To be argued by:
JONATHAN R. GOLDMAN, ESQ.
Time requested: 20 minutes

APL-2022-00132

State of New York
Court of Appeals

In the Matter of
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

REPLY BRIEF FOR PETITIONERS-APPELLANTS

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Appellate Division, Third Department Docket No. 532948
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PRELIMINARY STATEMENT

In their opening brief, Appellants demonstrated that, under the plain text of the relation back statute and this Court's reasoning in *Buran v. Coupal*, a party's inadvertent omission of a legally necessary party united in interest with a timely-named party constitutes a legal error that may be cured by relation back under CPLR § 203(c). Thus, their mistaken failure to initially join Rosa Kuehn as a necessary party to this proceeding satisfies the relation back test.

Respectfully, Respondents' arguments in opposition are misplaced and unavailing. They ignore *Buran's* central points – that the relation back test should focus on the defendant's state of mind (not plaintiff's), that the statute is remedial in nature and must be construed and applied liberally, and that the doctrine's purpose is to advance the State's policy of adjudicating claims on their merits. They also seek to relitigate factual matters already decided against them and not properly before this Court. And their arguments as to unity of interest under the second prong of the relation back test miss the mark.

At bottom, Respondents seek to perpetuate a cramped and restricted application of the relation back doctrine, unwarranted by the text of the statute and this Court's precedent. Respectfully, this Court should reject their attempt and clarify that, in considering the mistaken omission of a necessary party under the relation back test, the plaintiff/petitioner's state mind is relevant only to determining

whether he omitted the party deliberately for some litigation purpose or otherwise in bad faith and that, absent such a finding, his mistake satisfies the relation back test.

ARGUMENT

Point I

Appellant's inadvertent omission of Rosa Kuehn is the type of mistake that satisfies the relation back test.

Respondents first argue that, while *Buran* removed the excusability requirement, the relation back test still requires a "mistake as to the identities of the parties" and that such a "mistake" does not exist where the "plaintiffs knew of the existence of the proper parties at the time of their initial filing." Resp. Br. at 6 (quoting *Buran v. Coupal*, 87 N.Y.2d 173, 180 (1995)). But this argument is an oversimplification and misreads *Buran*.

In so arguing, Respondents cite to a portion of *Buran* where the Court explained how the excusability requirement "originated as a judicial gloss" on Fed. R. Civ. P. 15(c) [the federal relation back rule] "in a category of Federal decisions denying plaintiffs the benefit of the doctrine on grounds that they *deliberately* failed to identify the proper party who was known to them at the time . . . , or where the proposed new defendant had no notice of the action such that the defendant could not reasonably have expected to have been sued." *Buran*, 87 N.Y.2d at 179-80 (emphasis added).

But the Court then explained why this "judicial gloss" on the federal rule did not justify an excusability requirement under the state rule: "Despite the existence of this judicially created exception to the doctrine for reasons of *lack of notice or bad faith*, it is apparent that apart from excusability of the mistake, the *Brock* test already provides an independent ground for denying application of the doctrine in these cases – absence of mistake under the first prong or operative prejudice to the defendant under the second. Adding the word "excusable" to the third prong effectively converts what are already valid considerations under the first and second prongs into an independent factor under the third." *Id.* at 180.

In other words, in recognizing "absence of a mistake" as a potentially proper ground to deny relation back, *Buran* was referring to a plaintiff's *deliberate* or *strategic* choice to omit a party or where omission was made in bad faith or otherwise prejudiced an unwitting defendant. Indeed, this conclusion is further supported by what the Court later wrote: "This is not to say, however, that removing the excusability requirement from the third prong would prevent a court from refusing to apply the doctrine in cases where the plaintiff omitted a defendant *in order to obtain a tactical advantage* in the litigation. When a plaintiff *intentionally decides not to assert a claim against a party known to be potentially liable*, there has been no mistake and the plaintiff should not be given a second opportunity to assert that claim after the limitations period has expired." *Id.* at 181 (emphasis added).

Of course, the corollary to this rule is that, where a necessary party, united in interest with a timely named party, is *not* omitted in bad faith or deliberately to gain some tactical advantage, the otherwise inadvertent failure to join such party should be deemed a "mistake" that satisfies the relation back test. This is especially so where, because of that party's unity of interest, she has, or should have had, knowledge of the suit and suffers no prejudice from late joinder. Indeed, as this Court explained, "the primary consideration in such cases [is] whether the *defendant* could have reasonably concluded that the failure to be sued 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 for as he is concerned." *Id.* at 180-81 (emphasis in original).

And that was the case in *Buran* itself, as Justice Gary recognized in dissent below – the Burans knew who their neighbors were and presumably had constructive notice of their ownership as tenants by the entirety such that they could properly have been charged with knowledge of who the necessary parties to their trespass suit were. Yet, despite their knowledge, this Court found the relation back test satisfied because Mrs. Coupal, whom they initially omitted, was united in interest with her husband and, given her knowledge of the suit from its outset and ability to investigate and prepare her defense, was not prejudiced by late joinder.

In an attempt to avoid this conclusion and its implications for them here, Respondents contend that the facts of *Buran* are meaningfully distinguishable from

ours. *See* Resp. Br. at 6-8. Specifically, they contend that the description of the property in the Coupals' deed was inadequate "and, thus could not have given plaintiffs' notice of any ownership claim of Mrs. Coupal." Resp. Br. at 7 (quoting *Buran*, 87 N.Y.2d at 175). And so, they contend, "in regards to the portion of land at issue . . . the *Buran* plaintiffs were mistaken as to the identity of a party to the suit . . ." and, while they "may have been aware of defendant Mrs. Coupal's interest in her own property . . . [they] 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." Resp. Br. at 7.

Respectfully, Respondents are wrong. First, the factual premise of their argument – that the Coupals' deed was inadequate to give notice of her ownership claim – is taken from the points of counsel portion of the syllabus section preceding the actual opinion and is not something that this Court discussed in the decision itself. As such, even if true, this purported "fact" appears to have been of no legal significance to the Court.

Moreover, this purported "fact" does not support the argument for which Respondents cite it, and Respondents misconstrue the relevant issues in *Buran*. At the outset, *Buran* was a trespass suit, which the plaintiffs brought because their neighbors built a seawall across their property to Lake Champlain. There has been no suggestion that the Coupals did not initially take title to their land as tenants by

the entirety – indeed, the opinion expressly notes that "John *and* Janet Coupal obtained [the] property" and that, during pendency of the first suit brought only against John, "the *Coupals* [plural] transferred ownership of *their* lot . . . ." *Buran*, 87 N.Y.2d at 176 (emphasis added). In other words, when the Burans first commenced their trespass suit, the issue of adverse possession had not yet arisen and they knew, or should have known, that both Mr. and Mrs. Coupal owned the neighboring property from which the seawall over their property to Lake Champlain was built and, thus, that both were necessary parties to the trespass suit. To the extent there was any deficiency in the deed, it had to do with the description of the property, not who the owners were. Again, the fact that the Court did not discuss this point in its decision suggests it was irrelevant to the relation back issue it ultimately decided.

Thus, contrary to the Respondents' contention, the Burans were not mistaken about the identities of the proper parties in the sense that they initially did not know, or could not have known, that Mrs. Coupal owned the property with her husband as tenants by the entirety. And, as this Court held, that knowledge [whether actual or constructive] did not preclude relation back because it was Mrs. Coupal's knowledge and state of mind that mattered.

Respondents next argue that Appellants "have known who Rosa Kuehn is since they purchased their property some twenty (20) year ago." Resp. Br. at 8. But

this argument runs afoul of this Court's admonition in *Buran* that it is the *defendant's* knowledge, not plaintiff's, that controls the analysis. Indeed, just as Appellants have been aware of Rosa Kuehn's ownership of the property for all of these years, Rosa Kuehn has been equally aware of Appellant's challenges to the use thereof, including in the present matter, where she was a signatory to the challenged ZBA application on behalf of her company, Kuehn Manufacturing (A-72), and attended at least one of the public ZBA hearings at which Appellants opposed the application (A-84 [sign-in sheet of April 21, 2016 meeting noting Rosa Kuehn's presence]. She has also been represented throughout all of the prior related judicial and administrative proceedings by the same attorney – Mr. Pope – who continues to represent her and the other Kuehn Respondents (and now also the Village of Hancock ZBA). And, most critically, throughout this entire proceeding, Respondents have not offered a scintilla of evidence or any argument suggesting that Rosa Kuehn was unaware of this matter since its outset or otherwise would be prejudiced by her late technical joinder as a party hereto.

Moreover, the fact that Appellants were aware of her status as property owner makes illogical the notion that they would have deliberately failed to name her as a party respondent to obtain some sort of litigation advantage. Indeed, as a necessary party, her joinder was required for Appellants to gain any relief, and so her omission could not have advantaged Appellants in any way. As such, they could not possibly

have intended to omit her, and they did so only inadvertently because they named Kuehn Manufacturing, on whose behalf Rosa Kuehn signed the ZBA application, thus signifying her apparent interest in the company and seemingly making it unnecessary to also name her personally.

In other words, Appellants did not act deliberately or in bad faith in initially omitting Rosa Kuehn, but were simply mistaken. Put differently, to suggest that Appellants should have initially named Rosa Kuehn because they knew her status as landowner is another way of saying their mistake is "inexcusable"; however, of course, *Buran* has excised the excusability requirement from the relation back test, and so this argument must fail.

Respondents next argue that, of the four departments of the Appellate Division, only the Second Department appears to allow mistakes of law to satisfy the relation back test, suggesting that this apparent consensus militates against this Court's intervention. *See* Resp. Br. at 8-9. But this is not so. Indeed, the Third Department recently allowed relation back of a counterclaim untimely asserted against individual trustees united in interest with the trust against which the counterclaim had been timely asserted, even though the defendant was aware of the identities of the individual trustees at the time it asserted the counterclaim against the trust and failed to then name them, an apparent mistake of law. *See NYAHSA Servs., Inc., Self-Insurance Trust v. People Care Inc.*, 167 A.D.3d 1305, 1308 (3d

Dep't. 2018). Moreover, as Justice Gary noted in dissent below, there is conflicting caselaw amongst and within all four departments with respect to the mistake prong, warranting this Court's intervention (A-11 n. 2 and cases cited therein).

Respondents next complain that Appellants seek to "change the language of the standard enunciated in *Buran*" and "advocate the wholesale removal of the mistake requirement," which would "alter the New York standard completely and eviscerate language specifically applied by this Court across the Appellate Departments." Resp. Br. at 9. First, this argument somewhat overstates Appellants' position – while they have noted that the relation back statute says nothing about "mistakes" and agree that doing so would be consistent with the statute, they do not expressly seek to abolish the entire mistake prong. Rather, they simply ask this Court to clarify that, consistent with the policy underlying relation back and the safeguards against prejudice provided by the other prongs of the test, the mistake prong is necessarily broad and includes mistakes of law and inadvertent omissions and is satisfied so long as the plaintiff/petitioner has not made a deliberate choice to omit a party or otherwise has acted in bad faith.

But more critically, whatever the breadth or scope of Appellants' position, and even if they seek a drastic, statewide alteration to the relation back test, such is an entirely proper position to take in this Court, which is in the business of setting statewide policy in manner consistent with Legislative purpose and underlying

competing policy considerations, even if doing so would change the *status quo*. Notably, other than pointing to the fact that the test has been applied in a particular way by certain courts over time, Respondents provide no good substantive explanation or policy rationale as to *why* that should continue.

In short, the Third Department below has perpetuated an unduly restrictive application of the mistake prong of the relation back test and, respectfully, this Court should clarify the scope of that prong and find it satisfied here.

Point II

Rosa Kuehn is united in interest with Kuehn Manufacturing and K-Tooling.

As noted in Appellant's opening brief, while Supreme Court held that Rosa Kuehn is not united in interest with any of the timely-named parties, the Third Department majority assumed unity of interest without deciding the issue, grounding its affirmance solely on the mistake prong (A-5, A-8), and Justice Gary's dissent expressly found sufficient unity of interest (A-11-12). Since the Order appealed from did not expressly decide the issue against them, Appellants did not address unity of interest in their opening brief, presuming that, should this Court agree with them about the mistake prong (the dispositive issue below), the matter would be remitted to the Third Department to decide the unity of interest issue as an appellate matter in the first instance. In opposition, Respondents seek affirmance on this alternative ground. Respectfully, their arguments lack merit and should be rejected.

Parties are united in interest when their interest "in the subject-matter is such that they stand or fall together and . . . judgment against one will similarly affect the other . . . ." *Prudential Ins. Co. v. Stone*, 270 N.Y. 154, 159 (1936).

Prudential involved a suit by an insurance company against an insured and his wife (the named beneficiary) seeking to invalidate the insurance policy on the grounds that the insured-husband made certain misrepresentations in his application. Under the predecessor to CPLR § 203 in effect at the time, an action was commenced against a defendant when service was made "on him or on a co-defendant who is a joint contractor or otherwise united in interest with him." The insurance company timely served the beneficiary-wife but could not effect service on the insured-husband before he died and, after the limitations period expired, it later served his wife as administratrix of his estate. This Court held that the insured-husband and beneficiary-wife were united interest with respect to the insurance company's suit and, therefore, allowed relation back of its claim against the late-served insured-husband's estate.

In doing so, this Court recognized that, "[t]o be 'united in interest,' it is not necessary to be joint contractors or to have a joint interest." *Id.*[1] Rather, a lesser

[1] Indeed, as noted in Section 203's Advisory Committee notes, "[t]he term 'joint contractor' has been omitted as an unnecessary example of a situation in which codefendants are 'otherwise united in interest.'" *See* N.Y. C.P.L.R. § 203 (1978 Advisory Committee Notes, Subd (b)); *See also*

relationship is sufficient and, so long as "the interest of the parties in the subject matter is such that they stand or fall together and that judgment against one will similarly affect the other[,] then they are 'otherwise united in interest'" under the statute. *Id.* at 159. It then reasoned that the relationship of insured and beneficiary satisfies this standard: "The case at bar presents a situation where the interests of the defendants in preventing the plaintiff from obtaining the relief sought are so inseparably intertwined that the presumption is warranted that they will both be desirous of reaching the same result. The interests of the parties in the subject-matter of the action are such that they stand or fall together and judgment against one will similarly affect the other." *Id.* at 161.

Put differently, the insured's primary desire is that his named beneficiary obtain the benefits of the policy (otherwise, why have the policy?), and the beneficiary, of course, shares this interest and, indeed, has no other interest in the policy. If the insurance company prevails in invalidating the policy, both the insured and beneficiary lose in the same way and, thus, they share the same interest in defending against and defeating the claim. Thus, as this Court put it: "[B]oth the insured and the beneficiary have a real, substantial and united interest in sustaining

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Connell v. Hayden, 83 A.D.2d 30, 42 (2d Dep't. 1981) (reviewing history of this provision and noting removal of "joint contractor" language).

the validity of the policy, and a decree cancelling the policy will substantially affect the insured and the beneficiary in a similar derogatory manner." *Id.*

While *Prudential* provides the general standard for what constitutes unity of interest for relation back purposes, the Second Department's opinion in *Connell v. Hayden*, 83 A.D.2d 30 (2d Dep't. 1981) provides an excellent explication of the underlying rationale for this rule and how this rationale should inform the analysis of when parties are deemed united in interest. Deducing the meaning of *Prudential's* rule, the Second Department looked to the policies underlying statutes of limitations and the legislative development of the relation back statute to its current form under Section 203 and explained: "The rationale [for allowing relation back where parties are united in interest] is that where the two defendants are united in interest their defenses will be the same and they will either stand or fall together with respect to the plaintiff's claim. Timely 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." *Id.* at 41. In other words, 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.

As *Connell* distilled it, "the 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. 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 the named manufacturing entities 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. 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.

Rosa Kuehn is also the landlord of both manufacturing concerns and, in that capacity, supported their application for a use variance to her property for the sole and express purpose of permitting them to operate out of the 800 square foot addition. There is no evidence that she sought the variance for any other reason or that she would have done so solely in her capacity as landowner absent her tenants'

use, and intended use, of the property. In this way, Rosa Kuehn is just like the insured-husband in *Prudential* and the manufacturing entities are like the beneficiary-wife. The only reason the insured husband obtained the insurance policy was to benefit his wife through payment of death benefits upon his demise; likewise, here, even if she had no actual interest in Kuehn Manufacturing, the only reason Rosa Kuehn supported application for a use variance to her property was to benefit the named manufacturing entities, who at all times were the intended beneficiaries of the variance. As such, all of these parties shared exactly the same interest in and relationship with the *res* of this proceeding – *i.e.*, the propriety of the grant of the use variance – and all will be impacted in exactly the same way if the variance is annulled.

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 Rosa Kuehn liable for alleged misconduct or negligence and, with respect to Appellant's Article 78 challenge, these Respondents are not sued as joint tortfeasors. Rather, Appellants' substantive claim is against the ZBA, challenging its grant of a use variance as arbitrary and capricious and contrary to law. As such, Rosa Kuehn and the two manufacturing entities all share the same relationship to this proceeding – that of necessary party.

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 Kuehn 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.

Respondents' arguments against unity of interest lack merit. First, they repeatedly suggest that unity of interest exists only where there is vicarious liability. *See* Resp. Br. at 11-14. But they are wrong. While vicarious liability may be sufficient to establish unity of interest, it is not always necessary. *See, e.g.*, *Prudential*, 270 N.Y. at 160-61 (unity of interest between insured and beneficiary; not dependent on vicarious liability); *Losner v. Cashline, L.P.*, 303 A.D.2d 647, 648 (2d Dep't. 2003) (unity of interest between successor and predecessor mortgagees based upon identity of their defense, not vicarious liability).

Indeed, unity of interest by vicarious liability arises only in the context of tort litigation against joint tortfeasors, where, absent vicarious liability, the late-served party has available at least one defense not available to the timely-served party – namely that the other party is responsible for the alleged injury. *See Connell*, 83 A.D.2d at 44-45. As the Second Department explained in *Connell*:

> With respect to persons *whose only relationship is that of joint tort-feasors*, the courts have held that they are not united in interest. The reason for this rule is that where the proximate cause of an injury is the concurring wrongful acts or omissions of two or more persons acting independently, each is liable to plaintiff for the full amount of his damage, but the liability is only because of his own negligence and the fault of his codefendant is not imputed to him . . . . Although the liability of joint tort-feasors is "joint and several", neither is responsible for the acts or omissions of the other. Either defendant could be held legally liable or not liable without a like finding as to the other defendant . . . . In such a case the defendants' interests are not united because each will seek to show that he was not at fault and that it was the other who caused the injury.

Id. at 44-45 (citations omitted) (emphasis added). Indeed, the cases Respondents cite to support their argument are tort cases involving alleged joint tortfeasors. *See Zehnick v. Meadowbrook II Associates*, 20 A.D.3d 793 (3d Dep't. 2005) (premises liability); *Quine v. Burkhead Bros.*, 167 A.d.2d 683 (3d Dep't. 1990) (negligence). But in other contexts, the absence of vicarious liability is not dispositive. *See, e.g., Losner, supra* (successor mortgagee united in interest with predecessor mortgagee because they share the same defenses to plaintiffs' challenge to mortgage transaction). Since the present matter is not a tort a claim against alleged joint tortfeasors, the issue of vicarious liability is simply irrelevant.

Next, Respondents attempt to distance Rosa Kuehn from the manufacturing entities, asserting that only Perry Kuehn owns Kuehn Manufacturing. But the record demonstrates otherwise. Indeed, notwithstanding Justice Fitzgerald's recitation in

her 2010 Decision and Order[2] that Perry Kuehn owns Kuehn Manufacturing and Respondents' apparent suggestion that ownership cannot change over time, at the February 2013 ZBA hearing, Rosa Kuehn announced that *she* owns the company (R-1222 ("I'm sorry, I'm Rosa Kuehn, owner of Kuehn Manufacturing Company and K Tooling. My son, Perry is the owner of the tooling. So we [sic] both in this together.").[3] Further, contrary to Respondents' conclusory and unsupported assertion otherwise, Rosa Kuehn signed the ZBA application in 2016 on behalf of Kuehn Manufacturing (A-72 ["Rosa Kuehn – Kuehn Manufacturing"]). And, notably, when this proceeding reached the Third Department for the first time in 2018, that Court recognized that "there is no dispute that Rosa Kuehn owns both the subject property and Kuehn Manufacturing company . . . ." *Matter of Nemeth v. K-Tooling*, 163 A.D.3d 1143 (3d Dep't. 2018). Despite this, on remand, Respondents provided no affirmative evidence to attempt to dispute this finding – they submitted no affidavit from Rosa or Perry Kuehn disclaiming her ownership and no company documents reflecting ownership. And so, when the matter reached the Third Department again, the Court again properly recognized what seems apparent from

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[2] The copy of the cited Decision and Order Respondents include in their Supplementary Appendix appears to be from the Record on Appeal to the Third Department in the prior proceeding between these parties. The document is also contained in the Record on Appeal below in this proceeding, where it is located at pages R-1256-65.

[3] Citations to "R-__" refer to the Record on Appeal in the Third Department below, a copy of which has been filed with this Court on this appeal.

the information available in this record – that Rosa Kuehn has an ownership interest in Kuehn Manufacturing (A-2).

In short, Respondents had their opportunity to attempt to dispute this factual issue below and failed to do so and, even if they had a legitimate argument, this Court lacks jurisdiction to revisit such a factual issue already decided below unless unsupported as a matter of law, which, as just explained, is not the case here. *See* N.Y. Const., art. VI, § 3; *People v. Rizzo*, 40 N.Y.2d 425, 430 (1976).

In any event, even if she did not have an ownership interest in Kuehn Manufacturing, Rosa Kuehn is clearly its landlord, which, as explained above, is a sufficient jural relationship under the circumstances presented here. In other words, as landlord of these manufacturing entities, which sought the use variance to operate from her property, Rosa Kuehn was like the insured-husband in *Prudential* and, in the context of Appellants' Article 78 challenge, shared the *same exact defenses* as her two manufacturing tenants, and, thus, stood and fell with them *vis-à-vis* the variance. Moreover, even if not its technical owner, there is no dispute that Rosa Kuehn is not some stranger to these matters – she is the widow of Ray Kuehn, who started Kuehn Manufacturing, mother of Perry Kuehn, who owns and operates K-Tooling, and owns the family home where these businesses have operated for decades. Irrespective of actual technical ownership, Rosa Kuehn is clearly interrelated and inextricably intertwined with these family businesses.

Respondents next recognize that Rosa Kuehn has the same defenses[4] as the manufacturing entities in this Article 78 proceeding; however, again erroneously relying on the absence of vicarious liability, they contend that this does not matter because she lacks a sufficient jural relationship with them to establish unity of interest, and her role as landowner and landlord is insufficient. *See* Resp. Br. at 13-14. Respectfully, they are mistaken.

Initially, Respondents do not explain what about Rosa Kuehn's role as a landowner/landlord causes her interests in this proceeding to diverge from those of Kuehn Manufacturing or K-Tooling. Indeed, all sought the same variance for the exact same purpose – that is, allowing the businesses to use the 800 square foot addition for manufacturing purposes – and so 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

[4] As Respondents put it, there is a "simple similarly" of defenses. See Resp. Br. at 13. But this understates it. Rosa Kuehn's defenses in this proceeding are *identical* to the manufacturing entities' defenses. Respondents have never argued otherwise and have never cited a single defense she does not share with them. Nor have they ever intimated that her late joinder has prejudiced her ability to adequately defend the use variance in this proceeding,

owner, Rosa Kuehn suffers the same loss as her company and, even if she did not own the company, as Respondents have asserted, she still suffers the same loss because the only reason she ever supported pursuit of the variance was to allow these companies to operate from her property. In short, 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, Rosa Kuehn's interests in this proceeding – that is, in defending the grant of the variance – are *exactly coextensive* with her manufacturing tenants', which seek to uphold the variance for the exact same reason as 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*, 270 N.Y. at 159. This inquiry looks to the parties' potential defenses, *see Connell*, 83 A.D.2d at 41, which Respondents fail to address. Again, regardless of Rosa Kuehn's status as landowner, the fact remains that she and her tenants, 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 are all similarly affected by an adverse judgment because annulling the ZBA's determination would subvert all of their intended uses of the property.

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 or K-Tooling 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.

Finally, Respondents' reliance upon *Stepanian v. Bed, Bath & Beyond, Inc.*, 207, A.D.3d 1182 (4th Dep't. 2022) and *Matter of Ayuda Re Funding, LLC*, 121 A.D.3d 1474 (3d Dep't. 2014) is unavailing as those cases are distinguishable and inapposite. *Stepanian* involved a premises liability claim arising from plaintiff's slip and fall at a Bed, Bath and Beyond store in a shopping plaza. She attempted to sue all potentially liable parties, including the tenant-store, the plaza owner-landlord and the property manager. In this context, the Fourth Department found that the plaza owner-landlord was not united in interest with the store-tenant because a "landlord and tenant relationship alone, without more, is insufficient to establish unity of interest." 121 A.D.3d at 1184.

Unlike *Stepanian*, our case does not involve a tort claim against joint tortfeasors where vicarious liability is essential to establishing unity of interest and where the landlord-tenant relationship, in itself, is insufficient. Moreover, unlike in *Stepanian*, here, there is more than just a landlord-tenant relationship because Rosa Kuehn owns Kuehn Manufacturing and, even if she doesn't, she has the same jural relationship to the subject matter of this proceeding – the propriety of the issuance of the use variance to her property – and has the same exact defenses to Appellants' challenge as her manufacturing tenants.

In *Matter of Ayuda*, the petitioners challenged a town's adoption of a zoning amendment, initially naming only the town and the two entities that apparently sought the zoning change for the purposes of conducting business under the new zoning law. *See* A.D.3d at 1474-75. After the statute of limitations ran, they joined as necessary parties the owners of the property affected by the zoning change. *See Id.* The third Department concluded there was no unity of interest between the landowners and the other respondents, reasoning as follows: "Here, the original respondents consist of the municipality that enacted the zoning law at issue and the entities that purportedly sought the zoning changes, whereas the later-added respondents are the owners of the real property affected by the zoning changes. Thus, it is apparent that the original respondents do not have the same interests in the zoning changes as the later-added respondents." *Id.* at 1475-76.

Respectfully, this analysis is somewhat conclusory and does not provide sufficient detail about the nature of the relationship between the parties that led the Court to conclude that it was "apparent" that they did not share the same interests in the zoning changes. In any event, as explained above, here, Rosa Kuehn *does* share with the manufacturing entities the same interest in the outcome of this proceeding and, while it is unclear whether any of the originally-named parties in *Ayuda* had any relationship with the property owners, here, Rosa Kuehn is the landlord of both manufacturing entities and an owner of one. Finally, it is notable that Justice Gary was part of the panel that decided *Ayuda* and, in our case, distinguished that decision in finding unity of interest here (A-11-12).

In short, Rosa Kuehn is sufficiently united in interest with Kuehn Manufacturing and K-Tooling to satisfy the second prong of the relation back test.

CONCLUSION

For all of the foregoing reasons, and those set forth in Appellant's opening brief – and for the reasons set forth in Justice Gary's well-reasoned dissent below – the Third Department's Order should be reversed and vacated, Respondents' motion to dismiss denied and the matter remanded to Supreme Court to adjudicate the merits of the Petition in the first instance.

Dated: Goshen, New York
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CERTIFICATE OF COMPLIANCE
PURSUANT TO 22 N.Y.C.R.R. § 500.13(c)(1)

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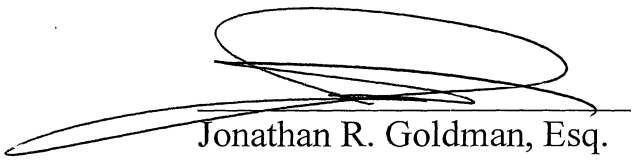

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