To be argued by:
ALAN J. POPE, ESQ.
Time requested: 20 minutes

STATE OF NEW YORK
COURT OF APPEALS

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.

RESPONDENTS-RESPONDENTS' BRIEF

APL – 2022 – 00132

Date: December 23, 2022

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PRELIMINARY STATEMENT

This is a twelve (12) year old case, starting with the Petitioners-Appellants' loss at a 2010 bench trial before the Hon. Molly Reynolds Fitzgerald. (RA-1). Respondent-Respondent Perry Kuehn was determined in the trial Decision and Order to be the Owner of Kuehn Manufacturing. (RA-1). Respondent-Respondent Perry Kuehn signed the use variance application in 2016 to the Hancock Zoning Board of Appeals on behalf of both Respondents-Respondents K-Tooling and Kuehn Manufacturing and Rosa Kuehn signed the application as the owner of the property, but Rosa Kuehn had no interest in Kuehn Manufacturing. (RA-71-72). The Petitioners-Appellants failed to name Rosa Kuehn as the known property owner within the thirty (30) day time requirement. None of the Respondents-Respondents played any role in the Petitioners-Appellants' failure to name Rosa Kuehn as a necessary party.

It is respectfully submitted that the Memorandum and Order of the Appellate Division Third Department herein dated May 5, 2022 should be affirmed.

QUESTION PRESENTED

Does the current New York relation back doctrine under § CPLR 203(c) need to be revised or clarified?

Answer: No; there is no compelling reason to change the current state of New York law interpretating § CPLR 203(c), and certainly not with respect to the instant matter.

NATURE OF THE CASE

A. Statement of Facts

Respondents-Respondents Kuehn Manufacturing and K-Tooling are manufacturing businesses owned and operated by Perry Kuehn. (A-71). Respondent-Respondent K-Tooling operates, and has operated for almost twenty (20) years, as a tenant from the property located at 396 East Front Street in the Village of Hancock, New York. (RA-1-2). Rosa Kuehn owns and resides at 396 East Front Street, Hancock, New York. (A-88). The Petitioners-Appellants own a neighboring residential property to Rosa Kuehn. (A-88).

The 396 East Front Street property is located in a residential district in the Village of Hancock. (A-4). The 396 East Front Street property is a prior non-conforming manufacturing use, in that, manufacturing was conducted at the property prior to any zoning in the Village of Hancock. (RA-2). The Petitioners-Appellants purchased their property in the Village of Hancock with full knowledge of the prior manufacturing at the adjacent property owned by Rosa Kuehn. (A-74).

The Respondents-Respondents sought and received from the Village Zoning Board of Appeals a variance allowing them to use an 800 square foot addition to

the existing main building for manufacturing purposes. (A-61; 78). Petitioners-Appellants thereafter commenced an Article 78 proceeding challenging that ZBA determination, but Supreme Court Delaware County upheld the ZBA grant of the use variance for that 800 square foot area. (A-38). On appeal, the Third Department vacated the Supreme Court's Order and annulled the ZBA's determination, holding that the Respondents-Respondents had failed to provide sufficient proof for one of the elements for a use variance.

Thereafter, the Respondents-Respondents again applied to the ZBA for a use variance for the 800 square foot addition. (A-71). Perry Kuehn signed the application on behalf of both K-Tooling and Kuehn Manufacturing and Rosa Kuehn signed the application as the owner of the property. (A-71-72). The ZBA then held two public hearings – one on April 21, 2016 and another on May 26, 2016 – at which the ZBA received testimony and voluminous documentary evidence to support the requested use variance for the 800 square foot addition, including the required dollars and cents proof. (A-82-87).

On July 25, 2016, the ZBA granted the variance for the 800 square foot addition. (A-61). Petitioners-Appellants once again commenced an Article 78 proceeding challenging the ZBA's determination, but unlike the prior Article 78, the Petitioners-Appellants chose not to name Rosa Kuehn – the known and obvious property owner. (A-38-51). By Decision and Order dated February 10, 2017,

Supreme Court dismissed the Petition as a result of Petitioners-Appellants' failure to name Rosa Kuehn as an obvious and known necessary party (A-32). Petitioners-Appellants appealed that Order (A-30) and, by Decision and Order dated July 5, 2018, the Third Department remanded the matter so that Petitioners-Appellants could join Rosa Kuehn and serve an Amended Petition on Rosa Kuehn as the obvious and known property owner who participated in obtaining the use variance that was twice granted. (A-26).

Petitioners-Appellants then served their Amended Petition, which for the first time added Rosa Kuehn as a respondent. (A-88-95). Thereafter, Respondents-Respondents moved to dismiss the Amended Petition on the grounds that Petitioners-Appellants had failed to join Rosa Kuehn as a known necessary party within the 30-day statute of limitations period. (A-96). By Decision and Order dated August 11, 2020, Supreme Court, Delaware County granted Respondents-Respondents' motion and dismissed the Amended Petition. (A-16).

By Decision and Order dated and entered May 5, 2022, the Third Department affirmed Supreme Court's dismissal of the Amended Petition. (A-2).

B. Appellate Division's Decision and Order

In dismissing the Amended Petition, Supreme Court held that Petitioners-Appellants failed to establish the second and third prongs of the New York relation

back test, namely, finding that Rosa Kuehn was not united in interest with any of the other Respondents-Respondents and that Petitioners-Appellants' failure to initially name Rosa Kuehn – the known property owner – as a respondent was not the type of mistake contemplated by the New York relation back doctrine. (A-4-5).

The Appellate Division correctly concluded that, even if the second prong of unity of interest was satisfied (which it was not), Petitioners-Appellants could not meet the third prong of the relation back test. (A-10). The Third Department held that: "Indeed, Rosa Kuehn was appropriately named as a respondent and identified as the landowner of the subject property in petitioners' successful challenge to the use variance issued in 2013…; thus, this is simply not an instance where the identity of a respondent…was in doubt or there was some question regarding the party's status". (A-10).

ARGUMENT

POINT I – PETITIONERS-APPELLANTS' REQUEST TO CHANGE PRONG 3 OF NEW YORK'S RELATION BACK DOCTRINE SHOULD BE DENIED

The primary case the Petitioners-Appellants rely on is *Buran v. Coupal*, 87 NY 2d 173 (1995). However, the plain reading of the change in New York's relation back doctrine adopted by the *Buran* Court cannot be unilaterally expanded to fit Petitioners-Appellants' needs for an even broader reading of that *Buran*

decision. In *Buran*, this Court essentially removed the excusability requirement of the New York relation back doctrine. *Buran v. Coupal*, 87 NY 2d 173, 176 (1995). In making a change in the relation back doctrine in 1995, this Court in *Buran* found convincing the requirements of the corresponding Federal relation back doctrine, which requires only a mistake concerning the identity of the parties, rather than an excusable mistake. *Id.*

However, what remains crystal clear under current New York law is the fact that an alleged mistake as to the identities of the parties is still required. In fact, this Court in *Buran* explicitly stated that courts properly reject use of the relation back doctrine in cases where "there was no 'mistake'—i.e. that plaintiffs knew of the existence of the proper parties at the time of their initial filing." *Id.* at 180.

As such, while this Court's decision in *Buran* "makes clear that the 'excusability' requirement has been eliminated, it is equally clear that a mistake as to the identity of the parties at the time of the initial filing is still required." *See State v Gruzen Partnership*, 239 AD 2d 735, 736 (3rd Dept 1997).

The facts of the *Buran* case lend itself to Respondents-Respondents' argument that the Petitioners-Appellants' request for further change to the New York relation back doctrine should be denied. In *Buran*, there was a mistake, whether excusable or otherwise, as to who should be the proper parties to the action (*Id.* at 175), but certainly not a general mistake in naming an already known

existing party like we have here in the instant matter with Rosa Kuehn. In *Buran*, "[t]he description in defendants' deed was far worse than inadequate . . . and thus, could not have given plaintiffs' notice of any ownership claim of Mrs. Coupal." *Id.* at 175.

This is an important element in New York's relation back doctrine, and it should not be eroded to serve the particular desires of the Petitioners-Appellants. While the neighboring landowners were known to those *Buran* plaintiffs, Mrs. Coupal's alleged interest relative to a portion of land the defendants claimed they had adversely possessed, was in no way clear. *Id.* at 175. As such, in regards to the portion of land at issue in *Buran*, the *Buran* plaintiffs were mistaken as to the identity of a party to the suit, as is required under the third-prong of the New York relation back doctrine. *Id.* While the *Buran* plaintiffs may have been aware of defendant Mrs. Coupal's interest in her own property, but notably and central to the *Buran* case, the *Buran* plaintiffs were unaware of her alleged interest or claim to interest in the disputed property, that being the property for which adverse possession was being claimed.

The *Buran* result makes perfect sense because in that case, in relation to the relevant portion of the disputed property, the *Buran* plaintiffs were unaware of the identity of the proper parties to the claim. Additionally notable in the *Buran* case is this Court's heavy emphasis on the bad-faith of the defendants, whose actions in

transferring the property to an entity and then back to themselves, were calculated to delay the proceedings and cause difficulty to the *Buran* plaintiffs in ascertaining the proper parties to the action. *Buran*, 87 NY 2d 173 at 182.

None of those facts, or types of factors, are even remotely present in the instant case involving Rosa Kuehn. The Petitioners-Appellants have known who Rosa Kuehn is since they purchased their property some twenty (20) years ago. There was no question over ownership of the 800 square foot addition being that of Rosa Kuehn, and there certainly were no clandestine deed transfers by Rosa Kuehn as was the case in *Buran*.

The current New York bright line distinction between a mistake as to the identities of the parties versus knowledge of who the necessary parties are, but making a mistake in naming a known necessary party, is easy to apply and is imminently fair to both sides. Statutes of limitations serve an important gate keeper purpose in cutting down on litigation and protecting the citizens and businesses of New York. There should be no change in the current New York relation back doctrine.

The reality is the First, Third and Fourth Departments have continued to apply the mistake of law bar to use of the New York relation back doctrine even after the *Buran* decision. Only the Second Department appears to find distinctions in application of the mistake of law. *See Gilbert v. Perine*, 52 AD 3d 240 (1st Dept

2008); *Windy Ridge Farm v. Assessor of Town of Shandaken*, 45 AD 3d 1099 (3rd Dept 2007), *affd*, 11 NY 3d 725 (2008); *Matter of Sullivan v. Planning Bd. of the Town of Mamakating*, 151 AD 3d 1518 (3rd Dept 2017); *Doe v. HMO-CNY*, 14 AD 3d 102 (4th Dept 2004).

Here, the Petitioners-Appellants are advocating for a statewide change in the application of the third prong of the relation back doctrine, which would necessarily change the language of the standard enunciated in *Buran*. In *Buran*, this Court enunciated a clear requirement for the third prong that "but for a mistake concerning the identity of the proper party, the action would have been brought against the party." *Buran*, 87 NY 2d 173 at 179. For Petitioners-Appellants to advocate the wholesale removal of the mistake requirement of *Buran* would be to alter the New York standard completely and eviscerate language specifically applied by this Court across the Appellate Departments. As the majority of the Third Department in the instant case aptly noted, "in this state, a threshold requirement for relation back [is] that the petitioner/plaintiff made a mistake 'as to the identity of the proper parties.'" (A-11) *citing Buran v. Coupal*, 87 NY 2d 173, 180 (1995).

Just as the Third Department's majority concluded herein that since Petitioners-Appellants were well aware that Rosa Kuehn was the landowner before the Petitioners-Appellants commenced their underlying Article 78 proceeding,

their mistake or error in failing to name Rosa Kuehn as a known necessary party fails to satisfy the third prong of the New York relation back test, thereby precluding application of this doctrine. As such, it is respectfully submitted that the Order of the Third Department herein should be affirmed.

The Petitioners-Appellants cite to the United States Supreme Court case of *Krupski v Costa Crociere S. p. A,* 560 US 538; 130 S. Ct. 2485 (2010). In *Krupski*, the Court highlighted the importance of distinguishing between knowing about a party's existence and being mistaken about a proper party's identity. As the United States Supreme Court pointed out, "A plaintiff might know that a prospective defendant exists but nonetheless choose to sue a different defendant based on a misunderstanding about the proper party's identity". That is clearly not the case here – the Petitioners-Appellants always knew the exact existence and identity of Rosa Kuehn. FRCP Rule 15 was not meant to protect a plaintiff who knew of the existence and identity of a proper party defendant, nor was the CPLR meant to protect a plaintiff who knew of the existence and identity of a proper party defendant.

This legal concept of a plaintiff having made no mistake, and in fact knowing the existence and identity of a proper defendant, but simply not naming that defendant, is an important distinction in New York's application of the relation back doctrine. *See Crawford v City of New York*, 129 AD 3d 554 (1st Dept; 2015)

where the plaintiff admitted he knew of the existence and identity of the proper defendant but waited two years to move to amend the complaint, and therefore, plaintiff was not permitted to use the relation back doctrine.

Based on the above, it is respectfully submitted that the Order herein of the Appellate Division Third Department should be affirmed.

POINT II – PETITIONERS-APPELLANTS FAIL TO MEET PRONG 2 OF NEW YORK'S RELATION BACK DOCTRINE

Prong 2 of New York's relation back doctrine requires there be "unity in interest" between the existing named defendants in an action or proceeding and the new defendant sought to be added after the statute of limitations has expired. The Petitioners-Appellants have failed to establish prong 2 – unity in interest. The law is clear – "the unity of interests test will not be satisfied unless the parties share precisely the same jural relationship." *Zehnick v. Meadowbrook II Assoc.,* 20 AD 3d 793 (3rd Dept; 2005) (emphasis added). "[T]he unity of interest test will not be satisfied . . . unless the original defendant and new party are 'vicariously liable for the acts of the other.'" *Id*. *citing Quine v. Burkhard Bros.*, 167 AD 2d 683, 684 (3rd Dept 1990). Clearly, Rosa Kuehn does not have the same jural relationship with the manufacturers-tenants and is clearly not vicariously liable for the acts of the two manufacturing companies who happen to be tenants at Rosa Kuehn's property.

Rosa Kuehn's interests as a land owner with a properly granted Use Variance that runs with the land is not the same or united with the Respondents-Respondents manufacturers or the Respondent Village of Hancock. For over a decade of litigation, the Petitioners-Appellants have consistently taken a position that Kuehn Manufacturing was owned and operated by Ray Kuehn, now deceased. Petitioners-Appellants have no proof to support their speculation that Rosa Kuehn is somehow operating a manufacturing business. As determined in Justice Fitzgerald's Decision and Order dated August 11, 2010, Perry Kuehn has been the owner of Kuehn Manufacturing since 2000. (RA-1). Petitioners-Appellants did not appeal that factual finding and cannot contest it now a decade later. With all due respect to Justice Garry's dissent in the Third Department Decision, Justice Fitzgerald made the determination in 2010 that Perry Kuehn is the owner of Kuehn Manufacturing, and therefore, it is not subject to further debate. The Petitioners-Appellants' speculation as to ownership is not evidentiary proof and cannot supersede what Justice Fitzgerald has already determined as a matter of law for this case, namely that Perry Kuehn is the owner of Kuehn Manufacturing. (RA-2).

The relevant issue for determining prong 2 is whether Rosa Kuehn is vicariously liable for the acts, omissions and liabilities of K-Tooling, which, of course, Rosa Kuehn is not. The same is true of Kuehn Manufacturing, in that, Rosa Kuehn had nothing to do with obtaining the permit or constructing the 800

foot addition that was the subject to the underlying Use Variance, and as determined by Justice Fitzgerald, Perry Kuehn has been the owner of Kuehn Manufacturing since 2000. (RA-2). *Facse v Smithen,* 188 AD 3d 1542 (3rd Dept; 2020).

Even though there are some very limited commonalities among Rosa Kuehn and the manufacturing Respondents-Respondents, the Petitioners-Appellants failed to clearly demonstrate evidence to satisfy the second prong of the relation back doctrine. As the sole real property owner, Rosa Kuehn could not possibly be vicariously liable for the liabilities of the separate tenant manufacturer K-Tooling or liable for the liabilities of the Village of Hancock Zoning Board of Appeals. Rosa Kuehn simply owns and resides at the real property on which the separate corporate manufacturing tenant K-Tooling operated its business. Rosa Kuehn is not an officer, director or manager of K-Tooling, a manufacturing tenant. Petitioners-Appellants failed to establish how Rosa Kuehn could possibly be vicariously liable with K-Tooling a manufacturer tenant, and completely fail to mention or establish how Rosa Kuehn is united in interest with the Hancock Zoning Board of Appeals. Regardless of some simple similarity of Rosa Kuehn's "defenses" with manufacturer K-Tooling as a Respondent-Respondent, Petitioners-Appellants completely failed to demonstrate how Rosa Kuehn has the exact same jural relationship with manufacturer K-Tooling or with the Hancock Zoning Board of

Appeals, or even how Rosa Kuehn could ever be vicariously liable as a matter of law for the acts of the other Respondents-Respondents to satisfy the second prong of the relation back doctrine. *Stepanian v Bed, Bath & Beyond, Inc.,* 207 AD 3d 1182 (4th Dept; 2022). As it relates to Prong 2 – Unity of Interest, the *Stepanian* Court properly set forth the unity of interest test in New York as follows: "Although the parties might share a multitude of commonalities, … the unity of interest test will not be satisfied unless the parties share precisely the same jural relationship in the action at hand … Indeed, unless the original defendant(s) and the new (defendants) are vicariously liable for the acts of the other(,) …. there is no unity of interest between them." *Id* at 1183. The *Stepanian* Court went on to hold that a landlord tenant relationship alone, without more, is insufficient to establish a unity of interest. *Id* at 1184.

The case of *Ayuda Re Funding, LLC,* 121 AD 3d 1474 (3rd Dept; 2014) involved an Article 78 proceeding where there was a change in the zoning law and the original respondents included the municipality and the parties that sought the zoning change, but failed to name the real property owners. The *Ayuda Re Funding* Court held that the real property owners do not have the interest in the zoning changes as the original named respondents. This is the exact same situation, in that, Rosa Kuehn as the sole real property owner is not united in interest with the Hancock Zoning Board of Appeals or with K-Tooling the

manufacturer. See also *Belair Care ctr., Inc. v. Cool Insuring Agency, Inc.*, 161 AD 3d 1263, 1269 (3rd Dept. 2018).

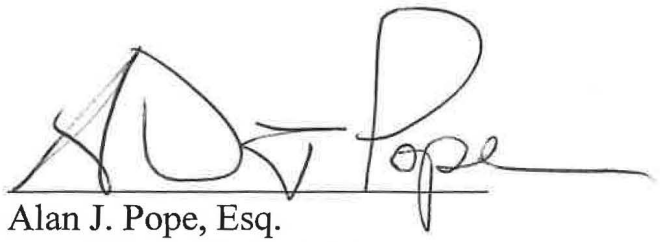
CONCLUSION

Based on the above, the Petitioners-Appellants are unable to meet Prong 2 and Prong 3 of the New York relation back doctrine. The Petitioners-Appellants cannot sustain Prong 2 by establishing a unity of interest of Rosa Kuehn to the Village of Hancock Zoning Board of Appeals or to K-Tooling a manufacturer tenant on Rosa Kuehn's real estate. The Petitioners-Appellants also cannot sustain Prong 3 because the Petitioners-Appellants admittedly knew of the existence and identity of a proper party defendant, namely Rosa Kuehn, but they just did not name Rosa Kuehn as a respondent before the statute of limitations had expired.

Furthermore, based on the above arguments, there is no factual reason or legal basis to change the law in New York as it relates to Prong 3 of New York's relation back doctrine. Here, the Petitioners-Appellants knew of the specific existence and exact identity of Rosa Kuehn as the sole real property owner. Whether under the Federal rules or New York State rules, Prong 3 cannot be met seeing that the Petitioners-Appellants knew all along about the existence and identity of Rosa Kuehn.

It is respectfully submitted that this twelve plus years of litigation must come to a certain end.

Dated: December 23, 2022



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PRINTING SPECIFICATIONS STATEMENT

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Dated: December 23, 2022

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