STATE OF NEW YORK
COURT OF APPEALS

JOSEPH AND DONNA NEMETH, VALERIE GARCIA,

Petitioners-Appellants, **Mo. No. 2022-455**

-against-

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

Respondents-Respondents.

RESPONDENTS-RESPONDENTS' OPPOSITION MEMORANDUM OF LAW TO PETITIONERS-APPELLANTS' MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT
CASE NO. 532948

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

JOSEPH and DONNA NEMETH, VALERIE GARCIA,

Petitioners-Appellants,

Mo. No.: 2022-455

vs.

App Div. No.: 532948

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

Respondents-Respondents,

MEMORANDUM OF LAW IN OPPOSITION TO PETITIONERS' MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

I. PRELIMINARY STATEMENT

There is no special, extraordinary or of state-wide significance concerning the particular legal issue advanced by the Petitioners-Appellants. The "relation back" doctrine is not in any type of legal turmoil amongst the various Appellate Departments. This is a twelve (12) year old case, starting with the Petitioners' loss at a 2011 bench trial before the Hon. Molly Reynolds Fitzgerald.

It is respectfully submitted that the Petitioners-Appellants' application for permission to appeal to the Court of Appeals be denied.

A. Factual Background

Respondents Kuehn Manufacturing and K-Tooling are manufacturing businesses owned and operated by Perry Kuehn. K-Tooling operates, and has operated, as a tenant from the property located at 396 East Front Street in the Village of Hancock, New York. Rosa Kuehn owns and resides at 396 East Front Street, Hancock, New York. The Petitioners-Appellants own a neighboring property to Rosa Kuehn.

The 396 East Front Street property is located in a residential district. 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.

The 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. 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. On appeal, the Third Department vacated Supreme Court's Order and annulled the ZBA's determination, holding that the Respondents had failed to provide sufficient proof of an element for a use variance.

Thereafter, the Respondents again applied to the ZBA for a variance. 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. (R-264). 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. (R-280-83, R-789-92).

On July 25, 2016, the ZBA granted the variance for the 800 square foot addition. (R-251-61). 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. (R-13-90). 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 obviously known necessary party (R-2688-93). Petitioners-Appellants appealed that Order (R-2694-99) 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 her as the obvious and known property owner which was the subject to the use variance that was granted. (R-2700-03).

Petitioners-Appellants then served their Amended Petition, which for the first time added Rosa Kuehn as a respondent. (R-2704-83). Thereafter, Respondents moved to dismiss the Amended Petition on the ground that Petitioners-Appellants had failed to join Rosa Kuehn as a known necessary party within the 30-day statute of limitations period. (R-2789-2978). By Decision and Order dated August 11, 2020, Supreme Court Delaware County granted Respondents' motion and dismissed the Amended Petition. (R-8-12).

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

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

The Appellate Division correctly concluded that, even if the second prong of unity of interest was satisfied, 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).

II. JURISDICTION

The Respondents-Respondents acknowledge that this Court has jurisdiction under CPLR § 5602(a)(1) to entertain the Petitioners-Appellants Petition for leave to Appeal.

III. REASONS FOR DENYING LEAVE

A. Leave should be denied because the Third Department's Order does not raise any issue of public interest or statewide need that should be addressed by the Court of Appeals. The Court of Appeals precedent in *Buran v. Coupal*, 87 N.Y.2d 173, 176 (1995) is good law and does not need to be addressed or modified.

The primary case the Petitioners-Appellants rely on is *Buran v. Coupal*, 87 N.Y.2d 173, 176 (1995). However, the plain reading of the change in language adopted by the *Buran* Court cannot be ignored for Petitioners-Appellants' broader

reading of an alleged "spirit" of that *Buran* decision. In *Buran*, this Court essentially did away with the excusability requirement of the relation back doctrine. *Buran v. Coupal*, 87 N.Y.2d 173, 176 (1995). That is, the standard before *Buran* to fulfill the third prong required the party claiming the relation back doctrine had to show "the new party knew or should have known that, but for an excusable mistake . . . as to the identity of the proper parties, the action would have been brought against him as well." *Id.* at 178. The standard after the decision in *Buran* removed only the requirement that the mistake be ***excusable***. *Id.* at 176 (emphasis added).

In other words, the standard in New York continues to require the party seeking to use the relation back doctrine show that "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." *Id.* at 179. In coming to this conclusion, this Court found convincing the requirements of the corresponding Federal relation back doctrine rule, after which the New York rule is modeled, which requires only a mistake concerning the identity of the parties, rather than an excusable mistake. *Id.*

However, what remains crystal clear 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." *State v Gruzen Partnership*, 239 A.D.2d 735, 736 (3d Dep't 1997).

The facts of the *Buran* case lend itself to Respondents' argument that the Petitioners-Appellants Petition for leave to Appeal should be denied. In *Buran*, according to the points of counsel for those plaintiffs, the plaintiffs were inexcusably neglectful in ascertaining that the added party in this instance, Mrs. Coupal, was a co-adverse possessor, and therefore, a party. *Id.* at 175. As such, there was a mistake, whether excusable or otherwise, as to who the proper parties to the action were, not a general mistake in naming an already known party like we have here with Rosa Kuehn. According to counsel for plaintiffs 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 statement or position also assists in differentiating the dissent by Justice Garry in the instant matter, who stated that "[t]he mistake in [Buran], where the plaintiffs had failed to join a necessary party they knew to be the landowner, mirrors the mistake of law in the instant proceeding." (A-14). With all due respect

to Justice Garry, this assertion fails to consider fully the facts of the *Buran* case. While the neighboring landowners were known to those 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, the *Buran* plaintiffs were mistaken as to the identity of a party to the suit, as is required under the third-prong of the relation back doctrine. *Id.* While the *Buran* plaintiffs may have been aware of defendant Mrs. Coupal's interest in her own property, notably and central to the *Buran* case, they were unaware of her alleged interest or claim to interest in the disputed property, that is the property for which adverse possession was being claimed. *Buran v. Coupal*, Plaintiff-Respondents' Brief, 12 (Oct. 10, 1995). As such, in relation to the relevant portion of property, the *Buran* plaintiffs were unaware of the identity of the proper parties to the claim. *Id.* Additionally notable in the above-cited *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 N.Y.2d 173 at 182.

In regard to the above, Petitioners-Appellants' counsel appears to correctly assert in their Memorandum of Law that the "generally prevailing view among the four Departments of the Appellate Division" is that a legal error will prevent a

party's use of the relation back doctrine. Petitioners-Appellants' counsel additionally noted in their Memorandum of Law that the Court, since the *Buran* decision, has not directly addressed this issue. Indeed, the Court of Appeals has actively denied leave to appeal in several cases whose decisions relied on the mistake of law differentiation for the relation back doctrine since the *Buran* decision. *See Matter of Sullivan v. Planning Bd. of the Town of Mamakating*, 30 N.Y.3d 906 (3d Dep't 2017) *lv denied* 30 N.Y.3d 906 (2017); *Branch v. Community Coll. Of the County of Sullivan*, 148 A.D.3d 1410 (3d Dep't 2017) *lv denied* 29 N.Y.3d 911 (2017); *Baker v. Town of Roxbury*, 220 A.D.2d 961 (3d Dep't 1998) *lv denied* 87 N.Y.2d 807 (1996). As such, while this Court has not directly addressed the issue, that has been evidently by choice.

Furthermore, this Court has affirmed decisions by the Third Department that are wholly dependent on the application of the relation back doctrine as applied with the requirement that a mistake as to the identities of the parties be made, and affirming the requirement that a mistake of law does not constitute a mistake for purposes of the relation back doctrine. *See Windy Ridge Farm v. Assessor of Town of Shandaken*, 45 A.D.3d 1099 (3d Dep't 2007), *affd*, 11 N.Y.3d 725 (2008).

Additionally, Petitioners-Appellants' counsel attempts to argue that there is a clear problem with application of the relation back doctrine across the Appellate Division Departments. However, in reality, the First, Third and Fourth Department

have continued to apply the mistake of law bar to use of the relation back doctrine after the *Buran* decision. Only the Second Department appears to reject the mistake of law. *See Gilbert v. Perine*, 52 A.D.3d 240 (1st Dep't 2008); *Matter of Sullivan v. Planning Bd. of the Town of Mamakating*, 30 N.Y.3d 906 (3d Dep't 2017); *Doe v. HMO-CNY*, 14 A.D.3d 102 (4th Dep't 2004). In fact, the only Third Department case cited by opposing counsel, *NYAHSA Servs., Inc., Sefl-Ins. Trust v. People Care Inc.*, 167 A.D.3d 1305 (3d Dep't 2018), cited for the contention that mere inadvertent legal mistakes can be sufficient to allow use of the relation back doctrine, on the facts of that Third Department decision, there still appears to be an error as to the identities of the parties. In *NYAHSA*, that plaintiff intended to sue the individual trustees of an entity, but failed to. In discussing this mistake, the Third Department noted that "the specific names of the individual trustees *could have been ascertained* from certain documentation." *NYAHSA Services, Inc. v People Care Inc.*, 167 AD 3d 1305, 1307-08 (3d Dep't 2018) (emphasis added). This statement makes clear that the identity of the parties were not known at the time, and the *NYAHSA* mistake was to the identities of the parties, rather than to known individuals that were simply not named.

Finally, while Petitioners-Appellants' counsel highlights, extensively, the idea that the third prong should focus primarily on whether the defendant knew or should have known the proceeding would have been brought against them, this

contention necessarily changes the language of the standard enunciated in *Buran*. That is, 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 N.Y.2d 173 at 179. That is, by a plain text reading of the *Buran*, Petitioners-Appellants' knew or should have known the legal analysis is necessarily dependent on and occurs only where a mistake as to the identity of a party is made. For Petitioners-Appellants to ignore the mistake requirement of *Buran* would be to alter the standard completely and eviscerate language specifically chosen by this Court. As the majority of the Third Department in our 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 N.Y.2d 173, 180 (1995).

The Third Department's majority decision concluded that, since Petitioners-Appellants were aware that Rosa Kuehn was the landowner before they commenced their proceeding, their inadvertent legal error in failing to name her as a necessary party fails to satisfy the third prong of the relation back test thereby precluding application of this doctrine. Accordingly, the Petition by the Petitioners-Appellants For Leave to Appeal should be denied.

CONCLUSION

Based on the above, the Petition by the Petitioners-Appellants' For Leave to Appeal should be denied.

Dated: June 28, 2022

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PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing opposition was prepared on a computer using Microsoft Word.

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Dated: June 28, 2022

/s/ Alan J. Pope

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AFFIDAVIT OF SERVICE

Mo. No.: 2022-455

App Div. No.: 532948

STATE OF NEW YORK)
)SS.
COUNTY OF BROOME)

Lauren Thomas, being duly sworn, deposes and says:

1. I am not a party to this action, am 18 years of age or older, and reside in Vestal, County of Broome, New York.

2. On June 29, 2022, I served one (1) true copy of the annexed Memorandum of Law in Opposition to the Petitioners' Motion for Leave to Appeal to the Court of Appeals via FedEx by depositing the papers in an official FedEx depository under the exclusive care and custody of Federal Express, addressed to the following address, which is designated by the addressee for that purpose:

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Lauren Thomas

Lauren Thomas

Sworn to before me on the 29th day of June, 2022

Notary Public

GINA MIDDLETON
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 02MI6418945
Qualified in Broome County
Commission Expires June 28, 2025