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COURT OF APPEALS

STATE OF NEW YORK

HERKIMER COUNTY INDUSTRIAL
DEVELOPMENT AGENCY,

Appellant,

-against-

NO. 14

VILLAGE OF HERKIMER, ET AL.,

Respondents.

20 Eagle Street
Albany, New York
February 10, 2021

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

CHARLES W. MALCOMB, ESQ.
HODGSON RUSS, LLP
Attorney for Appellant
140 Pearl Street, Suite 100
Buffalo, NY 14202

MICHAEL J. LONGSTREET, ESQ.
LONGSTREET & BERRY, LLP
Attorney for Respondent
415 Elm Street
Fayetteville, NY 13066

Karen Schiffmiller
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: This is appeal number 14,
2 Herkimer County Industrial Development Agency v. The
3 Village of Herkimer.

4 Counsel?

5 MR. MALCOMB: Thank you. May it please the
6 court, my name is Charles Malcomb, for the appellant,
7 Herkimer County Industrial Development Agency. And I would
8 like to request two minutes for rebuttal.

9 THE COURT: You may have two minutes, sir.

10 MR. MALCOMB: The Appellate Division erred as a
11 matter of law when it held that the IDA was contractually
12 liable for a bankrupt company's water bills for several
13 reasons.

14 First, dealing with the implied contract issue,
15 even if you were to assume that Dunbar dealt with personal
16 liability as opposed to lien interests and the due process
17 issues relevant to that, and even if you're assuming that
18 the existing law that the Fourth Department applied, the
19 village regulations can and did provide for personal
20 liability for a noncontracting owner.

21 The Appellate Division failed to apply the
22 existing law governing the nature of the IDA's ownership at
23 issue here. Specifically, we're talking about General
24 Municipal Law, Article 18-A, and this court's holding in
25 Roberts, which noted that the ownership structure is merely



1 as a mechanism, and that it functions only as a conduit,
2 and it's not true ownership. The IDA assumes no risk of
3 loss, has no opportunity to gain, and that line of
4 reasoning has been followed repeatedly by numerous courts.

5 If you go back to Dunbar - - -

6 JUDGE FAHEY: Mr. Malcomb?

7 Judge, may I ask a question?

8 CHIEF JUDGE DIFIORE: Yes.

9 MR. MALCOMB: Yes, Judge Fahey.

10 JUDGE FAHEY: On the question of ownership, is it
11 really necessary for the court to make a definitive answer
12 about this question of ownership? It seems to me that it's
13 a much larger question that we need to resolve on this
14 appeal. And let's say we assume that there was ownership
15 in some form or another, and without deciding what type of
16 ownership there is, couldn't we resolve this question
17 otherwise?

18 MR. MALCOMB: You know, I think it's essential
19 that the court, at least, you know, acknowledges and
20 interprets what type of ownership it was for a number - - -

21 JUDGE FAHEY: Well, let me ask you this. You
22 know, the question of ownership as I understand it - - -
23 well, as I understand the IDAs in New York State, right now
24 there are 109 IDAs in New York State. It affects hundreds
25 of projects throughout the state. The controller's report



1 in 2019 said, that there were 751 million dollars in
2 outstanding bonds issued by those 109 IDAs.

3 I don't know if - - - without having been fully
4 briefed on all the impact of what a decision on partial
5 title or quasi title or nominal title is, which is not set
6 out in the statute, and has not been defined in the common
7 law, is necessary to really dissolve a water rate dispute
8 in a village setting. It seems to me that we could address
9 that issue without resolving this much, much larger issue.

10 MR. MALCOMB: Well, I would submit, Judge Fahey,
11 that this court already did address this issue squarely in
12 the Roberts case. I mean, this - - -

13 JUDGE FAHEY: Um-hum.

14 MR. MALCOMB: - - - this court looked at what is
15 the nature of this ownership. Now, the IDA - - - I mean,
16 we all know that the IDA is on nominal title. The IDA took
17 title for a reason. And - - - and it's pretty - - - it's
18 been pretty well-established from the 1980s as to what it
19 means when an IDA holds fee title for the purpose of
20 facilitating finance on a particular project.

21 JUDGE WILSON: So if I might - - -

22 MR. MALCOMB: So I don't - - -

23 JUDGE WILSON: I have a question for counsel.

24 CHIEF JUDGE DIFIORE: Judge Wilson?

25 JUDGE WILSON: Roberts really - - - isn't Roberts



1 really about the definition of a public work under a
2 specific statute, rather than the general proposition about
3 ownership?

4 MR. MALCOMB: The issues in that case, it was
5 about whether an IDA project was a public work for purposes
6 of applying the prevailing wage requirement, but in getting
7 to the answer, this court adopted the Fourth Department's
8 decision, which kind of explained what this title is, like
9 what does it mean? What does it mean when the IDA owns
10 title? How - - - what are the relationships between the
11 parties? And that Roberts case has been applied many, many
12 times as, you know, most recently as 2014, (audio
13 interference) from the Second Department in the - - - let's
14 see, it's in the Dorval case, which no - - -

15 JUDGE STEIN: Chief Judge, may I ask a question?

16 MR. MALCOMB: Yes, Judge Stein.

17 JUDGE STEIN: Yes.

18 Counselor, are you saying that we cannot find in
19 your favor without addressing this question by looking at
20 the statute and the regs and the interplay of the statutes
21 at issue here?

22 MR. MALCOMB: No, because when you go to what the
23 Village Law actually provides, it gives the village the
24 ability to adopt rules and regulations, provided they're
25 not inconsistent with law. And what the village has done



1 here is attempted to read their regulations, which, in my
2 view, are ambiguous and don't really address the issue of
3 in personam liability versus in rem liability, and is
4 attempting to take a contractual matter and bring a breach
5 of contract cause of action without alleging privity,
6 without dealing with - - - without even alleging an
7 agreement of any kind between the parties.

8 And so the reason I'm talking about the ownership
9 issue, it's a secondary reason, but it's also what the
10 majority opinion at the Appellate Division held, that there
11 was an implied contract. And they said that based on the
12 issue - - -

13 JUDGE RIVERA: Counsel, if I - - - I'm sorry to
14 interrupt you, but if I can ask you - - -

15 CHIEF JUDGE DIFIORE: Judge Rivera? Judge
16 Rivera, please.

17 JUDGE RIVERA: Thank you.

18 So you agree, though, that you have title. The
19 ADA has always had title. Correct?

20 MR. MALCOMB: Since the 1980s, when they entered
21 into this financing arrangement for - - - in accordance - -
22 -

23 JUDGE RIVERA: And you've not be able to - - -

24 MR. MALCOMB: - - - (audio interference) fee
25 title.



1 JUDGE RIVERA: Right. And you've not been able
2 because Quackenbush went bankrupt and you were not able to
3 turn over the deed, so you hold the deed, correct?

4 MR. MALCOMB: That's correct.

5 JUDGE RIVERA: Okay. So I understood your
6 argument to be that although you're owners, in name only
7 because that's how you interpret these prior cases, to mean
8 nominal ownership, that whatever ownership there is within
9 that - - - right, the bundle of sticks, that nevertheless
10 here, you don't have to pay the water bill.

11 So let me ask you this. Let's put aside the
12 ownership for one moment, whether or not nominal ownership
13 would mean you are totally exempt from paying the bill at
14 all. Let's assume for one moment we disagree, and that
15 there's some liability you may carry.

16 I want you to address this question of personal
17 versus imposing a lien on the property. Personal liability,
18 what you're calling in personam, versus in rem. But whether
19 or not the only recourse for the village is to pursue the
20 lien.

21 MR. MALCOMB: So this court essentially in the
22 Silkman case and New York University case noted that where
23 you have metered water rents, you're talking about - - -
24 you're in the realm of contract. Now, there is an ability
25 under the statute to impose a lien on real property, and



1 that's set forth in Village Law 11-1118. But that's not
2 what we're talking about here. That's not the type of
3 liability, the in rem liability going against the property
4 that's at play here, because the village has chosen to seek
5 a contractual remedy under Silkman - - -

6 JUDGE RIVERA: No, you're correct about that
7 completely. I'll ask him about that. But do you agree
8 that if they wanted to pursue the lien, they could?

9 MR. MALCOMB: The - - -

10 JUDGE RIVERA: Against the premises. You hold
11 the title, but against the premises.

12 MR. MALCOMB: That's - - - pursuing the lien is
13 one of the options that's available to the village under
14 the statute, under Village Law 1111-18.

15 JUDGE RIVERA: So you're not taking the position
16 that merely because an IDA holds title, nominal ownership,
17 whatever you want to call it, that they couldn't pursue the
18 lien?

19 MR. MALCOMB: Well, against the IDA specifically,
20 this issue was decided by the Fourth Department, and the
21 Fourth Department determined that imposing a lien on the
22 real property was not appropriate because the IDA held
23 title and because it was tax exempt. So what we're talking
24 - - - and that's no different than, for example, the
25 village providing water service to out-of-district users.



1 JUDGE FAHEY: No.

2 Judge, sorry, if I may?

3 CHIEF JUDGE DIFIORE: Judge Fahey?

4 JUDGE FAHEY: Weren't the two reasons, first,
5 they didn't go after the lien because there's no value,
6 because the property has no value, so that's why they
7 didn't go after the lien, as a practical matter, right?

8 MR. MALCOMB: Yes, Your Honor.

9 JUDGE FAHEY: Okay. So as a practical matter, it
10 seemed that way. The other reason, of course, is - - - and
11 Judge Rivera referred to it--- is that the lien, it - - -
12 you have a strong exemption partment because the General -
13 - - argument, because the General Municipal Law, I believe,
14 refers to you being exempt from taxes and assessments.

15 MR. MALCOMB: Right.

16 JUDGE FAHEY: So for both those reasons, and I
17 thought that in the earlier iteration of this case in 2015,
18 the Fourth Department had said that you were exempt in this
19 context.

20 MR. MALCOMB: That's right. That's - - -

21 JUDGE FAHEY: Okay. All right. So it made no
22 sense. So the only option the village seemed to have was
23 this form of in personam jurisdiction as a result of that,
24 and that arose in the counterclaim?

25 MR. MALCOMB: My time has expired, but if I may



1 respond to the question?

2 CHIEF JUDGE DIFIORE: Please do, sir.

3 MR. MALCOMB: Judge Fahey, what the village had
4 as available to it is contractual remedies under the common
5 law and with that party that they entered into a contract
6 with, and that was not the IDA. It's undisputed that the
7 village never contracted for the water - - -

8 JUDGE FAHEY: Right, yet Quacken - - -
9 Quackenbush was in bankruptcy though, weren't they?

10 MR. MALCOMB: They were, but because the village
11 can't collect from a party they contracted with, the IDA by
12 virtue of its participation in this transaction does not
13 become the guarantor of bad debts.

14 JUDGE FAHEY: Yeah. Thank you, Mr. Malcomb.

15 CHIEF JUDGE DIFIORE: Counsel, from a public
16 policy perspective, does it make any sense to hold IDAs
17 accountable for these kinds of charges that are associated
18 with an IDA project?

19 MR. MALCOMB: No, Your Honor. As a matter of
20 fact, it would frustrate the purpose of the General
21 Municipal Article 18-A. The state set up the statutory
22 regime, and I think we all know the power to tax is the
23 power to destroy. So if you're going to impose this broad
24 liability against IDAs that is unknown, and that if there's
25 any risk that the company may not succeed, that the IDA is



1 going to be a public benefit corporation who's going to be
2 holding the bag for the bad debts of a private company, I
3 think that would chill and frustrate the statutory purpose
4 that the legislature set forth when they adopted the
5 statutory scheme.

6 CHIEF JUDGE DIFIORE: Thank you, Counsel. You'll
7 have your rebuttal time.

8 Counsel?

9 MR. LONGSTREET: Thank you, Your Honor, members
10 of the court. Michael Longstreet here.

11 Our basic position - - - and I know you've been
12 kicking about this ownership issue, and I agree with Judge
13 Fahey that it is a little bit of a case-by-case basis issue
14 that you have to analyze, but in the Adimey case, the basic
15 holding was that there are advantages and disadvantages to
16 owning property - - - for an IDA to own property. The big
17 advantage is the tax exemption; you don't have mechanic's
18 liens hanging out there. You can't have any liens. You
19 have to go through the notice of claim procedure. And just
20 - - - there are just a lot of protections that they have.
21 But there are also disadvantages.

22 JUDGE WILSON: I have a question for you,
23 Counsel?

24 CHIEF JUDGE DIFIORE: Judge Wilson?

25 JUDGE WILSON: So you rest very heavily on the



1 Adimey case, and there's a point in your adversary's reply
2 brief that I'd like you to address, which is that the
3 majority there makes - - - well, sorry. The dissent there
4 makes a distinction between 240(1) and 241(6). And even
5 the dissent agrees that the rule that eventually is
6 affirmed without an opinion by our court applies to 240(1)
7 but not to 241(6).

8 So isn't it the fairest, really, and almost the
9 only reading of Adimey that it states a special rule about
10 ownership for 240(1) that doesn't apply to 241(6) or really
11 any other statutory provision?

12 MR. LONGSTREET: Again, I really think you have
13 to focus on the rationale for the decision. And the
14 rationale in our particular case for holding the IDA liable
15 is that they're the owner for the purposes of liability.
16 If you step back and look at what's going on here, we - - -
17 the scheme of a holding party's liable for water rents is
18 that owner's liable, and we have to - - - we have the - - -
19 we have two rights, statutorily.

20 JUDGE WILSON: But wouldn't UCC 1-203 treat this
21 really as a security, not as a true lease?

22 MR. LONGSTREET: This doesn't - - - I don't
23 believe that UCC really applies here. This is a statutory
24 remedy granted to us under the Village Law. And basically,
25 we either have the right to lien, which the Fourth



1 Department said we don't have here, or the right to shut
2 off water. We do not have a contract with the tenants.
3 And in fact, water commissions throughout this state do not
4 impose liability on the tenants because it's just
5 impractical to manage a program in that - - -

6 JUDGE FAHEY: Judge, can I ask a question here?

7 CHIEF JUDGE DIFIORE: Judge Fahey?

8 JUDGE FAHEY: I had thought, Mr. Longstreet, that
9 your contract to the water rates meter was directly with
10 Quackenbush, not with the IDA.

11 MR. LONGSTREET: Actually, under our rules and
12 regulations, and this is basically the way it works
13 statewide, the owner is liable. And we have a right to
14 lien. We don't - - -

15 JUDGE FAHEY: Well, there's one case out of
16 Syracuse that makes that argument, but there is no
17 statewide law on that.

18 MR. LONGSTREET: Actually, Judge, I think I - - -

19 JUDGE FAHEY: Let me finish my point.

20 MR. LONGSTREET: Sure.

21 JUDGE FAHEY: And then you can respond. I don't
22 mean to cut you off. You can respond in a second.

23 MR. LONGSTREET: Sure.

24 JUDGE FAHEY: But what I'm interested in is, the
25 village here is seeking direct personal liability against



1 the IDA as an entity, different from a lien, and it doesn't
2 seem that that remedy is contemplated in the village regs.
3 The village regs, I thought, gave you two remedies. One is
4 cut off the water, and secondly, to impose a lien on the
5 property.

6 And I understand the practical reasons for not
7 imposing a lien, but it seems that in your failure to do
8 that, you're back to the dissent's argument in the
9 Appellate Division, which is that you're conflating your in
10 rem rights with personal liability, and personal liability
11 is not set out in the statute. And what am I missing
12 there?

13 MR. LONGSTREET: Well, the water department rules
14 say the property owner will be held liable for all the
15 water rents.

16 JUDGE FAHEY: Well, yeah. The problem there is
17 that then we get into the situation of - - - if you could
18 devise a remedy, and whether or not that remedy is within
19 the law.

20 MR. LONGSTREET: Well - - -

21 JUDGE FAHEY: In other words, you don't have
22 privity - - -

23 MR. LONGSTREET: - - - the village - - -

24 JUDGE FAHEY: In other words, you don't have
25 privity with them, so therefore, it's not within the law.



1 MR. LONGSTREET: Well, the privity argument, I
2 think Dunbar pretty much did away with that, and they can
3 distinguish - - -

4 JUDGE FAHEY: Well, no, I don't know about that.
5 Dunbar is a 1970 - - - 1917 Supreme Court case. In that
6 case, it dealt with the right to a lien what - - - the
7 right for the municipality of New York to impose a lien on
8 a property, and whether or not that imposition of a lien
9 was a violation of your due process rights. I don't think
10 that's the situation we have here.

11 MR. LONGSTREET: But the distinction about the
12 lien wasn't made in the Dunbar case. It was - - the basis
13 of the decision was that it was an implied contract for the
14 reasons set forth therein.

15 And if I could just back up a little bit to the
16 Winston case, because I - - - my - - -

17 JUDGE RIVERA: But - - - I'm sorry to interrupt
18 you.

19 If I may, Chief Judge?

20 But - - -

21 CHIEF JUDGE DIFIIORE: Yes.

22 JUDGE RIVERA: - - - the law is - - - is it not
23 clear that the owner can't serve as a surety? What about
24 the surety argument?

25 MR. LONGSTREET: As I said, we are not - - - we



1 cannot hold the tenant liable. This is, again, going back
2 to the Winston case, and I was not involved in that case,
3 but the Village - - -

4 JUDGE RIVERA: But I'm talking about the owner
5 serving as a surety.

6 MR. LONGSTREET: The owner is a surety of the
7 tenant, but the tenant's not liable under the Village of
8 Herkimer water regulations or any other regulations I know
9 of. And if you go - - -

10 JUDGE RIVERA: But isn't - - -don't you have, as
11 Judge Fahey's already pointed out - - - you've got your two
12 remedies: shut off the water, which is of no consequence
13 to you here, or impose a lien. The only problem is that,
14 as Judge Fahey has pointed out, you're not going to get any
15 money for that, right? So that's really your problem. Did
16 you not seek in bankruptcy to go against Quackenbush and
17 get paid?

18 MR. LONGSTREET: Again, we do not have, under our
19 regulations, a right to get payment from a tenant, as in
20 the Winston case.

21 JUDGE RIVERA: But you agree that you can impose
22 a lien on the premises, correct?

23 MR. LONGSTREET: We tried, and we lost. The
24 remedy we had was to impose - - - was to take the water
25 bill and levy it against taxes, and as soon as we did that,



1 that was deemed to be taxes, and that remedy failed. So
2 their position is, the only remedy we have is shut off.
3 That's it. We have no other remedy under the law against a
4 public agency.

5 And here again, they're taking it - - - they want
6 to take advantage of it being a public entity owning the
7 property for the purposes of the lien, but they don't want
8 the responsibility that would be imposed individually or
9 personally against them.

10 JUDGE RIVERA: So your argument is that if
11 someone's got to be holding the bag, it shouldn't be you?
12 It should be them because they're the ones who entered this
13 agreement with Quackenbush and Quackenbush went bankrupt?

14 MR. LONGSTREET: Right. And that's what - - -
15 that was their agreement. The agreement was that the
16 tenant would be liable as though they were the owner. They
17 knew what the liabilities were, and - - -

18 JUDGE WILSON: Chief, may I?

19 CHIEF JUDGE DIFIORE: Judge Wilson?

20 JUDGE WILSON: Counsel, if the IDA is correct
21 that they are really only a nominal owner, and the real
22 owner is or was Quackenbush, wouldn't you have had a claim
23 you could have pursued in bankruptcy?

24 MR. LONGSTREET: Yeah, well, then, you know, we
25 would have to claim that you weren't - - - they were the



1 real owner, and we had to pursue them. That's just not
2 something that we did.

3 JUDGE FAHEY: You know - - -

4 MR. LONGSTREET: I don't - - -

5 JUDGE FAHEY: I had thought, Mr. Longstreet, that
6 when Quackenbush went into bankruptcy the village was
7 listed as a creditor by Quackenbush for a tax lien for
8 water service, about 231,000 dollars. So it seems that it
9 was listed in bankruptcy. Am I incorrect about the record?

10 MR. LONGSTREET: Well, it may very well have been
11 listed in bankruptcy, but my point, and again, getting back
12 to it, we do not have a contract with the tenants, and we
13 don't do that for the reasons set forth in the Winston
14 case. And I can tell you, I wasn't involved in Winston,
15 but that was a legal services case, and they sued a lot of
16 cities, villages, and towns throughout the state, including
17 the Village of Herkimer. We waited until that was done,
18 and that's just the way it's done. Municipalities don't
19 contract with tenants for the reasons set forth in the
20 Winston case. So that's the case.

21 I mean, it - - - I think it's pretty clear, at
22 least to me, that we have rights under the water
23 department's regulations to pursue them individually and
24 that's what we did.

25 CHIEF JUDGE DIFIORE: Thank you, Counsel.



1 Counsel, your rebuttal?

2 MR. MALCOMB: Thank you, Your Honor. I just find
3 it astonishing that the village is here claiming that they
4 don't have a contract with the tenant, Quackenbush, here,
5 when Quackenbush set up the meter and set up the account.
6 Quackenbush was billed for the water all along. The
7 village pursued, as a creditor, payment in bankruptcy, and
8 during the bankruptcy, the village agreed to keep the water
9 running during the bankruptcy.

10 So the idea that there was no contractual
11 relationship between the village and Quackenbush, it - - -
12 it just actually makes no sense, based on the village's own
13 admissions in the record, the bankruptcy proceeding, and
14 the fact that, you know, this court has held that the
15 village does have a remedy against the user of water.
16 These are contractual charges, and the person that comes
17 and uses the water and turns it on, and is in privity with
18 the village, has the contractual remedies.

19 With respect to the Adimey case, you know - - -

20 JUDGE RIVERA: So Counsel - - - if the Chief
21 Judge will permit.

22 I'm having difficulty seeing why, if that fails,
23 like in this case - - - a person goes bankrupt, they're
24 unsuccessful - - - why they can't oppose - - - I understand
25 that it may not give them value here, but theoretically,



1 they can impose a lien on the premises, can they not?

2 MR. MALCOMB: Well, I would normally agree with
3 you, Judge Rivera, but the Appellate Division in this case,
4 and I don't know if that's subject to a later appeal down
5 the line, determined that because of the IDA's exempt
6 status, that the lien was properly canceled by the county.

7 JUDGE STEIN: So is it your position that their
8 only remedy would have been or may still be a shut-off?

9 MR. MALCOMB: No, absolutely not. They have a
10 remedy to pursue under the law of the State of New York,
11 the common law, contracts - - - breach of contract theory
12 with who they agreed with, to sell the water to, and who
13 used the water, and they have a contractual remedy.

14 Now, it didn't work out here.

15 JUDGE STEIN: Well, that's what I meant. In this
16 particular case, because of the bankruptcy and all of that,
17 their only remedy would be to shut off the water? And is
18 that impacted by the fact that the county did impose - - -
19 that a lien was imposed through that process, but then that
20 lien was held to be invalid? Does that in any way affect
21 the right to the shut-off?

22 MR. MALCOMB: Not the way I read Village Law 11-
23 1118, is that they have the ability to shut it off for
24 nonpayment.

25 JUDGE STEIN: Okay. Even if - - - even after a



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lien has been imposed?

MR. MALCOMB: Yes, I mean, after a lien's been imposed, yes. And the lien has been extinguished in this case, so there would be no basis to say that the IDA couldn't turn off the water when there's no lien that's been imposed.

CHIEF JUDGE DIFIORE: Thank you, Counsel.

MR. MALCOMB: Thank you.

MR. LONGSTREET: Thank you.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Herkimer County Industrial Development Agency v. Village of Herkimer, et al., No. 14 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers
Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001
Date: February 17, 2021

