Mrs. Hetelekides submitted evidence of the County Appellants' deficient policy and raised issues of fact precluding summary judgment.

1. The County Appellants' Policy

First, the County Appellants argue that Mrs. Hetelekides failed to establish a widespread policy for which they can be held liable. Appellants' Brief, pp 56-57. To prove a municipal policy or custom, a plaintiff may show any of the following:

> (1) the existence of a formal policy officially endorsed by the municipality; (2) actions taken or decisions made by municipal officials with final decision making authority, which caused the alleged violation of plaintiff's civil rights; (3) a practice so persistent and widespread that it constitutes a custom of which constructive knowledge can be implied on the part of the policymaking officials; or (4) a failure by policymakers to properly train or supervise their subordinates, amounting to deliberate indifference to the rights of those who come in contact with the municipal employees.

Nelson, 789 F. Supp. 2d at 355 (internal quotation omitted).

In opposition to summary judgment, Mrs. Hetelekides submitted evidence demonstrating there were questions of fact regarding the County Appellants' "policy of contacting property owners that did not receive notification of an impending foreclosure." R. 1192-93 [Korona Aff. ¶ 15].

The Record shows that County officials, including Appellant Baxter, developed a policy of identifying property owners that he believed did not receive notification of an imminent foreclosure and auction sale. Baxter testified that he devised and implemented the County's policy of making "extra attempts" to contact property owners who did not receive notification of an imminent foreclosure and auction sale. R. 913-14 [Baxter Deposition Testimony]; that the list of extra properties was formulated or discussed by him, along with Second Deputy Treasurer Robin Johnson, County Attorney Gary Curtiss, and staff members Nancy Dunn, and Stephanie Cook. R. 908-09 [Baxter Testimony]; R. 1077-78 [Deposition Ex. 7]. Once the extra attempt notice policy was implemented, it was and is incumbent upon the County Appellants to abide by it in a fair and equitable manner. The summary judgment record established an intent to not notify the property owner and to not provide adequate time to

redeem the Property and to conceal information that could have led to a fair resolution and redemption of the Property.

"Where an official has final authority over significant matters involving the exercise of discretion, the choices he makes represent government policy." *Benedith v. Malverne Union Free Sch. Dist.*, 38 F. Supp. 3d 286, 316 (E.D.N.Y. 2014) (internal quotation omitted) (finding principal was final policymaker of district and denying summary judgment motion).

It cannot be disputed that Baxter had final decision-making authority with respect to the Ontario County's foreclosure proceedings. Baxter's affidavit submitted in support of the summary judgment motion established that he is the County Treasurer and is "the enforcing officer for *in rem* tax foreclosure proceedings … pertaining to properties in the County outside the cities of Geneva and Canandaigua." R. 1143 [Baxter Aff. ¶ 1]. Baxter's affidavit also asserts he has discretionary authority with respect to foreclosure proceedings. R. 1147 [*Id.* at ¶ 18].

Baxter implemented the policy in his role as the County Treasurer, and the enforcement officer for the County's foreclosure proceedings. Accordingly, Mrs. Hetelekides demonstrated the existence of an official policy. Defendants' involvement, indeed, Baxter's personal involvement in developing and

executing this policy with respect to The Property precluded dismissal of the 42 U.S.C. 1983 claims.

Nelson v. Ulster Cty., 789 F. Supp. 2d 345 (N.D.N.Y. 2010) provides valuable guidance. There, the plaintiff-widow and her late husband were owners of a tavern in Ulster County. *Id.* at 350. After property taxes were not paid, the County Treasurer and County Clerk sent a notice by certified mail to the plaintiff and her late husband that Ulster County was commencing a foreclosure proceeding on the tavern property. *Id.* The certified mailing was returned as undeliverable. *Id.* at 351. County officials then published the notice of foreclosure in two local newspapers and checked the surrogate's court for death records. *Id.* The Court noted that the County officials "did not post a notice of foreclosure on the Tavern property, send a subsequent notification by regular mail to the Tavern address, or attempt to contact [the plaintiffs] by phone." *Id.* The property was ultimately sold at a foreclosure auction without [the plaintiffs] receiving notice. *Id.* at 351-52.

The Court denied Ulster County's motion for summary judgment on the plaintiff-widow's 42 U.S.C. 1983 claim, finding "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." *Id.* at 356.

The summary judgment record established that other property owners with connections to Baxter or County workers were contacted in advance and their properties were not auctioned. Considering these facts and that Baxter personally rejected Mrs. Hetelekides' attempt to pay taxes on January 16, 2007 (less than a week after Baxter's failed efforts to provide notice), a reasonable trier-of-fact could conclude that Baxter's notice "attempts" were not intended to lead to redemption, but rather were designed to merely appear to be legitimate notification efforts so as to procure the windfall surplus notwithstanding the lack of notice and due process.

Further, Baxter's personal involvement in both the development and unfair implementation of the unconstitutional policy prevent a finding of summary judgment. *See Nelson*, 789 F. Supp. 2d at 356 (finding "sufficient evidence to demonstrate a genuine issue of material fact" regarding the personal involvement of the county treasurer and clerk to deny summary judgment on the 42 U.S.C. 1983 claims).

The County Appellants argue that the claims against Baxter should be dismissed because he was authorized to "issue additional formal or informal notices" under RPTL 1125. But this tired argument relies upon disregard of the

fact that Baxter and Ontario County officials learned of the Property owner's death. In opposition to the summary judgment motion, Mrs. Hetelekides argued there was a question of fact as to whether Baxter, despite his Verified Answers to Interrogatories, knew James Hetelekides had died. R. 1222-25 [Korona Aff. Ex. H, Baxter Interrogatory Response No. 12]. Baxter and County Officials identified the Property as requiring notice. R. 1077-78 [Deposition Ex. 7]. At his deposition, Baxter testified that he did not ask for James Hetelekides by name, but instead "for someone in charge" at The Akropolis during the week of January 9, 2007. R. 917-921 [Baxter Deposition Testimony]. These facts called into question the Treasurer's credibility about his actual knowledge about the owner's death as opposed to statements in his affidavit to the effect that he had concluded that the Property was listed as requiring additional notice because it was an "ongoing business that was still in operation[.]" R. 1147 [Baxter Aff. ¶ 18].

The Court properly denied summary judgment on credibility issues. Mrs. Hetelekides' well-founded belief about County Appellants' actual knowledge was ultimately proven true at trial when Baxter admitted he discussed James Hetelekides' death with County officials in December 2006 and confirmed that

was the reason he "would not have asked to speak to James Hetelekides" when he went to the Property on January 11, 2007. R. 471-72 [Baxter Testimony].

2. RPTL 1131 Does Not Bar Recovery Pursuant to 42 U.S.C. 1983

County Appellants further argue, without citing any authority, that the "Section 1983 claims should have also been dismissed on summary judgment since [Mrs. Hetelekides] 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 [its entry]." Appellants' Brief, p 58. The County Appellants relied upon this argument twelve years ago in relationship to their motion to dismiss. As discussed above, the motion was denied, and that decision was unanimously affirmed by this Court. The 42 U.S.C. 1983 claim is based on the County Appellants' unconstitutional policy and seeks different relief, including attorneys' fees and costs. *See Corvetti v. Town of Lake Pleasant*, 227 AD2d 821, 823 (3d Dept. 1996) (rejecting defendants' election of remedies defense since a cause of action based on 42 U.S.C. § 1983 is separate and distinct from one predicated upon RPTL Article 7).

Finally, County Appellants cite to Attorney Tyo's letter to the Ontario County Board of Supervisors in support of their argument that the trial court's denial of summary judgment was error. The County Appellants fail to establish

any connection between this letter and their failure to abide by their due process obligations. Further, Mrs. Hetelekides' opposing affidavit explained that she neither personally addressed nor submitted an affidavit or sworn statement to either the Financial Management Committee or the full Board of Supervisors. R. 1270 [Hetelekides Supp. Aff. ¶¶ 4-5]. Mrs. Hetelekides was told to remain silent and to present funds demonstrating her ability to pay the tax arrearage. *Id.* at ¶ 6. Ontario County Supervisor Mary Green assured her the County would accept her payment. *Id.* at ¶ 7. At most, the Tyo letter, which appears to have no bearing on the 42 U.S.C. 1983 claims, created a question of fact and summary judgment was properly denied.

III. The Court Should Grant Mrs. Hetelekides' Cross-Appeal

A. The Trial Court Erred in Dismissing the 42 U.S.C. 1983 Claims

The trial court incorrectly dismissed Mrs. Hetelekides' 42 U.S.C. 1983 claims. "A municipal custom or policy can be shown by establishing that an official who is a final policy maker directly committed or commanded the violation of the plaintiff's rights. Liability . . . may be predicated on a single act, as long as it is the act of an official authorized to decide policy in that area." *See Bassett v. City of Rye*, 104 AD3d 889, 891 (2d Dept. 2013) (internal quotations omitted) (trial court erred granting defendant's motion to set aside jury verdict).

The evidence established during the trial fully supported a finding that Mrs. Hetelekides' rights were violated by a policy that called for disregard of facts and deliberate withholding of information that would have led to a result other than an auction sale of the Property. When opposing summary judgment, Mrs. Hetelekides argued that there were questions of fact regarding County Appellants' policy of contacting property owners that did not receive notification of an impending foreclosure violated 42 U.S.C. § 1983. R. 1193-94. [Korona Aff. ¶ 15]. At trial, the evidence revealed blatant and repugnant government misconduct providing the basis for the relief called for by 42 U.S.C. § 1983. The County Appellants' policy elevated foreclosure auction revenue over the requirement that its process respect constitutional rights of meaningful notice. R. 767 [Plaintiff's Proposed Conclusions of Law ¶ 9].

At trial, the evidence conclusively established that Baxter and Ontario County officials knew that James Hetelekides died before the notices of foreclosure were sent to him. R. 471-72 [Baxter Testimony]. Despite identifying the Property as requiring notice at least as early as December 2006, Baxter waited until January 9 and 10, 2007, before he even attempted to telephone the Property and even then, he failed to inquire about the identity of the person with whom he claims he spoke and/or state that the purpose of his call was to permit

redemption of the Property. R. 277-78 [Baxter Deposition]; R. 366-67 [Baxter Testimony]. On January 11, 2007, at 1:30 in the afternoon, the day before the deadline, Baxter for the first time went to the Property where he stayed for "3 minutes" and left without speaking to anyone about the impending foreclosure. R. 368 [Baxter Testimony]. During the 3-minute visit on January 11, 2007, Baxter failed to ask to speak with asked to speak with any member of the Hetelekides family and/or Barb Schenk, even though he had recently reviewed the certified mail receipt cards. R. 466-67, 470-72 [*Id.*]; R. 591 [*Id.*]. The trial court erred by failing to find that the County Appellants engaged in a policy, the aim of which was to make it appear that they had taken steps to provide notice, when in fact the objective was to ensure, at all costs, that the process not be interrupted, even by redemption of the Property, so that it could realize a significant windfall surplus. The County Appellants engaged in a foreclosure process that deprived Mrs. Hetelekides of notice in a calculated effort to effort to profit at her expense. The Property had a 2006 assessed value of $289,300 and the County gained significant profit from auctioning it. R. 582 [Ex. 5, Auction Booklet]. The County Appellants' conduct was purposefully designed to avoid redemption in spite of the actual knowledge possessed by the Treasurer and County representatives, including the County attorney.

The actions of the County Appellants following the deadline (previously described herein) provide further evidence of an unconstitutional policy. On January 16, 2007, less than a week after Baxter first called The Akropolis, Mrs. Hetelekides visited his office and offered to pay. R. 544. Baxter refused. R. 152-53 [Plaintiff's Testimony]. On January 26, 2007, Ontario County Attorney Gary Curtiss wrote to Baxter and others noting they "successfully prevented [the Board of Supervisors] from discussing any individual properties" and urged these County officials to strategize "to set the tone for what [he] expect[ed] will be requests for exceptions for the restaurant and Delgatto." R. 678 [Ex. 14 Curtiss Email]. On March 6, 2007, knowing that under consideration by the Board of Supervisors was Mrs. Hetelekides' offer to purchase the Property pursuant to RPTL 1166, Appellant Baxter distributed a memorandum to all supervisors in which he expressly misrepresented that Mrs. Hetelekides "herself signed for the foreclosure notice that was delivered by mail." R. 609. Baxter never disclosed that he identified the Property as requiring notice or revealed his alleged notice attempts. R. 522 [Baxter Testimony]; R. 609 [Ex. 10 Baxter Memo]. Ultimately, the Board of Supervisors declined to permit Mrs. Hetelekides to purchase back the Property for more than the tax arrearage. R. R. 674-75 [Ex. 12, Minutes]. This vote, based upon misinformation, occurred

19 days after the date County Appellants argue was the last date on which Mrs. Hetelekides could have challenged the process pursuant to a motion to vacate the default judgment under RPTL 1131. This conduct should be recognized as blatant, deliberate municipal conduct that forms the basis for recovery under Title 42. The trial court erred in dismissing Mrs. Hetelekides' claims under 42 USC 1983. *See Bassett*, 104 AD3d at 891 (liability for a violation of 42 USC § 1983 may be predicated on a single act); *Nelson*, 789 F. Supp. 2d at 356 (reasonable jury could find constitutionally deficient policy, custom, or practice that caused deprivation of property without due process of law).

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

At trial, Mrs. Hetelekides submitted evidence of a loan she obtained from The Canandaigua National Bank ("CNB") to pay Ontario County for the Property at the public auction. R. 547-74 [Ex. 2, Holman Aff.]. The loan carried an initial variable rate of 9.78% interest. R. 548 [*Id.* at ¶ 4]. The total interest payments made by Mrs. Hetelekides through November 30, 2018 was $33,751.58. R. 549 [*Id.* at ¶ 7].

Mrs. Hetelekides sought recovery of these borrowing costs that arose as a direct result of the County Appellants' refusal to permit redemption and its conduct of the foreclosure auction sale. R. 761-63 [Plaintiff's Proposed Findings

of Fact ¶¶ 71-81]. If Ontario County had not wrongfully taken the Property, Mrs. Hetelekides would not have been compelled to procure the loan.

While the trial court correctly applied a prejudgment interest rate of 9%, it declined to award Mrs. Hetelekides any borrowing fees she incurred from the CNB Loan. R. 22 [Decision].

The trial court erred, and Mrs. Hetelekides is entitled to damages for the CNB borrowing costs. *See E.J. Brooks Co. v. Cambridge Sec. Seals,* 31 NY3d 441, 448 (2018) (the fundamental purpose of compensatory damages is to have the wrongdoer make the victim whole); *Sharapata v. Town of Islip*, 56 NY2d 332, 335, (1982) (compensatory damages measure fair and just compensation, commensurate with the loss or injury sustained from the wrongful act).

CONCLUSION

The evidence at trial demonstrated that Appellant Baxter and Ontario County officials knew that James Hetelekides died before they sent foreclosure notices. Yet, the County Appellants failed to take reasonable steps to notify his wife, Krystalo Hetelekides, who they had identified and knew worked at the Property. Instead, they applied for and obtained a default judgment against James Hetelekides, six months after his death. Through the default judgment, Ontario County took title to the Property, conducted an auction sale that

realized a price nearly eight times the tax arrearage and retained a windfall surplus of $138,656.83. R. 17 [Decision, p 6].

For over a decade, the County Appellants have attempted to excuse their behavior on the basis of form over substance arguments that ignore the constitutional obligations imposed by the law.

Krystalo Hetelekides respectfully requests that the Court affirm the trial court's ruling that the County Appellants' failed to give proper notice and grant her cross-appeal to allow her to be fully compensated for the County Appellants' actions and to include an award of attorneys' fees and costs.

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Rochester, New York

Respectfully submitted,

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