To Be Argued By:
JOHN VAN DER TUIN
Time Requested: 30 Minutes

APL-2023-00088
Appellate Division, First Department Case Nos. 2021-03399, 2021-03400, 2022-00030
New York County Clerk's Index No. 157631/15

Court of Appeals

STATE OF NEW YORK

In the Matter of

KASOWITZ, BENSON, TORRES & FRIEDMAN, LLP,

Petitioner,

—against—

JPMORGAN CHASE BANK, N.A.,

Respondent-Appellant,

THE DAKOTA, INC.,

Respondent-Respondent,

(*Caption continued on inside cover*)

BRIEF FOR RESPONDENT-RESPONDENT

JOHN VAN DER TUIN
MORGAN V. MANLEY
SMITH, GAMBRELL & RUSSELL, LLP
1301 Avenue of the Americas,
21st Floor
New York, New York 10019
Telephone: (212) 907-9700
Facsimile: (212) 907-9800

Attorneys for Respondent-Respondent

November 27, 2023

ALPHONSE FLETCHER, JR.,

Respondent,

—and—

FLETCHER INTERNATIONAL LTD., *et al.*,

Intervenors-Respondents.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Section 500.1(f) of the Rules of Practice for this Court, counsel for The Dakota, Inc., certifies as follows:

1. The Dakota, Inc., is not a publicly owned corporation.

2. The Dakota, Inc., has no parent, subsidiary or affiliated companies.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

Cases

Statutes

Rules

Other Authorities

PRELIMINARY STATEMENT

Respondent-Respondent The Dakota, Inc. ("Dakota" or "Respondent") submits this brief (i) in support of affirmance of the Memorandum Decision and Order of the Appellate Division, First Department, entered October 18, 2022, that affirmed the judgment of the Supreme Court, New York County (Lewis J. Lubell, J.) entered November 8, 2021, and, alternatively, (ii) in support of dismissal of this appeal as moot by reason of the subsequent Decision and Order of the Supreme Court, New York County (Arlene P. Bluth, J.) ("Bluth II"), dated June 5, 2023, that denied, on the merits, the motion of Appellant JP Morgan Chase Bank, N.A. ("Appellant" or "Chase") pursuant to CPLR 5015(a) to vacate the prior judgment of the Supreme Court, New York County (Arlene P. Bluth, J.), dated December 14, 2017 ("Bluth I"), that awarded judgment for attorney's fees in favor of Dakota and against Alphonse Fletcher Jr. ("Fletcher").[1]

INTRODUCTION

Chase has created a procedural quagmire in this case with a Potemkin Village of issues in its effort to avoid the central substantive dispositive issue on which

[1] The mootness of this appeal occurred by reason of Bluth II that was issued after the motion for leave to appeal was fully submitted. It was addressed by letter submissions of the parties to this Court, and the letter of the Clerk of this Court, dated August 14, 2023, instructed that mootness might be addressed in the briefs. Chase's Appellant's Brief has done so. Dakota responds and, pursuant to the Clerk's direction, also submits an Addendum ("Add.") with the papers pertinent to Chase's May 2023 motion that resulted in Bluth II.

Justices Lubell and Bluth have agreed – that Dakota was entitled to judgment pursuant to its proprietary lease with its shareholder Fletcher for the reasonable attorney's fees that it incurred in successfully defending Fletcher's suit against it. Justices Acosta, Renwick, Singh, and Scarpulla correctly and unanimously affirmed Justice Lubell on this point in the Appellate Division.[2] There is no basis for this Court to reverse those judgments.

At Point I below, addressing the merits that were fully litigated below, Dakota shows that the courts below – Justices Lubell and Bluth on the respective motions to them and the Justices of the Appellate Division on appeal – properly applied Dakota's proprietary lease to award, and uphold the award of, legal fees to Dakota.

At Point II below, responding to Chase's new arguments made in its Points I, II, III and IV, Dakota shows that Chase was both fully heard below on its claim that fees are not due pursuant to Dakota's proprietary lease and is, in any event, bound by collateral estoppel to the adjudication of the fee award between Fletcher and Dakota in Bluth I as Fletcher's contractual and common law privy.

At Point III below, responding to Chase's Point V on mootness, Dakota shows that Chase's arguments on appeal to this Court – that it has been deprived of its day in court and that it is not bound by the adjudication as to legal fees in the

[2] R. 180-183 [Bluth I]; R. 5-12 [Lubell Decision]; R. 2112-2115 [Appellate Division's Decision]; Add. 1-8 [Bluth II].

Fletcher v. Dakota litigation are moot. In May 2023, Chase belatedly moved pursuant to CPLR 5015(a) for an order from Justice Bluth to vacate her December 2017 fee judgment for the same reasons Chase previously asserted to Justice Lubell and, on appeal, to the Appellate Division. Justice Bluth, in her decision and order dated June 5, 2023, Bluth II, rejected Chase's arguments on the merits. Chase has had its "day in court," twice, and its arguments have been rejected on the merits by all six justices who have heard them.

At Point IV below, Dakota shows that, according to the affirmation of Appellant's counsel to Justice Bluth in Appellant's 2023 CPLR 5015(a) motion, the sole Question Presented in Appellant's brief was not presented below; the appeal should therefore be dismissed as not presenting an issue subject to review.

STATEMENT OF FACTS

The material facts are undisputed.

Dakota, by statute, UCC §§ 9-102(74), 9-322(h)(1) and 9-102(27-b, c and e), had a lien against Fletcher's shares and lease for all obligations of Fletcher to it incident to his lease and share ownership.[3] This lien is recited in Dakota's by-laws at Art. VI Section 6 and its Certificate of Incorporation at paragraph 12.[4]

[3] R. 8 [Lubell Decision and Order at p.3]; R. 2113 [Appellate Division Decision and Order at p.2] ("It is undisputed that Alphonse Fletcher, Jr.'s Dakota shares constituted a cooperative interest") (citing UCC 9-102[27-b]).

[4] R. 348 [Bylaws]; R. 354 [Certificate of Incorporation].

Dakota's lien was perfected in 2001 at the time the cooperative shares and lease were issued to Fletcher, remains perfected so long as the cooperative interest exists, UCC 9-308(h), and has priority over all other security interests in the cooperative interest. UCC 9-322(h)(1).

Seven years after Dakota's lien was perfected, in 2008, Chase made a loan to Fletcher. In connection with the loan, Chase was assigned a security interest in the shares and lease by Fletcher which was subordinate to Dakota's lien by statute. UCC 9-322(h)(1). Fletcher retained title to the shares and lease.[5] At the time of its loan, in 2008, Chase entered into a "Recognition Agreement" with Dakota and Fletcher that memorializes the parties' liens and respective priorities.[6] The Recognition Agreement acknowledged, at ¶1, that Chase had been granted a security interest in the shares and lease and, in every provision that addresses the priority of payment as between Dakota and Chase, ¶¶ 2(e), 3(c)(2) and 4, acknowledged that Dakota was entitled to be paid first from the proceeds of any disposition of the shares and lease before any payment to Chase.

[5] *See* R. 377

[6] R. 157-158.

Fletcher commenced suit against Dakota in 2011, alleging breach of fiduciary duty to him as a shareholder, interference with contractual relations, racial discrimination, and defamation (The "*Fletcher* Action").[7]

Dakota's Answer in the *Fletcher* Action included a First Counterclaim for reimbursement of its reasonable legal fees incurred in defense of the suit pursuant to the proprietary lease between Dakota and Fletcher.[8] Art. II (Fifteenth) of the proprietary lease provides:

> **If** the Lessee [*i.e.*, Fletcher] shall at any time be in default hereunder, and the Lessor [*i.e.*, The Dakota] shall take any action against the Lessee based upon such default, **or if** the Lessor shall defend any action or proceeding (or claim therein) commenced by the Lessee, **the Lessee will reimburse** the Lessor for all expenses (including, but not limited to attorneys' fees and disbursements) thereby incurred by the Lessor, so far as the same are reasonable in amount, and the Lessor shall have the right to collect the same **as additional rent** or damages.

(Bolded emphasis and bracketed material added.)

Dakota wholly prevailed in obtaining summary judgment dismissing the Fletcher Action.[9]

---

[7] R. 191-255. Mr. Fletcher, a former member of the board of directors and president of Dakota, is African American; he commenced suit after Dakota's board denied approval for his purchase of an additional apartment.

[8] R. 510-511.

[9] R. 2019, *et seq* [Decision and Order dated September 11, 2015] (granting summary judgment dismissing then-remaining Fletcher claims).

Dakota's counterclaims for fees were thereafter referred to former Justice Ira Gammerman, as Judicial Hearing Officer, to hear and report. An evidentiary hearing was held on May 2, 2017, at which Fletcher was represented by counsel. Justice Gammerman reported the reasonable fees that he concluded were owed by Fletcher to Dakota.[10]

Dakota and Fletcher, by counsel, moved, on June 5 and 28, 2017, respectively, for confirmation and rejection of Justice Gammerman's report. The motions were submitted to Justice Arlene Bluth, argued on October 3, 2017, and decided on October 12, 2017. The decision confirmed Justice Gammerman's report. Judgment was signed on December 14, 2017, and entered December 29, 2017, for Dakota and against Fletcher in the amount of $3,118,076.26 on Dakota's First Counterclaim for fees.[11]

In 2015, prior to dismissal of the *Fletcher* Action and prior to litigation of Dakota's counterclaim for fees, the special proceeding underlying this appeal was commenced by Fletcher's former law firm Kasowitz, Benson, Torres, & Friedman, LLP ("Kasowitz"). Kasowitz sought enforcement of an unpaid fee judgment the

[10] R. 379, *et seq*. [Report]. Chase makes an irrelevant attack on the competence of Fletcher's counsel; but it is more credible that Fletcher's counsel recognized what the Justices below uniformly recognized – that Dakota is clearly entitled to fees pursuant to the lease - and therefore focused on other issues.

[11] R. 180-183 [Supplemental Judgment on Counterclaim (Bluth I)].

firm had obtained against Fletcher[12] by turnover of the shares and lease for Fletcher's Dakota apartments then in the possession of Fletcher's lender, Chase (the "Kasowitz Proceeding.") Dakota and other parties having actual or potential liens against the shares and lease were also named or permitted to intervene as respondents.[13]

In 2015, at the outset of the Kasowitz Proceeding, Chase was expressly informed of the nature, amount, and details of Dakota's fee claim, including that Dakota claimed priority of its fee claim and lien against the shares and lease, all before Dakota's fee claim was litigated to Justice Gammerman and Justice Bluth in 2017.[14] In June 2017, when Dakota moved to confirm Justice Gammerman's fee recommendation, Dakota's counsel emailed a copy of the motion to confirm to Chase's counsel before the motion was submitted and months before it was decided by Justice Bluth.[15]

Chase took no timely steps prior to or after Dakota's fee claim was submitted to and decided by Justice Bluth in 2017 (Bluth I) to assert to Justice Bluth its claimed interests in the fee claim and its contrary interpretation of the relevant provision of

[12] Kasowitz had represented Fletcher for a portion of Fletcher's unsuccessful suit against Dakota.

[13] R. 60-67 Petition.

[14] R. 567 *et seq.* ¶ 9 [August 28, 2015, Affirmation of John Van Der Tuin on Kasowitz application for appointment of a receiver in the Kasowitz Proceeding]; R. 573 [August 27, 2015, letter of John Van Der Tuin to counsel for Kasowitz and Chase as to compilation of Dakota fee claim].

[15] R. 578-579 [email exchange between John Van Der Tuin and Chase counsel dated June 7-12, 2017 providing a copy of Dakota's motion to confirm Justice Gammerman's report].

the proprietary lease. It did so only six years later, in its May 2023 CPLR 5015(a) motion, after Chase's arguments failed before Justice Lubell and the Appellate Division.[16]

In its 2023 CPLR 5015(a) motion to vacate Bluth I, Chase, by its attorney Zachary G. Newman, Esq., described the issues and argument that it had made to Justice Lubell and then to the First Department in this proceeding. The issues that Mr. Newman represented to Justice Bluth that Chase had made in this Kasowitz Proceeding did not include the sole issue it now asks this Court to hear and adjudicate – whether it as an assignee is, or constitutionally can be, bound by the Bluth I judgment against Fletcher. The issues presented below on this proceeding and appeal, according to Mr. Newman were:

> 46. After the close of discovery in the *Kasowitz* Action in late 2020, Chase and The Dakota both moved for summary judgment. Chase based its motion on two main points. First, that the plain language of the Lease, coupled with the explanatory comment as to its meaning, made clear that The Dakota could not seek to recover its attorneys' fees unless they were incurred in a litigation with a shareholder in default. Because The Dakota admitted Fletcher was never in default, the Lease provision simply did not apply, barring The Dakota's claimed lien. Second, Chase argued, the First Department's decision in *Krodel v. Amalgamated Dwellings, Inc.,*

[16] *See* Add. 9-10 [Chase's May 1, 2023, Order to Show Cause pursuant to CPLR 5015(a) to intervene and vacate Bluth I, the April 27, 2023]; Add. 11-579 [Affirmation of Zachary Newman, Esq., in support of Chase's Order to Show Cause, the May 30, 2023, together with the exhibits referenced therein]; Add. 580-705 [Affirmation of John Van Der Tuin, Esq., in opposition to Chase's Order to Show Cause, and the June 5, 2023, together with the exhibits referenced therein]; Add. 1-8 [Decision and Order of Justice Arlene Bluth denying, on the merits, Chase's motion to vacate, together with the notice of entry dated June 22, 2023].

> 166 A.D.3d 412 (1st Dep't 2018) ("*Krodel*"), which held that fee-shifting clauses to be [sic] unenforceable if they had any potential to deter a shareholder's [sic] from b[r]inging colorable claims against a co-op, eliminated The Dakota's claim to collect its legal fees in response to Fletcher's litigation over The Dakota's own alleged wrongdoing, including racial discrimination.

And

> 49. Chase timely appealed, arguing, among other things, that: (a) summary judgment was improper when the parties present conflicting interpretations of a contractual provision; (b) the lack of a merger clause in the Lease, and the conflicting interpretations, permitted the review of parol evidence, and The Dakota's documents and admissions confirmed that The Dakota's contractual interpretation was unreasonable and unsupported; (c) The Dakota never secured a ruling in this or any other court that its multi-million dollar legal fee balance incurred in defending a racial discrimination claim can be recovered as additional rent; and (d) the First Department's decision in the *Krodel* matter rendered The Dakota's reading of the Lease unconscionable.[17]

Chase's statement to Justice Bluth of the issues litigated below in this proceeding shows that it did, indeed, have its "day in court" in this proceeding as to the meaning of Dakota's proprietary lease provision as to fees and the validity of Bluth I. It also shows that Chase's appeal to this Court now attempts to pivot and argue a new claim: not that the courts below got it wrong as to the lease provision and fees, but that it – Chase – should not be bound by Bluth I.[18]

[17] Add. 23-24, ¶¶ 46, 49.

[18] <u>*See*</u> Appellant's "Question Presented".

Justice Bluth issued a decision and order dated June 5, 2023, Bluth II, adjudicating Chase's CPLR 5015(a) motion. Bluth II rejected Chase's arguments on the merits as to Dakota's right to prevailing party fees pursuant to the proprietary lease and re-affirmed the December 2017 fee award.[19]

ARGUMENT

POINT I

TWO TRIAL COURTS AND THE APPELLATE DIVISION ALL CORRECTLY FOUND THAT DAKOTA IS ENTITLED TO ITS LEGAL FEES IN BLUTH I UNDER THE PROPRIETARY LEASE

Three courts have analyzed Dakota's Proprietary Lease and each has held that Dakota was entitled to its fees in Bluth I. Each court's interpretation of the Lease was correct under this Court's well-settled precedent on contract interpretation. The Decision and Order below should be affirmed.

It is axiomatic that courts must first examine the contractual language itself and that "extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face." *W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 163 (1990) (internal quotation marks and citation omitted); *accord* *Donohue v. Cuomo*, 38 N.Y.3d 1, 13 (2022) ("Extrinsic

[19] Add. 3-5.

or parol evidence 'is admissible only if a court finds an ambiguity in the contract'") (quoting *Schon v. Troutman Sanders, LLP*, 20 N.Y.3d 430, 436 (2013)).

Article II (Fifteenth) of the proprietary lease between Dakota and Fletcher governing the award of fees provides:

> *If* the Lessee shall at any time be in default hereunder, and the Lessor shall take any action against the Lessee based upon such default, *or if* the Lessor shall defend any action or proceeding (or claims therein) commenced by the Lessee, *the Lessee will reimburse* the Lessor for all expenses (including but not limited to attorneys' fees and disbursements) thereby incurred by the Lessor, so far as the same are reasonable in amount, and the Lessor shall have the right to collect the same as additional rent or damages.

(Emphasis added). As Justice Lubell and the Appellate Division properly held,[20] this provision provides that Dakota may recover its reasonable attorney's fees in two situations: (1) if Dakota commences an action against Fletcher because he is in default under the Lease, and (2) if Fletcher commences any action or proceeding against Dakota. Thus, when Dakota prevailed against Fletcher's claim this provision entitled Dakota to reasonable legal fees. Justice Lubell and the Appellate Division both determined that this provision was clear and unambiguous.[21]

---

[20] R. 10; R. 2113 (the Appellate Division's decision at 2, explaining that Article II (Fifteenth), provides that "if the Lessor [*i.e.*, the Dakota] shall defend any action or proceeding . . . commenced by the Lessee [*e.g.*, Fletcher], the Lessee will reimburse the Lessor for all expenses (including . . . attorneys' fees and disbursements) thereby incurred by the Lessor, . . . and the Lessor shall have the right to collect the same as additional rent") (additions and ellipses in original).

[21] R. 10; R. 2113 First Department Decision and Order ("Thus, unless paragraph 15th does not mean what it says, the judgment is incident to Fletcher's ownership of his Dakota shares").

As Justice Bluth later explained in rejecting Chase's CPLR 5015(a) motion on the merits, this interpretation "makes sense."[22] The agreement among the shareholders that reasonable legal fees incurred in defending a suit by any one of them who turns against their neighbors should be reimbursed has ample justification. Dakota is not a for-profit landlord; it is a group of cooperators and neighbors. Where one of them inflicts legal costs on the others by launching a baseless litigation, the parties' agreement that the plaintiff shareholder should reimburse the cooperative's costs should be honored as written.[23] There is no ambiguity in their agreement, and no basis to look outside the four corners of Art. II (Fifteenth) of the lease to create ambiguity.

Chase's continued argument that the 2017 fee judgment in Bluth I should be ignored or overturned is based on a tortured interpretation of the lease, an inconsistent memorandum distributed to shareholders twenty years ago in advance of a later shareholders' meeting that adopted Article II (Fifteenth), and the contention that the lease is unconscionable because the provision does not explicitly

---

[22] Add. 4.

[23] Besides being a provision that mutually applies to all the shareholders – whether they are "the Board" or the adverse shareholder – the provision is fair and equitable because the fees sought must be "reasonable" thus bringing them within the court's review and evaluation of which party substantially prevailed and within the court's power of approval or disapproval. *See generally In re Freeman's Estate*, 34 N.Y.2d 1, 9 (1974) (setting forth the factors that a court should consider in assessing the reasonableness of the requested attorney's fees).

provide that only the "prevailing party" may recover fees. Each argument has been correctly rejected by the courts below.[24]

First, for the reasons discussed above, Chase's attempt to read into the lease a requirement that a "default is always a precondition for a fee award,"[25] fails under a plain reading of the lease. As the Appellate Division said, "unless paragraph 15th does not mean what it says, the judgment is incident to Fletcher's ownership of his Dakota shares."[26]

Second, the memorandum cannot be introduced to create an ambiguity where none exists. *W.W.W. Assoc*., 77 N.Y.2d at 162. Moreover, any conflict between the memorandum and the language of the provision subsequently approved by the shareholders should, as with statutory provisions, be resolved in favor of the finally adopted text as the "clearest indicator of legislative intent." *DaimlerChrysler Corp. v. Spitzer*, 7 N.Y.3d 653 (2006).[27]

---

[24] Chase made its arguments as to the meaning of Art. II (Fifteenth) both in support of its summary judgment motion (R. 925-936 [Chase's moving memorandum of law]; 944-952 ¶¶ 22-41 [Affirmation of Zachary Newman in Support]; 1964-1966 [Chase's Reply Brief in Further Support]) and in opposition to Dakota's summary judgment motion (R. 768-769 ¶¶ 7-8 [Affirmation of Zachery Newman in Opposition]; 869-877 [Chase's Memorandum in Opposition]) and they were addressed on the merits by both Justice Lubell (R. 10-11) and the Appellate Division (R. 2113). Chase likewise made its arguments as to the supposed unconscionability of the fee provision. (R. 930-932).

[25] Appellant's Brief at 9.

[26] R. 2113.

[27] The Lease provision, not the earlier memorandum, was adopted by the shareholders in 2000, and each of the witnesses who Chase deposed disputed Chase's argument as to the meaning of the provision and the intent at the time the Lease provision was adopted in 2000. R. 518-523

Third, Article II (Fifteenth) is not unconscionable. This Court has held that "[a]n unconscionable contract has been defined as one which is so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforc[eable] according to its literal terms." *Gillman v. Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1, 10 (1988) (internal quotation marks omitted). "The doctrine, which is rooted in equitable principles, is a flexible one and the concept of unconscionability is intended to be sensitive to the realities and nuances of the bargaining process." *Id.* (internal quotation marks omitted). Thus, a determination of unconscionability "generally requires a showing that the contract was both procedurally and substantively unconscionable when made – *i.e.*, some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Id.*

Art. II (Fifteenth) was adopted by the cooperators for their mutual benefit and protection, is equally applicable to all of them, and explicitly incorporates a reasonability requirement. It is neither procedurally nor substantively unconscionable. It imposes no one-sided terms or penalty. It was adopted by vote of the shareholders. It requires any fees to be reasonable. In the context of recovery of attorneys' fees in litigation, it is well-accepted that "reasonable" by implication

---

[Deposition Transcript of Aaron Shmulewitz]; R. 528-533 [Deposition Transcript of Toni Sosnoff]; R. 540-547 [Deposition Transcript of Robert T. McFarland]. No witness, over five days of vigorous examination by Chase's counsel, agreed with or adopted Chase's interpretation.

requires that the party has prevailed. See *Firemen's Ass'n of State of N.Y. v. Wash., LLC*, 73 A.D.3d 1320, 1323 (3d Dep't 2010); *437 W. 16th St. LLC v. 17th & 10th Assoc. LLC*, 2017 WL 1001601, at *3 (Sup. Ct., N.Y. Cnty. Feb. 15, 2017); see also *Nester v. McDowell*, 81 N.Y.2d 410, 415 (1993) (denying attorneys' fees because "only a prevailing party is entitled to attorney's fees," notwithstanding the absence of such a requirement in the parties' agreement); *Weiderhorn v. Merkin*, 98 A.D.3d 859, 862 (1st Dep't 2012) (holding that an indemnification provision required showing that a party prevailed notwithstanding the absence of such language), *lv. denied* 20 N.Y.3d 855 (2022).

Krodel v. Amalgamated Dwellings Inc., 166 A.D.3d 412 (1st Dept 2018), on which Chase relies, does not require a contrary result because it is distinguishable. In *Krodel*, the Court rejected the fee claim of a cooperative corporation, based on a proprietary lease provision that did not require the corporation to prevail, against its proprietary lessee who claimed that the corporation defaulted in its obligation to recognize the transfer of the apartment at issue from plaintiff's husband to the plaintiff. The underlying merits of the dispute had not yet been adjudicated and the corporation made a preemptive motion for its fees. The court applied an unconscionability/penalty analysis previously used in disputes between for-profit

landlords and indigent rental tenants to invalidate the fee provision.[28] Unlike the cooperative in *Krodel*, Dakota was not sued for default and it was the prevailing party. Thus, the policy concerns at issue in *Krodel,* even if well-founded, are not at issue here.

Krodel, decided on November 8, 2018, also cannot be applied retroactively to overrule Bluth I, that granted judgment to Dakota in December 2017. This Court's settled law is that the "conclusive effect of a final disposition is not to be disturbed by a subsequent change in decisional law." *Gown v. Tully*, 45 N.Y.2d 32, 36 (1978); *Slater v. Am. Minerals Spirits Co.*, 33 N.Y.2d 443, 447-448 (1974).

For all of these reasons, this Court should affirm the Decision and Order of the First Department that Justice Lubell correctly interpreted Dakota's proprietary lease fee provision in granting summary judgment to Dakota.

[28] One might reasonably question whether *Krodel*, which has never been reviewed by this Court, properly reasoned that the rule of unconscionability that it plucked from attorney fee disputes between commercial landlords and indigent rental tenants should also be applied to attorney fee disputes between cooperators who have voted to all be governed by the fee provision at issue.

POINT II

CHASE HAD ITS DAY IN COURT, BOTH BEFORE JUSTICE LUBELL AND IN BLUTH II AND, IN ANY EVENT, IS BOUND BY THE COURT'S DECISION IN BLUTH I BECAUSE CHASE IS BOTH THE COMMON LAW AND CONTRACTUAL PRIVY OF FLETCHER

As explained in Point I, three courts have now addressed, on the merits, the interpretation of Article II (Fifteenth) and ruled that Dakota is entitled to its fees under the Proprietary Lease.[29] Justice Lubell explicitly addressed and rejected each of Chase's arguments.[30] Subsequently, the Appellate Division held that "unless paragraph 15th does not mean what it says," Dakota was entitled to judgment in this action.[31] Subsequently, after this Court granted Chase leave to appeal the Appellate Division's decision, Chase also moved in the *Fletcher* Action pursuant to CPLR 5015(a) and in deciding the motion Justice Bluth, in Bluth II, held that under the "clear provision" of the Lease, Dakota was entitled "to reasonable legal fees when it prevailed against Fletcher."[32]

---

[29] Contrary to its present argument that it never had its day in court, the April 27, 2023, affirmation of Chase's counsel submitted to Justice Bluth in support of its motion to vacate the fee judgment of Bluth I, expressly argued that Chase's arguments as to the meaning of the proprietary lease and Dakota's entitlement to the fees judgment had been made to, and rejected by, Justice Lubell and the First Department in their decisions below in this proceeding. Add. 23-24 ¶¶ 46, 49. Chase had its day in court; it just does not like the result and seeks a do-over.

[30] R. 6-12.

[31] R. 2113.

[32] Add. 4.

Chase nonetheless attacks the Appellate Division's (correct) holding that Chase was bound by the judgment in Bluth I and that Chase's challenge to the attorneys' fees award would be an impermissible collateral attack on Dakota's judgment. In particular, Chase sets forth a parade of imaginary horribles if the Appellate Division's holding stands and its collateral attack fails. However, for the reasons set forth below, the Appellate Division properly, not horribly, held that Chase is barred from relitigating the judgment in Bluth I. Moreover, contrary to Chase's arguments, this result is consistent with good public policy.

A. Chase's Attack on Bluth I Is Barred by Collateral Estoppel

The law of collateral estoppel is well-established in New York. Where an issue has been determined in favor of a party (in this case, Dakota), that party's adversary (in this case., Fletcher) – who had a full and fair opportunity to contest the determination – and the adversary's privies (in this case, Chase) are precluded from contesting the determination in a subsequent proceeding. *Ryan v. N.Y. Tel. Co.*, 62 N.Y.2d 494, 500 (1984) ("The doctrine of collateral estoppel . . . precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same"). It applies, *inter alia*, when a different judgment in a second action "would destroy or impair rights or interests established by the first." *Id.* at 500-501. The policies underlying its application are

avoiding re-litigation of a decided issue and the possibility of an inconsistent result. *Buechel v. Bain*, 97 N.Y.2d 295, 303-304 (2001).

Thus, persons who were not parties to the litigation in which the issues were determined, but who are privies to the adverse estopped party in that litigation, are also bound by the determinations. *Buechel*, 97 N.Y.2d at 305-306 (concluding that collateral estoppel barred relitigating validity of fee arrangements determined illegal in an earlier action when they were in privity with the person against whom the issue was decided); *In Re Shea's Will*, 309 N.Y. 605, 616 (1956) (holding that "[s]ound public policy" requires that "a judgment rendered jurisdictionally and unimpeached for fraud shall be conclusive, as to the questions litigated and decided, upon the parties thereto and their privies, whom the judgment, when used as evidence, relieves from the burden of otherwise proving, and bars from disproving, the facts therein determined").

Courts have held that privity, for collateral estoppel purposes, exists between a mortgagor and mortgagee to bind the mortgagee to the results of legal proceedings in which the mortgagee had a stake and was unified in interest with the mortgagor. See *Altegra Credit Co. v. Tin Chu*, 29 A.D.3d 718, 719-720 (2d Dep't 2006) (holding mortgagee was collaterally estopped from re-litigating issue determined in mortgagor's separate proceeding when there was a "unity of interest," inasmuch as both parties had a stake in establishing the validity of the mortgage); see also *In Re*

56 Walker, LLC, 2014 WL 1228835, at *3 (Bankr. S.D.N.Y. Mar. 25, 2014) (holding creditors, who were not parties to prior action, are bound to decision by collateral estoppel because they "are in privity with the Debtor" and the interests of the debtor and its creditors were fully aligned for preclusion purposes). In this case, the interests of Chase and Fletcher were fully aligned in that they both had the same interest in defeating Dakota's claim for fees, a claim that Fletcher, in fact, opposed vigorously.

Chase's arguments at Points I – IV of its Brief are all dependent on the contention that it was not in privity with Fletcher or that the rules of privity would impermissibly require those in privity to intervene in litigations with their privy. But, Chase clearly was in privity with Fletcher because (i) as secured lender it had a continuing shared and common interest with Fletcher in the shares and lease that secured its loan; and (ii) at the time it made its loan, Chase entered into a written Recognition Agreement with both Fletcher and Dakota as to their respective rights and priorities regarding the shares and lease. Further, and removing any equitable doubt, (i) in 2015, in this proceeding, Chase was given specific written notice as to the nature, amount and details of Dakota's fee claim and priority claim under the proprietary lease against the shares and lease,[33] and (ii) in June 2017, Chase was

[33] R. 573-576; 578-591.

provided with copies of Dakota's motion for confirmation of its fee award in the *Fletcher* Action months before the motion was submitted to or decided by Justice Bluth in July and October 2017, respectively. Chase was in common law and contractual privity with Fletcher and Dakota and was on ample notice of the specific adverse claim of Dakota that it belatedly sought to evade in this proceeding.

Chase contends that the usual rules of collateral estoppel should not apply to it because of its "assignor-assignee" relationship with Fletcher. There is no such exception in New York law and, even if there were, it would not save Chase in the circumstances of this dispute.

First, while Chase was an "assignee," it was an assignee only of a junior[34] security interest while Fletcher retained ownership of the shares and lease. Both Fletcher and Chase had a continuing mutual interest in the shares and lease, unlike a true assignment of title or ownership in an asset where the assignor's interest terminates. Second, at the time of making its loan and taking assignment of a security interest, Chase entered into an express three-way contractual relationship with Fletcher and Dakota as to the relative interests and priorities in the shares and lease of each of them.[35] Third, Chase was on express, repeated and timely notice of

[34] By statute, UCC 9-322(h)(1), Dakota had a first priority, senior security interest, as Chase so recognized in entering into the Recognition Agreement.

[35] Chase's reliance on *Chase Nat'l Bank v. City of Norwalk*, 291 U.S. 431 (1934) is misplaced. Nearly 90 years ago, the Court, applying then-applicable federal and Ohio state law, not New York law, held, *inter alia*, that a decree against a mortgagor with respect to property did not bind a

the substance of Dakota's claim – the fees due under the proprietary lease and the priority of Dakota's claim. A clearer example of privity for collateral estoppel purposes is difficult to imagine.[36]

Chase's principal reliance on *Gramatan Home Investors Corp. v. Lopez*, 46 N.Y.2d 481 (1979) is misplaced. The facts and circumstances in *Gramatan* are readily distinguishable and inapposite. *Gramatan* involved a true assignment, not just assignment of a security interest in the asset at issue. *Id.* at 484. The contract and mortgage were assigned to plaintiff and the assignor had no continuing interest in the asset. *Id.* Further, the fact that the assignee has no notice of the adverse claim and litigation against the assignor factored into the *Gramatan* Court's decision. *Id.* at 487 ("the assignee is charged with notice that his rights to the assignment are subject to competing claim"). As shown above, Chase had repeated and detailed

---

mortgagee whose interest was acquired before the commencement of the suit. However, unlike in *City of Norwalk*, the Fletcher Action involved a pre-existing superior lien that had been expressly recognized by Chase by written agreement and did not merely involve a litigation commenced by a later third-party without any interest in the property or relationship with the mortgagee. Moreover, as explained in Wright and Miller, 18A Fed. Prac & Proc. Juris § 4461 (3d. ed.), on which Chase also relies, "[d]epartures from the basic rule that denies preclusion through representation by a party holding a concurrent property interest" may occur based on "ad hoc decisions that arise from particular circumstances." For the reasons stated herein, the circumstances here justify finding Chase and Fletcher are privies.

[36] Further, this relationship of cooperative corporation, shareholder-borrower, and lender-secured party expressed in the form Recognition Agreement and consistent with the statutory priority of cooperative organization security interests in New York's UCC, is the standard and usual relationship of a residential cooperative corporation, its shareholder and its shareholder's lender. The Justices of the Appellate Division, at argument of the appeal, expressed incredulity that Chase sought to avoid these well-established relationships.

notice of Dakota's claim against Fletcher and claim of priority with respect to the asset. Moreover, in *Gramatan* there was no three-way express contractual allocation of rights and priorities as there is in the present case. *Gramatan* and its progeny have no bearing on this case.[37]

Chase also contends, that the decisions below wrongfully imposed on it a duty to intervene in the *Fletcher* Action in violation of due process, notwithstanding its knowledge[38] that Dakota was both asserting a right to fees pursuant to the proprietary lease and that the fee claim had priority over Chase's lien. This contention mischaracterizes the decisions below and is meritless. Chase had the *option*, not the duty, to intervene prior to the adjudication of fees in Bluth I, pursuant to CPLR 1012 or 1013, or after the adjudication of fees pursuant to CPLR 5015(a). Chase chose not to do so for some six years, presumably as a matter of litigation strategy, until both Justice Lubell and the First Department had rejected its claims and Chase filed its CPLR 5015 motion in 2023.[39] In addition to the well-settled law of collateral

---

[37] Nor are the pre-*Gramatan* cases referenced by Chase factually analogous or applicable here. See *Masten v. Olcott*, 101 N.Y. 152 (1886) (140-year old case that does not involve assignment of security interest with continuing shared interest in asset and three-party recognition agreement); *Postal Tel. Cable Co. v. City of Newport, Ky.*, 247 U.S. 464 (1918) (100-year old case that pertains to an action to recover taxes in connection with transfer of property; not to assignment of security interest with continuing shared interest in asset and three-party recognition agreement); *Dull v. Blackman*, 169 U.S. 243 (1898) (pertains to a judgment based on improper service of process).

[38] See Record material discussed supra, at n. 14-15.

[39] Chase's motion, and Justice Bluth's rejection of Chase's arguments rendered this appeal moot. Point III, below.

estoppel that binds privies, the law is well-settled that a party who delays unreasonably in asserting its intervention rights, pursuant to CPLR 1012 or CPLR 5015(a) thereby waives them. *1077 Madison Street, LLC v. Dickerson*, 137 A.D.3d 446 (2d Dep't 2021) (affirming CPLR 1012(a) motion to intervene due to five years' delay); *Wells Fargo Bank, N.A. v. Mazzara*, 124 A.D.3d 875 (2d Dep't 2015) (affirming order denying CPLR 1012(a) and 5015(a) motion due to four years' delay); *JP Morgan Chase Bank v. Edelson*, 90 A.D.3d 996 (2d Dep't 2011) (affirming order denying CPLR 1012 motion to intervene due to delay of four years after commencement of action and two years delay after intervenor-movant acquired its interest in the property at issue.) Indeed, Appellant JP Morgan Chase has relied on this law of waiver when it was to its advantage to do so. *Id.*

Chase's implicit argument on this appeal that a party's failure to timely exercise its options to intervene or to seek post-judgment relief has no adverse consequence under New York law and that any adverse consequence would be a violation of Due Process is entirely without merit. The contention, if accepted by this Court would eviscerate the law of collateral estoppel as applied to those in privity, and the law of CPLR 1012 and 5015.

B. Chase Seeks to Circumvent New York Law Providing Cooperatives A Priority Lien Against its Shares and Gut Dakota's Judgment

The irony of Chase's warning that the First Department's decision will "wreak havoc on the finality of judgments" cannot be overstated. Dakota obtained a final

judgment against Fletcher that Chase sought to avoid for six years (2017 to 2023) until its misbegotten strategy of collateral attack failed. Dakota's claim against Fletcher is protected by the public policy of statutory first priority granted to it by the New York Legislature in the UCC. Dakota's priority is well-established and recognized in the market and industry – as indicated by the form Recognition Agreement.[40] See also, e.g., Vincent DiLorenzo, *New York Condo & Coop. Law* § 11.6 Lien on Shares and Proprietary Lease (2016-2017 Suppl.); Talel & Siegler, *Priority of Liens–Evolving Rules for Condominiums & Lenders*, 256(47) N.Y.L.J. (Sept 7, 2016).[41]

The only havoc that might be wreaked by this case is the havoc that would be wreaked on the finality of judgments and statutory priority of cooperative corporation liens if Chase's contentions were respected. Indeed, every cooperative apartment lender would welcome the special privilege to re-litigate, and collaterally attack years after the fact, disputes between their borrower-shareholder and the cooperative arising under the cooperative's governing documents.

Chase's imagined world of "mass intervention" by "any absent party" is worthy of Chicken Little.[42] Only those in privity with a party, who are on notice of

[40] R. 740-741.

[41] Available at https://www.stroock.com/uploads/070091616stroock.pdf.

[42] See "Chicken Little," Dictionary.com, https://www.dictionary.com/browse/chicken-little

the underlying action and potentially adverse claim, and who believe their privy may not adequately defend the claim are implicated. This is fully consistent with existing law. Such parties have a right of intervention if they do not wish to risk being bound. CPLR 1012(a). The offense to sensible policy is the special privilege that Chase seeks – to simply sit back and ignore the potentially adverse consequences of a known litigation and claims between your privy and a third party with the expectation that you can later attack and re-litigate an adverse judgment after the fact and in a different court.

Finally, in an attempt to analogize the procedural history here to the facts of *Neenan v. Woodside Astoria Transp. Co.*, 261 N.Y. 159, 161 (1933), Chase claims that granting it a (fourth) opportunity to re-litigate the meaning of Art. II (Fifteenth) will not destroy Dakota's judgment against Fletcher. In *Neenan*, however, the issue was whether a bus driver who was successful in defeating the claim of one party injured in a vehicle accident could use that success to collaterally estop a later suit by a second injured party. There was no contractual agreement as to priorities (or liabilities) between the parties in *Neenan.* There was no asset in which both parties shared an interest. There was no issue of a party ignoring the CPLR 5015(a) remedy for six years. A determination contrary to that rendered by the Appellate Division would effectively gut in substance, if not in form, Dakota's judgment against Fletcher and the existing statutory priorities of cooperatives.

POINT III

THE QUESTION OF WHETHER CHASE WAS REQUIRED TO INTERVENE IN BLUTH I IS NOW MOOT BECAUSE CHASE VOLUNTARILY SOUGHT INTERVENTION

The core of Chase's appeal is that it never had the opportunity to be heard on its arguments as to the meaning of Art. II (Fifteenth) of Dakota's Lease and it was a stranger to *Fletcher* Action who should not be collaterally estopped by Bluth I. As demonstrated above at Point I, Chase did make its arguments as to the meaning and supposed unconscionability of Art II. (Fifteenth) in this proceeding below,[43] lost the arguments and is properly bound as a privy of Fletcher (Point II). Chase has also, however, rendered its appeal moot by moving before Justice Bluth pursuant to CPLR 5015 for relief from the judgment. The appeal should, alternatively, thus be dismissed as moot.

It is a fundamental principle of this Court's jurisprudence that "the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal." *Matter of Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 713 (1980). Thus, the Court is precluded "from considering questions which, although once live, have become moot by passage of time or change in circumstances. In general[,] an appeal

[43] *See* n. 24 *supra*; Add. 23-24 ¶¶ 46, 49 [Newman's Affirmation to Justice Bluth in Chase's 2023 motion to vacate her prior judgment].

will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment." *Id.* at 714.

Put another way, a matter is "moot when a determination is sought on an issue which, if rendered, could not have any practical effect on the existing controversy." 1 New York Appellate Practice § 3.15 (citing *Saratoga Cnty. Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801 (2003) (finding one portion of appeal moot because the Court's decision "would have no practical effect of the parties" even though a ruling would "provide beneficial advice to future officials," and finding the second branch of the appeal was not moot because it "carrie[d] immediate, practical consequences for the parties")). "The principle involved is of constitutional dimension, having its roots in the doctrine of separation of powers, and it relates to subject matter jurisdiction." Arthur Karger, *Powers of the NY Court of Appeals* § 11:11 (Sept. 2023 Update).

The Appeal is clearly moot. In its opening salvo, Chase emphasizes that this appeal is based on its claim that Chase was denied "its constitutional right to a day in court" because the First Department held that Chase was "bound" by Justice Bluth's judgment in a litigation "in which Chase was never involved."[44] It

[44] Appellant's Brief at 1.

complains that it should not have had to intervene in the *Fletcher* Action to litigate Dakota's fee claim.

However, after applying for leave to appeal in this proceeding, Chase inexplicably also chose to move before Justice Bluth in the *Fletcher* Action to vacate the fee judgment in Bluth I.[45] Justice Bluth considered Chase's argument on the merits and rejected it in Bluth II.[46]

This Court's decision of this appeal – as to the consequences of Bluth I with respect to Chase as a non-party to the *Fletcher* Action – will therefore have no immediate, practical consequences for the parties because Chase has just had its "day in court" before Justice Bluth in the *Fletcher Action* on the merits of the interpretation of Art. II (Fifteenth) of Dakota's proprietary lease and the award of fees to Dakota. Courts have found in analogous situations that a party's voluntary actions rendered their appeal moot. *See, e.g.*, *OneWest Bank, FSB v. McKay*, 172 A.D.3d 887, 888 (2d Dep't 2019) (finding appeal moot, the court reasoning that "by voluntarily discontinuing this action, the plaintiff, in effect, waived any right to challenge the propriety of the conditional order"); *Judson Realty, Inc. v. First Park Assocs., L.P.*, 164 A.D.2d 767, 767 (1st Dep't 1990) (appeal of motion to compel

[45] Add. 9-10. Chase's description of Bluth II is a disingenuous attempt to avoid the consequences of its lack of success on the merits before Justice Bluth. The court held that Chase was "entitled to bring th[e] application" for intervention and "consider[ed] th[e] motion on the merits." Add. 3.

[46] Add. 3-5.

arbitration was moot where plaintiff entered into an agreement to arbitrate, did not seek a stay pending appeal, or "indicate in any way that its execution of the agreement was under protest" because "plaintiff ha[d] voluntarily committed itself to arbitrate its dispute regardless of the outcome of th[e] appeal"); *Cioffi v. Town of Guilderland*, 124 A.D.2d 319, 319 (3d Dep't 1986) (appeal from an order dismissing a case for improper service rendered moot where plaintiff commenced and properly completed personal service in a subsequent action); *Matter of Lefkowitz v. Kershenberg*, 56 A.D.2d 555, 555-556 (1st Dep't 1977) (decision directing appellant to comply with subpoena dismissed as moot since Appellant "voluntarily complied fully" with the subpoena).

While there is a narrow exception to the mootness doctrine, it has no application to this case. The exception allows a moot issue to be decided only where (1) it is "likely to recur, either between the parties or other members of the public, (2) is substantial and novel, and (3) will typically evade review in the courts." *Coleman v. Daines*, 19 N.Y.3d 1087, 1090 (2012); *see also Matter of Med. Professionals for Informed Consent, Individually & On Behalf of its Members v. Bassett*, 2023 WL 6528763 (4th Dept Oct. 6, 2023) (question of whether medical professionals had to be fully vaccinated did not fall into the mootness exception because, although the issue was substantial and novel, it was not likely to recur, and was not a question that would typically evade review). This exception will not be

applied where there is "no sufficient reason to depart from the normal jurisdictional principle which calls for judicial restraint when the particular controversy has become moot." *Hearst Corp.*, 50 N.Y.2d at 716.

Chase's reliance on *Matter of Veronica P. v. Radcliff A.*, 24 N.Y.3d 668 (2015) and *N.Y. State Comm'n on Jud. Conduct v. Rubenstein*, 23 N.Y.3d 570, 576 (2014) is misplaced. Each of those cases involved findings of penal or similar wrongdoing that would continue to damage the appellant's reputation if not reviewed. They stand for the general proposition that "an appeal is not moot if an appellate decision will eliminate readily ascertainable and legally significant enduring consequences that befall a party as a result of the order which the party seeks to appeal." *Matter of Veronica P.*, 24 N.Y. at 671; *Rubenstein*, 23 N.Y.3d at 576; *see, also e.g.*, *Paladino v. Bd. of Ed. for City of Buffalo Pub. Sch. Dist.*, 183 A.D.3d 1043, 1045-1046 (3d Dep't 2020) (addressing moot issue where "petitioner's reputation and credibility as an attorney [was] subject to damage because he was removed from a public office for violating the law" and the order could "potentially subject petitioner to attorney discipline" or "compromise his reputation as an ethical attorney, which are enduring consequences"). The principle protects litigants from continuing severe stigma or reputational consequences not, as in the present case, a financial loss that carries no stigma or reputational damage to Chase.

Nor is the issue involved likely to otherwise evade review. The interpretation of the fee provision of Dakota's proprietary lease could have been resolved on a direct appeal either by Fletcher or by Chase on a timely CPLR 5015 motion. The issues as to Chase's status as a privy bound by the Bluth I judgment are not unusual and could be litigated by any party who chooses to avoid intervening in a known action involving its privy that results in a judgment adverse to its interests. As a result, this appeal must be dismissed as moot. *Wisholek v. Douglas*, 97 N.Y.2d 740, 742 (2002) (dismissing appeal as moot, the Court finding the exception to the mootness doctrine was inapplicable because, while the issues on appeal "may well be substantial and recurrent, the issue is not of the type that typically evades review").

POINT IV

THE SOLE QUESTION PRESENTED BY APPELLANT'S BRIEF WAS NOT RAISED BELOW AND IS THEREFORE NOT REVIEWABLE.

Appellant's brief states a single question presented – "whether assignees are required to intervene in post-assignment suits involving their assignors on penalty of being bound by the judgment in that suit in future litigation."[47] This is not a question that, by the express affirmation of Appellant's counsel, was presented to

[47] Appellant's Brief at 5.

either Justice Lubell or to the First Department. It is therefore not reviewable in this Court and the appeal should be dismissed or the order of the First Department should be affirmed.

This Court's well-established practice is that it will not review questions that are first raised on appeal. *See generally* Karger, *The Powers of the N.Y. Court of Appeals*, §17.1 (Thompson West 3d ed.). This rule is most strictly applied to constitutional issues, such as the deprivation of Due Process now asserted by Appellant.[48] *See, e.g.*, *Lichtman v. Grossbard*, 73 N.Y.2d 792, at 794-795 (1988); *Matter of Colton v. Riccobono*, 67 N.Y.2d 581, 575-576 (1986). In cases not raising constitutional issues, the scope of reviewability is relaxed only where the issue is a clear matter of incontrovertible fact or law that could not have been obviated if the issue had been timely raised below. *See* Karger, *supra*, §17.2.

By Appellant's own description, in the April 27, 2023, affirmation of its counsel, Zachary G. Newman, Esq., in support of its motion to Justice Bluth to vacate her 2017 judgment for Dakota,[49] the issues presented to both Justice Lubell

[48] Appellant's Brief at 3, 12.

[49] *See* Add. 23-24 ¶¶ 46, 49 [Newman Aff]. The question presented on appeal to this Court was not among the issues raised before either Justice Lubell or the First Department. *See supra* at 8-9, 32-33. Any contention now, by Chase on Reply, that Mr. Newman did not mean what he said, or that the present question was somewhere buried in the briefing below, would be yet another indication of Chase's litigation strategy to pick and choose what issues it presents to which courts and when, to obscure or avoid adverse decisions against it.

and to the First Department, below, did not include the issue it now argues to this Court.

The appeal should be dismissed or denied as not presenting any reviewable issue.

CONCLUSION

For the reasons set forth above, the Court should affirm the First Department's decision.

Dated: New York, New York
November 28, 2023

SMITH, GAMBRELL & RUSSELL, LLP

By: _____
John Van Der Tuin
Morgan V. Manley
1301 Avenue of the Americas, 21st Floor
New York, New York 10019
(212) 907-9700

Attorneys for Respondent-Respondent
The Dakota, Inc.

CERTIFICATION

I certify pursuant to 500.13(c)(1) that the total word count for all printed text in the body of the brief, exclusive of the statement of the status of related litigation; the corporate disclosure statement; the table of contents, the table of cases and authorities and the statement of questions presented required by subsection (a) of this section; and any addendum containing material required by subsection 500.1(h) of this Part is 8,525 words.

Dated: New York, New York
November 28, 2023

SMITH, GAMBRELL & RUSSELL, LLP

By: _____
John Van Der Tuin
Morgan V. Manley
1301 Avenue of the Americas, 21st Floor
New York, New York 10019
(212) 907-9700

Attorneys for Respondent-Respondent
The Dakota, Inc.