Matter of Anderson v Garr
2024 NY Slip Op 35554(U)
January 2, 2024
Supreme Court, Cayuga County
Docket Number: Index No. 2017-0270
Judge: Elena F. Cariola
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At a Term of the Supreme Court, in and for the County of Cayuga, County Courthouse, Auburn, New York.

PRESENT: HON. ELENA F. CARIOLA
Supreme Court Justice

SUPREME COURT
STATE OF NEW YORK CAYUGA COUNTY

In the Matter of the Petition of

SHERRY L. GARR ANDERSON, Successor Trustee of Trust B created pursuant to the provisions of the GARR REVOCABLE TRUST dated September 19, 1994, residing at 5911 Petre Drive, Auburn, New York, 13021;

PHYLLIS A. GARR-ALLEN, Successor Co-Trustee of the GLADYS M. GARR REVOCABLE TRUST, dated October 19, 2001, residing at 5911 Petre Drive, Auburn, New York, 13021;

DECISION/ORDER

SHERRY L. GARR ANDERSON, Successor Co-Trustee of the GLADYS M. GARR REVOCABLE TRUST, dated October 19, 2001, residing at 5911 Petre Drive, Auburn, New York, 13021;

Index No. 2017-0270

SHERRY L. GARR ANDERSON, Co-Executor of the ESTATE OF GLADYS M. GARR, residing at 5911 Petre Drive, Auburn, New York 13021;

PHYLLIS A. GARR-ALLEN, Co-Executor of the ESTATE OF GLADYS M. GARR, residing at 5911 Petre Drive, Auburn, New York 13021;

SHERRY L. GARR ANDERSON, individually, residing at 5911 Petre Drive, Auburn, New York 13021;

PHYLLIS A. GARR-ALLEN, individually,
residing at 5911 Petre Drive, Auburn, New York 13021; and

RICHARD M. GARR, individually,
residing at 5911 Petre Drive, Auburn, New York 13021;

Petitioners,

-vs-

LINDA A. GARR,
5910 Petre Drive, Auburn, New York 13021,

Respondent.

APPEARANCES:

JAN SMOLAK, ESQ.
Attorney for Petitioners
Sherry L. Garr
Phyllis A. Garr-Allen

JUSTIN TARANTINO, ESQ.
Attorney for Petitioner
Estate of Richard M. Garr

CECELIA R. CANNON, ESQ.
Attorney for Respondent

Elena F. Cariola, J.

As a result of an Order from the Appellate Division, Fourth Department reinstating the instant Petition following its dismissal, a trial was conducted on July 27 and 28, 2023, in Cayuga County, as there are triable issues of fact relative to "whether the sale of . . . [certain disputed] property can achieve the intended purpose of the grantors by compensating respondent for the value of her right of occupancy" (*Anderson v Garr*, 182 AD3d 1010 [4th Dept 2020]). The appeal stemmed from an Order of the Court (Decision and Order, Taddeo, J., October 16, 2017) which, in relevant part, granted summary judgment in favor of Respondent and found that the sale of the property was not expedient. By way of background, "Respondent and [P]etitioners Sherry L. Garr Anderson, individually, Phyllis A. Garr-Allen, individually, and Richard M. Garr,[1] individually, are siblings who, as beneficiaries of two trusts, acquired an interest in certain, now disputed, real property. Pursuant to the terms of the trusts, [R]espondent also has the right to live rent-free in an apartment on the property during her life. Petitioners commenced this proceeding pursuant to RPAPL article 16 seeking, among other things, an order authorizing the sale of the property." (*Anderson*, 182 AD3d at 1011]; *see also* RPAPL § 1604.) Now, upon due consideration of the testimony and documentary evidence presented, and upon careful reflection of the arguments proffered by both counsel, the following constitutes the Decision and Order of the Court.

The disputed property in question in this action, 5910 Petre Drive, Auburn New York, is located on Owasco Lake and it has lake access ("Lake House"). The Lake House is part of a swath of land along Owasco Lake that was originally owned and used by the whole Garr family. The land along Owasco Lake, of which the Lake House is a part, also

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[1] Mr. Garr is now deceased, and his Estate is representing his interests in this action.

includes the homes at 5911 and 5913 Petre Drive – residences located directly across the street from the Lake House. The Lake House is comprised of a main residence and a separate apartment unit. Petre Drive is a private road, which means the residents along the road paid for the creation thereof and are responsible for its maintenance and upkeep.

At the trial, Sherry L. Garr testified, in pertinent part, that she and her sister, Phyllis Garr-Allen, are co-executors of the Estate of Gladys Garr and co-trustees of the Gladys Garr Revocable Trust ("Trust"). The Trust provides that the Lake House can only be sold with all of the owners' consent. It further provides that Respondent has free use of the apartment unit. Sherry stated that the Lake House had been in her family for as long as she could remember. However, she wishes to sell the Lake House because of her age and Phyllis' compromised physical health. Sherry stated that the siblings have tried to sell the Lake House in the past, but Respondent has refused. She explained that on December 15, 2014, a purchase offer for the Lake House was made from a local buyer named Bellerdine for $495,000.00. Additionally, Sherry and her husband made a purchase offer on February 5, 2015 for $495,000.00. A third purchase offer was made in 2021 from buyer Hoadley in the amount of $550,000.00, a local resident known to buy and rent properties.

Respondent testified that she previously lived in New York City for approximately 25 years and had spent a lot of time working there. She explained that although she had moved away from the Owasco Lake/Auburn area as a young adult to pursue college and a career, she returned to live in Auburn shortly after the death of her father in 2001. She has lived there, in the Lake House apartment, for the past twenty-two (22) years since her return from New York City. She indicated that she is currently employed by Skaneateles Jewelry, a high-end boutique in Skaneateles, New York, located between 20 and 30 minutes from the Lake House. Respondent described the Lake House as "really beautiful" and explained that there is a panoramic view that looks down over the lake. She testified about her porch and a deck that goes from the back of the garage all the way across the whole perimeter of the Lake House, and how the Lake House allowed her to enjoy the nature around her. Respondent stated that if she was forced to leave the apartment, there was no other home on Petre Drive where she could live, and she would need to rent a new home.

Petitioners' expert, Gregory Doan, offered opinion testimony as to the market value of the property and rental value. Mr. Doan testified that he had been a licensed real estate appraiser for 43 years and has performed approximately 16,000 appraisals. Mr. Doan conducted an appraisal of the Lake House on March 3, 2023. In describing his methodology, Mr. Doan explained that in conducting appraisals, he first conducts an inspection of the premises and compares that data to recent sales in the area. He noted that if there aren't many recent sales for comparative analysis purposes, he calculates an adjustment to account for market changes. He explained that he obtains comparable sale data from the Multiple Listing Service database (a databased established by cooperating real estate brokers to provide data about properties for sale), which is most relevant to local markets. Upon inspection of the Lake House, Mr. Doan noted that the Lake House was older, and certain items were in need of repair. He opined that the site value was significant in that it had 120 feet of lake frontage, and it was "good, level marketable lake frontage." Mr. Doan used seven comparable properties, five of which were adjusted for market conditions, to arrive at his appraisal. He estimated that the fair market value of the Lake House is $782,000.00. The sales comparison analysis he relied upon indicated a range of from $545,700.00 to $992,700.00. Mr. Doan believed that at the time of trial, nearly six months since his appraisal, the value of the Lake House had increased. He stated, "[l]ake values, lake front property values have gone up substantially. As you know, they don't make lake frontage anymore, so therefore there's a demand. That demand hit a temporary glitch in 2008, but it has come back completely and then some. At present time[,] there are four properties listed in the MLS system as either active listings or listings under contract. . . . There's very few properties for sale with lake frontage that's decent lake frontage." He further opined that the fair market rental value of the Lake House apartment is approximately $1,200.00 per month. His assessment was based upon three comparable rental properties with somewhat different market characteristics than the Lake House. He testified that it was difficult to find lakefront properties in the area that were available for a 12-month rental. Mr. Doan explained that the problem with doing a comparable rent schedule for a lakefront property is that typically property owners don't rent on a year-round basis; they rent on a nine-month basis, because the owners know that during the summertime they can get significantly higher rent rates on a weekly basis.

Respondents' expert, Jennifer Lovell, CPA offered testimony pertaining to the present value of Respondent's right to occupancy. Ms. Lovell measured Respondent's right of occupancy by measuring what it would cost to obtain replacement housing. In her report, dated July 3, 2023,[2] Ms. Lovell relied upon apartments that were selected by Respondent as ones she reported that she would consider moving to if she were forced to leave the Lake House. Ms. Lovell used these rentals and compared the reported attributes of the rentals with the Lake House in terms of the number of bedrooms, bathrooms and square footage. Ultimately, Ms. Lovell offered two separate calculations for replacement value: one that took into account the lakefront nature of the home ($2,950.00 per month), and one that did not ($1,750.00 per month). She then performed a calculation that took into account Respondent's life expectancy of 15.667 years, used a shelter inflation rate (6%), and then adjusted the resulting number downward using a

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[2] Ms. Lovell prepared an earlier report, dated March 8, 2021, while she was employed by a different accounting firm. The figures she relied upon differ from the July 3, 2023 report; to wit: Respondent's life expectancy was calculated at 17.5 years; the fair market rent (which was based on an evaluation by a certified real estate appraiser) was $1,200.00/month; the shelter inflation rate was calculated at 2%; and a 4% discount rate, which variable remained the same in both reports. In the first report, Ms. Lovell opined that, based upon the variables, the value of Respondent's right to occupancy was $207,487.00.

present value calculation (4%) ("discount rate") which is the Treasury Department bond rate and considered risk-free in assessing the time value of money (as this is the most commonly used measurement in discounting for present value because treasury bonds are guaranteed by the government and considered to be the safest investment). In sum, she opined that the replacement cost without consideration for the lakefront was $365,781.00 and with the lakefront it was $616,603.00.

On cross examination, Petitioners disputed both the methodology and figures relied upon by Respondent and implored this Court to find that the value of Respondent's right of occupancy is based upon: (1) replacement rental value of $1,200.00; (2) a shelter inflation rate of 2%; (3) a life expectancy of 15.667 years; and (4) a discount rate of 6% which includes an additional 2% for risk. With these figures, Petitioners calculate the value of Respondent's right to occupancy to be $194,907.00.

"RPAPL [§] 1604 provides that the court may grant an application to sell an interest in real property where it is satisfied that the sale is 'expedient,' which is defined as 'characterized by suitability, practicality, and efficiency in achieving a particular end[, which is] proper or advantageous under the circumstances'" (*Anderson*, 182 AD3d at 1011 [internal citations omitted]; *see also In re Gaffers' Estate*, 254 AD 448 [3d Dept 1938] [court found sale of property expedient where (1) there was a purchase offer for the property in excess of the appraised value, (2) the rental income derived from the property was insufficient to meet the expenses, (3) the property was unoccupied, and (4) the property would be a burden to the life tenant which would subject him to unnecessary expenses; *but cf. Hahn v Hagar*, 153 AD3d 105, 112 [2d Dept 2017] [sale of property not expedient where plaintiffs failed to present evidence of proposed buyer, valuation of property with and without development rights, or any tangible or intangible benefit that would be achieved by the sale of the development rights]). "The court may grant the application even if it is opposed by one or more persons having an interest in the property and even if the sale would contravene a provision of the instrument creating the interest in the affected real property" (*Anderson*, 182 AD3d at 1011 [internal citations omitted]).

As a threshold matter, the Court credits the proof adduced by Petitioners with respect to the valuation of the Lake House. Specifically, the testimony and expert report of the appraiser, Gregory Doan, was persuasive in establishing the fair market value of the Lake House to be $782,000.00. Respondent did not tender any proof in this regard, and the Court finds her attempts to challenge Mr. Doan's appraisal purely speculative and rooted in conjecture.

Turning next to the valuation of Respondent's right of occupancy, the parties dispute three of the four factors:[3] (1) the shelter inflation rate; (2) discount rate; and (3) replacement rental value. The Court will address each contested factor in turn. First, the Court fully credits Ms. Lovell's expert opinion as to the basis for utilizing 6% for the shelter inflation rate. She based her opinion on her analyses of the Consumer Price Index

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[3] The parties both agree that Respondent's life expectancy is 15.667 years.

(CPI) Northeast, which is derived from data tracked by the Bureau of Labor Statistics (*see* Respondent's Exhibit "E" – Appendix "C" – Data from CPI Northeast Region May 2023):

Expenditure category	Indexes				Percent change from			
	Historical data	Mar. 2023	Apr. 2023	May 2023	May 2022	Mar. 2023	Apr. 2023	
Housing		333.279	333.309	332.726	4.6	-0.2	-0.2	Shelter Inflation Rate:
Shelter		404.764	406.734	408.046	6.2	0.8	0.3	We concluded
Rent of primary residence		407.727	409.454	410.567	6.7	0.7	0.3	on a rate of 6%.
Owners' equivalent rent of residences(1)		417.564	419.513	421.154	6.1	0.9	0.4	
Owners' equivalent rent of primary residence(1)		417.206	419.161	420.801	6.1	0.9	0.4	

She opined that 6% was a "somewhat conservative number" to use as the percentages for the categories "shelter," "rent of primary residence," "owners' equivalent rent of residences," and "owners' equivalent rent of primary residences" are all over 6% for the annual year of 2022-2023, which are the figures Ms. Lovell relied upon in forming her opinion (*see* Respondent's Exhibit "E" – Appendix "C"). As she explained her report, Ms. Lovell compellingly testified that the reason for increasing the shelter inflation rate from 2% in her 2021 report to 6% in her 2023 report was due to market variables. She explained that she used the CPI Northeast average in both reports, and that she didn't change the numbers, the numbers changed; "it's the same variable, just a different environment." She further noted that inflation occurred globally as a result of a 100-year pandemic, and she opined that shelter inflation is continuing to rise.

Although on cross examination Petitioners critiqued Ms. Lovell's usage of an annual average (2022-2023), which, in part, reflects historic inflation due to COVID-19, she persuasively expounded that she did not believe a 10-year average of shelter inflation would be an appropriate figure to utilize in an unstable market. She testified, "I'm very leery of a lot of things given the after COVID environment. We used to have very stable -- stable rates, stable rents, stable -- you know, I'm not to the point where I would use a ten-year average on almost any variable right now." She explained that 2% had been used for quite some time, but now, with post-COVID market uncertainty, in the future, the shelter inflation rate could be higher, or it could be lower. She was nevertheless resolute in opining that 6% was an appropriate figure in light of all relevant market conditions, trends, reports and projections. The Court is likewise unpersuaded by Petitioners' attempt to discredit Ms. Lovell's conclusion based upon their observation that the percentages appear to be trending downward. As explained by Ms. Lovell, the changes reflected in the columns for March and April 2023 for the line item "Shelter", .8% and .3% respectively, reflect a month-to-month change, i.e., they are not annual figures and thus not comparable figures to the 6.2% reflected in the May 2022 column (*see* Respondent's Exhibit "E" – Appendix "C"). In other words, those figures are not an indicator of shelter inflation rates trending downward.

Next, the Court is persuaded by Ms. Lovell's conclusion that 4% is the appropriate figure to calculate the discount rate. Ms. Lovell explained that this variable was necessary to account in the computation for the time value of money because "we are looking to come up with an amount today to account for payments that would be made over a fifteen and two-third year period." In arriving at her determination, Ms. Lovell relied upon the Department of Treasury's bond rates, considering the 20-year rate (4.09%) and a 10-rate (3.83%). As the Treasury Department does not offer a 15.667 rate (Respondent's life expectancy), Ms. Lovell settled on 4% as it is approximately an average of the ten and twenty-year rates, and 15.667 is approximately halfway between ten and twenty. She further indicated that 4% represented a "risk-free" discount rate, which is common in valuation method of accounting for the time value of money.

Lastly, with respect to the replacement rental value of the Lake House's apartment, the Court takes issue with both Mr. Doan and Ms. Lovell's assessments. By Mr. Doan's own admission, "there are very few rentals of single-family residences in the suburban Auburn market to use in this analysis. . . [and] it is difficult to obtain reliable rental information" on what is available. To that end, the three comparables relied upon by Mr. Doan "differed from the [Lake House] in certain market characteristics and as such, required [Mr. Doan to make] . . . dollar adjustments." Furthermore, it is an onerous task to juxtapose Mr. Doan's moderately divergent appraisals for the rental and purchase values of the Lake House. On one hand, Mr. Doan remarks as to the significant value of the Lake House, it's sizable and level lake frontage, the upward market trends, and the limited availability of lakefront properties, and correlatively, a high demand for them. Yet, incredibly, he estimates a rental value at a rate that nearly contravenes all common sense. The Court questions the accuracy of Mr. Doan's assessment of $1,200.00 per month, which is the same figure that a certified real estate appraiser estimated to be the fair market value of a comparable apartment for Respondent nearly two and a half years earlier (*see* n 2).

Ms. Lovell's replacement rental valuation does not fair much better. The Court cannot overlook the fact that she based her analyses upon the rental prices of apartments provided to her by the Respondent, an interested party who is inherently biased and unquestionably not qualified to render a professional opinion in terms of valuation. Although Ms. Lovell exercised professional diligence in assessing whether the properties suggested by Respondent constituted a comparable property, the Court cannot give full weight to her replacement rental valuations.

The Court now finds itself in the arduous position of reconciling the cavernous divide of two expert opinions, both of which appear have aspects of unreliability. It is for these reasons that the tenets of equity require a compromise between the figures provided by both Mr. Doan and Ms. Lovell, as the actual valuation of rental replacement likely falls somewhere in between their unsound estimates/appraisals. Thus, for purposes of determining the value of Respondent's right of occupancy, the Court will rely upon the mean of the figures for lakefront rentals as proffered by Mr. Doan ($1,200.00) and Ms. Lovell ($2,950.00).

Based upon the foregoing analyses, the Court estimates Respondent's right of occupancy to be $434,557.50 based upon a replacement rental value of $2,075.00 per month, a 6% shelter inflation rate, a 4% discount rate and a life expectancy of 15.667 years.

Year	Rent*	Present value at 4%	Present value of rental savings
1	$24,900	0.9615	$23,941.40
2	$26,394.00	0.9246	$24,403.90
3	$27,977.60	0.889	$24,872.10
4	$29,656.30	0.8548	$25,350.20
5	$31,435.70	0.8219	$25,837.00
6	$33,321.80	0.7903	$26,334.20
7	$35,321.10	0.7599	$26,840.50
8	$37,440.40	0.7307	$27,357.70
9	$39,686.80	0.7206	$28,598.30
10	$42,250.00	0.6756	$28,544.10
11	$44,785.00	0.6496	$29,092.30
12	$47,472.10	0.6246	$29,651.10
13	$50,320.40	0.6006	$30,222.40
14	$53,339.60	0.5775	$30,803.60
15	$56,540.00	0.5553	$31,396.70
16**	$39,955.00	0.5339	$21,332.00
TOTAL:	$620,796	TOTAL:	$434,577.50

*Rent calculated at $2,075.00 per month x 6% shelter inflation rate
** 2/3 year calculated

With these principles in mind, under the totality of the circumstances, in this Court's estimation, selling the Lake House would not be expedient. Initially, upon careful analysis of the fair market value of the Lake House ($782,000.00) and Respondent's right of occupancy ($434,577.50), there is little doubt that Respondent would be adequately compensated for the value of her right of occupancy based upon the characteristics of the Lake House, the limited inventory of lake frontage and market conditions. To be sure, even if the Court were to rely upon Respondent's highest valuation of her right of occupancy ($616,603.00, based upon a rental unit costing

$2,950.00 per month), such a figure falls below the fair market valuation of the Lake House.

However, an analysis of 'expediency' is not limited only to these financial considerations. Considering the age of Respondent, that she has resided in the Lake House's apartment for 22 years, and the incalculable value of living in a family home on the lakefront, forcing Respondent to relocate would undoubtedly constitute a hardship. Of additional concern, as noted by Mr. Doan, it is difficult to find lakefront properties in the area that are available for a 12-month period, and Respondent's geographical options are somewhat limited in terms of remaining reasonably close to her employer. In balancing the interests of the parties, the Court is not persuaded of the existence of any hardship, tangible or otherwise, to Petitioners. When asked about the burdens of the Lake House, Sherry, the only Petitioner to testify, explained, "I think it's a burden for all of us to try to share a piece of property. . . . It's a burden because of the loss of family and my children don't come home any more since my mom passed away. I have adult children. I have two grandchildren. And my brother Richard had two children. And they didn't have any use of the property because they weren't comfortable without my brother being there. . . . It's an emotional burden as well as possibly financial as well." The terms of the Trust give Respondent use of apartment portion of the Lake House and all of the children have an equal share in use of the main Lake House. Yet, there was no evidence before the Court that Petitioners were precluded in any manner from use thereof. There is clear animus between the parties, and while the sale of the Lake House may be practicable, or even wise, the annoyance and frustration caused to Petitioners and their choice not to use the Lake House is of little significance in measuring the expediency of the sale.

Finally, there is no meaningful evidence before this Court that there was a proposed buyer of the Lake House. To the extent Petitioners aver that the three purchase offers tendered respectively by Bellerdine ($495,000.00 in 2014), Sherry Garr and her husband ($495,000.00 in 2015) and Hoadley ($550,000.00 in 2021) constitute sufficient evidence in this vein, the Court disagrees. The passage of time has eroded the relevance of such offers. Additionally, while Sherry testified that she previously had made a purchase offer, had explicitly stated that she had no current interest in purchasing the Lake House. Furthermore, inasmuch as it is Petitioners who advance a fair market value of $782,000.00, it belies logic that they would simultaneously advance the legitimacy of these offers which fall well below the fair market value they urge this Court to adopt.

This Court's conclusion would not change even if it were to rely upon Mr. Doan's lesser replacement rental valuation. In such a scenario, Respondent's right to occupancy would be $251,376.00 based upon a replacement rental value of $1,200.00 per month, a 6% shelter inflation rate, a 4% discount rate and a life expectancy of 15.667 years.

Year		Rent*	Present value at 4%	Present value of rental savings	
1		$14,440	0.9615		$13,884.10
2		$15,306.40	0.9246		$14,152.30
3		$16,224.80	0.889		$14,423.90
4		$17,198.30	0.8548		$14,701.10
5		$18,229.90	0.8219		$14,983.20
6		$19,323.70	0.7903		$15,271.50
7		$20,483.10	0.7599		$15,565.10
8		$21,712.10	0.7307		$15,865.00
9		$23,014.80	0.7206		$16,584.50
10		$24,395.70	0.6756		$16,481.70
11		$25,859.40	0.6496		$16,798.30
12		$27,410.70	0.6246		$17,120.70
13		$29,055.30	0.6006		$17,450.60
14		$30,789.60	0.5775		$17,781.00
15		$32,637.00	0.5553		$18,123.30
16**		$22,832.80	0.5339		$12,190.40
	TOTAL:	$358,914		TOTAL:	$251,376.70
*Rent calculated at $1,200.00 per month x 6% shelter inflation rate					
** 2/3 year calculated					

It is significant to note that the spread between the fair market value of the Lake House and Respondent's right of occupancy is certainly greater under this scenario (approximately $530,000.00 as compared to the near $350,000.00 differential based upon the Court's determination as to right of occupancy), however, even with figures more favorable to Petitioners, it nevertheless cannot be said that the sale of the Lake House would be suitable, practical and efficient in achieving a particular end. Nor can it be said that the sale would be advantageous or proper under the totality of this situation.

"The record establishes that the intent of the grantors was, inter alia, to provide respondent with a place to live for the remainder of her life" (*Anderson*, 182 AD3d at 1011).

While the sale of the Lake House may be desired by Petitioners, it would not comport with the intent of the Trust, and furthermore, there is insufficient evidence before the Court that such a sale would it be advantageous to the interests of the parties (*see generally In re Talmage*, 64 AD3d 662 [2d Dept 2009]). Where the contemplated sale of the Lake House directly contravenes the discernible intent of the Trust, there should be persuasive grounds and overriding considerations to justify such a deviation. Despite the value of the Lake House, and correspondingly the probable fair compensation to Respondent in the event of its sale, in balancing all of the evidence before the Court, in its view, the circumstances are not exceptional so as to counter the Trust and cause hardship to Respondent. This conclusion, considered in conjunction with the absence of evidence relative to any overt and tangible benefit to Petitioners, causes this Court to conclude that Petitioners have failed to meet their burden, by a preponderance of evidence, that the sale of the Lake House would be expedient.

Based upon the foregoing, it is hereby

ORDERED that the Petition is DENIED and DISMISSED.

Any prayers for relief not specifically addressed herein are DENIED.

The above constitutes the decision and order of the Court.

Dated: 1/2/2024

HON. ELENA F. CARIOLA
Supreme Court Justice