Central Brooklyn Independent Democrats
Judicial Candidate Questionnaire 2023

To :richbennett12@gmail.com

A1. Candidates Name : Bernard J. Graham

A2. Campaign Manager name/
Campaign Treasurer name

Campaign Manager: Musa Moore
Moore Consultancy Corp.
Tel: 718-749-9410

Campaign Treasurer: John Bartos,
515 East 86th St., N.Y., N.Y 10028
Tel: 917-363-7420

A3. Campaign Contact Information:

Bernard Graham -Cell 347-276-3502
Musa Moore – 718-749-9410

A4. Office for which the endorsement
Is requested:

Surrogate Court Judge, Kings County

A5. Are you the incumbent

As of January 1, 2023 I was designated as Acting Surrogate for Kings County due to suspension of Judge Harriet Thompson

A6. Have you been endorsed by
CBID before?

Yes. I was endorsed by CBID in my campaign for Civil Court (2004) and for Supreme Court (2009)

A7. As of now funds raised…?

Currently $12,000 raised and several fundraisers are scheduled
Subject to various factors we expect to raise $50kTo $150k (depending on competitiveness of The race

A8. What endorsements from
From community leaders, elected
Official, political organizations
Or newspapers have you received
Thus far?

My campaign began January 29, 2023. I have been endorsed by Jim Brennan, Robert Carrolll Marty Markowitz, Joan Millman

A9. Is your candidacy receiving Any support from the Kings County Democratic Party? If so, what type

I have not received any support from the Kings County Democratic Party. I am participating in The Judicial Screening conducted by the Kings County Democratic Party

A10. What sitting Supreme Court Justice of the US do you most Admire and why?

I admire and respect Supreme Court Associate Justice Sonia Sotomayor as she represents my values and applies the law in a fair and just manner and she has tremendous intellect.

A11.If you were President Biden Who would you nominate to the US Supreme Court to fill the Current vacancy and why?

I agree with the recent choice of Ketanji Brown As a Supreme Court Justice as she is extremely Qualified and adds to diversity on the SC bench. As for the next vacancy I would choose Elizabeth Warren, who would oppose the current trend favoring corporations and limiting women's rights.

B1. Attachments

a) Citations for 3 most significant decisions-
   See copies of published decisions annexed as Schedule A
b) Resume – Attached (See Bernard Graham Bio)
c) Any published article -None
d) Any application filled out for other
   Organizations- see Judicial Screening Questionnaire for Democratic Party attached

B2. How many trials have you Participated in within the last 10 years? Please include citations

I have been a trial judge in State Supreme Court for The past 12 years (and prior to that 3 years as a Family Court Judge and 3 years as a Civil Court Judge). For the past 12 years I have conducted Approximately 120 jury trials. Approx. 50 bench Trials.
Annexed please find information from the last 10 Trials, with names of attorneys and contact Information

B3. How many written motions have You made citing legal authority in the Last 5 years?

Not applicable (Motions are submitted to the Court For decision by the Judge)

B4. Have you had any court sanctions Or disciplinary sanctions in You career? If so, please provide An explanation

I have never been sanctioned by the Court or For disciplinary reasons as a practicing attorney Or as a Judge

B5. If you are currently serving as a Judge please list the names of the Lawyers involved in the last three Written opinions you have issued.

1. Herzdorfer v Maimonides (46187/92)
(plaintiff) Barbara Albom
212-966-5253
(defendant) Charles A. Singer
516-482-0666

2.Cooper v Glattmart (505491/2018)
(plaintiff) Paul Koenigsberg
718-215-0318
(defendant) Margaret Ludlam
Baxter Smith Shapiro
516-997-7330

3.Melendez v KFG Operating (500536/2022)
(plaintiff) John Dalli
Dalli and Marino
516-292-4700
(defendant) Sheely LP
Katherine Charles
646-650-5952

B6. Provide citations to your last 5 published opinions. If you have Less than 5, please provide copies of Enough unpublished opinions to bring The total to 5. All published decisions first , then fill in the balance with the Most recent unpublished decisions.

1.Lamberty v Papamichael
2.Raritan Baykeeper v City of NY
3.Baumgardt v Tarantino
4.Dinerman v Fox
5.In the Matter of Karpati
(Copies Attached)

C1. Are you a member of a political club?

No. Judges are prohibited from belonging to a Political organization

C2. Have you been elected to any Public office or political party Position?

No (other than election as a judge).

C3.Have you performed any pro bono Work in the last 3 years? Please Describe the type of pro bono work You have performed.

I have lectured to lawyers as part of Requirements for attorneys. I have Lectured To the Bay Ridge Lawyers Organization; the Columbian Lawyers of Brooklyn; the Defense Association of New York (DANY) all within the Last 3 years

C4. What Civic Organizations do you Belong to? Please describe what the Organization does and what role you Play within the organization.

I am a member of the Park Slope Civic Council And I was a past president of the Civic Council (2001-2004). I am not an active member

Currently.

C5. For each Civic Organization
Provide contact information for the
Executive Director, CEO or organization
Head.

The President of the Park Slope Civic Council
Is Timothy Gilles. Email is :
Parkslopeciviccouncil.org

D1. What bar associations do you belong to?
What sections or committees do you belong to?
What is your role with the section or
Committee

I belong to the Brooklyn Bar Association;
The Catholic Lawyers Association; the
Columbian Lawyers of Brooklyn; The Brehon
Law Society..
I am a member of the Medica Malpractice
Committee of the State Bar Association
And the Mentoring Committee of the
Brooklyn Bar Association.

D2. List any CLEs you have taught within
The last three years, if any..Please provide
A syllabus if one is available.

I have conducted a CLE for the Bay Ridge
Lawyers on Medical Malpractice and other
Recent :Developments in November, 2022
(see syllabus attached)

Attachments:

Schedule A - Copies of Significant/ Published Decisions (Question B1/B5)

Schedule B - List of Recent Trials and Contact Information for Attorneys (Question B2)

Schedule C - Bernard Graham Bio
Judicial Questionnaire for Democratic Party Screening Committee

Schedule A

Significant/ Published Decisions

New York Law Journal

DECISION

Eric Lamberty, Norma Hidalgo, Luz Pagan, Gladys Burgos, Aura Rodriguez, Hemerildo Gonzalez and Eladio Gonzalez, Plaintiff(s) v. Peter Papamichael and Pandyland, LLC, Defendant(s), 1819/2013

Supreme Court, Kings County, Part 36
Landlord/Tenant Law

New York Law Journal September 25, 2013

Cite as: Lamberty v. Papamichael, 1819/2013, NYLJ 1202620313200, at *1 (Sup., KI, Decided September 13, 2013)

1819/2013

Justice Bernard J. Graham

Decided: September 13, 2013

ATTORNEYS

Sr. Staff Attorney; Counsel for Plaintiffs along with Ed Josephson, Karen May Bacdayan, Legal Services NYC-Brooklyn Branch.

*Defendants' Attorney was Paul Coppe, Esq. of Rose and Rose in Manhattan.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to:

Plaintiffs' Motion for Preliminary Injunction;

Papers... Numbered

Notice of Motion and Affidavits Annexed.. (Motion and Cross Motion)...

Order to Show cause and Affidavits Annexed... 1, 2

Answering Affidavits... 3

Replying Affidavits

Exhibits

Other: Post-Hearing Memoranda of Law (Plaintiff and Defendant)... 4, 5

MOST VIEWED ARTICLES

Circuit Rejects Weinstein's View on Child Porn Sentence

Facing Drop in Applications, Law Schools Cut Costs

Nassau Bar Criticizes Enlisting Non-Lawyers to Represent Poor

Bar Groups Call on Cuomo to Fill Appellate Vacancies

Man Dies Two Weeks After His Conviction Is Overturned

DECISION/ORDER

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Upon the foregoing cited papers, the Decision/Order on this application is as follows:

DECISION:

Plaintiffs, Eric Lamberty, Norma Hidalgo, Luz Pagan, Gladys Burgos, Aura Rodriguez, Hemerildo Gonzalez and Eladio Gonzalez (collectively "Tenants" or "plaintiffs") had been residents of the building located at 137 Nelson Street, Brooklyn, New York ("137 Nelson" or "subject building"). An order to show cause had been brought on behalf of the Tenants by their

*2

attorneys in New York County on January 8, 2013, before Hon. Justice Lucy Billings. The plaintiffs are seeking a temporary restraining order and a preliminary injunction against defendants Peter Papamichael and Pandyland, LLC, as the owners of 137 Nelson Street, to make certain repairs required by the New York City Department of Buildings ("DOB") and eliminate hazardous conditions that led to the issuance of a Peremptory Vacate Order ("vacate order") against the subject property on December 28, 2012. The relief requested additionally demands that the Tenants be restored to their respective apartments after the vacate order has been removed.

An answer was submitted on behalf of the defendants' counsel on or about February 10, 2013. Defendants raise a defense that the repair of the subject building would be economically infeasible and that, as a result, the defendants are not required to restore these Tenants to possession of their apartments.

On February 14, 2013, the defendants' motion to transfer the matter to Kings County was granted without opposition. The terms of the TRO have been extended to the present.

A hearing was conducted in Part 36 of this Court before the undersigned. The hearing extended for a period of six (6) days between March and April, 2013. Plaintiffs were represented by South Brooklyn Legal Services, Inc. (Karen May Bacdayan and Edward Josephson) and defendants were represented by Paul Coppee, Esq. (Rose & Rose).

BACKGROUND:

137 Nelson Street is a tenement building in Brooklyn with a legal occupancy of 8 units. The building was occupied as seven (7) apartments (plaintiffs Lamberty and Hidalgo occupy a double apartment). Two (2) apartments were vacant prior to the issuance of the vacate order.

The subject property was purchased by defendants in April, 2011. Defendants paid approximately $595,000 for the property, and, it is worth noting, that the building was in need of repairs at that time. The Department of Buildings had conducted a forensic examination of the subject building in November, 2010 (by Timothy Lynch, P.E.) and found that repairs were needed. The predecessor owner of 137 Nelson Sheet had arranged for architectural plans to be prepared by Peter J. Mugavero which specified joist replacement (approximately six per floor) as well as the need for masonry repairs. The plans were approved in March, 2011 just prior to the

*3

purchase of the property by defendants (see Ex. "7").

Defendants had requested that the tenants voluntarily move out of their apartments for thirty (30) days to allow for the joists to be repaired and/or replaced. The offer by defendants provided for payments of $500 to each tenant for expenses involved in the temporary move. The tenants declined the offer.

The Department of Buildings made an inspection of the subject building prior to the issuance of the vacate order

on December 28, 2012. The vacate order (Ex. "1") made findings as follows; "Failure to maintain building in compliant manner...Defective brick work through entire building. Brickwork is loose and in danger of failing at exposure #4, Chimney at rooftop is defective and falling apart. There are cracks in the ceiling and walls in some of the apartments throughout entire building. Repair and replace. Make all necessary repairs" (See vacate order Ex. "1").

A forensic engineering report was issued by the Department of Buildings on December 17, 2012, which noted masonry defects and recommended shoring of the wood joists beneath the kitchens and bathrooms (See Ex. "5").

The plaintiffs' attorneys called several Tenants who offered testimony at the hearing. The Tenants consist of elderly residents (Hemerildo Gonzalez — 81 years; Luz Pagan–71 years); unemployed or minimally working residents (Eric Lamberty and Norma Hidalgo); or live on social security and disability (Gladys Burgos, Hemerildo Gonzalez and Aura Rodriguez). Each of the Tenants testified that they would be unable to pay a market rental for an apartment and none of the Tenants had found stable housing accomodations since being displaced. The rents paid at 137 Nelson were all low rents ranging from $193 to $600.

Plaintiffs called an engineering expert to testify. Dominic Cullen, a professional engineer. Mr. Cullen rendered an opinion as to the costs anticipated in removing the vacate order. Mr. Cullen testified as to the specific costs of replacing the joists at the building and the costs of material and labor. During cross examination, Mr. Cullen addressed the masonry repairs which were raised by the DOB. Mr. Cullen appeared knowledgeable as to the costs of joists and bricks and, based on his experience he offered estimates as to the projected costs of repairing the floor joists and masonry repair. Based on his observation of the building and the forensic reports, Mr. Cullen projected a cost of $51,000 for joist repairs. When questioned as to masonry repairs and asked to allow for more extensive joist replacement, Mr. Cullen gave a comprehensive estimate

*4

of $177,200 which would, in his opinion, cover replacement of every joist and allow for the necessary brickwork to be replaced (see Trial Tr. April 8, 2013 p. 244, ln 22).

Defendants called several professional experts to testify as to the necessary repairs and costs to make 137 Nelson Street suitable for residential tenants, Stephen Ohnemus, an engineer) testified that the scope of repairs was much more extensive than the scope described by Mr. Cullen. Defendants called a structural engineer, Brian Schenk, who testified that there were significant structural issues involving the main beam of the building and the structural integrity of the stair case as also questioned.

Michael Kitsos, a general contractor, was called by defendants to testify as to the cost of the entire scope of repairs needed to remove the vacate order and restore the building, Mr. Kitsos outlined 16 "divisions" of costs which were a comprehensive listing of all fees, permits, construction costs, demolition expenses, finishes, appliances) sprinkler systems and electrical systems for which he estimated a projected cost of $1.4 million dollars (see a copy of the Project Estimate in evidence as Ex. "H").

As to the issue raised of economic infeasibility, an integral element of this analysis is the value of the real property after repairs and renovations have been performed. Both parties in this matter produced real estate experts to render an opinion as to the value of 137 Nelson Street after the repairs and renovation are completed. Plaintiffs called Michael Weiner, a real estate broker with extensive experience in the Carroll Gardens area. The defendants called Shahron David Behin, a real estate broker who is involved in commercial transactions. While both brokers appeared to have significant real estate experience, Mr. Behin could not testify to having any experience with comparable properties and his resume was noticeably less impressive than Mr. Weiner's. Mr. Weiner testified that the proper valuation method was based on comparable sales which reflect the strong real estate market in the area at the present time. Mr. Weiner opined that a "functional renovation" of the building would lead to the building having a value of $1.4 million dollars even with the low paying tenants restored to occupancy.

On the other hand, Mr. Behin argued that the proper analysis was an income based approach which accounts for the rents received and the expenses incurred and arriving at a capitalization rate that determines the value of the building. In light of the low rents paid by the tenants, Mr.

*5

Behin gave his opinion that the building, with the present tenants would be valued between $500,000 and $600,000 (see Trial Tr. April 22, 2013 pg. 229, ln 5).

DISCUSSION

The instant case involves several substantive issues. A determination must be made as to whether the plaintiffs have satisfied their burden of whether a preliminary injunction is appropriate under these circumstances. The defense of economic infeasibility raised by the Defendants calls into question what the scope of the repairs or renovations which are required at 137 Nelson Street and to determine whether such costs exceed the value of the premises after the renovation.

Starting with the application for a preliminary injunction, the criteria is that the movant establish: (1) a likelihood of success on the merits; (2) irreparable harm in the absence of an injunction; and (3) a balance of the equities in favor of granting the injunction (see Aetna Ins. Co. v. Capasso 75 NY2d 860 (1990); Doe v, Axelrod, 73 NY2d 748 (1988); W.T. Grant co. V. Srogi, 52 NY2d 496 [1981]; Matter of Merscorp, Inc. v. Romaine 295 AD2d 431 [2002], aff'd 8 NY3d 90 [2006]).

The plaintiffs seek an order of this Court to compel the defendants to take the affirmative action of restoring the subject building to habitability and requiring the owner to allow the plaintiffs to resume their occupancy. As such, it is an extraordinary form of relief and only granted under unusual circumstances (see Rosa Hair Stylists v. Jaber Food Corp, 218 A.D2d 793 (1995): Times Square Stores Corp. v. Bernice Realty Co., 107 AD2d 677 (1985)). Defendants counsel argues strongly that the granting of a preliminary injunction in this instance is tantamount to a final decision on the merits and should not be done when the facts are hotly disputed.

The Court recognizes that there are substantial rights and interests at stake on both sides of this dispute. The defendant owners argue that the vacate order was issued without any culpability on their part and that the cost of restoring the building may far outweigh any profit or gain that might be generated by the building. The plaintiff Tenants, on the other hand, have lived for many years in an obviously neglected building, which, through no fault of their own, has led to their displacement by the City of New York. The Court observed these Tenants and it is quite

*6

obvious that they are incapable financially of finding suitable alternative housing based on their age, their disabilities and their low income. The Court agrees with the argument of the plaintiffs that an injunction is needed to preserve the status quo and prevent them from becoming permanently displaced. The Court has considered the arguments at the hearing and in the post-hearing memoranda and finds that the plaintiffs, for the reasons set forth below, have a likelihood of success on the merits and that the balance of equities favor granting the injunction. Accordingly, the Tenants in this instance should be restored to their apartments.

The defendants central argument in this case is that the defense of economic infeasibility requires that the defendant owners be permitted to terminate the existing tenancies based on the anticipated costs of restoring the building exceeding the value of the building after the restoration (See Bernard v, Scharf. 246 AD2d 171 [1st Dept. 1998] revd, as moot, 93 NY2d 842 (1999); see also DHPD v. Mill River Really, Inc., 169 AD2d 665 [1st Dept. 1991]; Eyedent v. Vickers Mgmt., 150 AD2d 202 [1st Dept. 1989]).

Both sides in this dispute have presented ample evidence in support of their positions. Defendants have produced several engineers and a general contractor, while plaintiffs have offered an engineer and other documentary evidence. The issue of the market value of the subject building is also strongly contested, with each side offering the testimony of a real estate professional to argue its contention.

In presenting their case, the defendants have adopted an all-out approach in claiming that the required renovation of the building involves a total reconstruction. The scenario described by defendants' experts would result in a completely new and modernized apartment building. In essence, the defendants' experts claim that the vacate order requires that the entire building be rebuilt, The testimony of Stephen Ohnemus, the engineer, and the testimony of Michael Kitsos, the contractor, was that the building is in such poor condition that the cost of the renovation would trigger compliance with the 1968 Building Code. To comply with the 1968 Code, the renovation would entail installation of completely new systems and finishes and fire rated enclosures.

Testimony was given that the scope of the renovations would require the filing of an "Alt 1" permit due to the projected costs of the renovation exceeding 60 percent of the appraised value. This filing would necessitate completely new electrical systems, sprinkler systems, handicap accessibility, plumbing systems as well as the architectural and engineering costs and other sundry costs. Following this line of reasoning, the costs could be projected to reach 1.4 million

*7

dollars as set forth in Mr. Kitsos' cost estimate (see Ex. "H").

Plaintiffs adopt a much more modest view of the scope of the required repairs. Dominic Cullen, plaintiffs' engineer, addressed brick and joist repairs which were specifically mentioned in the vacate order, and he reached a much lower total cost estimate for stabilizing the building and removing the vacate order.

The Court is not persuaded by the testimony of defendants' experts that the scope of the claimed renovations is the measure which should determine economic infeasibility. Defendants' counsel acknowledges in his post-hearing memorandum that the testimony on this point was inconsistent, and allows for the fact that the New York City Administrative Code permits renovations to be made which would comply with the pre-1968 Code under Administrative Code sec. 27-120. The less arduous renovations are permitted as long as the "general safety and public welfare are not compromised" (see Administrative Code Sect. 27-120).

While the defendants choose to argue that 137 Nelson Street must undergo a comprehensive and substantial renovation, that is not the legal standard for removing the vacate order. The owner is required by the DOB to stabilize the building and not required to perform a complete rehabilitation (see Farrell v. E.G.A. Assoc. Inc., 9 Misc.3d 1118 (A)[Civ, Ct. NY Co. 2005]). It appears from the evidence that the defendant owners chose to gut the interior of the building and replace all kitchens and bathrooms in the units, together with all floors, walls, finishes and appliances and fixtures. It is this Court's finding that the defendants elected to undergo a much more extensive renovation of this building than was legally required by the Department of Buildings and that defendants did so for their own elective purposes.

The condition of the building clearly warrants structural repairs to some degree. The subject building was in poor condition in 2011 when the defendant owners' predecessor filed building plans to replace floor joists. The defendants, as prospective purchasers, were made aware of the condition of the building and assumed the responsibility to provide suitable habitable apartments when they became the owner (see Multiple Dwelling Law Sec 78; Admin. Code sec 27-2005; Eyedent v. Vickers Management et al., 150 AD2d 2002 [1st Dept. 1989]).

While the subject building has been long neglected, the evidence does not indicate that Mr. Papamichael engaged in unscrupulous conduct or otherwise intentionally caused the building to deteriorate. This case does not fall within that category of buildings in which the owner "vindictively withheld services" to force the tenants to vacate (see Dept. Of HPD v. St. Thomas

*8

Equities Corp, 128 Misc2d 645 [App. Term2d & 11th Jud Dist. 1985]; see also Dept. Of HPD v. Mill River Realty, Inc., 169 AD2d 665 [1st Dept. 1991]).

Notwithstanding the fact that the new owners have not acted maliciously, they are nevertheless sophisticated real estate investors and were aware of repairs that were needed from the date they purchased the property. Furthermore, the record indicates that the defendant owners had owned the property from April, 2011 to the date the vacate order was issued on December 28, 2012, which is a period of approximately twenty (20) months. The Court places significant weight on the fact that the defendants had actual knowledge of the need for imminent replacement of the floor joists and would have been expected, as sophisticated investors, to remedy the repairs immediately. Clearly Mr. Papamichael and his principals anticipated expending money to stabilize the building and address the sagging floors in each bathroom and kitchen. To now claim that it is an economic hardship to make the repairs, which should have been done with tenants in residence on an as-needed basis, is somewhat disingenuous. When the need for repairs should have been anticipated courts have rejected a defense based on economic hardship (see Eyedent v. Vickers Management et al., 150 AD2d 202, 205 [1st Dept. 1989];

Matter of National Merritt v. Weist, 41 NY2d 438, 442 (1977]).

In granting the motion for a preliminary injunction, this Court will require the Defendant owners to expend money which may not have been fully anticipated when, the building was purchased. Defendants argue that economic infeasibility should prevent the granting of the preliminary injunction and rely on the case of Bernard v. Sharf, 246 AD2d 171 [1st Dept. 1998] rev'd as moot 93 NY2d 842 [1999]). In Bernard, a building was significantly damaged by a fire. The Appellate Court was receptive to the argument that the owners would suffer an unconstitutional taking if the owner was required to rebuild and restore the tenants to possession. At 137 Nelson Street the facts are different. The building has been neglected over many years and the needed repairs were well known. The defendants were apprised of the needed repairs and chose to purchase notwithstanding the condition. The defendants, in this Court's opinion, had the resources and ability to repair the building with the tenants in possession and (thereby) avoiding the drastic circumstance of having the Department of Buildings issue a vacate order.

*9

CONCLUSION

Economic infeasibility is a defense which must be proven by a fair preponderance of the credible evidence (see 153-155 Essex Street Tenants Association v. Kalian, 4 Misc. 3d 1008(A) [Civ Ct. NY Co. 2004.]; 280 Grand Street, NYLJ March 28, 2012 at 21 col 2 [Civil Ct, N.Y. Co.])[1].

It is the Court's finding that the defense of economic infeasibility has not been proved by the defendant owners. Starting with the defendant experts' testimony, the Court finds it inconvincing that the subject building is in need of complete rebuilding and upgrading to meet the updated Building Code. The Court is of the opinion that the testimony of plaintiffs' expert engineer, Dominic Cullen, is far more convincing that the scope of repair should be limited to the floor joists and the defective masonry work and that the repair of those items would result in the cancelling of the vacate order. The decision to gut-out the building and undertake to install all new kitchens and baths and plumbing and electrical systems is a decision that was made by the defendants, but not required by law.

Similarly, the testimony of the defendants' real estate broker, Mr. Behin, that the building would be worth as little as $500-600,000 after repair is simply not credible. Both real estate experts testified to the strength of the current real estate market and it would be implausible to conclude that the value of the building, which defendants paid $595,000 in 2011, would be worth less in the current market.

The Court found fault with Mr. Behin's calculations that were used to derive an income-based valuation. Mr. Behin was not aware of the actual building costs and did not even have the real estate tax information. In addition, his use of various capitalization rates seemed arbitrary and speculative. The Court is troubled by the conclusions reached by Mr. Behin, who is not an

*10

appraiser, because his analysis was performed without specific cost data and he was unable to use comparable sales to support his opinion. His reliance on an income approach seems simplistic and inappropriate given the location of the subject building in a vibrant residential area. It would also be reasonable to expect that the building would experience some turnover among its residents leading to higher rents, yet this was not discussed by Mr. Behin.

Finally, and most significantly, the owners of 137 Nelson Street are sophisticated real estate professionals and they had been informed of the physical condition of the property when it was bought in 2011. It seems clear after the testimony and other evidence offered at trial that the owners chose a course of action in which they did not make immediate repairs and after the issuance of a vacate order claim that they can not afford to restore the building. An owner is "vested with the ultimate control and responsibility for the building, it is he who has the corresponding and non-waivable duty to maintain it. The so-called 'economic viability' of a building may not be used as a device, nor raised as a standard by which a landlord is permitted to escape his non-waivable duty" (Dept. Of HPD v. St. Thomas Equities Corp., 128 Misc. 2d 645, 494 NYS 2d 787, 791 [App. Term 2d & 11th Dept. 1985]).

In light of the defendants' prior knowledge of the building's poor physical condition it would be against the interests of justice to deny the preliminary injunction. A denial of the injunction would assuredly lead to these Tenants never returning to the premises and most likely being homeless. Furthermore, a decision to deny the injunction would create an unjustified windfall to the owners and serve as a reward for failing to maintain the property (see Eyedeal v. Vickers Management et al., 150 AD2d at 205).

For the reasons stated herein, the plaintiffs' motion for a preliminary injunction must be granted. The plaintiffs have shown a likelihood of success on their claim to be restored to possession and they would be irreparably harmed if the injunction were not granted.

The Court has also considered the economic status of plaintiffs, and the Court has taken into consideration that they had neither the means to pay for private legal counsel nor to retain experts in this matter. The Court finds that it is a necessary exercise of this Court's discretion to set a nominal amount for the required bond ($1.00) in view of the financial condition of the plaintiffs (See Daytop Village v. Consolidated Edison Co. of New York, 61 AD2d 933 [1st Dept. 1978]).

Accordingly, it is therefore,

"11

ORDERED, that plaintiffs' motion for a preliminary injunction is granted;

ORDERED, that defendants, Peter Papamichael and Pandyland, LLC, are ordered to complete such repairs and alterations as may be required to remove the vacate order issued by the Buildings Department against 137 Nelson Street, Brooklyn, New York.

ORDERED, that within two (2) weeks of the date of this order, defendants shall commence work necessary for shoring the subject building and take such steps as are necessary to stabilize the subject building;

ORDERED, that defendants, Peter Papamichael and Pandyland, LLC, shall, within six (6) months of the date of this order, restore the building at 137 Nelson Street, Brooklyn, New York to allow residential occupancy of the premises to the plaintiff Tenants. The defendants shall repair, renovate and restore the subject building to create the same configuration of apartments that existed at the subject building prior to the vacate order and defendants shall, within six (6) months, allow plaintiffs to resume occupancy of their respective apartments. The completion of repairs and restoration, of the subject building may be extended for reasonable cause upon application made to this Court.

ORDERED, that defendants may not rent or re-let any portion of the subject building to any persons other than the plaintiffs without further order of this Court.

This shall constitute the decision and order of this Court.

Dated: September 13, 2013

1. Plaintiffs' counsel asserts that the standard imposed on property owners in a case of economic infeasibility is proof beyond a reasonable doubt, citing "regulatory taking" cases (see Aubin v. Folacke, 68 NY2d 66 (1986)). The Court finds the standard of proof by a preponderance of the evidence is the appropriate standard for the defense of economic infeasibility, in that the dispute is not generated by a governmental act such as a zoning restriction or a particular rent regulation (see Dawson v. Higgins, 197 AD2d 127 [1st Dept. 1994]).

Bernard Graham - Re: Request for opinion: In Re Raritan Baykeeper, Inc. v the City of New York

From: State Reporter
To: Bernard Graham
Date: 1/7/2014 3:18 PM
Subject: Re: Request for opinion: In Re Raritan Baykeeper, Inc. v the City of New York

Re: Matter of Raritan Baykeeper, Inc. v City of New York
By: Graham, Bernard J., J.
Decision Date: 12/20/2013
Assigned Slip Opinion Number: 2013 NY Slip Op 52258(U)

I have accepted the above-entitled opinion for online publication. The opinion will appear in the New York Slip Opinion Service (http://www.courts.state.ny.us/reporter/Decisions.htm) and in the New York Official Reports on Westlaw.

NOTE: 2012 OFFICIAL STYLE MANUAL

The 2012 edition of the Official Style Manual is available online at http://www.nycourts.gov/reporter/Styman_Menu.htm.

Limited quantities of the spiral bound version of the Style Manual are also available. If you are unable to obtain a copy from your court's librarian, you may request a copy directly from the Reporter's Office at LRBSTYLEMANUAL@courts.state.ny.us.

Very truly yours,

William J. Hooks
State Reporter

>>> Bernard Graham 01/06/2014 5:02 PM >>>
Dear Mr. Hooks:

You may print a copy of the decision as you had requested.
The reference number is : QXK005812.
A WordPerfect copy of the decision: In Re Raritan Baykeeper is attached.

Please let me know if you need anything further.

BG

>>> State Reporter 1/3/2014 2:21 PM >>>
Dear Justice Graham:

We have reviewed the attached opinion and have selected it for online publication.
If you agree, please reply to this message and attach a WordPerfect version of the opinion in accordance with the attached instructions. Please include the following identifier in the text of your email message: 'QXK005812'.

This request is made pursuant to Judiciary Law § 432, which provides that "the judges or justices of every court of record, including surrogates, shall promptly cause to be delivered to the state reporter, without charge, a copy of every written opinion rendered in causes determined therein." Courts have given this requirement "a practical construction, and they deliver to the State Reporter copies of only those opinions which the Reporter requests or which the judge writing the opinion might deem 'worthy of being reported' " (Murray v Brancato, 290 NY 52 [1943]).

In 2001, the Court of Appeals authorized a significant increase in the number of opinions to be selected for publication by permitting the State Reporter to select additional opinions for online, rather than print, publication. These opinions are

published in the New York Slip Opinion Service <www.nycourts.gov/reporter/Decisions.htm> and the New York Official Reports on Westlaw. They also are made available to online vendors such as LEXIS and Loislaw, and permission is granted under 22 NYCRR 7300.1 for these vendors to publish the opinions on their services.

Your cooperation by regularly submitting opinions for publication is needed in order to effectuate the policy of publishing every opinion "worthy of being reported because of its usefulness as a precedent or its importance as a matter of public interest" (Judiciary Law § 431). Please submit future opinions in accordance with the attached instructions.

Very truly yours,
William J. Hooks
State Reporter

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: Part 36

Index No. : 31145/06
Motion Calendar No.
Motion Sequence No.,

In the matter of the Application of

RARITAN BAYKEEPER, INC. d/b/a NEW YORK/NEW JERSEY BAYKEEPER, CUYLER YOUNG and SEBASTIAN DE JESUS,

Petitioner(s)

For a Judgment pursuant to Section 3001 of the Civil Practice Law and Rules,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF SANITATION and THE NEW YORK CITY DEPARTMENT OF PARKS & RECREATION,

Respondent(s).

DECISION / ORDER

Present:
Hon. Bernard J. Graham
Acting Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to :
for summary judgment and consolidation:

Papers	Numbered
Notice of Motion and Affidavits Annexed..(Motion and Cross Motion)....	1,2; 3,4
Order to Show cause and Affidavits Annexed.....	
Answering Affidavits.....	
Replying Affidavits.....	5;6
Exhibits.....	
Other: Plaintiff's Memorandum and Reply Memorandum;	7;8
Respondent's Memorandum and Reply Memorandum	9;10

Decision:

Petitioners in this case are Raritan Baykeeper, Inc., d/b/a New York/New Jersey Baykeeper, Cuyler Young and Sebastian De Jesus ("Raritan Baykeeper" or "Petitioners"). Petitioners have brought a motion for summary judgment pursuant to CPLR sections 3212 and 3001.

Respondents in this case are the City of New York, the New York City Department of Sanitation and the New York City Department of Parks & Recreation (hereinafter referred to as the "Municipal Respondents"). The Municipal Respondents have filed a cross-motion for dismissal of the Raritan Baykeeper Petition.

As for the relief sought by Raritan Baykeeper, the Petitioners have brought a hybrid motion. Petitioners seek a declaratory judgment against the Municipal Respondents related to an alleged violation of the "Public Trust Doctrine" and Petitioners additionally seek injunctive relief and a consolidation of the instant case with a pending matter.

The subject of these motions are the solid waste management facility referred to as the Spring Creek Park Composting Facility ("Spring Creek Facility" or "Facility") for which a permit has been issued for operation by the New York State Department of Environmental Conservation ("DEC").

In the summary judgment motion brought by Raritan Baykeeper, the Petitioners seek an order of this Court against the Municipal Respondents, inter alia, declaring: (1) that the actions of the Municipal Respondents are contrary to law; (2) enjoining the Municipal Respondents to immediately cease all activities associated with the operation of the Spring Creek Park Composting Facility; and (3) ordering Respondents to remove all berms and other fences which prohibit access of the public to Spring Creek Park.

Raritan Baykeeper seeks to consolidate the instant matter with a pending Article 78 proceeding (Raritan Baykeeper, Inc. d/b/a NY/NJ Baykeeper v. Joe Martens, et al. (Supreme Court, Kings County, Index No. 21409/12) alleging that there is a common question of law and fact related to the issuance of a solid waste disposal permit by the New York State Department of Environmental Conservation for the Spring Creek Facility. The motion to consolidate is opposed by the DEC and the Municipal Respondents.

For the reasons set forth below, this Court finds that Raritan Baykeeper is entitled to summary judgment against the Municipal Respondents and declaring that the use of the Spring Creek Facility violates the Public Trust Doctrine. The Court also finds that the appropriate relief is a preliminary injunction to cease operation of the Facility unless and until the Facility has obtained the approval of the State Legislature for use as a composting facility.

As to the motion for consolidation, the Court denies the motion to consolidate, as the Court finds that there is not a commonality of issues presented on the two separate matters.

Background

Spring Creek Park is a municipal park located in the Old Mill Creek/New Lots section of Brooklyn, New York. The Spring Creek Facility is located on approximately 20 acres of Spring Creek Park and is referred to by the street address 1270-B Flatlands Avenue, Brooklyn, New York. The Spring Creek Park is located at the Northern Jamaica Bay and is primarily undeveloped land and includes salt marshes. The petitioners allege that the Park is environmentally significant as the salt marshes are alleged to act as a natural filtration system which prevents pollution from contaminating Jamaica Bay (see Aff. of Deborah A. Mans annexed to the Motion for Summary Judgment, Ex. "4").

Beginning in 2001, the Spring Creek Facility was constructed and operated pursuant to a Memorandum of Understanding ("MOU") entered into on August 27, 2001 between the New York City Parks Commissioner and the Commissioner of the Department of Sanitation. The Department of Sanitation ("DSNY") applied to the DEC for a permit to operate a solid waste facility in October, 2001 under Title 6, NYCRR Part 360 to compost 15,000 tons of organic waste consisting of leaves, manure, branches and stumps. The permit application met with opposition by Raritan Baykeeper and others from the adjacent community.

The issue of alienation of parkland was brought up by the DEC staff as a potential substantive issue and several procedural steps were taken before the application was deemed complete by DEC.

The matter was deemed to have a significant degree of public interest and it was decided that a public hearing be held. The matter was referred to the DEC Office of Hearings and Mediation Services on January 7, 2004 and assigned to Administrative Law Judge Susan DuBois.

On August 30, 2004, ALJ DuBois issued a ruling in which, among other findings, determined that "the State Legislature, not DEC, the Applicant, or Parks, would have authority to authorize alienation of parkland in Spring Creek Park". In effect, Judge DuBois held that legislative approval was needed for the proposed use of Spring Creek park as a solid waste facility. ALJ DuBois called for further revisions to be made to the permit application and determined in a supplemental ruling in February 8, 2005, that parkland alienation was a subject for adjudication.

DEC and DSNY both appealed the ALJ's ruling on various grounds. A series of procedural steps followed which involved DEC procedures (not immediately relevant to a determination of these motions). Ultimately (on November 23, 2009) the ALJ rejected the permit application.

On July 2, 2012, DEC Commissioner Joe Martens issued a decision in which he rejected the findings of ALJ DuBois and found that the Spring Creek Facility would operate within the applicable laws. DEC issued a permit for the Spring Creek Facility on August 2, 2012.

On November 2, 2012, Raritan Baykeeper filed a petition for judicial review of the Commissioner's July 2, 2012 decision as being arbitrary and capricious. DEC responded to the allegations by claiming to have followed DEC's own regulations and the determination was, therefore, reasonable. It is this Article 78 proceeding (the"Article 78 proceeding") which Petitioners seek to consolidate with the instant action.

The relief sought by Petitioner Raritan Baykeeper in the instant summary judgment motion requires this Court to determine whether the use of Spring Creek Park as a solid waste facility is a permissible non-park use of parkland.

Issues Presented

1. Parkland Alienation/Non-Permissible Use of Parkland

The petition brought by Raritan Baykeeper in 2006, (the instant matter) challenges the decision of the Municipal Respondents to authorize and use approximately 20 acres of parkland in the park known as Spring Creek Park as an alleged violation of the "Public Trust Doctrine". Municipal Respondents argue that the City of New York is advancing the City mandate of recycling and composting by using the Facility to compost leaves, branches, manure and stumps and, as such, the use of the Facility is a permissible park use which does not violate the public trust doctrine.

Raritan Baykeeper adamantly opposes the position of the Municipal Respondents on the grounds that no solid waste management facility can be considered a traditional or legitimate park use; that the public is deprived of any and all recreational access to the subject area; and that the Facility is an eyesore and has created unbearable nuisance conditions.

2. Injunctive Relief

Petitioners argue that the conflict requires a declaratory judgment by this Court that the Respondents have alienated parkland and that injunctive relief is available in this instance to enjoin the Municipal Respondents from conducting operations at the Facility until appropriate action is taken to obtain approval from the New York State Legislature. Injunctive relief is also needed to assure that all barriers be removed for the public to have access to the Park.

Conversely, the Municipal Respondents respond that the application for injunctive relief is premature and not warranted. Since the relevant question in this proceeding is whether DEC improperly interpreted the governing statutes and regulations, the appropriate disposition would be a remand of the matter to DEC with an appropriate interpretation of the same statutes and regulations.

3. Consolidation of the Article 78 Matter and the Instant Matter

CPLR section 602 allows for consolidation of actions which involve a common question of law or fact. Section 602 allows the trial court to make such orders as may be needed to avoid unnecessary costs and delay (see CPLR sec. 602). Petitioners argue that the issue of parkland alienation is the central point in the instant motion for summary judgment by Petitioners and it is "an intrinsic component" of the Article 78 proceedings (see Petitioners' Memorandum of Law in Support of Motion for Summary Judgment and to Consolidate, page 35). Both proceedings involve question regarding the operation of the solid waste facility at Spring Creek and involve, essentially, the same parties.

In opposition to the motion to consolidate, distinctions are raised by Respondents' counsel between the two matters. In the instant matter, the issue pertains to whether the Facility is a proper park function and not violative of the Public Trust Doctrine. The Article 78 proceeding, while it involves the same project, is more specifically a question as to whether parkland alienation can be a proper adjudicable issue in a part 360 Permit Hearing. It is the position of the DEC that it followed its own regulations and procedures and that the decision thus rendered is reasonable. The question of whether the Facility is an appropriate use of parkland would be wholly an issue for the New York City Parks Commissioner, who had assented to the use of the parkland as a solid waste management facility. Accordingly, the DEC decision (according to the Municipal Respondents) does not call for an interpretation of the proper use of parkland, as that determination was not within the scope of the DEC.

Discussion

Beginning first with the central issue in this case, which is whether the use of a portion of Spring Creek Park is an alienation of parkland, requires a brief review of the Public Trust Doctrine. The long recognized "Public Trust Doctrine" prohibits the diversion of parkland to any use which is not consistent with public use and enjoyment of a park unless the use has been authorized by the State Legislature. In one of the earliest cases [1] the Court of Appeals addressed

[1] While Williams v. Gallatin is often cited as a leading decision in this area, the public trust doctrine was recognized by New York courts as early as the 1870's when the high court found that the City of Brooklyn, which had taken title to certain lands for public use as a park could not convey the same lands without the approval of the State Legislature (see Brooklyn Park

the doctrine by first describing a park as "a pleasure ground set apart for recreation of the public to promote its health and enjoyment". Williams v. Gallatin, 229 NY 248 (1920). Judge Pound further stated that the park need not be open space but "no objects, however worthy, such as court houses and school houses which have no connection with park purposes should be permitted to encroach upon it without legislative authority plainly conferred". Williams v. Gallatin, id at 253.

There is a formidable body of case law which stands for the proposition that any "non-park use" of a park requires legislative approval (see Miller v. City of New York, 15 NY2d 34 [1964]; Friends of VanCortland Park v. City of New York, 95 NY2d 623 [2001]; Ackerman v. Steisel, 104 AD2d 940 [2d Dept. 1984]).

It is immediately evident from the evidence submitted to this Court that the operation of the Spring Creek Facility precludes the use of the 20 acre portion of the Park for recreational enjoyment by the public. The subject area is fenced in and operated as a solid waste management facility and there is no real dispute between the parties that the composting facility is set aside and unavailable for use by the public.

The Municipal Respondents contend that it is integral to the operation of the New York City Parks that there be a solid waste composting facility located on parkland to process the large volume of organic matter collected by the Department of Sanitation. The composting plan, the City argues, is consistent with local laws and solid waste management plans of the City of New York.[2]

Towards this end, the New York City Department of Sanitation and the Department of Parks Commissioner entered into the MOU on August 27, 2001 to operate a portion of Spring Creek Park as a solid waste management facility. The Parks Commissioner authorized the Department of Sanitation to construct and operate the Spring Creek Facility to generate compost to be used by the Parks Department.

The Municipal Respondents assert that the use of the Facility to compost leaves and branches is a "park use" and is needed to generate compost for the various New York City parks, including Spring Creek Park. The composting of leaves is said to reduce soil compaction and increase water retention, minimizing erosion and storm water runoff. The composting material also adds

nutrients to park soil and is used in planting, horticultural projects and capital projects, among

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Commrs. v. Armstrong, 45 NY 234 [1871]).

[2]Local Law 19 of 1989 provides for collecting and composting of leaves. The City Solid Waste Management Plan ("SWMP") has been approved by the Department of Environmental Conservation.

other uses (see Aff. of Bram Gunther in Support of Cross-Motion for Summary Judgment). Furthermore, the testimony offered on behalf of the Municipal Respondents explained that the New York City Parks Department does not have the financial capability to relocate a similar composting facility on a non-park location.

There are many New York State cases which have addressed the question of which uses of park land are permissible park uses and which are not. On one end of the spectrum are cases in which restaurants were proposed to be located within parks. In Central Park a restaurant was permitted to be located in the park with the court describing the proposed restaurant as "well-designed" and "harmonious with the Park" and there was found no violation of the public trust doctrine (see 795 Fifth Ave. Corp. v. City of New York, 15 NY2d 221 (1965). In a recent case, the proposal to place a restaurant and a "holiday market" in Union Square Park was initially found by the trial court to violate the public trust doctrine. However, on appeal the Appellate Division (First Dept.) reversed and, in a brief decision, stated that the proposed restaurant and holiday market do not violate the public trust doctrine since they are permissible park uses (see Union Square Park Community Coalition, Inc., et al. v. New York City Department of Parks and Recreation, 107 AD3d 525 (1st Dept. 2013).

At least as to restaurants, there is an apparent judicial tolerance for allowing a portion of a park to be used for a private enterprise.

On the other hand, cases which involve the use of parkland for uses such as a solid waste disposal sites and landfills are deemed to be unacceptable park uses, and consequently, require Legislature approval (see Village of Croton-on-Hudson v. County of Westchester, 38 AD2d 979 (2d Dept. 1972): Stephenson v. County of Monroe, 43 AD2d 897 (4th Dept. 1974).

As part of their supporting documentation, the Raritan Bay Petitioners have included evidence that the operation of Spring Creek Park presents an unsightly, industrial operation in Spring Creek Park which generates noise and odors to the surrounding residential community.[3] In photos annexed to the motion for summary judgment, (Ex. "10" to the Motion), the Spring Creek Facility is shown with a mountain of garbage bags containing unknown materials which are moved by the use of front end loaders or other heavy equipment. The initial motivation for creating the Spring Creek facility may be premised on a worthy goal of composting leaves and branches, yet in practice the evidence shows that it is more accurately characterized as a working garbage dump.

In reviewing the supporting evidence for the motion and cross-motion, the Court finds that the actual use of the Spring Creek Facility is a large scale solid waste facility, which is inaccessible to the public and provides no typical benefits that are expected of a park. The scope of the

[3]See Affidavit of Ronald J. Dillon, President of Concerned Homeowners Association annexed to Motion for S.J. as Ex. "5".

Facility also makes clear to the Court that the Department of Sanitation is using Spring Creek Park as a central location to collect all types of organic waste from locations including and beyond Spring Creek Park. The reality is that the Parks Department has burdened Spring Creek Park with serving as a solid waste processing facility for the general area at the expense of its local residents.

The Municipal Respondents offer the argument that the duration of the Spring Creek Facility is temporary, however, courts have rejected a temporary taking of public park land even for a modest duration of only five years (see Friends of VanCortland Park v. City of New York, 95 NY2d 623 (2001); see also Ackerman v. Steisel,104 AD2d 940 [2d Dept. 1984]).

It is impossible to consider the recycling and composting being performed at Spring Creek Park, to be an acceptable park use. The public is denied the use of the 20 acres of Spring Creek Park and the type of solid waste processing that is being undertaken is a use that presents no aesthetic or enjoyable appearance or activity typically associated with leisure and recreation. The use of Spring Creek Park as a composting facility does not add to the enjoyment of visiting the park or enhance the experience in the manner that a restaurant or café may achieve (see 795 Fifth Ave. Corp v. City of New York, 15 NY2d 221; Union Square Park Community Coalition, Inc. et al v. New York City Department of Parks and Recreation, 107 AD3d 525 (1st Dept. 2013). The attempt by the Parks Department staff to describe the use of the Spring Creek Facility as a well intentioned effort to compost leaves and branches is belied by the actual industrial scale processing of waste that can not (and should not) be permitted without legislative approval.

In the motions before the Court, the Petitioners have moved for summary judgment for a declaratory judgment declaring that the Municipal Respondents have engaged in parkland alienation and a violation of the public trust doctrine. Municipal Respondents have cross-moved for summary judgment to dismiss the petition for declaratory judgment.

Before considering the drastic remedy of summary judgment the Court must determine that there is an absence of triable issues of fact. Rotuba Extenders v. Ceppos, 46 NY2d 223 ([1978]; Sillman v. Twentieth Century Fox Film Corp, 3 NY2d 395 [1957].

It is well established that the party moving for summary judgment has the burden of establishing the absence of a triable issue of fact. Alzarez v. Prospect Hospital, 68 NY2d 320 [1986].

An extensive argument was presented by both sides of this controversy before the Court and both sides had a full opportunity to set forth the admissible evidence supporting their respective positions. The dispute between these parties is essentially a question of law, that is, whether the use of Spring Creek Park as a composting facility violates the public trust doctrine. Based on the

evidence presented, the conclusion is unassailable that the Municipal Respondents have engaged in the use of a portion of parkland in a manner which is contrary to law and likely detrimental to the surrounding community. The evidence is clear and unambiguous that the size and scope of this Facility is of such a type that it can not be reconciled as a proper "park use" despite the claims made by Municipal Respondents. The available evidence, taken in a light most favorable to the Municipal Respondents confirms that the composting activity is conducted on parkland and the activity is fenced-off from the general public. Aside from providing a general, laudatory goal of composting solid waste material, the Spring Creek Facility in actuality is a disruptive, commercial enterprise that would only be authorized by authority properly conferred by the Legislature (see Williams v. Gallatin, 229 NY 248 [1920]; Friends of Van Cortlandt Park v. City of New York, 95 NY2d 623 [2001]; Jones v. Amicone, 27 AD3d 465 [2d Dept. 2006]).

Accordingly, Raritan Baykeepers' motion for summary judgment is granted based on the finding of this Court that the Municipal Respondents have violated the public trust doctrine and there are no issues of fact presented which would require a trial on this issue.

Injunctive Relief

The Raritan Petitioners have brought the instant action as a declaratory judgment action and have made the argument that the actions of the Municipal Respondents constitutes an illegal taking of parkland. CPLR sec. 3017 (b) authorizes a preliminary injunction in a declaratory judgment action (see Jones v. Amicone, 27 AD3d 465 ([2d Dept. 2006] ; Ackerman v. Steisel, 104 AD2d 940 [2d Dept. 1984]).

A party seeking injunctive relief must show that : (1) there is a likelihood of success on the merits; (2) irreparable harm is likely absent granting of the injunction; and (3) a balancing of the equities that favors the movant's position (see Aetna Ins. Co. v. Capasso, 75 NY2d 860 [1990]; Doe v. Axelrod, 73 NY2d 748 [1988]; W.T. Grant Co. v. Srogi, 52 NY2d 496[1981]).

In this action there has been a strong showing as a matter of law, that the Municipal Respondents had acted with a good indication that they would be violating the public trust doctrine by issuing a permit for the operation of the Facility.[4] The use of the 20 acres in question squarely falls in the category of uses which are not for the public enjoyment. The rationalization that compost is being produced and thereby a benefit to the City parks rings hollow when the scope and nature of the use is considered. Accordingly, the Court is persuaded that the Raritan Baykeeper Petitioners have shown a likelihood of success under these circumstances. Petitioners have demonstrated a clear right under the law and the undisputed facts, for which an

[4]As part of the application process for a permit from DEC to operate a solid waste facility, the DEC staff initially raised the issue that there was a potential alienation of parkland. Furthermore, ALJ Susan DuBois ruled that the State Legislature is the appropriate party to authorize the alienation of parkland and not DEC or the Parks Commissioner (see Decision of ALJ DuBois annexed as Ex. 11 to the motion for summary judgment).

injunction is appropriate (see Hoefner v. John F. Frank, Inc. 302 AD2d 428 [2d Dept. 2003]).

The issuance of injunctive relief in this instance is not an award of a ultimate relief, which should only be granted under extraordinary circumstance (see Rosa Hair Stylists v. Jabar Food Corp., 218 AD2d 793 [2d Dept. 1995]). The practical effect of injunctive relief in this matter would be to preserve the status quo until such time as a determination could be reached by the State Legislature to grant its approval to the operation of the Spring Creek Facility.

This Court is also receptive to the arguments raised by the Raritan Baykeeper Petitioners that the operation of the Spring Creek Facility causes irreparable injury. The Court has reviewed the photographs of the Facility when it was operated and is plainly an unattractive activity (see Estrin Aff "Ex. "10"). The Court has also considered the testimony of parties who have testified at the DEC adjudicatory hearings who have described the facility as generating pungent smells that are described as rotting and unpleasant (see Estrin Aff., Ex. "30"). The surrounding community is subjected to a garbage-like facility on parkland which distributes odors, noise and dust and has been installed without the appropriate legal authority. Consequently the Raritan Petitioners are entitled to a preliminary injunction until such time as the State Legislature renders a determination.

The last prong of the requirements for injunctive relief is also satisfied. The balancing of equities in this case favors the Raritan Baykeeper Petitioners who have made a strong showing that the actions of the New York City Parks Commissioner and DEC were done with a somewhat flagrant disregard for the principles of the public trust doctrine. The operation of a solid waste management facility would not be welcomed in most New York City communities and it appears that the arrangement entered into (the MOU) between the Parks Commissioner and Department of Sanitation (and given the blessing of the DEC Commissioner) is an expeditious end-run to avoid the more cumbersome and politically perilous option of obtaining legislative approval. Nonetheless, the case law is unequivocal and the only legal option is for the Parks Department to obtain the necessary approval. As such, the balance of equities favors the Petitioners.

Motion to Consolidate

Administrative Law Judge Susan DuBois determined that the proposed use of Spring Creek Park as a composting facility would constitute parkland alienation when the matter was before her as part of the permit process. That decision was reversed by DEC Executive Deputy Lynette Stark who concluded that "to allow composting at Spring Creek Park is a local land use determination outside the DEC's jurisdiction and not subject to challenge in a DEC permit hearing proceeding" (see DEC interim decision of Lynette Stark).

Raritan Baykeeper initiated the Article 78 proceeding challenging the Stark determination that parkland was not an adjudicable issue in 2006. The Hon. Justice Martin Schneier dismissed the Article 78 proceeding on May 10, 2007 finding it was not a final determination and, thus, not ripe for adjudication. On July 12, 2012, DEC Commissioner Joe Martens issued a decision which essentially rejected the findings made by ALJ DuBois. On August 2, 2012, DEC issued a solid waste management permit to operate the Spring Creek Facility.

Raritan Baykeeper re-filed the Article 78 petition (index No.: 21409/12) which challenged the issuance of the permit on the grounds that it was improper to exclude the issue of parkland alienation in rendering its decision to award a permit for the operation of the Spring Creek Facility. A second cause of action raised by Petitioners is that DEC certified to New York State that the operation of the Facility is consistent with, and will not substantially hinder, the policies set forth in the New York City Local Waterfront Revitalization Program (see Verified Petition annexed as Ex. "1" to the Petitioner's Motion to Consolidate).

Municipal Respondents oppose consolidation, arguing first that the decision to issue the permit by DEC should not be disturbed because it is not predicated on an error of law and is not arbitrary or capricious and does not represent an abuse of discretion (see Akpan v. Koda, 75 NY2d 561 [19990]; Matter of Reg'l Action Group v. Zagata, 245 AD2d 798 [3rd Dept. 1977]).

The basis for Respondents' argument is that DEC does not have the jurisdictional basis for adjudicating a parkland alienation claim and, accordingly, the Commissioners's decision not to adjudicate such a claim can not be considered irrational or arbitrary.

Municipal Respondents assert that the management of parks in New York City is a local action and the determination of the proper use of parks lies in the first instance with the City Parks Commissioner (see 795 Fifth Ave. Corp. v. New York, 15 NY2d 221 [1965]).

Municipal Respondents accurately point to the authority of then Parks Commissioner Benape as being vested with the jurisdiction of determining proper park uses (whether or not correctly) and the determination of DEC can not be faulted as arbitrary or capricious when it rests on the determination of the Parks Commissioner that parkland alienation is not indicated. The DEC argument might seem somewhat disingenuous considering that it was DEC, by its own staff early on in the hearing process, who raised the concern of parkland alienation as being a relevant issue for consideration. However, the Court finds that the DEC decision, if it was in reliance on the Parks Commissioner's determination may not be ruled arbitrary or capricious.

In any event, the motion to consolidate does not involve common questions of law or fact. In the present summary judgment motion the question raised is the possibility of parkland alienation, while the Article 78 petition raises the question of whether the DEC issuance of the solid waste permit is arbitrary and capricious. There will also be a separate question of law posed in the Article 78 petition as to whether DEC's decision to issue the permit is consistent with the City Waterfront Program (see Memorandum of Law of Eric T.Schneiderman, by

Kathryn M. Liberatore, on behalf of DEC in Opposition to the Motion to Consolidate, pg. 33).

This Court agrees that the issues are separate and must be decided using different analysis. There would be no saving of judicial resources by consolidating the two matter or any other obvious benefit to consolidate the two cases. Accordingly, the motion to consolidate is denied.

Conclusion

For the reasons stated herein, the Raritan Baykeepers' motion for summary judgment declaring that the use and operation of Spring Creek Facility is a violation of the public trust doctrine is granted.

The Raritan Baykeeper Petitioners have established the grounds for injunctive relief and a preliminary injunction is granted requiring the Municipal Respondents be enjoined from operating the Spring Creek Facility unless and until State Legislature approval is obtained. That portion of the Petitioner's motion which seeks an immediate removal of the fences, berms and any other barriers to public entry to the Park is denied, without prejudice. Such application may be renewed if no approval for the operation of the composting facility is obtained within six (6) months of the date hereof.

CPLR sec. 6312(b) requires this Petitioner to post an undertaking prior to the issuance of a preliminary injunction. While neither party has addressed this aspect of the motion, the Court understands that the Petitioners are a not-for-profit orgqanization and litigating this matter at their own cost (see Daytop Village v. Consolidated Edison Co. of N.Y., 61 AD2d 933; Broadway Triangle Community Coalition v. Bloomberg, 35 Misc.3d 167 [Supreme Ct., NY Co., 2011]). There is also little concern that the Respondents would suffer economic damages as a result of the injunction. Accordingly, the Court imposes a bond requirement in the minimal amount of $1,000, as a condition of the injunction.

The cross-motion of the Municipal Respondents to dismiss the petition is denied.

The Raritan Baykeeper's motion to consolidate the instant summary judgment proceeding (index no.: 31145/2006) with the Article 78 proceeding (index no.: 21409/2012) is denied.

This shall constitute the decision of the Court.

Settle Order.

Dated: December 20, 2013

/s/
Bernard J. Graham, Acting Justice
Supreme Court, Kings County

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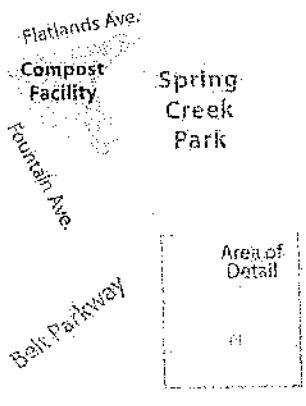
City Blocked in Bid to Operate Compost Facility in Local Park

BY BRENDAN PIERSON

NEW YORK City cannot operate a 20-acre composting facility in Brooklyn's Spring Creek park unless it can get approval to do so from the state Legislature, a Brooklyn state judge has ruled.

Acting Supreme Court Justice Bernard Graham ruled on Dec. 20 in *Raritan Baykeeper v. City of New York*, 31145/06, that the facility, which was built to compost leaves, manure and tree stumps gathered from Spring Creek Park and other city parks, is an alienation of public parkland and therefore a violation of the public trust doctrine, which requires that all parkland be open for use by the public unless the Legislature authorizes another use.



The decision was a victory for Raritan Baykeeper, also known as New York/New Jersey Baykeeper, a group that advocates for clean water in the lower bay of New York's harbor.

The facility, called the Spring Creek Park Composting Facility, was built in 2001 under a memorandum of understanding between the Parks Commissioner and the Commissioner of the Department of Sanitation that allowed about 20 acres of Spring Creek Park to be used for the facility.

It began operating immediately, until the Department of Environmental Conservation told the Sanitation Department in 2002 that it needed a permit. The Department of Sanitation then stopped operation of the facility and applied for a permit from the DEC. Raritan Baykeeper and others opposed that application. The facility has not operated since 2002, but has remained fenced off and inaccessible to the public.

In 2004, a public hearing was held on the permit before a DEC administrative law judge, Susan DuBois.

In 2006, while the application process was still pending, Raritan Baykeeper and two » Page 7

Online

The Brooklyn Supreme Court decision is posted at nylj.com.

summary judgment against the city on the public trust doctrine issue.

Graham noted that it was undisputed that the 20-acre area set aside for the composting facility cannot be used by the public. The city responded that composting solid waste generated by the city's parks is an integral function of the park system, including Spring Creek Park, and that the facility was therefore not an alienation of park land.

Graham, however, found that such a facility ran afoul of the public trust doctrine because it "provides no typical benefits that are expected of a park."

"The scope of the facility also makes clear to the Court that the Department of Sanitation is using Spring Creek Park as a central location to collect all types of organic waste from locations including and beyond Spring Creek Park," the judge continued. "The reality is that the Parks Department has burdened Spring Creek Park with serving as a solid waste processing facility for the general area at the expense of its local residents."

In fact, he said, "in practice the evidence shows that it is more accurately characterized as a working garbage dump" than as a compost facility for the city's parks.

Graham said that, because the city could still get approval from the Legislature to run the facility, the appropriate remedy was a preliminary injunction that the city not operate the facility. He did not order the city to take down the fences and other structures associated with the facility.

Daniel Estrin, supervising attorney of the Pace Environmental Litigation Clinic, said that accepting the city's argument would have created "a very slippery slope."

"Why not let [power tool maker] Black & Decker build a leaf blower factory on park land because parks need leaf blowers?" he added.

Estrin also said that the city has established waste facilities in other parks in the past, including a solid waste facility in Soundview Park in the Bronx, and a dumping ground for cesspool trucks, leading to a sewage pipe, in another part of Spring Creek Park.

"Usually these parks are in underprivileged areas of the city. You try to take 20 acres of Central Park, you'd have an injunction so fast it would make your head spin," he said.

The city is represented by Assistant Corporation Counsel Kathleen Schmid.

"We are disappointed in the Court's decision," Schmid said in an emailed statement. "In particular, we believe that the Court failed to fully consider the fact that the Spring Creek facility is intended to produce compost for use in City parks. Like much of Parks' infrastructure, it exists in a park and is necessary to support the agency's management of parkland throughout the City. As such, it is a proper park use under the law."

She said the city was considering a motion for reargument or an appeal.

@ Brendan Pierson can be contacted at bpierson@alm.com.

Baumgardt v. Tarantino, 16770/11

March 27, 2017

Cite as: Baumgardt v. Tarantino, 16770/11, NYLJ 1202781983574, at *1 (Sup., KI, Decided February 10, 2017)

CASENAME

Jean Baumgardt, As Administratrix of the Estate of Julius Baumgardt and Jean Baumgardt, as Administratrix of the Estate of Christine Baumgardt, Plaintiff(s) v. Christian Tarantino and Scott Mulligan, Defendant(s)

16770/11

Justice Bernard J. Graham

Read Summary of Decision

Decided: February 10, 2017

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion: for summary judgment against defendants and cross-motions by defendants:

Papers Numbered

Notice of Motion and Affidavits Annexed (Plaintiff's Motion for Summary Judgment) 1-2

Defendant's (Tarantino's) Cross-Motion to dismiss 3-4

Order to Show Cause and Affidavits Annexed

Answering Affidavits (Aff. in Opp. by Defendant (Mulligan) 5

Replying Affidavits (Plaintiff Reply Aff./Tarantino Reply Aff.'s) 6,7

Exhibits

Other: Memoranda of Law (Plaintiff/Def. Tarantino/Def. Mulligan) 8, 9, 10

DECISION / ORDER

Decision:

*1

Plaintiff, Jean Baumgardt, as Administratrix of the Estates of Julius Baumgardt and Christine Baumgardt ("Baumgardt") has brought a motion pursuant to CPLR sec. 3211(a)(1) and (7) and/or CPLR sec. 3212, for summary judgment as to the issue of liability against defendants, Christian Tarantino and Scott Mulligan in this wrongful death case. The motion additionally seeks, inter alia, dismissal of defendant, Christian Tarantino's ("Tarantino") affirmative defenses (First, Second, Fifth and Sixth) which are contained in defendant Tarantino's amended answer.

*2

A cross-motion has been filed on behalf of defendant Tarantino pursuant to CPLR sec. 3211 (a) (5) seeking dismissal of plaintiff's complaint as time barred and for such additional relief as the Court may grant.

Opposition to plaintiff's motion has been submitted by counsel for defendant Tarantino (in the form of Tarantino's cross-motion to dismiss) and by counsel for defendant Scott Mulligan ("Mulligan"). The motion had been fully brief and deemed submitted on November 17, 2016.[1]

Procedural History:

This wrongful death lawsuit was initiated by plaintiff Baumgardt on July 26, 2011. Issue was joined by defendant Tarantino on October 11, 2011. An amended complaint was served on or about June 29, 2012 naming Scott Mulligan as a defendant and an answer was submitted on his behalf.

There has been significant motion practice in this case which included a series of motions filed on behalf of defendant Tarantino to obtain deposition discovery of Nassau County Police Department officers involved in the Tarantino criminal prosecution as well as demands for books and records of the investigation into Tarantino's involvement in the criminal case.

This Court, by the undersigned, rendered a decision on October 29, 2015 in response to the discovery motions filed by Tarantino's attorneys. The Court denied the requests for depositions of the non-party police officers involved with the case and denied production of

documents of the Nassau County Police Department as well as other matters. As part of the ruling by this Court in the October 29, 2015 decision (the "October 29, 2015 Decision"), the Court concluded that defendant Tarantino could not re-litigate his convictions of murder in the context of the wrongful death suit brought by plaintiff.

The instant motion for summary judgment by plaintiff has been brought on the premise that this Court has made findings as to the guilt of the defendants which would be the law of the case

*3

and, thereby, preclude defendants from re-litigating the question of their guilt in a wrongful death action.

The plaintiff's motion is opposed by both defendants on multiple grounds as set forth below.

Discussion:

Defendant, Christian Tarantino, was convicted of murder in the Eastern District Federal Court after trial by a jury. Tarantino was found guilty of murder in connection with an armored car robbery which took place on June 23, 1994 resulting in the death of Julius Baumgardt, an employee of the armored car company. Mr. Tarantino was convicted pursuant to a Federal Statute, USC sec. 33 ("Destruction of Motor Vehicles or Motor Vehicle Facilities"). Defendant Tarantino was also convicted in the murder of a co-conspirator, Louis Dorval, and was sentenced to life imprisonment on April 24, 2013. (See Plaintiff's Memorandum, p.4).

Defendant Mulligan pled guilty to the federal charges of violation of USC sec's. 33, 34. His judgment in the criminal case acknowledges his guilt as follows: "Willfully endangering the safety of a commercial motor vehicle operator resulting in the death of Julius Baumgardt". (See United States District Court, Eastern District of New York Judgment in Criminal Case, annexed as Ex. "C" to the Affirmation in Opposition filed by Def. Mulligan). Mulligan received a sentence of 72 months and is currently in protective custody. (See Plaintiff's Motion for Summary Judgment, Ex. "I").

In the prior motions, this Court rejected the defendant Tarantino's attempt to re-litigate his criminal convictions on a speculative theory that Mr. Baumgardt's killing was an "inside job". The attempt to undermine the criminal conviction was found to be based upon "conjecture and speculation" and the Court found that Tarantino's guilt in Baumgardt's murder "has been resolved and any further attempts to litigate the issue is barred by collateral estoppel". (See October 29, 2015 Decision, p. 5).

Based upon the October 29, 2015 Decision, plaintiff asserts that summary judgment on the issue of liability of the defendants must be granted as this Court has reached a finding that the guilt of both Tarantino (by jury verdict) and Mulligan (by guilty plea) resolves the question

of liability that would be required to be proven in a wrongful death trial. The prior decision of this

*4

Court, in the opinion of the plaintiff, is the law of the case and forms the basis for granting summary judgment in this motion.

As stated in the October 29, 2015 Decision, the convictions of Tarantino and Mulligan in the Federal Trial Court lays the ground for the application of collateral estoppel in this wrongful death case. (See D'Arata v. New York Central Mutual Fire Insurance Company, 76 NY2d 659 [1990]; Villanueva v. Comparetto, 180 AD2d 627 [2d Dept. 1992]; Chism v. New York City Transit Authority, 145 AD2d 400 [2d Dept. 1988]).

For the doctrine of collateral estoppel to apply, it is necessary that the criminal conviction is based upon facts identical to those in issue in the related civil action and that the defendant has had a full and fair opportunity to litigate the issues in the criminal action. (See McDonald v. McDonald, 193 AD2d 590 [2d Dept. 1993]; Grayes v. Distasio, 166 AD2d 261 [1st Dept. 1990]).

There are several arguments raised by counsel for Mr. Tarantino to oppose the plaintiff's motion for summary judgment.[2]

Basically, plaintiff Tarantino opposes the motion for summary judgment by drawing fine distinctions between his conviction in the Eastern District trial court and the ability of this Court to apply collateral estoppel concepts to conclude that Mr. Tarantino is legally responsible for the death of Mr. Baumgardt.

The first line of argument raised by Mr. Tarantino's attorneys is that the decision of the Federal District trial court can not be considered by this Court for the purposes of collateral estoppel. While the Federal courts are separate from our State courts, there is no implicit bar to recognizing the results of a guilty verdict of murder (in Tarantino's case) or from a guilty plea (in Mulligan's case) provided that the defendants had a full and fair opportunity to contest the charges and the guilt established in the criminal proceeding would satisfy the requirements of the elements of a wrongful death action. In this Court's opinion, the convictions of Tarantino and Mulligan conclusively establish the basis for liability in the instant wrongful death case.

According to Tarantino's argument, the conviction in Federal Court was based on a Federal Statute, USC sec. 33 which is applicable to an armored car robbery. Counsel makes a specious

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argument that the statute could only have relevance to disabling a motor vehicle and not relevant to an intentional tort involving the death of Mr. Baumgardt. Counsel seems to ignore the fact that Mr. Tarantino was indicted and convicted by a jury on count one of the indictment which reads "willfully endangering the safety of a commercial motor vehicle operator resulting in death". The actual verdict sheet reads "Count One (Murder of Julius Baumgardt) How do you find the defendant as to Count One" and the jury drew an "X" in the Guilty box. (See a copy of the Federal Indictment and the Jury Verdict Sheet annexed as Ex. "A" and Ex. "E" to the Opposition to the Motion filed by Defendant Mulligan).

The fact is that Mr. Tarantino was convicted by a jury of murder and his conviction was affirmed on appeal. Despite counsel's valiant attempts to find that Mr. Tarantino's conviction can not be recognized by this Court using collateral estoppel, the inescapable truth is that Mr. Tarantino engaged in activity which would support a felony murder conviction in New York State Court (pursuant to Penal Law sec. 125.25(3)) and this Court may take that conviction and apply it to the instant wrongful death case. The guilty pleas of defendant Mulligan similarly implicates Mr. Mulligan in a felony-murder despite his lesser role as a lookout in the armored car robbery which resulted in Mr. Baumgardt's death.

Furthermore, both Mr. Tarantino and Mr. Mulligan "had a fair and full opportunity to litigate the initial determination". (People v. Evans, 94 NY2d 499, 502 [2000] citing Arizona v. California, 460 US 605; see also Ramanathan v. Aharon, 109 AD3d 529 [2d Dept. 2013]). The Court rejects defendant Mulligan's argument that Mr. Mulligan did not have a full and fair opportunity to litigate the matter because Mr. Mulligan accepted a plea deal in exchange for a lesser sentence. Nonetheless, Mr. Mulligan was afforded a full opportunity to contest the criminal charges brought against him.

The facts of the instant case, which have been fully litigated in the prior criminal trial and the finding of guilt of the defendants after a full and fair opportunity to be heard together present an altogether appropriate use of collateral estoppel to find liability against the defendants for the wrongful death of Mr. Baumgardt. "The doctrine of collateral estoppel is designed to conserve time and resources of the court and parties by precluding a party from litigation an issue which has been resolved against him in another action where he had a full and fair opportunity to contest the determination". (People vv Plevy, 52 NY2d 58, 64 [1980], citing Schwartz v. Public

*6

Administrator of County of Bronx, 24 NY2d 65).

The Court has reviewed the affirmative defenses raised by Mr. Tarantino's counsel and finds them to be without merit. Defendant Tarantino alleges the wrongful death case must be dismissed based on a violation of the statute of limitations. The instant case had been filed by the plaintiff against Tarantino in July 2011, which is two months after his guilty conviction in the Baumgardt murder. The EPTL, at sec. 5-4.1(2) allows a representative to bring suit within one year from the date the criminal action has been terminated, therefore, the defense

based on statute of limitations violation (the First Affirmative Defense) is inapplicable in this instance.

The Second Affirmative Defense, which seeks to limit Mr. Tarantino's liability (pursuant to CPLR Article 16), to his equitable share for wrongful death is unavailable in a case in which the tort is based on intentional and willful conduct. (See CPLR sec. 1602 (5) ; Pantages v. L.G. Airport Hotel Associates, Inc., 187 AD2d 273 [1st Dept. 1992]). There is no legal basis to apportion the "fault" of a tortfeasor engaged in an intentional and wilful action resulting in the death of a person.

Similarly, the attempt to allege the decedent's (Mr. Baumgardt's) culpable conduct or allege assumption of risk of the decedent Baumgardt (as set forth in Tarantino's Fifth Affirmative Defense) is unavailable to Tarantino and Mulligan, who are intentional tortfeasors. For that reason, the Fifth Affirmative Defense must be dismissed. It is also noted by the Court, as it was when the October 29, 2015 Decision was rendered, that no credible proof had been offered that Mr. Baumgardt had taken part in an "inside job" and that the allegation of such was speculative and unfounded.

The Sixth Affirmative Defense sets forth a defense based on a failure to name necessary parties pursuant to CPLR sec. 1001(a). However, and as noted by counsel for plaintiff, the defendants have not made a motion to dismiss the action for failure to implead a necessary party and defendants have not named any additional parties who would be needed or relevant.

*7

Accordingly, the Sixth Affirmative Defense is without merit and must be dismissed.

Conclusion:

The instant motion before the Court presents a clear and logical application of the doctrine of collateral estoppel. Notwithstanding defense counsel's efforts to carve distinctions between the criminal convictions of the defendants and the present civil litigation for wrongful death, the application of collateral estoppel is designed to prevent an unnecessary waste of judicial resources and eliminate a burden on a civil litigant who would be otherwise compelled to participate in a second trial to establish the guilt of a person convicted of a horrible crime which has already been decided.

Furthermore, this Court has visited these same issues in the prior motions filed by defendant Tarantino and found, as the Court does now, that the defendants should be barred from relitigating their actions after having had a full and fair opportunity to contest the matter in the criminal proceedings. Having reached the conclusion that Mr. Tarantino and Mr. Mulligan were responsible for Mr. Baumgardt's death in the October 29, 2015 Decision, such decision constitutes the law of the case and summary judgment against the defendants for liability in this wrongful death action must follow.

For the reasons set forth above, the Court grants plaintiff's motion for summary judgment against defendants Tarantino and Mulligan as to the issue of liability in this matter.

Defendant Tarantino's cross-motion to dismiss is denied.

*8

This shall constitute the decision and order of the Court.

Dated: February 10, 2017

ENTER:

1. The Court notes that counsel for Scott Mulligan notified the Court by letter dated November 17, 2016 that Mulligan had discharged his attorneys, Long and Tumiello, and would proceed pro se in this matter. Correspondence was also forwarded by Long and Tumiello from Mr. Mulligan confirming he would proceed pro se and that he was in protective custody. The Court has considered the opposition submitted by Long and Tumiello on Mulligan's behalf in connection with this motion.

2. Opposition to the plaintiff's summary judgment motion has been submitted on behalf of defendant Mulligan and the arguments raised by defendant Mulligan essentially mirror arguments raised by Tarantino's attorneys such that the doctrines of collateral estoppel and law of the case do not apply to the instant case.

2018 WL 513201 (N.Y.Sup.), 2018 N.Y. Slip Op. 30127(U) (Trial Order)
Supreme Court of New York.
Kings County

Dinerman v. Fox
Supreme Court of New York. January 23, 2018 (Approx. 3 pages)

**1 Barry DINERMAN, Plaintiff(s),

v.

Roberta FOX, Esq., Defendant(s).

No. 513181/2016.
January 23, 2018.

Decision

Present: Hon. Judge Bernard J. Graham.

Supreme Court Justice

***1 Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion:** *defendant's Motion to Dismiss pursuant to CPLR sec. 3211(a)(1) and 3211(a)(7):*

Papers	Numbered
Defendant's Motion to Dismiss and Affidavits Annexed.	1-2
Answering Affidavits ..... (Plaintiff's Opp.).	3
Replying Affidavits (Defendant's Reply Memorandum).	4
Exhibits	
Other: *Defendant's Memorandum in Support of Motion.*	5

Upon the foregoing cited papers, the Decision/Ordrr on this application is as follows:

Decision:

Defendant, Roberta Fox, Esq. ("Fox") by her attorneys, has brought the instant motion to dismiss the legal malpractice lawsuit filed by the plaintiff, Barry Dinerman ("Dinerman").

Defendant Fox seeks dismissal of the lawsuit as plaintiff has failed to state a cause of action pursuant to CPLR sec. 3211(a)(1) and based upon documentary evidence pursuant to CPLR sec. 3211(a)(7).

Plaintiff, Dinerman, by his attorneys, opposes the motion. Argument was heard on the motion to dismiss before the undersigned on October 12,2017 in Part 36 of the Court.

Background:

Fox had represented Dinerman in a divorce proceeding between Dinerman and his spouse, Mary Bergam (Supreme Court Kings Co., Index No. 52375/13). As part of the divorce proceeding, a **2 preliminary conference was held on August 1, 2013. An order was entered upon stipulation of the parties providing for various interim relief and discovery to be conducted. The August 1, 2013 order (the "Preliminary Conference Order") provides in the section entitled Pendente Lite Relief, the following:

"The parties shall pay 50/50 the following expenses: Carrying charges on the marital home; college expenses for Katherine, tutoring and college prep fees for Daniel". (A copy of the Preliminary Conference Order is annexed as Exhibit "B" to the Motion to Dismiss).

The plaintiff's legal malpractice case is rooted in the fact that there is no provision for the plaintiff to discontinue the college expenses for his daughter Katherine after she turns 21

SELECTED TOPICS

Child Support

Education
College Related Expenses of Child of Divorced Parents

Secondary Sources

s 7:26. The add-ons-Educational expenses

1 New York Matrimonial Law and Practice § 7:26

...Under the traditional child support formulation employed by the New York courts, private school and college educational expenses were not regarded as necessary in the absence of "special circumstances...

s 5:33. Elements of child support-Education

1 NY Fam Ct. Law & Prac § 5:33

...The Child Support Standards Act authorizes a court to award educational expenses where the court determines, after regarding the circumstances of the case, the respective parties, and the best interest...

Responsibility of noncustodial divorced parent to pay for, or contribute to, costs of child's college education

99 A.L.R.3d 322 (Originally published in 1980)

...This annotation collects and analyzes the state and federal cases involving the responsibility of a divorced parent who was not given custody over a child of the marriage to pay for, or contribute towa...

See More Secondary Sources

Briefs

Petition for Writ of Certiorari

1992 WL 12074620
Michael J. KUHN, Petitioner, v. Gloria KUHN, Respondent.
Supreme Court of the United States
May 04, 1992

...To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States: Michael J. Kuhn, the petitioner herein, prays that a writ of certiorari issue to review an order o...

JOINT APPENDIX, VOL. I

2015 WL 881797
James Obergefell, et al., and Brittani Henry, et al., Petitioners, v. Richard Hodges, Director, Ohio Department of Health, et al., Respondents. Valeria Tanco, et al., Petitioners, v. William Edward Bill Haslam, Governor of Tennessee, et al., Respondents. Gregory Bourke, et al., and Timothy Love, et al., Petitioners, v. Steve Beshear, Governor of Kentucky, et al., Respondents.
Supreme Court of the United States
Feb. 27, 2015

...FN* Counsel of Record FN* Not admitted in D.C.; supervised by Ropes & Gray partners who are members of the D.C. Bar [Filed: 07/19/13] I, James Obergefell, under 28 U.S.C. §1746, declare under the penal...

Petition for Writ of Certiorari

years of age. It is plaintiff's contention that, while he voluntarily agreed to stipulate payment of his daughter's college tuition, he had been advised by his then attorney (Fox) that he would not be obligated to pay for expenses after his daughter turned 21. (See Dinerman Aff., par. 9, annexed to the Plaintiff's Opposition to the Motion).

Upon Dinerman's failure to pay the college costs after Katherine turned 21 years of age, a motion was brought by Dinerman's spouse to direct Dinerman to pay the college expenses for Katherine, as well as costs related to the operation of the couple's law office, temporary maintenance and other relief. In regard to the aspect of the motion related to the college expenses, Hon. Justice Delores J. Thomas ruled that based on the agreement signed by Dinerman that he "continue to pay 50/50 of his daughter's tuition as set out in the Preliminary Conference Order, is binding upon him". (See Decision of Justice Delores Thomas dated July 6, 2015 annexed to the Motion to Dismiss as Ex. "C").

**2 Justice Thomas also referred, in the Decision, to case law and statutory law which also confers discretion on the Court to award tuition expenses in the absence of an agreement. Justice Thomas, citing *Scanlon v Scanlon*, ruled that the Court may take into consideration various factors such as educational background of the parents, financial ability and ability of the child in determining whether a parent should be compelled to provide college expenses. (See Hon. Thomas Decision, dated July 6, 2015, citing *Scanlon v Scanlon*, 41 Misc3d 1204 (A)[2014]).

The Court has reviewed the decision of Justice Thomas and, based on the well-thought reasoning contained therein, it is this Court's opinion that the decision allows for the possibility (or even likelihood) that Justice Thomas would have ordered Dinerman to bear responsibility for the payment of his daughter Katherine's college expenses until she completed college, regardless of whether Dinerman sought to limit his responsibility for the period ending when his daughter turned 21 years of age. If this possibility exists, it would be impossible to find Dinerman's attorney's action to be the proximate cause of his alleged damages.

In any event, this Court is compelled to dismiss the action grounded in legal malpractice based upon the accepted case law in New York. As argued by defendant's counsel, Dinerman can not establish a prima **3 facie case for legal malpractice without establishing that he sought to appeal the decision of Justice Thomas. (See *Grace v Law*, 24 NY3d 203 [2014]; see also *Buczek v Dell & Little*, 127 AD3d 1121 [2d Dept. 2015]).

This argument is relevant given that the accepted rule is that a parent is not obligated to support a child after the child turns 21 years of age (See Family Court Act sec. 413(1); Social Service Law sec. 101(1); *Bani-Esraili v Lerman*, 69 NY2d 807 [1987]). Based upon the statutory law limiting the obligation to support his child until she turned 21 years of age and the fact that there was nothing explicitly stated as to the cut-off of college obligations when his daughter turned 21 years of age, it is entirely possible that Dinerman would be "likely to succeed" on an appeal of Justice Thomas' decision. Consequently his failure to appeal would bar a legal malpractice claim. (Grace v Law, 24 NY3d at 211). Dinerman can not establish that Fox's alleged negligence proximately caused his damages. (Defendant's Memorandum of Law in Support of Motion to Dismiss, pg. 4).

As to the portion of the motion to dismiss which seeks, inter alia, to dismiss the plaintiff's causes of action for breach of contract and breach of fiduciary duty, those causes of action are clearly duplicative of the cause of action based upon alleged legal malpractice and are dismissed.

Conclusion:

It is this Court's finding that Dinerman can not, as a matter of law, bring a case of legal malpractice against his former attorney due to his failure to appeal the decision of Justice Thomas of which he now complains. In addition, as stated above, there can be no definitive determination that Dinerman would have been able to limit his college expenses for his daughter due to the discretion that the presiding Judge has in a matrimonial action.

It is also troubling to this Court that Dinerman, an attorney, entered into the Preliminary Conference stipulation on false pretenses. The stipulation was silent as to the date of termination of his responsibility for his daughter's college tuition and Dinerman signed it (after admittedly having a discussion with his attorney) with every intention to not comply with its terms after his daughter turned 21 years of age. As a practicing attorney, Dinerman would be expected to make the stipulation reflect a termination date but affirmatively chose not to do so. Regardless of whether his attorney's advice to him was correct, Dinerman

2001 WL 34115491
Dee Ellen Garrison BARDES, Petitioner, v. Samuel Pogue TODD III, Respondent.
Supreme Court of the United States
Aug. 31, 2001

...FN1. For C000055 documents, and docket online go to http:// www.courtclerk.org FN2. Gifted expert, Dr. Bruce Kline, Psy.D., attested that Samuel possesses an 150 I.Q. [WISC-III test], 7/31/97 Exh. L, p...

See More Briefs

signed an agreement which, on its face obligates him to pay 50% of his daughter's entire tuition, yet he did not intend to do so. When the Court (per Justice Thomas) prevented him from ending his payment obligation, he chose to hold his attorney responsible. Dinerman should not be permitted to engage is what appears to be a deceptive practice.

*3 **4 The breach of contract claims and the claims for breach of fiduciary duty contained in the plaintiff's complaint as the "Second" and "Third Claims for Relief ", are hereby dismissed.

The claim of legal malpractice by plaintiff Dinerman set forth is the "First Claim For Relief in the complaint is dismissed.

This shall constitute the decision and order of this Court.

Dated: January 16, 2018

ENTER:

<<signature>>

Bernard J. Graham, JSC

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A Curious Lack of 'Grace' In Legal Malpractice

By **Andrew Lavoott Bluestone**

In 2014, we wrote about a new and unprecedented rule that if an appeal of the case leading to a legal malpractice action was reasonably likely to succeed, that appeal must be taken or the legal malpractice case is waived. *Grace v. Law*, 24 N.Y.3d 203 (2014). This rule was thrust on the legal malpractice bar without any warning when the Court of Appeals granted certiorari on an unpublicized case and rendered a novel decision in a question of first impression. The new rule serves as another unique legal malpractice roadblock in addition to the gateways of "privity," the "successor attorney" rule, the "attorney judgment" rule, the economic damages only rule, the "effectively compelled" settlement rule and the "settlement as waiver" rules. What we did not expect was an almost total lack of case law arising from this new rule. We'll examine the sparse landscape since.

The Appeal Requirement

The Court of Appeals' rule in *Grace* is the natural but unprecedented outcome of the intersection of the requirement to mitigate and an institutional desire to limit legal malpractice cases. In *Grace*, plaintiffs started and lost a medical malpractice case on statute of limitations grounds. They then sued their attorney for legal malpractice. Their claim was that the attorneys waited too long to start the case. The attorneys moved for summary judgment, which was denied in Supreme Court and affirmed by the Third Department. The Court of Appeals then took the occasion to issue a new rule on forfeiture of legal malpractice cases for the failure to take an appeal which was likely to succeed. It wrote:

> We agree that ... prior to commencing a legal malpractice action, a party who is likely to succeed on appeal of the underlying action should be required to press an appeal. However, if the client is not likely to succeed, he or she may bring a legal malpractice action without first pursuing an appeal of the underlying action.
>
> On balance, the likely to succeed standard is the most efficient and fair for all parties. This standard will obviate premature legal malpractice actions by allowing the appellate courts to correct any trial court error and allow attorneys to avoid unnecessary malpractice lawsuits by being given the opportunity to rectify their clients' unfavorable result.

> What we did not expect ... was an almost total lack of case law arising from this new rule.

For the first time in New York jurisprudence, a requirement of taking an appeal which is "likely to succeed" is a now a requirement of legal malpractice. The failure to take an appeal under these circumstances is fatal to the law suit. Previously there was no rule that a plaintiff must undertake an appeal prior to suing their attorney in legal malpractice.

The elements of legal malpractice were up to this point stable and well settled. Time and time again, the Court of Appeals and all of the departments of the Appellate Division had repeated that there were four elements of legal malpractice. The four elements were (1) the attorney failed to exercise the care, skill and diligence commonly possessed by a member of the legal profession; (2) that the attorney's conduct was a proximate cause of the loss sustained; (3) that the plaintiff suffered actual damage as a direct result of the attorney's action or inaction; and (4) that "but for" the attorney's negligence, the plaintiff would have prevailed in the underlying action. *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, 8 N.Y.3d 438 (2007). The most critical element had been that the plaintiff must show that "but for" the attorney's negligence there would have been a better economic outcome. Now, there is an additional unique roadblock.

Against this background, *Grace* considered a per se rule that an appeal must be taken and whether it would force parties to prosecute potentially meritless appeals to their "judicial conclusion" in order to preserve their right to commence a malpractice action. Unnecessary appeals would increase the costs of litigation and overburden the court system, discourage settlements, conflict with plaintiff's duty to mitigate damages and run out the statute of limitations for legal malpractice. It decided on a "likely to succeed" rather than a per se rule.

There has been a very short list of post-*Grace* cases considering how "likely to succeed" an appeal would have been. The newest is *Dinerman v. Fox*, 2018 NY Slip Op 30127 from Judge Bernard Graham of Supreme Court, Kings County with a very straightforward explanation of dismissal:

> In any event, this Court is compelled to dismiss the action ... grounded in legal malpractice ... based upon the accepted case law in New York. As argued by defendant's counsel, Dinerman can not establish a prima facie case for legal malpractice without establishing that he sought to appeal the decision of Justice Thomas. (See *Grace v. Law*, 24 N.Y.3d 203, 997 N.Y.S.2d 334, 21 N.E.3d 995 [2014]; see also *Buczek v. Dell & Little*, 127 A.D.3d 1121, 7 N.Y.S.3d 558 [2d Dept. 2015]).
>
> This argument is relevant given that the accept-

» Page 8

ANDREW LAVOOTT BLUESTONE *is an attorney in Manhattan specializing in legal malpractice litigation. He is an adjunct professor of law at St. John's University School of Law.*

'Grace'

« Continued from page 4

ed rule is that a parent is not obligated to support a child after the child turns 21 years of age (See Family Court Act sec. 413(1); Social Service Law sec. 101(1); *Bani-Esraili v. Lerman*, 69 N.Y.2d 807, 505 N.E.2d 947, 513 N.Y.S.2d 382 [1987]). Based upon the statutory law limiting the obligation to support his child until she turned 21 years of age and the fact that there was nothing explicitly stated as to the cut-off of college obligations when his daughter turned 21 years of age, it is entirely possible that Dinerman would be "likely to succeed" on an appeal of Justice Thomas' decision. Consequently his failure to appeal would bar a legal malpractice claim. (*Grace v. Law*, 24 N.Y.3d at 211). Dinerman cannot establish that Fox's alleged negligence proximately caused his damages.

In *Buczek v. Dell & Little*, 127 A.D.3d 1121 (2d Dept. 2015), plaintiff commenced a medical malpractice action against the attending physicians and the hospital. The case lay dormant for years and then was dismissed due to the attorney's "failure to prosecute" the action. During the medical malpractice action, the attorneys discontinued the case against the hospital but continued against the attending physicians. A legal malpractice case followed. In defending the legal malpractice case, the defendant attorneys argued that the medical malpractice case against the hospital lacked merit under *Mduba v. Benedictine Hosp.*, 52 A.D.2d 450 (3d Dept. 1976) because the hospital staff properly carried out the directions of the attending physicians and did not engage in any independent negligent acts. They argued that their dismissal against the hospital was proper. They admitted that they might be liable for dismissal of the attending physicians, but that the court's decision to dismiss was an error, which could have been cured on appeal. They argued that because no appeal was taken the error was never corrected.

The Second Department agreed that an appeal would have been successful regarding dismissal of the attending physicians because Supreme Court wrongly dismissed the medical malpractice case where no 90-day demand had been served and where the case was not "marked off or stricken from the trial calendar." So, because no appeal of this wrong decision was taken, when it would have been likely to succeed, the legal malpractice case should be dismissed pursuant to *Grace*.

In another post-*Grace* case, *Buckskin Realty v. Greenberg (In re Buckskin Realty* LEXIS 907 (E.D.N court discussed only in passing. Fo tions that "prior to a legal malpractice who is likely to succ of the underlying ac required to press a

In the second po sion, the opposit reached. *Levine v* A.D.3d 1395 (3d De

Our earlier confi 'Grace' has not y

a gas truck spill and gas station owners truck company. Face ery deadlines, plain conducted only a li and then negligent bill of particular cla resulting from the sp any damages for lo or property damag the owners. When summary judgment to the gas truck con gas truck driver pla ers filed Chapter 7 b tions. The trustee took over the case.

Rather than perf on behalf of the ban the trustee comme malpractice action

Matter of Karpati (Raphael N.)
Supreme Court, Kings County
May 19, 2014
62 Misc.3d 784
93 N.Y.S.3d 517
62 Misc.3d 784, 93 N.Y.S.3d 517, 2014 N.Y. Slip Op. 24441

*1 In the Matter of Adam Karpati, M.D., in His Capacity of Director of Community Services of the Department of Health and Mental Hygiene, Petitioner, for an Order Authorizing **Assisted Outpatient Treatment** for Raphael N., Respondent.

Supreme Court, Kings County
300178/2014
May 19, 2014

CITE TITLE AS: Matter of Karpati (Raphael N.)

RESEARCH REFERENCES

Am Jur 2d Mentally Impaired Persons §§ 44, 45, 52–54, 63.

McKinney's, Mental Hygiene Law § 9.60.

NY Jur 2d Infants and Other Persons Under Legal Disability §§ 131, 132, 134, 137.

ANNOTATION REFERENCE

See ALR Index under Incompetent or Insane Persons.

*785 FIND SIMILAR CASES ON THOMSON REUTERS WESTLAW

Path: Home > Cases > New York State & Federal Cases > New York Official Reports

Query: " **assisted outpatient treatment** " & "collateral estoppel"

Mental Hygiene Legal Service (*Sara Rollyson* of counsel) for respondent.
New York City Department of Health and Mental Hygiene (*Jacqueline Orcutt* of counsel) for petitioner.

OPINION OF THE COURT

Bernard J. Graham, J.

The decision/order on this application is as follows:
Decision

The captioned matter was brought by petitioner, Adam Karpati, M.D., in his capacity as Director of Community Services of the Department of Health and Mental Hygiene (hereinafter petitioner or Department of Health), for an order requiring **assisted outpatient treatment** (AOT) for the respondent, Raphael N. The **assisted outpatient treatment** legislation is contained in section 9.60 of the Mental Hygiene Law and was adopted by New York State in 1999. The legislation is commonly known as Kendra's Law.

Respondent, Mr. N., is represented by Mental Hygiene Legal Service (MHLS) by Sara Rotkin, Esq. A motion in limine has been brought by MHLS, on behalf of the respondent, seeking to preclude "any representative of the Petitioner from using collateral estoppel, or introducing into evidence any prior order subjecting Raphael [N.] to **assisted outpatient treatment** either directly, as documentary evidence, or indirectly, through the testimony of any witness, to establish proof of any criteria under MHL 9.60 (c)." (See respondent's notice of mot in limine.)

Petitioner Department of Health opposes the motion and responds that the court may and should consider prior orders issued by the court which made certain findings pertaining to the criteria necessary for issuance of an AOT order and, inter alia, deem those requirements fulfilled by utilizing collateral estoppel principles.

For the reasons set forth below, the court finds that certain elements of section 9.60 of the Mental Hygiene Law that *786 require proof by clear and convincing evidence may be proved by introduction of prior orders issued by the court in earlier AOT proceedings.
Background

There is very little factual dispute concerning the AOT history of Mr. N., the respondent herein. An AOT order was issued by Kings County Supreme Court on two separate occasions for Mr. N. On January 2, 2013, the first AOT petition was brought by Department of Health and a six-month AOT order was granted by Justice Richard Velasquez.

A second AOT order was signed (prior to the expiration of the first order) by Hon. Carl J. Landecino on June 19, 2013, which ordered continued AOT for an additional six months to January 2, 2014.

Both sides have a somewhat different interpretation of the facts at the point that the second AOT order was set to expire. Department of Health claims that it had notified Mr. N. for a medical evaluation on October 29, 2013, for a December 10, 2013 exam. The evaluation was adjourned at the behest of the Department of Health and a second notice, dated December 9, 2013, was sent to Mr. N. for an examination on December 17, 2013. Mr. N. failed to appear on the adjourned date on December 17, 2013. The Department of Health attributes the failure to renew the AOT order in a timely manner to the missed appointment by Mr. N. (*see* aff of Jacqueline Orcutt in opp to the mot ¶ 4).

In the MHLS recitation, MHLS simply states that petitioner Department of Health "chose to allow" the AOT order to expire.

Regardless of the reason for the missed appointments, the inability to renew the AOT order in a timely manner has no bearing on the instant motion. The respective counsel both acknowledge that the order to show cause filed by Department of Health is deemed to be an initial order and not a renewal order.[1]

Having filed an initial order for AOT, the petitioner must prove each of the seven elements set forth in the statute (*see* § 9.60 below). The order to show cause filed by the petitioner **787* was filed on February 5, 2014, after an examination of Mr. N. took place on January 30, 2014. Argument was heard before the undersigned on April 23, 2014.

Issues Presented

The primary focus of this motion is whether collateral estoppel may be used to establish the existence of certain facts which are necessary to obtain an AOT order pursuant to section 9.60 of the Mental Hygiene Law. By the application of collateral estoppel in this instance, the petitioner would be able to offer the findings made in the first AOT order which was granted by Justice Richard Velasquez and avoid the burden of proving the elements in the current proceeding.

Petitioner argues that collateral estoppel is directly on point in this situation as it involves a determination of an issue of fact or law which was reached in a prior proceeding and applying the determination to a different cause of action (the instant proceeding), as the same issue was necessarily raised and decided previously.

The motion in limine brought by respondent MHLS advocates that due process protection of the respondent requires a de novo hearing to establish the existence of the elements of the statute. Furthermore, MHLS argues that a "look-back" is required by the examining psychiatrist to establish each element and consider whether the patient still requires the AOT. Allowing for a current exam by a psychiatrist without establishing the criteria in the new proceeding would amount to "circumventing the statute's testimonial requirements" and, in the opinion of MHLS, collateral estoppel was never intended by the legislature to satisfy the elements of Kendra's Law. (*See* Sara Rotkin aff in support of mot in limine ¶ 35.)

Discussion

Kendra's Law contains seven criteria which must be met for obtaining an AOT order in section 9.60 (c) of the Mental Hygiene Law. The applicable subdivision reads as follows:

> "(c) Criteria. A person may be ordered to receive **assisted outpatient treatment** if the court finds that such person:
>
> "(1) is eighteen years of age or older; and
>
> "(2) is suffering from a mental illness; and
>
> "(3) is unlikely to survive safely in the community without supervision, based on a clinical determination; and
>
> **788* "(4) has a history of lack of compliance with treatment for mental illness that has:
>
> "(i) prior to the filing of the petition, at least twice within the last thirty-six months been a significant factor in necessitating hospitalization in a hospital, or receipt of services in a forensic or other mental health unit of a correctional facility or a local correctional facility, not including any current period, or period ending within the last six months, during which the person was or is hospitalized or incarcerated; or
>
> "(ii) prior to the filing of the petition, resulted in one or more acts of serious violent behavior toward self or others or threats of, or attempts at, serious physical harm to self or others within the last forty-eight months, not including any current period, or period ending within the last six months, in which the person was or is hospitalized or incarcerated; and
>
> "(5) is, as a result of his or her mental illness, unlikely to voluntarily participate in outpatient treatment that would enable him or her to live safely in the community; and
>
> "(6) in view of his or her treatment history and current behavior, is in need of **assisted outpatient treatment** in order to prevent a relapse or deterioration which would be likely to result in serious harm to the person or others as defined in section 9.01 of this article; and
>
> "(7) is likely to benefit from **assisted outpatient treatment** " (Mental Hygiene Law § 9.60 [c]).

It is now well settled that a petitioner must "prove at a court hearing, by clear and convincing evidence, that the patient meets each of the criteria enumerated in Mental Hygiene Law § 9.60 (c)." (*Matter of James D.*, 185 Misc 2d 836, 839 [Sup Ct, Kings County 2000].) There is no dispute on the part of the petitioner that it has the burden of proving the elements listed in the statute. Towards this end the Department of Health has arranged for a psychiatric observation of Mr. N. and will arrange for the testimony of the appropriate doctor at the AOT hearing. Of the above listed criteria, the requirements of section 9.60 (c) (2), (3), (5), (6) and (7) pertain to issues that could only be resolved by the testimony of the examining psychiatrist based on a recent exam. Whether a person is suffering from a *789 mental illness (element 2) or is unlikely to survive safely in the community (element 3) may only be proved with evidence from testimony of a witness based upon recent observation. Similarly the elements (5, 6 and 7) which require the petitioner to prove whether the person will voluntarily comply with medication, whether AOT is needed to prevent a relapse or deterioration of the person, and whether the person is likely to benefit from AOT must be proved at the hearing in which the court will consider the opinion of the examining psychiatrist. [2]

As pointed out in the petitioner's opposition to the motion in limine, the current examination of the respondent must occur no more than 10 days prior to the filing of the AOT petition. It is this examination which functions as a safeguard to ensure that respondent's current condition is taken into consideration by the psychiatrist in forming their opinion. Based upon the requirement of a recent psychiatric examination, it is not realistic that the AOT petition would be granted based upon the past history of the respondent alone. Instead the past history will be *2 weighed together with the observations of the recent exam. It is therefore difficult for the court to envision a denial of Mr. N.'s due process rights as the court will preside over the hearing and the respective counsel will have a full opportunity to advocate for their clients.

Applicability of Collateral Estoppel

The court notes that an AOT order was granted for Mr. N. after a hearing before the Honorable Richard Velasquez on January 2, 2013. Justice Velasquez rendered a determination that Mr. N. was hospitalized on two occasions as a result of noncompliance with mental health treatment. The order of Justice Velasquez was not appealed and neither was the AOT renewal order which was granted by Justice Landecino on June 19, 2013.

The limited purpose of introducing the prior order of Justice Velasquez to establish the respondent's previous noncompliance with mental health treatment is, in this court's opinion, a textbook application of the principle of collateral estoppel.

There is an obvious identity of issue between the earlier hearing and the upcoming hearing as to whether Mr. N. failed to comply with his treatment and was hospitalized. It is also *790 apparent that the issue was decided in the prior action and is decisive of the present action. Furthermore, as required by case law, "there [has] been a full and fair opportunity to contest the decision now said to be controlling." (*Schwartz v Public Adm'r of County of Bronx*, 24 NY2d 65, 71 [1969]; *see also Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481 [1979].)

It can not be said that Mr. N. did not have an opportunity to litigate this issue when it first was presented to Justice Velasquez nor can it be said that the issue (presently before the court) is not identical to the issue resolved in the prior hearing.

The court has considered the argument raised by MHLS on behalf of respondent that the court is required to assess historical evidence of change in a person's psychiatric condition over time (Rotkin aff ¶ 42). To properly accomplish this review, MHLS argues that collateral estoppel should not be available and that the trial court must review the entire history and establish the prior hospitalizations. In support of this position MHLS cites *People ex rel. Leonard HH. v Nixon* (148 AD2d 75 [3d Dept 1989]). A review of the *Nixon* case offers no guidance in the current matter. *Nixon* involved a much different application of collateral estoppel (or the corollary res judicata). The petitioner in *Nixon* was released from a psychiatric facility pursuant to the order of the trial court and within 24 hours the petitioner was picked up and retained as an involuntary admittee. Petitioner's counsel argued that res judicata could be applied in the habeas corpus proceeding to compel the petitioner's release. The Court in *Nixon* rejected the application of res judicata as it would be inappropriate to apply the principle in a habeas corpus matter. The *Nixon* Court correctly surmised that changes in circumstances may result or new evidence may be available which precludes reliance on the earlier determination. The standard for a habeas corpus proceeding is fundamentally different as it involves inpatient retention and the court must concern itself with the person's current psychiatric condition. In the present case, the issue involves assisted outpatient treatment and the application of collateral estoppel to establish only a portion of the elements necessary for an AOT order and the collateral estoppel evidence will not, itself, be the sole criteria in rendering an AOT order.

Neither is the case of *Forcino v Miele* (122 AD2d 191 [2d Dept 1986]), cited by respondent's counsel, a decision which guides this court in the present matter. The Appellate Division rejected collateral estoppel in a situation in which the aggrieved *791 party did not have an opportunity to litigate the issue *and* the prior determination was not decisive of the later action (the application of collateral estoppel was rejected due to the fact that the prior determination granted a conservatorship but did not address the issue of competence [of the person subject to the conservatorship] to execute a power of attorney in the later proceeding) (*see Forcino v Miele*, 122 AD2d 191 [2d Dept 1986]).

Conclusion

The respondent's motion recites the need to protect the person in need of mental health treatment with as few restrictions as possible and the court readily agrees. However, the MHLS insinuation that the court would effectively deny a person the right to hear testimonial evidence leading to "precipitous decisions that unwarrantedly curtail the liberty of those who are subject to AOT petitions" (Rotkin aff in support of mot ¶ 32) is misplaced at best. The reference to cases requiring testimonial evidence at a hearing (*see Matter of Gail R. [Barron]*, 67 AD3d 808 [2d Dept 2009]) are not relevant to the instant matter. It is undisputed that a hearing will occur before any AOT order is contemplated for Mr. N. It is also disingenuous to allege that a respondent would be deprived of a "hearing" when the petitioner seeks to employ collateral estoppel for a limited narrow purpose—to prove whether a person was hospitalized on two or more prior occasions due to noncompliance with mental health treatment. MHLS is fully aware that a hearing will be conducted in this matter and Mr. N. will be afforded due process protection by the court. Further, as stated above, an AOT order will not be granted unless the petitioner produces a psychiatrist to testify and has met the petitioner's burden to prove each of the elements by clear and convincing evidence.

Respondent's claim that the use of collateral estoppel (to establish the prior noncompliance) violates the statutory requirements set forth in Kendra's Law is not supported by the evidence. The applicable statute at section 9.60 (h) provides for a hearing to be conducted as previously mentioned. Paragraph (2) states that

> "[t]he court shall not order **assisted outpatient treatment** unless an examining physician, who recommends **assisted outpatient treatment** and has personally examined the subject of the petition no more than ten days before the filing of the petition, *792 testifies in person at the hearing. Such physician shall state the facts and clinical determinations which support the allegation that the subject of the petition meets each of the criteria for **assisted outpatient treatment**." (Mental Hygiene Law § 9.60 [h] [2].)

The physician is required to meet certain statutory requirements in giving his or her testimony as set forth in paragraph (4) of section 9.60 (h). The paragraph requires as follows:

> "[a] physician who testifies pursuant to paragraph two of this subdivision shall state: (i) the facts which support the allegation that the subject meets each of the criteria for **assisted outpatient treatment**, (ii) that the treatment is the least restrictive alternative, (iii) the recommended **assisted outpatient treatment**, and (iv) the rationale for the recommended **assisted outpatient treatment**." (Mental Hygiene Law § 9.60 [h] [4].)

The statute requires the physician to testify as to the elements stated above, yet, and as pointed out by petitioner's counsel, there is no requirement included by the legislature as to the type of evidence needed to prove the statutory requirement. It is this court's opinion that a prior *3 finding by the court which determined one of the statutory elements needed for the AOT order is sufficient and reliable proof and is compliant with the statute's protections.

Mental Hygiene Legal Service is a zealous advocate for its clients. While the court understands that MHLS seeks to advocate for the rights of persons who may be subject to an AOT order, the tenor of this motion is that the court would be unable to render a fair decision by allowing for the fact that the respondent was previously hospitalized on two occasions. The court believes that the due process rights of Mr. N. can be safeguarded by the court and the spirit of Kendra's Law be complied with by allowing the petitioner to introduce a prior finding by the court that establishes that Mr. N. was hospitalized previously.

The goal of Kendra's Law as stated by the New York State Legislature is to create effective mechanisms for helping mentally ill persons take responsibility for their own care by the establishment of **assisted outpatient treatment** and improved coordination of care for mentally ill persons living in the community (*see* Historical and Statutory Notes, L 1999, ch *793 408 legislation, McKinney's Cons Laws of NY, Book 34A, Mental Hygiene Law § 9.60). It is not apparent to this court that an additional hurdle of again proving that a person was hospitalized for noncompliance with treatment serves the interest of the respondent or the efficacy of the legal process.

For the aforesaid reasons, the motion in limine to preclude the prior findings of the court related to establishing elements of section 9.60 (c) of the Mental Hygiene Law is denied.

Footnotes

1 Had the petition been filed as a renewal order for AOT treatment, the Department of Health would not be required to meet the requirements of section 9.60 (c) (4) (i) and (ii) which necessitate a finding of lack of compliance with mental health treatment resulting in either (i) at least two hospitalizations within a 36-month period; or (ii) one or more acts of serious violent behavior towards self or to others within the prior 48 months.

2 The court has not considered the quantum of proof needed to establish whether Mr. N. is 18 years of age or older (element 1 above), as it is not likely to be a contested issue.

6/22/2022

KINGS | MEDICAL MALPRACTICE

Summary Judgment Improper When Experts Differ in Medical Malpractice Case

Justice
Bernard Graham
Supreme Court

Defendants, a doctor and a medical center, moved to dismiss the medical malpractice complaint against them in light of an earlier decision granting similarly situated defendants' motion for summary judgment under res judicata. In opposition, plaintiff submitted a motion to reargue and renew, asserting that the court overlooked their expert's testimony and incorrectly granted summary judgment. Both parties submitted expert testimony and the experts differed on whether a certain test doctors neglected to conduct would have alerted them to the decedent's renal cancer sooner, improving his treatment options and chances of survival. The court granted plaintiff's motion to reargue, conducting a hearing and reviewing the previous decision. Upon review, the court found that it had erroneously accepted the opinion of defendants' expert witness above plaintiff's. The court vacated its previous decision granting summary judgment finding that the conflicting expert testimonies raised issues of fact for trial.

Estate of Jerry Fernandez v. Wyckoff Hgts. Med. Ctr, 9090/2015 (May 24)

U.S. - SDNY | CRIMINAL LAW

Rational Trier of Fact Could Find Defendant Participated in Two Distinct Conspiracies

District Judge
Mary Kay Vyskocil
Southern District

Following a jury trial, defendant was convicted of two counts of conspiracy to commit drug adulteration and misbranding with intent to defraud. The jury found that defendant participated in two distinct conspiracies in which he manufactured and distributed untestable performance enhancing drugs that would be used to "dope" racehorses and that would evade detection by racing authorities and drug regulators. The first count charged defendant with joining a conspiracy run by a prominent thoroughbred racehorse trainer, while the second count charged defendant with running his own longstanding conspiracy through his business. Defendant moved pursuant to Rule 29 of the Federal Rules of Criminal Procedure for acquittal on the first count, arguing that the first count is multiplicitous of the second count. The court denied defendant's motion, concluding that a rational trier of fact could find, based on the evidence at trial, that the defendant participated in two distinct conspiracies. The court noted, among other things, that the evidence supported the conclusion that there was no significant "interdependence" between the two charged conspiracies.

U.S. v. Fishman, 20-cr-160 (May 31)

Schedule B

List of recent trials with Attorney Information

Judicial Screening Application 2023 Addendum

10 Most Recent Trials Conducted

1. In the Matter of Schmuel Goldstein - Commenced November 14, 2022

   Description: Mental Hygiene Jury Trial

   Attorneys: Respondent: Douglas Stern, Abrams Fensterman PC , Tel: 917-721-6763

   Petitioner: Martine Joseph and Laurie Cartwright – Mental Hygiene Legal Services - Tel: 609-731-6713

2. Natalie Dodd as Administrator v Dr. Keller – Commenced October 28, 2022

   Description: Medical Malpractice Jury Trial

   Attorneys: Plaintiff: Clifford Argentar, Duffy and Duffy , Tel: 301-706-4881

   Defendant: Robert Fein, Marks and O'Neal, Esq.', Tel: 914-646-6012

3. Linda Cooper v Glatt Mart, Inc.- Commenced September 30, 2022

   Description: Personal Injury Jury Trial

   Attorneys: Plaintiff: Robert Rosenberg (of Counsel to Konigsberg Law), Tel: 516-521-9221

   Defendant: Margaret Lundsman, Baxter Smith and Shapiro , Tel: 917-699-4802

4. Arroyo as GAL v Centers for Specialty Care – Commenced August 15, 2022

   Description: Medical Malpractice Jury Trial

   Attorneys: Plaintiff, Vincent Provenzano, Office of Brian Swerling Tel: 347-728-5194

   Defendant, Domingo Galleardo, Tel: 631-974-2530

5. Barbara Grant v Muhammed Al Ihsan - Commenced August 8, 2022

   Description: Summary Jury Trial (PI)

   Attorneys: Plaintiff: Joseph Ferri , Tel: 516-446-7048

   Defendant: Richard Brown, Schahill Law Office, Tel: 917-757-1307

6. Bonilla v Canon – Commenced July 26, 2022

   Description: Personal Injury Jury Trial

   Attorneys: Plaintiff : Dean Deleanitis, Subin and Associates , Tel: 646-797-4673

   Defendant: Joseph Dash, Cheven & Kiely, Tel: 718-288-1147

7. Fiorentino v Zamdborg – Commenced June 14, 2022

   Description: PI Damages Jury Trial

   Attorneys: Plaintiff : Mariel Crippen, Burns and Harris Esq.'s , Tel: 212-393-1000

   Defendant: Charles Marchello, James Butler and Assoc's , Tel: 516-497-6100

8. Ellis v Rahman – Commenced May 31, 2022

   Description: Personal Injury Jury Trial

   Attorneys: Plaintiff: Malik Anderson , Saco and Fillas , Tel: (O) 718-269-2235 © 678-637-0187

   Defendant: Dina Predergast (of Counsel Baker and McAvoy), Tel: 917-576-8405

9. Ioffe v The City of New York - Commenced March 14, 2022

   Description: Personal Injury Jury Trial

   Attorneys: Plaintiff: Jonathan Panarella , Krenzel and Guzman , Tel: 212-227-2900

   Defendant: Erin Berry , Corporation Counsel , Tel: 646-951-6419

10. Cynamon v Mt. Sinai - Commenced February 15, 2022

    Description: Medical Malpractice Jury Trial

    Attorneys: Plaintiff: Evan Torgan, Torgan and Cooper , Tel: 212-232-2500

    Defendant: Robin Gregory , Wilson Elser, Esq.'s , Tel: 212-490-3000

Schedule C

Bernard J. Graham Bio
Kings County Democratic Party Screening Application

Bernard J. Graham (Bio)

Justice Bernard Graham was born and raised in Brooklyn. Justice Graham has served as a New York State Judge for seventeen years, first as an elected Civil Court Judge, then as a Family Court Judge and then as a New York State Supreme Court Justice as of 2013. On January 3, 2023 Justice Graham was chosen as Acting Surrogate Judge of the Brooklyn Surrogate's Court.

Bernard Graham attended Brooklyn public schools and attended Stuyvesant High School in the 1970's, He attended the State University of New York at Stony Brook and then obtained a JD degree from Brooklyn Law School in 1985 where he had served as the Student Bar Association President.

After attending Brooklyn Law School Bernard Graham was hired as an associate at the firm of Certilman Haft Lebow Balin Buckley & Kremer, practicing real estate development law and co-op and condominium law. In 1989 Bernard Graham founded the Park Slope law firm of Graham & Graham with his mother, Nancy Graham. In addition to representing local residents in probate, real estate and general civil matters, Bernard Graham served as legal counsel to several churches, youth organizations and charities.

Bernard Graham has presided in a wide variety of cases throughout his judicial career. He is proud of his years of service in Family Court where he handled hundreds of difficult custody and visitation cases. In the Kings County Supreme Court Judge Graham has presided in the Mental Hygiene Part in 2014 where he conducted hearings involving involuntary commitment to hospitals due to mental illness and related matters. Judge Graham was assigned to an IAS Trial Part in 2015 to preside over civil jury trials of personal injury cases involving construction accidents, automobile accidents, cases against New York City and commercial matters. Justice Graham currently handles a medical malpractice part in the Supreme Court and has a full calendar of motions and trials.

Each year Justice Graham mentors law school or college student interns who join his Chambers staff and students participate in case conferencing, legal research and observing jury trials. Justice Graham has also spoken at local public schools about the legal profession and has enjoyed meeting with community groups to discuss the law and legal issues. In the recent past, Judge Graham has lectured at CLE gatherings for the Columbian Lawyers and for the Bay Ridge Lawyers. Justice Graham has also participated in mentorship of law students through the Brooklyn Bar Association and currently is a member of the Medical Malpractice Committee of the New York State Bar Association.

Bernard Graham is honored to have received the Brooklyn Bar Association Judiciary Award in 2017. Other awards received by Bernard Graham are the James Brennan Community Service Award as well as the Judiciary Award from the Brehon Law Society and the Catholic Lawyers' Guild Judiciary Award. Judge Graham has been recognized by the Irish American Parade Committee and he has received the President's Award from the Park Slope Civic Council. Bernard Graham is also a member of the Friendly Sons of St. Patrick, the Brooklyn Bar Association and has served as the president of the Prospect Park YMCA and the Park Slope Civic Council.

As President of the Park Slope Civic Council Bernard Graham arranged for the conversion of the Park Slope Armory to include a recreational facility managed by the YMCA of New York.

Justice Graham is married to Rosemary Quinn Graham, an elementary school teacher. They are the proud parents of Brendan, Alexandra and Aidan.

To: Tali N.
From Judge Graham
Resending Questionnaire
with Signatures

Judicial Screening Committee
Kings County Democratic Party

2022-2023 Questionnaire for Civil Court, Supreme Court and Surrogates Court

This questionnaire must be completed by all candidates before consideration of their candidacy can commence. Unless otherwise indicated, every question must be answered, even if the answer is negative or an indication that the question is inapplicable.

At the candidate's request, this questionnaire will also be provided in an electronic form formatted in Word or WordPerfect to facilitate completion without resorting to supplying answers on separate sheets where the space provided is insufficient. If the candidate chooses not to avail him or herself of the electronic format and the space provided is insufficient for a complete answer, please complete the answer on a separate sheet(s) attached to the questionnaire.

The Committee requires that if you change your address or telephone number, or if anything occurs which would affect your answers to this questionnaire, the Committee should be promptly notified. Please attach the following:

1. In the event you are a sitting Judge, please provide copies of all financial disclosure forms or statements filed with any Federal, State or City entity, including but not limited to financial disclosures filed with the OCA, New York State Ethics Commission or any other governmental entity.

2. Copies of any applications submitted to any Judicial Screening Selection Committee for the last 3 years, *other than your previous submissions to this committee*. Only the applications and answers are required, exhibits need not be provided. Scanned copies on CD are acceptable.

3. Please indicate whether you are applying for **Civil Court, Supreme Court, and/or Surrogates Court**?

PLEASE EXECUTE THE WAIVERS ON THE LAST TWO PAGES OF QUESTIONNAIRE.

Please be advised that all information provided will be kept strictly confidential.
Due to the pandemic, you must provide a pdf copy of the completed questionnaire no later than **NOVEMBER 30, 2022** to: tali@edelmanpc.com

1. Please indicate whether you are applying for the Civil Court, the Supreme Court and/or Surrogates Court :

   Surrogate's Court Kings County

2. Full name: __Bernard J. Graham

   (If you have ever used or been known by any other name, State that name):____NA_____

3. Office address:

   ___Surrogate's Court Kings County, 2 Johnson Street, Brooklyn, N.Y. 11201

4. Present residence:

   535 Ninth Street. Brooklyn, New York 11215

5. List other residences you have had within the past five years, including temporary residences, and dates:

   _____105 S. Midway Road, Shelter Island NY 11964 (summer home)

   _____
   _____
   _____
   _____
   _____

6. Telephone numbers and email address where you may be reached:

   Cell 347-276-3502; Office 347-404-9650
   Email – Grahamassoc@aol.com

   Date and place of birth:

   August 23, 1960. Brooklyn, New York

   (In the event you were not born in the United States, please submit evidence of United States citizenship)_____

7. Present position or occupation:

   __Elected Supreme Court Justice. Currently serving as Acting Surrogate Judge, Kings County as of January 3, 2023

8. Have you been engaged in any occupation, business or profession other than the practice of law, since the date you were admitted to the Bar?

   No

(a) If so, give details, including dates, and the circumstances under which you ceased to be so engaged:

NA

(b) In the event that the occupation, business or profession in which you were engaged was owned by you alone, or owned by you with others, directly or indirectly, state the names and present addresses of any of those who shared the ownership, and state whether or not there are unpaid debts or claims with respect to the conduct of that occupation, business or profession:

NA

9. If you are married, in a civil union or a domestic partnership whether formalized or not, state the date when this was entered into and the full name and occupation of your spouse:
Married September 9, 1989
Spouse – Rosemary Quinn Graham, Elementary School Teacher

10. List all colleges and professional schools (other than law schools) ever attended; include degrees received, class standing if known, honors, and indicate the month and year of beginning and ending of periods of attendance. If a degree was not received, state the reason, and state the nature of the course of study pursued:

Undergraduate degree obtained from SUNY Stony Brook. BS degree received 1981. Attended September 1977 to June 1981

A. List all law schools attended, giving the same information requested above:
Brooklyn Law School JD degree. Attended Sept. 1983 to June 1985

B. Date you were admitted to the Bar in New York
1986

C. List any other jurisdictions you are admitted to including all Federal and State Courts and the dates of admission- NA

11. A. List any post-law school education and the degrees if any awarded

Description of Course	Date	Sponsor
None		

B. List all continuing legal education courses which you have participated in either by lecturing or attending within the past four years

___Presented CLE to Bay Ridge Lawyers in Atlantic City Feb. 2018

Presented CLE to Bay Ridge Lawyers, Brooklyn, November 2022

Attended Monthly Columbian Lawyers of Brooklyn CLE's attended monthly 2019-2022

Presented CLE to Defense Assoc of New York (DANY) on topic of Bad Faith litigation – May, 2021

Number of Hours
Approx 60 hours

12. Have you been in continuous compliance with the registration requirements for Attorneys in the State of New York since your admission to the bar?

YES_X___ NO_____ if no please describe the circumstances.

13. Have you been in continuous compliance for the registration requirements for the other jurisdictions you have been admitted to since your admission to that Bar. Yes___ No ____ if no, please describe the circumstances.

NA

14. Are you registered to vote?

Yes __x__
No ____

15. If yes, in what county? ___Kings County_____

16. What, if any, is your party enrollment?

_____Democrat_____

17. Over the past five years have you consistently voted in primary (Y) (N) and general (Y) (N) elections? If no, please explain.

I have voted consistently in both primary and general elections.

18. Are you a member of any political club, association or organization?

A. If so, please identify and list any offices held during the past five years?

_____No_____

19. Have you been elected (including election as a result of an uncontested primary election) to any public office or have attained any position in any political party and if so please identify the offices or positions that you have held and dates you have held such office(s) or position(s)?

____Elected to Civil Court 1994; Elected to Supreme Court 2013

20. If you have served in the Armed Forces, including the Reserves or the National Guard, state the date of entry into and discharge from the service, nature and type of discharge, rank at the time of entry and discharge, and state any award or citations you received:

_____NA_____

21. Are you now an officer or director or otherwise engaged in the management of any enterprise or charitable organization?

(a) If so, give details, including name, dates, nature of business and description:

NA

(b) Is it your intention to resign each such position and withdraw from participation in the management of any such enterprise, if you are nominated and confirmed?

Yes ____
No ____

If not, state the reasons:

NA

22. List in chronological order the time and location of every place you have practiced law, and the nature of your practice since your first admission to the Bar. If you have practiced in partnership with others, include the partnership name(s) and address (es):

1987-1988 Gelbwaks and Pollack, 299 Broadway, NY NY
Real Estate Law Practice, Associate Position

1988-1990 Certilman Haft Lebow Balin and Buckley, 805 Third Avenue; Litigation and Real Estate Practice, Associate Position

1991 – 2004 Graham and Graham, 363 Sixth Avenue Brooklyn NY, General Law Practice. Real Estate, Wills and Probate. Partner

23. List areas of the law in which you have specialized, and the periods during which you have conducted each specialty:

_____Real Estate, Will Drafting, Co-op and Condo Conversions, Probate, General Practice 1991-2005

26. a) If you are an **attorney,** state the number of cases you have tried to conclusion in courts of record in the past five (5) years, indicating whether you were sole, associate, or chief counsel. Provide the name, a brief description of each case listed, and the court in which the case was tried. Give the citations of any reported cases. If you participated in the trials noted above as an **attorney,** provide the names, current addresses and telephone numbers of your adversaries, the name of the judge, and the approximate date the trial ended for all cases within the past five (5) years. If you have participated in more than 15 trials over the past five (5) years, list only the 10 most recent trials.

b) If you presided as a **Judge**, include ten (10) most recent trials within the past five (5) years. Also, provide the names of all lawyers and contact information and two (2) recent written opinions whether published or not and (2) published in Supreme/Civil Court if possible. (copies of all opinions should be annexed)

c) If you are a **Court attorney** please provide the last ten (10) conferences that you have participated in any substantial manner. Please provide with us with all names, addresses of the attorneys and contact information along with the names of the cases.

CAUTION

Do not "cherry-pick" the names of the cases or provide a list of recommendations. Please provide only the information requested. A failure to follow this instruction may result in a finding that you have not cooperated with the application procedures and may lead to negative rating by the Committee.

____See Trial List (Schedule A) and Written Decision List (Schedule B) Attached_

27. If you have appeared in the Appellate Court as a **lawyer**, state the number of appeals you have been involved with in the past five (5) years, indicating whether you were sole, associate, or chief counsel.
Provide the name, a brief description of each appeal listed, and the court to which the appeal was taken and legal citations. Provide the name, current addresses and telephone numbers of your adversaries.
If you have presided as an appellate Judge, provide the names and dates or the cases, current addresses and telephone numbers of the attorneys appearing who argued the appeal. Please limit this request to those decisions in which you have been the primary author in a past (5) five years.

NA

28. In the event that you have been a practicing lawyer at any time within the last five years, answer the following:

(a) Did you appear in Court regularly, occasionally or not at all?

NA

If the frequency of your appearances in Court varied during this period, explain the variance.

(b) Describe your litigation practice during the last five years, indicating what percentage was civil or criminal, or attributable to a more specific type of case, such as Personal Injury, Landlord and Tenant, Securities, and the like. Give as much detail as is necessary for an understanding of the nature of your litigation practice during the said five-year period:

NA

(c) What percentage of your appearances in the last five (5) years were in:
New York Court of Appeals,
Supreme Court of the State of New York and/or Civil Court of the City of New York (Including Appellate Divisions) %_____ other courts of record %_____ Administrative bodies %_____ Federal Court %_____
Other %_____

29. Summarize your experience in Court prior to the last five years, in comparison to your answer with respect to the last five years:

NA

In the event you have not appeared in court within the last five years, please provide us with a detailed answer as to your work history within that five-year period (e.g.: managing partner, supervising associates, etc.). Kindly list your prior litigation experience in detail.

30. If you have been a practicing lawyer within the last five years, but only a transactional lawyer whose practice did not require or need you to appear in Court on a regular basis or at all, on a separate sheet please list the 10 most important matters that you worked on and a brief description of them and please include the names and contact information of the attorneys you worked with on these matters including any and all supervising attorneys and the attorneys who represented the other parties involved.

NA

31. If your practice within the last five years was mainly a transactional practice as described above and you do not work for a government agency, with your client's permission the committee may wish to contact some clients if that permission is granted.
Please list the names and contact information of any client whom the committee may contact.

NA

32. If you have worked for any organization in the past 10 years and your legal duties consisted of either being a legal advisor or compliance officer, please list all positions you have held and the names and current contact information of your

immediate supervisor(s) who is/are intimately familiar with your work. If applicable, please provide at the names of at least three supervisors and current contact information.

NA

33. List each judicial office you have held, including dates in office, and any specific functions you had been assigned within the particular Court:

Elected Civil Court Judge served 2005-2007 in Civil Court Kings Co.
Volunteered for Family Court Assignment - served 2008-2010
Assigned to Supreme Court Civil Term 2011 as Acting Supreme Court Justice 2011-2013
Elected Supreme Court Justice 2013. - Served as Civil Supreme Court Justice 2013 to Present
Assigned to Surrogate's Court as Acting Surrogate Court Judge January 3, 2023 to present

34. List other experience or positions of a judicial nature, such as arbitrator, mediator, law clerk, and the like, giving dates and explanatory details:

NA

35. List each public position you have held, other than a judicial nature, giving dates and explanatory detail:

NA

36. List any teaching position you have held, including part-time or occasional, with dates and a description of the subject matter and educational institution or sponsor:

NA

37. List all bar associations, other professional societies and community organizations of any kind of which you are or have been a member, and give the titles and dates of any office, chairmanship or committee membership which you have held:

Brooklyn Bar Association
Brehon Law Society
Columbian Lawyers of Brooklyn
Catholic Lawyers Association

Member of All Above Organizations from 2005-Present

38. List any other organizations of which you are or have been a member, including social or fraternal, and give the titles and dates of any office, chairmanship or committee membership which you have held:

Friendly Sons of St. Patrick of Brooklyn, member 1995-Present
Park Slope Civic Council, President, 2001 to 2004
Prospect Park YMCA, Board Chair, 2000 to 20004

39. If you have answered the previous question in the affirmative, do any of these organizations, associations, or clubs restrict their membership on the basis of gender, race, religion, national origin, sexual orientation, or physical limitations. If the answer is yes, please describe the restrictions.

NA

40. Describe any executive or administrative experience you have had, whether through your occupation or otherwise, giving details and dates:

NA

41. Annex copies of at least five examples of any legal writings be it legal decisions, articles, books, briefs, or memorandums which are representative of your legal abilities.

See Decisions Attached as Schedule B

42. If you are a sitting Judge and have been reversed or had decisions modified by a higher Court, please provide a list of all such decisions. Please annex a copy of any decision in the last 5 years which have been reversed or modified. If no decision has been reversed or modified on appeal, please provide copies of the decisions which have been affirmed in the last five (5) years. If none of your decisions have been appealed, please so indicate.

See Schedule C Attached of Appellate Division Modifications/
Reversals in past 5 Years

43. If you are a sitting Judge, list all cases that have come before you in which a litigant has requested that you recuse yourself or which you have recused yourself sua sponte, and explain the circumstances of the request or sua sponte recusal.

_____I had recused myself in one Civil Court Case involving Tarzian Hardware -where I had been employed as a teenager

_____I had recused myself in a Supreme Court automobile case in which a Park Slope neighbor was the plaintiff.

_____I have not recused myself in any other cases.

44.

It is expected that a judge and other public officials shall not, by words or conduct, manifest or appear to condone bias or prejudice, including but not limited to bias or prejudice based upon age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status, socioeconomic status, alienage or citizenship status and shall require staff, court officials and others subject to his or her direction and control to refrain from such words or conduct. Will you be able to meet this expectation?

Yes__X__No____

45.

Has any complaint been filed or otherwise brought to your attention which involved issues concerning insensitivity to issues involving any of the above in question 44?

Yes____ No__X__

If you answered yes, please describe in detail the circumstances and any resolution that may have been reached.

46. If you are a sitting Judge in any Court, have you ever held a lawyer in contempt?

Yes____ No__X__

If yes, please list the number of times you have done so, the names and the addresses of the lawyers involved, the circumstances of the contempt, the fines you levied or imposed and the outcome of any appeal taken by the lawyer.

47. A judge may be required to handle emergency applications, cope with media scrutiny, issue quick decisions, deal with fractious litigants, recall significant mounts of information, and otherwise respond to extremely stressful situations. Can you describe briefly how you would handle such situations .

I have had extensive experience with contentious litigants in Family Court, including media scrutiny. I handle each matter professionally and appropriately. I am able to have litigants act appropriately by admonishing and possibly adjourning the proceeding. I do not lose my temper or shout or act emotionally.

48. Has an employer or supervisor or Administrative Judge ever counseled or expressed concern about, your absenteeism or failure to meet expected deadlines or other productivity expectations?

Yes____ No__X___

If yes, please describe:

49. If you are presently a Judge, can you detail whether or not your decisions on motions have been issued within the time frame set by either OCA or your administrative Judge and if not please detail the percentage of motions that are not in compliance and detail the circumstances that have prevented you from complying with the set time frames.

My staff and I have always issued decisions within the time frame set by OCA

50. If you are presently a Judge who handles trials, can you detail the average time to render decisions in post-trial motions.

All post trial decisions are rendered within 60 days

51. List all interviews you have given to newspapers, magazines, or other publications, radio, or television stations or programs broadcasted over the internet and provide the dates of and subject matter of such interviews

NA

52. Do you engage in TWITTER, LINKEDIN, FACEBOOK, INSTAGRAM or other similar public communication platforms?

No

53. What is the name(s) that you use when you use any of these platforms?

NA

54. What subjects have you Tweeted, Instagrammed, or Facebooked about?

NA

55. Do you have a following on any of these platforms?

NA

56. Do you give permission to member(s) of the committee to view/investigate the "public" aspect of your social media platform?

Yes

57. Are you now, or have you ever been, the subject of any formal complaint or charge filed with any disciplinary committee court, government agency or bar association arising out of your official or professional responsibilities during the course of your:

(a) law practice? Yes____ No _X__

(b) public or judicial service? Yes ____No_X___

(c) If yes, please describe each complaint or charge

(d) If the complaint or charge has been resolved please detail its outcome, including whether the governmental agency or other entity, with whom such complaint or charge was filed,

censured you, issued a caution, imposed a sanction or took any other action whatsoever criticizing your conduct, even if the complaint or charge was dismissed:

(e) If the complaint is not resolved as of today and it is still pending please include a detailed statement of what proceedings have taken place so far, if at all, and when if you know you expect a decision on the complaint or charge.

NA

58. Have you ever been investigated , disciplined, cited, admonished or cautioned for a breach of ethics or unprofessional conduct by any court, administrative agency, bar association, or other professional group, or without regard to the outcome, to your knowledge, has there ever been a complaint preferred against you with or by any court, administrative agency, bar association, or other professional group?

Yes___ No_X__ If so, give the particulars.

59. To your knowledge, have you ever been the subject of an investigation by any person or private or public entity concerning any possible misconduct, incompetence, unsatisfactory performance of duty, or violation of law?

Yes___ No_X___ If yes, give particulars.

60. Have you, to your knowledge, ever been found not qualified for any public position by any court, administrative agency, bar association or other professional group?

Yes___ No_X__ If yes, give particulars.

61. Have you ever been disciplined or terminated by or because of possible termination resigned from any public or private employer, law firm or any other entity because of any misconduct, incompetence or unsatisfactory performance in any respect?

Yes___ No_X__ If yes, give particulars.

62. Have you ever resigned from, or for other reasons, ceased to be a member of the bar or bench of any state or court in any jurisdiction, a member of any governmental body, a hearing officer or an occupant of any similar position?

Yes___ No_X__ If so, give particulars.

63. Have you filed appropriate tax returns as required by Federal, State, Local, and other Government authorities in a timely fashion whether by April 15 or by timely filed extensions

Yes___ No_X__ If no, explain

___I have always filed Federal State and Local Tax returns in a timely with the exception of tax year 2020 which was filed late due to my Accountant suffering from a mental breakdown. I had submitted an estimated tax payment when I realized the accountant was not able to file the taxes. I was able to have the IRS agree to void the penalty they had assessed (for late payment) based on my appeal which showed I made a good faith attempt to file and pay my taxes.

64. State whether you have ever:

a) been summoned, arrested, or taken into custody, indicted, or convicted, tried or charged with or pleaded guilty to the violation of any law, ordinance or in the commission of any felony, misdemeanor, or contempt of court, or been requested to appear before any prosecuting or investigative agency in any matter, other than traffic offenses?

Yes_X__ No____ If yes, please give the particulars:

_____In 1978 I received a summons for trespassing at Stony Brook University (where I was a student) for walking in school building after hours. The case was Adjourned in Contemplation of Dismissal (ACOD) and the case was sealed

b) Failed to answer on the return date any ticket, summons or other legal process served upon you personally at any time?

Yes ___ No_X___

If so, was any warrant, subpoena, or further process issued against you as a result of your failure to respond to legal process?

Yes ____

No __X___

If yes, please give the particulars:

c) As a member of any armed forces, been the subject of any charges or complaints, formal or informal, or have any proceedings been instituted against you, or have you been a defendant in any Court Martial proceeding or otherwise disciplined?

Yes___
No____

Not applicable__X___

If yes, Please give the particulars:

d) Been declared a ward of any Court, or adjudged an incompetent, or have any proceedings been brought to have you declared a ward of any Court or been adjudged incompetent in the past?

Yes ____
No _X____

If the answer is yes, please provide the details:

e) Have you received treatment for or in the past been committed to any institution for the care of persons suffering from mental or nervous disorders or drug addiction or alcoholism?

Yes ___
No_X__

If yes, please provide the details:

f) Been a Plaintiff or Defendant in a lawsuit of any kind?

If your answer is Yes to any subdivision above, on a separate sheet, state all facts in full detail and in each case, give name and locality of any court or agency, dates of beginning and termination of action or proceeding, and the judgment or other disposition.

No

65. (a) Are there any unsatisfied judgments against you?

If so, list the same giving name and address of the judgment creditor and the court by which judgment was rendered, together with the date(s) and the amount(s) thereof and the nature of the claim upon which it was based:

No

(b) Are you in default in the performance or discharge of any duty or obligation imposed upon you by any governmental agency or decree or order of any court including alimony and support Orders and Decrees?

Yes_____ No____

If so, state the facts in detail:

(c) Have you ever made an assignment for the benefit of any creditors?

Yes_____
No___X___

(d) Has any petition for bankruptcy ever been filed by or against you?

Yes_____
No___X__

If so, state the facts in detail:

66. (a) What is the present state of your health?

_____Very Good_____

(b) Have you in the past ten years:

been hospitalized due to injury or illness:

Yes_____
No__No____

(i) been prevented from working due to injury or illness or otherwise incapacitated for a period in excess of ten days?

Yes_____
No__No____

If so, give the particulars, including the causes, the dates, the places of confinement, and the present status of the condition which caused the confinement or the incapacitation:

(ii) Have you had any hospital confinement, mental illness, serious physical illness, or drug or alcohol addiction during the past ten (10) years?

Yes___ No___

If yes, explain and provide the name, address and telephone number of your attending physician(s), and all hospitals and other institutions to which you were admitted and the date(s) of each hospitalization.

(iv) Are you presently receiving or contemplating receiving treatment for a physical or mental illness or condition, or for drug or alcohol addiction? Yes ___ No_X___ If so, please give details.

(c) Do you suffer from any physical or mental impairment or other physical handicap that would impede your performance as a Judge, or if you would need any aides or additional help to properly perform your job.

Yes_____
No__X___

If so, give details:

(d) Are you currently under treatment for an illness or physical condition which may impede your ability to carry out your judicial functions?

Yes _____
No _X_____

If so, give details:

67. Do you currently use or have in the past used any illegal drugs, abused alcohol, or abused any prescription drugs?

Yes ____ No _X___

If yes, please describe the circumstances and any treatment or counseling you may have received:

68. Are you presently, or have been in the past, an officer or director or acted in any capacity or have or had any relationship whatsoever including but not limited to providing legal services for or to any corporation or institution be it a profit or not for profit corporation, hospital, or professional association?

Yes____No _X___

If yes, please supply complete details including all dates of service or association:

(a) Have you ever been issued a license other than a marriage license, license to practice law, license as a notary public, a driver's license or a realtor's license

Yes_X___ No_____

If yes, please describe the license, and list the dates of its initial issuance and its last renewal:

Fishing License, Town of Shelter Island 2010-2022

69. Has any license, including a license to practice law, a license as a notary public, a driver's license or a realtor's ever been revoked or suspended? Yes___ No X_ If yes, please describe the circumstances:

70. Have you ever resigned from a position as, or for other reasons, ceased to be a member of a governmental body, a hearing officer or magistrate or any similar position?

Yes____ No_X___

If yes, please describe the circumstances:

71. Are you now, or have you ever been the subject of any claim of malpractice, in an action or otherwise?

Yes_____ No_X__

If so, please describe the circumstances:

72. Have you, your firm, your employer or any of your clients ever been cited for contempt or otherwise had sanctions imposed upon you or them as a result of your conduct in any judicial or administrative proceeding?

Yes____ No__X

If yes, please describe, even if the citation or sanction was later withdrawn, suspended or modified.

73. A judge is expected to be on the bench or otherwise handling legal matters by about 9:30 A.M. for at least seven hours per day, five days per week, and at times, a Judge's responsibilities may require him or her to be on the bench or at work into

the evenings and on weekends. Are you able to perform these tasks on your own or with reasonable accommodation?

Yes_X__ No____

If no, please describe the circumstances:

74. Describe any significant community activities in which you have engaged:

____I have served as the President of the Park Slope Civic Council from 2001 to 2004 and I served as the Chairperson of the Prospect Park YMCA between1999 to 2002

75. Have you written articles for publication? Yes___ No_X____

If yes, please give the name and date of the publication and the title of each article:

76. Have you had any teaching experience in law or related fields?
Yes____
No_X___

If yes, please describe:

77. Have your qualifications been reviewed by **this** committee?
Yes_X___

No____

If yes, please list the years and determination of the committee even if you have withdrawn your application to avoid publication.
_____I was interviewed for the Judicial Screening when I was a candidate for the 2004 Civil Court election (approved) and I was interviewed by the Judicial Screening Committee when I was a candidate for Supreme Court in 2009 (approved)

78. Have your qualifications for public office previously been reviewed by any other committee or other professional association?
Yes_X__ No___

If yes, please identify the organization, state the date of the review, and detail all findings by the organization:

____I was interviewed by LEGAl in connection with my candidacy for Supreme Court in 2009 (approved)

_____

_____

79. (a) If you are seeking elective office, do you subscribe, and have adhered to the campaign guidelines established for judicial candidates by the New York State Bar Association (published in the New York State Bar Association Journal; Committee on Professional Ethics Opinion No. 289, dated April 27, 1973?

Yes_X__
No___
Not Applicable.____

If you answered this question in the negative, please explain:

_____

_____

_____

_____

_____

(b) If you are seeking elective office, have you, or anyone on your behalf, issued any campaign literature concerning the election in which you are a candidate?
Yes____ No_X__ If yes, please attach copies.

(c) If you are seeking elective office, have you read the rules of the Chief Administrative Judge relating to inappropriate political activity by a judge or a candidate for public election to judicial office(22 NYCRR 100.5)? Yes_X___ No____

(d) Have you complied with the rules mentioned in (c) above?

Yes_X___ No___

(e) If you are seeking elective office, please provide copies of campaign expenditure reports, if available.

80. Are you related by blood, marriage or other partnership or civil union relationship to any member of the Committee who will review this application?

Yes____ No _X___

If so, give their names.

_____
_____
_____
_____
_____

81. Has any member of the Committee ever represented you or any family member?

Yes_____ No_X___

If yes please give details of such representation.

_____
_____
_____
_____
_____

82. List any office, trusteeship, directorship, partnership or position of any nature, whether compensated or not, held by the reporting individual with any firm, corporation, association, partnership, or other organization other than the State of New York. Include compensated honorary positions; do NOT list membership or uncompensated honorary positions. If the listed entity was licensed by any state or local agency, was regulated by any state regulatory agency or local agency, or, as a regular and significant part of the business or activity of said entity, did business with, or had matters other than ministerial before, any state or local agency, list the name of any such agency.

X___ None

Position	Organization	State or Local Agency

83. If you, your spouse, domestic partner or unemancipated child was engaged in any occupation, employment, trade, business or profession which activity was licensed by any state or local agency, was regulated by any state regulatory agency or local agency, or as a regular and significant part of the business or activity of said entity, did business with, or had matters other than ministerial matters before, any state or local agency, list the name, address and description of such occupation, employment, trade, business or profession and the name of any such agency.
___ None

Self, Spouse/Partner,Child	Entity which Held Interest in Contract	Relationship to Entity and Interest in Contract	Contracting State or Local Agency
____Spouse, Rosemary Graham, is an elementary school teacher and licensed by the Department of Education of the City of New York__			

84. List any interest, in EXCESS of $1,000, held by the reporting individual, such as individual's spouse, domestic partner or unemancipated child of which any such person is a member, or corporation, 10% or more of the stock of which is owned or controlled by any such person, whether vested or contingent, in any contract made or executed by a state or local agency and include the name of the entity and the interest in such contract. Do NOT include bonds and notes. Do NOT list any interest in any such contract on which final payment has been made and all obligations under the contract except for guarantees and warranties have been performed, provided, however, that such an interest must be listed if there has been an ongoing dispute during the calendar year for which this statement is filed with respect to any such guarantees or warranties. Do NOT list any interest in a contract made or executed by a local agency after public notice and pursuant to a process for competitive bidding or a process for competitive requests for proposals. __X__None

Self, Spouse/Partner, Child	Entity which Held Interest in Contract	Relationship to Entity and Interest in Contract	Contracting State or Local Agency

85. State any additional education or other experiences you believe would assist you in holding judicial office:

None

86. (a) Set forth any information not otherwise elicited by this application which would effect favorably or unfavorably, your eligibility for the office for which you are a candidate or in any way may bear upon consideration of your candidacy:

None

(b) State any pertinent information reflecting positively or adversely on you which you believe should be disclosed to this Committee in connection with your possible nomination Judicial office.

I have served as a judge of the Civil Court for 3 years, I have served as a Family Court Judge for 3 years, I have served as an Acting Supreme Court Judge for three years and as an elected Supreme Court Justice for the past 8 years.

I have presided over a wide variety of legal matters and I have volunteered for very demanding assignments during the course of my career, including as a judge in the Family Court Custody Visitation and Family Offense part and Mental Hygiene part in Supreme Court.

I have extensive trial experience including presiding over Medical Malpractice part.

I have never had a trial verdict reversed by an appellate court for error On my part or any other reason.

(c) Is there anything in your personal or professional background that, if publicly known, could be viewed as embarrassing either to you personally or this committee or to the judiciary? Yes____ No _X____
If yes, give particulars.

87. State any achievements or actions you have accomplished, demonstrating your professional abilities and or your commitment to equal justice under the law:

I received the Brooklyn Bar Association Justice of the Year Award in 2018

88. Briefly state why you believe you are qualified for the Judicial position you seek.

In my career as a practitioner I represented clients in Surrogate Court matters and I have drafted and executed very many wills during my private practice. As a judge, my extensive experience over 17 years in different courts gives me an ability to handle various matters and resolve difficult cases. My legal ability will be well suited to presiding in Surrogate's Court.

WAIVER

STATE OF NEW YORK)
) ss.
COUNTY OF NEW YORK)

I, Bernard J. Graham hereby waive the privilege or privacy and confidentiality including, without limitation, any confidentiality under Section 90 of the Judiciary Law, with respect to any information which concerns me and is known, recorded with, on file with, or in the custody and possession of any person or organization including, without limitation, any governmental, judicial, investigate or other official agency, and grievance or disciplinary committees, body or court, any bar associations or other professional associations, and any educational institution, doctor or hospital; I hereby consent to the release of all such information to the Judicial Screening Committee and consent to the issuance, without notice, of any Order necessary or appropriate to obtain such information; I hereby authorize a representative of the Judicial Screening Committee to request and to receive any such information; and I hereby request any such organization or person in possession of such information to deliver it to a representative of the Judicial Screening Committee, forthwith.

I specifically consent to the release of any such information in the possession of the New York State Commission on Judicial Conduct and Office of Court Administration and request that the same be delivered to a representative of the Judicial Screening Committee, forthwith.

Sworn to before me
this 6th day of February 2013
Diane Matero
NOTARY PUBLIC

DIANE MATERO
NOTARY PUBLIC, STATE OF NEW YORK
No. 02MA6210683
QUALIFIED IN QUEENS COUNTY
COMMISSION EXPIRES AUGUST 24, ~~2013~~ 2025

Sworn to before me this
Day of 2023

Notary Public

INFORMATION AND PRIVACY WAIVER

I, Bernard J. Graham am informed that as a part of a routine check of my background in connection with my possible appointment to a position with the New York State Supreme Court / Civil Court of the City of New York, the Judicial Screening Committee may wish to make inquiries concerning me to various agencies of the Federal or State Government. Having been advised that information from the files of federal or state agencies may be unavailable to the Judicial Screening Committee without my written consent, due to the Privacy Act of 1974, 5 United States Code Section 552 (a), and the Freedom of Information Act, 5 U.S.C. Section 552, I hereby consent to inquiries concerning me by the Judicial Screening Committee to any Federal or State agency, and to the disclosure to the Judicial Screening Committee by such federal or state agency.

Bernard J. Graham

Sworn to before me this
6th day of February, 2023
Diane Matero

Notary Public

DIANE MATERO
NOTARY PUBLIC, STATE OF NEW YORK
No. 02MA6210683
QUALIFIED IN QUEENS COUNTY
COMMISSION EXPIRES AUGUST 24, ~~2023~~ 2025