To be argued by Michael H. Sussman
10 minutes requested

Appellate Division – Third Department Case No. 532948

New York Supreme Court

APPELLATE DIVISION – THIRD DEPARTMENT

JOSEPH AND DONNA NEMETH, VALERIE GARCIA,

Petitioners-Appellants,

–against–

K-TOOLING, KUEHN MANUFACTURING CO., VILLAGE OF HANCOCK ZONING BOARD OF APPEALS, and ROSA KUEHN,

Respondents-Respondents.

APPELLANT'S BRIEF-IN-CHIEF

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PRELIMINARY STATEMENT

This appeal arises from Appellants' Article 78 proceeding challenging Respondent Village of Hancock Zoning Board of Appeals' (hereinafter "ZBA") determination to grant Respondents K-Tooling and Kuehn Manufacturing's (hereinafter "Kuehn Respondents") application for a use variance with respect to an 800 square-foot addition to their property.

This is the fourth time the dispute between these parties has been before this Court, and the second time in this very action. In the first case, this Court held that the 800 square-foot addition constituted an illegal expansion of the Kuehn Respondents' non-conforming manufacturing use and enjoined use of that addition for any purpose not permitted in the residential zoning district in which the property is located. See Nemeth v. K-Tooling, 100 A.D.3d 1271, 1275 (3d Dep't. 2012) (hereinafter "Nemeth I"). In response, the Kuehn Respondents sought and obtained a use variance from the ZBA to allow manufacturing in the addition, but this Court later annulled the ZBA's determination to grant that variance because the applicants failed to provide legally sufficient evidence of financial hardship. See Matter of Nemeth v. Village of Hancock Zoning Bd. of Appeals, 127 A.D.3d 1360, 1361-63 (3d Dep't. 2015) (hereinafter "Nemeth II").

Thereafter, the Kuehn Respondents sought and received a new use variance from the ZBA, which Appellants again challenged by Article 78 proceeding. This

time, Supreme Court did not reach the merits and, instead, dismissed the Petition for Appellants' failure to name the property owner, Rosa Kuehn, as a Respondent to the proceeding. This Court reversed and vacated Supreme Court's Order, holding that the court had jurisdiction over Rosa Kuehn and, thus, instead of dismissing the proceeding, it should have ordered that Rosa Kuehn be summoned to appear. See Nemeth v. K-Tooling, 163 A.D.3d 1143 (3d Dep't. 2018) ("Nemeth III").

On remand, Supreme Court ordered appellants to amend their Verified Petition to include Rosa Kuehn as a respondent and to serve same upon the respondents. Appellants complied. Respondents then moved to dismiss on the ground that that statute of limitations had run with respect to Rosa Kuehn and that, upon dismissal of her from the proceeding on timeliness grounds, the proceeding must be dismissed against the remaining respondents for lack of a necessary party. Rejecting Appellants' argument that their filing of the Amended Petition including Rosa Kuehn related back to their timely filing of the initial Petition, Supreme Court granted the Respondents' motions and dismissed the Petition in its entirety.

Appellants now appeal Supreme Court's most recent Order. Respectfully, Supreme Court erred because Rosa Kuehn is united in interest with K-Tooling and Kuehn Manufacturing and knew, or should have known, that, but for Appellants' mistake in omitting her from the initial Petition, they would have named her as

necessary party respondent. Thus, the relation back doctrine applies, rendering the Amended Verified Petition timely filed as to Rosa Kuehn.

QUESTIONS PRESENTED

(1) Whether Rosa Kuehn is united in interest with either Kuehn Manufacturing or K-Tooling, or both, where she is an owner of Kuehn Manufacturing, signed the variance application in that capacity on behalf of that entity and sought the variance so that that these entities could use the 800 square foot addition to her property for manufacturing purposes?

(2) Whether Appellants' inadvertent and mistaken failure to initially name Rosa Kuehn as a necessary party satisfies the third prong of the relation-back test where she knew, or reasonably should have known, that, but for this mistake, Appellants would timely named her?

NATURE OF THE CASE

Most of the facts relevant to this appeal are undisputed or have already been resolved in prior proceedings in this Court. Kuehn Manufacturing and K-Tooling operated industrial manufacturing businesses from the property located at 396 East Front Street in the Village of Hancock, New York. See Nemeth II at 1361.[1] Rosa Kuehn owns both the property and Respondent Kuehn Manufacturing (R-1222) and Rosa's son Perry owns K-Tooling (Id.).

The property is situated in a residential district and, except for the 800 square-foot addition that is the subject of these proceedings, was a prior non-conforming manufacturing use at the time the matter last came before the Village ZBA. In

[1] Such operations ended more than two years ago when Perry Kuehn moved his operation to Sidney, New York, where he continues to operate (R-2678-84)

Nemeth I, this Court held that the 800 square-foot addition, built in 2001 [some 18 years after adoption of the Village's Zoning Ordinance], constituted an illegal expansion of the non-conforming use and, thus, enjoined the Kuehn Respondents from using the addition for any purpose not otherwise permitted in the residential zone in which it is located.

Thereafter, the Kuehn Respondents sought and received from the village ZBA a variance allowing them to use the addition for manufacturing purposes. Appellants commenced an Article 78 proceeding challenging that determination, which Supreme Court upheld. On appeal, in Nemeth II, this Court vacated Supreme Court's Order and annulled the ZBA's determination, holding that the Kuehn Respondents failed to provide sufficient dollars and cents proof that they could not realize a reasonable rate of return from any use permitted in the residential zone absent the use variance.

Following that decision, the Kuehn Respondents again applied to the ZBA for a variance. After obtaining an *ex parte* stay of this Court's order from Supreme Court, respondents filed their application to the ZBA on February 5, 2016, ten months after this court's decision annulling the prior variance (R-262-74). Perry Kuehn signed the application on behalf of both K-Tooling and Kuehn Manufacturing, Co. and Rosa Kuehn signed the application, also on behalf of Kuehn Manufacturing Co. (R-264). The ZBA then held two public hearings – one on April

21, 2016 and another on May 26, 2016 – at which it received testimony and documentary evidence (R-280-83, R-789-92).

On July 25, 2016, the ZBA filed its decision granting the variance (R-251-61). On August 24, 2016, Appellants timely commenced the underlying Article 78 Proceeding challenging the ZBA's determination (R-13-90). By Decision and Order dated February 10, 2017, Supreme Court dismissed the Petition for Appellants' failure to name Rosa Kuehn as a necessary party (R-2688-93). Appellants timely appealed that Order (R-2694-99) and, by Decision and Order dated July 5, 2018, this Court reversed and remanded the matter back to Supreme Court so that Appellants could join Rosa Kuehn and serve the petition on her (R-2700-03).

On July 30, 2019, Appellants served their Verified Amended Petition, which added Rosa Kuehn as respondent (R-2704-83). Supreme Court *sua sponte* dismissed the Amended Petition on the ground that Appellants failed to seek leave to amend the pleading; however, Appellants successfully moved to vacate that Order and the Court reinstated the Amended Petition (R-2784-88). Thereafter, Respondents moved to dismiss the Amended Petition on the ground that Appellants had failed to join Rosa Kuehn with in the 30-day limitations period (R-2789-2978).

By Decision and Order dated August 11, 2020, Supreme Court granted Respondents' motions and dismissed the Amended Petition (R-8-12). Appellants timely noticed their appeal (R-1-7) and now perfect same.

ARGUMENT

Appellants' claims against Rosa Kuehn relate back to their timely-filed Petition against the remaining respondents.

Under New York State's relation back doctrine, an action timely brought against one defendant is deemed timely as against all others united in interest with that defendant. See N.Y. C.P.L.R. §§ 203(b) and (c); Buran v. Coupal, 87 N.Y.2d 173, 177-78 (1995). To establish that his claims relate back, the plaintiff must demonstrate:

> (1) both claims arose out of the same conduct, transaction or occurrence, (2) the new party is "united in interest" with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits and (3) the new party knew or should have known that, but for a[] . . . mistake as to the identity of the proper parties, the action would have been brought against him as well.

Buran, 87 N.Y.2d at 178.

Here, it is undisputed, and Supreme Court concluded (R-11), that Appellants' claims against Rosa Kuehn arose out of the same conduct, transaction or occurrence as the claims they asserted against the Kuehn Respondents – namely the ZBA's grant of a use variance to the Kuehn Respondents. But Supreme Court held that Appellants could not establish the second and third prongs of the test. Respectfully, its holdings are erroneous and should be reversed.

Point I

Rosa Kuehn is united in interest with Kuehn Manufacturing, K-Tooling, or both.

Supreme Court erred in holding that Appellants failed to establish the second prong of the relation back test – that is, unity of interest. Indeed, Rosa Kuehn is united in interest with Kuehn Manufacturing and/or K-Tooling and, thus, Appellants have satisfied this prong.

Parties are united in interest when their interest "in the subject matter is such that they stand or fall together and that judgment against one will similarly affect the other . . . ." Prudential Ins. Co. v. Stone, 270 N.Y. 154, 159 (1936). The rationale for allowing relation back where parties are united in interest is that "[t]imely service upon one of two such defendants gives sufficient notice to enable him to investigate all the defenses which are available to both defendants within the period of limitations." Connell v Hayden, 83 A.D.2d 30, 41 (2d Dep't. 1981). Thus, where the original party could have asserted the same defenses as the new party, the new party suffers no prejudice by the expiration of the statute of limitations.

"[T]he question of unity of interest is to be determined from an examination of (1) the jural relationship of the parties whose interests are said to be united and (2) the nature of the claim asserted against them by the plaintiff." Id. at 42-43. "In other words, when because of some legal relationship between the defendants they

necessarily have the same defenses to the plaintiff's claim, they will stand or fall together and are therefore united in interest." Id. at 43.

Examining first the jural relationship between the parties, Rosa Kuehn owns Kuehn Manufacturing, which operated its manufacturing business from her property.[2] Indeed, she signed the use variance application on behalf of Kuehn Manufacturing in that capacity and for the sole purpose of obtaining municipal approval to allow her son's business to use the 800 square-foot addition for manufacturing purposes. She also is, and always has been, represented by the same attorney who represented Kuehn Manufacturing and K-Tooling before the ZBA and who represents them in this judicial proceeding.[3] In short, to the extent Rosa Kuehn gained any benefit to her property through the administrative proceedings now challenged in this proceeding, she did so through the efforts of her company, Kuehn Manufacturing, her son's company, K-Tooling, and her attorney, who fully represented her interests therein and does so here.

Looking next to the nature of the claim, Kuehn Manufacturing's and K-Tooling's participation in this proceeding is only as a necessary party. In other words, this is not case in which Appellants seek to hold the Kuehn Respondents or

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[2] Ms. Kuehn's late husband last operated the business she owns more than a decade ago and she never operated that business from the E. Front Street location.

[3] We also note that, since this matter was first commenced in August 2016, the Kuehn Respondents' attorney, Mr. Pope, has since become associated with the office of Coughlin & Gerhart, LLP, which represents the ZBA in this proceeding, and has done so since the outset. Thus, all of the respondents in this matter are now effectively represented by the same law firm.

Rosa Kuehn liable for alleged misconduct or negligence. Rather, their substantive claim is against the ZBA, challenging its grant of a use variance as arbitrary and capricious and contrary to law.

To the extent Kuehn Manufacturing and K-Tooling are able to assert their own defenses of the ZBA's determination, it is necessarily identical to *any* defense Rosa Kuehn might assert. Put differently, there is no defense on the merits that Rosa Kuehn could assert that Kuehn Manufacturing and K-Tooling could not [or would not] and, thus, Rosa is united in interest with them. And since, due to their jural relationship, they share the same defenses to Appellants' challenge to ZBA's grant of a use variance, Rosa Kuehn would not be prejudiced by late service.

Supreme Court held that Rosa Kuehn is not united interest with the other Kuehn Respondents because "Rosa Kuehn's interests as a land owner with a properly granted use variance that runs with the land is not the same or even united with the respondent manufacturers or the respondent Hancock ZBA" (R-10) But, respectfully, this reasoning is flawed.

As an initial matter, Supreme Court did not explain what about Rosa Kuehn's interest as a landowner causes her interests *in this proceeding* to diverge from those of Kuehn Manufacturing or K-Tooling. Indeed, all sought the variance for the exact same purpose – that is, allowing the business to use the 800 square foot addition for manufacturing purposes. The fact that Rosa Kuehn, as the property owner, might

obtain the *additional* benefit of a property interest that runs with the land, does not change the fact that her interests in seeking the variance in the first instance, and in defending its grant in this proceeding, are *identical* to Kuehn Manufacturing's and K-Tooling's interests in doing so.

A similar conclusion obtains should the grant of the use variance be vacated – both Rosa Kuehn and Kuehn Manufacturing would lose the ability to conduct manufacturing activities in the 800 square foot addition. As Kuehn Manufacturing's owner, Rosa Kuehn suffers the same loss as her company. Her loss of an additional benefit as the landowner of a property interest that runs with the land does not alter the fact her ability to use the 800 square foot addition for manufacturing purposes necessarily stands and falls with Kuehn Manufacturing's and K-Tooling's ability to do so.

In other words, while Rosa Kuehn might have a bit more on the line in terms of a longer lasting benefit to her property, which she may alienate, her interests in this proceeding – that is, in defending the grant of the variance – are exactly coextensive with manufacturing business's, which seek to uphold the variance for the exact same reason as its owner, Rosa Kuehn – that is, to continue using the 800 square foot addition for manufacturing purposes.

Moreover, to be united in interest, the parties need not be affected *identically* by the judgment; rather, they need only be similarly affected such that they stand or

fall together. Prudential Ins. Co., 270 N.Y. at 159. Again, this inquiry looks to the parties' potential defenses, see Connell, 83 A.D.2d at 41, which Supreme Court failed to evaluate. Again, regardless of Rosa Kuehn's status as property owner, the fact remains that she and the Kuehn Respondents, as necessary parties to Appellants' challenge to the ZBA's determination, share the same defenses and stand or fall together with regard to that transaction – they would both be similarly affected by an adverse judgment because annulling the ZBA's determination would subvert the parties' intended use of the property.

In any event, even crediting Supreme Court's conclusion that Rosa Kuehn and the other Kuehn Respondents would be affected differently by an adverse judgment, that conclusion still does not destroy their unity of interest. Again, the thrust of that inquiry is whether the parties *necessarily share the same defenses*, which, as already explained, they do. Thus, any slight practical difference in how that judgment might affect the two parties is insignificant.

In this regard, the Second Department's decision in Losner v. Cashline, L.P., 303 A.D.2d 647, 648 (2d Dep't. 2003) is apposite. There, the plaintiffs lost their property in foreclosure to Green Point, which then transferred title to an entity called Cantico. Cantico then conveyed mortgages to an entity to called Sagamore, which then assigned those mortgages to North Forth Bank. The Losners sued to void the transfer of the proper from Green Point to Cantico and to nullify the mortgages

assigned by Sagamore to North Fork, but they did not initially name North Fork, the current mortgagee, as a defendant. The Second Department held that Supreme Court properly granted the Losners' motion to amend the complaint to add North Fork despite the running of the statute of limitations.

In holding that North Fork was united in interest with its co-defendant Sagamore, the Court recognized that the two entities would be affected differently by a judgment: "[B]ecause North Fork is the holder of the mortgages, and Sagamore is not, an adverse judgment will affect North Fork's claims to the mortgages but will not similarly affect any rights of Sagamore, since it no longer has any interest in the mortgages." Id. at 648. But that fact did not preclude application of the relation back doctrine: "Nevertheless, *because North Fork does not have any defenses available to it that Sagamore does not have*, these parties will either stand or fall together with respect to the Losners' claims to set aside the mortgages as fraudulent." Id. (emphasis added). Thus, the two were united in interest. Id.

Likewise, here, even if Rosa Kuehn might suffer some impact from an adverse judgment as property owner that is different from the impact Kuehn Manufacturing might suffer, the fact remains that, under the circumstances of this case, both Rosa Kuehn and the manufacturing entities stand in the same light with respect to Appellants' challenge to the ZBA's use variance approval and both share exactly the same defenses – *e.g.*, that the ZBA's determination was rational and legally

sufficient. As such, Rosa Kuehn is not prejudiced by late joinder and the outcome would be the same for each party – annulment of the use variance and frustration of their intended use of the property. Thus, there is sufficient unity of interest.

Point II

Rosa Kuehn knew or should have known that, but for Appellants' mistake, they would have named her as a respondent as well.

Supreme Court erred in holding that Appellants failed to establish the third prong of the relation back test, which requires that "the new party knew or should have known that, but for a[] . . . mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well." Buran, 87 N.Y.2d at 178.

In establishing this prong, the plaintiff need not demonstrate that his mistake was excusable; indeed, such a requirement would "unwisely focus[] attention away from . . . the primary consideration in such cases – whether the *defendant* could have reasonably concluded that the failure to sue within the limitations period meant that there was no intent to sue that person at all and that the matter has been laid to rest as far as he is concerned." Id. at 180-81. (citations & quotations omitted) (emphasis in original).

Of course, there has been no mistake when the plaintiff "intentionally decides not to assert a claim against a party known to be potentially liable" and omits that

defendant "to obtain a tactical advantage in the litigation." Id. at 181. But courts repeatedly hold that a mistake that results from mere inadvertence, as opposed to an intentional decision to gain a tactical advantage, suffices under the relation back inquiry. See, e.g., Headley v. City of New York, 115 A.D.3d 804 (2d Dep't. 2014) ("[I]nitial failure to name the City as a defendant was a mistake, rather than an intentional decision not to assert the claim in order to gain a tactical advantage."); Thomsen v. Suffolk County Police Dep't., 50 A.D.3d 1015 (2d Dep't. 2008) ("[I]nitial failure to name the County as a defendant was a mistake, rather than an intentional decision not to assert the claim in order to gain a tactical advantage."); DeLuca v. Baybridge at Bayside Condo. I, 5 A.D.3d 533, 535 (2d Dep't. 2004) ("[T[here is no indication that the plaintiff intentionally failed to join the Baybridge defendants as parties to the 1998 action or acted in bad faith. His failure to properly join the Baybridge defendants to the 1998 action constituted a 'mistake.'"); Losner, 303 A.D.3d at 649 ("The Losners' failure to name North Fork as a defendant was merely inadvertent, and there is no evidence that the Losners were attempting to gain some tactical advantage by omitting North Fork from the action.").

Here, Appellants' failure to name Rosa Kuehn as a respondent in this proceeding arose from an inadvertent mistake. Indeed, as already noted, Rosa Kuehn signed the variance application in her representative capacity on behalf of Kuehn Manufacturing and the appealed from ZBA decision refers to the applicant

only as "Kuehn Manufacturing Company/K-Tooling." Moreover, as discussed, with respect to the use variance at issue in this proceeding, Kuehn Manufacturing's interests are entirely aligned with those of Rosa Kuehn.

Accordingly, it was eminently reasonable for Appellants to conclude [even if mistakenly] that these two businesses were the proper parties to be named in a proceeding challenging a use variance granted to them for the purpose of operating their respective businesses. And they did not omit Mrs. Kuehn in bad faith or to obtain any sort of tactical litigation advantage.

Furthermore, Rosa Kuehn knew, or should know, that but for this mistake, she would have been named as well. Again, the focus must be on the state of *her* mind and not whether Appellants knew of her existence at the time they commenced this proceeding. As owner of Kuehn Manufacturing and mother of K-Tooling's owner, and being represented by the same counsel as these entities, Rosa Kuehn certainly had, or should have had, notice of this proceeding during the limitations period. And, of course, she is well familiar with the variance application, the ZBA's determination and all of the administrative proceedings prior to this proceeding. Accordingly, she must be charged with actual or constructive knowledge of the fact that she would have been named as respondents but for Appellants' mistake.

Supreme Court held that Appellants' failure to initially name Rosa Kuehn as a respondent was a mistake of law and, citing this Court's decisions in Matter of

Sullivan County Patrolmen's Benevolent Assn., Inc. v. N.Y. State Pub. Emp. Relations Bd., 179 A.D.3d 1270, 1271-72 (3d Dep't. 2020) and Matter of Sullivan v. Planning Bd. of Town of Mamakating, 151 A.D.3d 1518, 1520 (3d Dep't. 2017), concluded that a mistake of law cannot satisfy the third prong of the relation back test and that failure to name a party whose existence is known because of a mistake as to the legal necessity of doing so constitutes such a mistake of law (R-10-11).[4]

Appellants respectfully submit that this Court should revisit and overturn the foregoing precedents. Our research has uncovered no Court of Appeals decision directly addressing and adjudicating this issue. And, based upon the Court of Appeals' exposition of the subject matter in Buran, Appellants submit that the relation back doctrine applies even in the case of a mistake of law, particularly where, as here, the mistaken omission of the party would require dismissal of the entire proceeding.

In holding that the third prong of the relation back doctrine does not require that the mistake be excusable, the Buran Court traced the origins and purpose of the State's relation back rule and, in doing so, explained that it was based in large part on the federal rule codified in Rule 15(c) of the Federal Rules of Civil Procedure. See Buran, 87 N.Y.2d at 179-80. A large part of the Court's reasoning in holding

[4] In Supreme Court, Appellants acknowledged that, if the court found their mistake to be one of law, it was bound this Court's precedents; however, to preserve their argument on appeal, they also argued extensively why this precedent should be overturned.

that the State rule does not require an excusable mistake is that the analogous federal rule does not require that the mistake be excusable. See Id. at 179. The Court also concluded that, requiring the mistake be excusable would run counter to, and undermine the policies, underlying the relation back doctrine, which is to protect against the harsh effects resulting from pleading errors that would otherwise obtain. See Id. at 177-78, 181.

In this regard, it is notable that the federal relation back rule *does* apply in the context of a mistake of law. See Soto v. Brooklyn Correctional Facility, 80 F.3d 34, 35-36 (2d Cir. 1996); Muwwakkil v. Hoke, No. 96-2394, 1996 U.S. App LEXIS 37677, at * 10 (2d Cir. 1996) (summary order) ("It is true that 'mistakes,' for purposes of Rule 15(c), include mistakes of law.").

In Soto, the plaintiff, while a pretrial detainee at the Brooklyn Correctional Facility, had been attacked and injured by other detainees. See Id. at 35. Despite advising corrections officers of the detainees who assaulted him, when he was released from the hospital, the officers returned him to the same housing unit as his attackers. See Id. The plaintiff was assaulted again and, thereafter, filed suit under 42 U.S.C. § 1983 alleging violations of his constitutional rights. See Id. In doing so, he named only Brooklyn Correctional Facility as a defendant, but he did not allege that the violations of his rights arose from a policy or custom, as would be required to state a claim against a municipal defendant such as the facility, see Monell v. NYC

Dep't. of Soc. Servs., 436 U.S. 658 (1978), and so the district court dismissed his complaint. See Soto, 80 F.3d at 35.

On appeal, the Second Circuit reversed, holding that the plaintiff should be granted leave to amend the complaint to assert claims against the individual corrections officer who violated his rights, noting that such claims would relate back to the filing of his complaint, so long as the officers had timely notice of the initial complaint and would not be prejudiced. See Id. at 34-35, 37. In doing so, the Court explained that the mistake prong of the relation back rule applies to mistakes law:

> For Soto's amended complaint to relate back to the date of his original complaint he must show that he failed to name the individual officers due to a "mistake concerning the identity of the proper party." Fed. R. Civ. P. 15(c)(3)(B). This phrasing of the "mistake" criterion was introduced in the 1966 amendment to Rule 15. According to the Advisory Committee Note accompanying the 1966 amendment, the language was prompted by several cases in which plaintiffs, unaware of the technical requirements of the law, mistakenly named institutional instead of individual defendants. See Cohn v. Federal Security Administration, 199 F. Supp. 884 (W.D.N.Y. 1961); Hall v. Department of Health, Education and Welfare, 199 F. Supp. 833 (S.D. Tex. 1960); Cunningham v. United States, 199 F. Supp. 541 (W.D. Mo. 1958). In these cases, plaintiffs, who were required by statute to sue the Secretary of Health, Education and Welfare, "had mistakenly named as defendants the United States, the Department of HEW, [and] the 'Federal Security Administration' (a nonexistent agency) . . . ." Fed. R. Civ. P. 15 advisory committee note (1966 amendment). The amendment was expressly intended to preserve legitimate suits despite such mistakes of law at the pleading stage.

Id. at 35-36. The court explained that Soto's mistake – that, absent a municipal policy or custom, as a matter of law, he could only sue individual officers in their individual capacities – was similar to the types of mistakes of law the Advisory Committee cited in its notes accompanying the 1966 amendments to Rule 15(c) as being subject to the relation back rule. See Id. at 36.

The Soto Court also distinguished its facts from those in its prior decision in Cornwell v. Robinson, 23 F.3d 694 (2d Cir. 1994). See Id. at 36. Cornwell recognized that mistakes of law are subject to the relation back rule but held that a proposed amended complaint did not relate back "where the plaintiff had shown neither factual mistake (*i.e.*, that she misapprehended the identities of the individuals she wished to sue) nor legal mistake (*i.e.*, that she misunderstood the legal requirements of her cause of action.)" Id. at 36.

There was no mistake there because "Cornwell had always known the identities of the individuals, and h*er original complaint had been legally sufficient.*" Id. (emphasis added). "Cornwall was not required to sue the individual defendants, and her failure to do so in the original complaint must be considered a matter of choice, not mistake." Id. at 36-37 (quotations & citations omitted) (alterations accepted). By contrast, absent a municipal policy or custom, "Soto was required to sue the individual defendants to maintain [his] action .... His failure to do so cannot be considered a matter of choice; but for his mistake as to the technicalities of

constitutional tort law, he would have named the officers in the original complaint . . . ." Id. at 37.

Like in Soto, here, Appellants were required to name Rosa Kuehn as a respondent and, but for their mistake as to the technicalities of having to join all possible necessary parties (including the landowner) when challenging a ZBA's land use determination, they would have timely done so. They plainly did not exclude Rosa Kuehn in bad faith or to obtain some tactical litigation advantage. Rather, their mistake, even if one of law, was inadvertent and should not prejudice their ability to challenge the ZBA's determination on the merits, particularly where Rosa Kuehn, through her unity of interest with the other Kuehn Respondents, is charged with notice of this proceeding and is not prejudiced by late joinder.

In short, the type of mistake at issue here is precisely the type of mistake that would be permitted to be corrected by amendment under the federal relation back rule. And, since New York's rule is "patterned largely after the Federal relation back rule," Buran, 87 N.Y.2d at 179, the same analysis should apply here. Neither the statutory basis for the relation back rule, see N.Y. C.P.L.R. §§ 203(b) and (c), nor any Court of Appeals' decision we can find precludes such a holding.

Indeed, one could describe the mistake at issue in the seminal relation back case of Buran v. Coupal as a mistake of law. There, in suing their neighbors for trespass, the plaintiffs sued only the husband, but not the wife, although the wife co-

owned the property with her husband. Id. at 176. Certainly, the deed reflecting the wife's shared ownership in the property was publicly available at the time. Thus, the plaintiff's mistake in failing to initially name her as a defendant was essentially a mistake of law regarding the technical need to name all property owners as necessary parties to the trespass suit. And, despite constructive notice of the existence and identity of the wife as a co-owner of the property at the time of the initial suit, the Court of Appeals held the plaintiff's later amended complaint naming the wife as defendant related back to the time of the initial filing suing only the husband. See Id. at 182.

The mistake at issue in Buran is quite similar, if not identical, to Appellants' inadvertent and mistaken failure to initially name Rosa Kuehn as a necessary party here. Thus, even if dubbed a "mistake of law," Appellants' mistake here should not preclude relation back.

In sum, "[t]he linchpin of the relation-back doctrine is whether the new defendant had notice within the applicable limitations period." OneWest Bank N.A. v. Muller, 189 A.D.3d 853, 856 (2d Dep't. 2020) (quotations & citations omitted); Accord Buran, 87 N.Y.2d at 180. Appellant's have demonstrated a good faith mistake as to their failure to name Rosa Kuehn, who most certainly knew, or should have known, that, but for this mistake, they would have timely named her as a

respondent as well. Thus, Appellants have satisfied the third and final prong of the relation back test.

CONCLUSION

For all of the foregoing reasons, Supreme Court's Order should be reversed and vacated. The matter should be remanded for Supreme Court to consider the merits of the Petition in the first instance.

Dated: Goshen, New York
May 17, 2021

Respectfully submitted,

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