STATE OF NEW YORK SUPREME COURT
ESSEX COUNTY

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ADIRONDACK PARK AGENCY and THE STATE OF NEW YORK,

Plaintiffs,

v.

Index No. 301-06

ARTHUR SPIEGEL and MARGARET SPIEGEL,

RJI No. 15-1-2006-0223

Defendants.

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STATE'S RESPONSE MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Defendants' cross-motion for summary judgment is without merit. In the first instance, they have abandoned their opposition to the Agency's well-supported motion for summary judgment and to dismiss their affirmative defenses. They are foreclosed from any challenge to the substance of the Final Enforcement Order or Permit No. 87-28. The Court's jurisdiction is, in fact, quite limited as a result of the Spiegels' failures to challenge final agency action and the jurisdiction vested in the Agency by the New York State Legislature. Accordingly, it is the Agency that is now entitled to judgment. The Spiegels have likewise acknowledged that the doctrines of res judicata and collateral estoppel preclude them from resisting the State's motion for summary judgment. Indeed, they concede that the State is entitled to judgment as a matter of law. Ignoring the law, the facts, and their own concessions, they nonetheless ask the Court to exceed its jurisdiction, overlook two adverse dispositive rulings by judges sitting in the Northern District of New York on their federal complaint, and make new factual findings, in order to permanently excuse their undisputed violations of Permit No. 87-28.[1]

Defendants now ask the Court to unilaterally modify Agency Permit No. 87-28. Specifically, the Spiegels ask the Court to strip Permit No. 87-28 of Condition 15(j) (thus allowing the Spiegels' house to be built on top of, not set back at least twenty feet from, Fawn Ridge (from which the subdivision takes its name)) and to modify Permit Condition 15(g) (thus allowing the construction of a house that is 42.7 feet high, rather than 30 feet high, as the Permit requires). The Spiegels alone, of the 8 ridge line lot owners, would receive this benefit. In return, they offer to do some landscaping that, together with a minor reduction in roof height, would allegedly cost the Spiegels in excess of $100,000 (a brand new finding of fact that neither the Agency nor a court has ever made and which is not proper on a motion for summary

[1] The Permit is attached as Exh. 2 to the Verified Complaint.

judgment. Accordingly, defendants also ask the Court to spare them the financial penalty contemplated by the Adirondack Park Agency Act.

In short, the Spiegels knowingly, or with gross negligence, violated three material provisions of Agency Permit No. 87-28, each of which was included in order to minimize the potential adverse visual impacts of the houses authorized by the Permit. The Spiegels elected to forego both an adjudicatory hearing and a proceeding pursuant to Article 78. They repeatedly made settlement proposals to the Agency that did not address the Agency's concerns. And when the Agency referred the matter for judicial enforcement to the Office of the Attorney General, the Spiegels commenced a federal action expressly to avoid the imposition of civil penalties. By this cross-motion, the Spiegels seek to have the Court modify Agency Permit No. 87-28, imposing on the State an even weaker version of the unacceptable settlement proposals that they have in the past made to the Agency or to the Office of the Attorney General. The Court should decline the Spiegels' invitation to exceed its jurisdiction, disadvantage their Fawn Ridge neighbors, and commit errors of law.

STATEMENT OF FACTS

After promising not to "re-litigate any facts on this motion," Spiegels' Memorandum of Law in Support of Cross-Motion (Defs.' MOL) at 4, the Spiegels proceed to do just that. As they point out, however, the District Court's factual findings have preclusive effect and can no longer be challenged.[2] Even if the facts could still be challenged, which they cannot, and even if they were material to the State's motion for summary judgment, which they are not, the "facts"

[2] Defendants ignore the preclusive effect of their failure to seek judicial review of the Agency's findings. For the reasons set forth in the Agency's reply papers on the Agency's motion for summary judgment, the statute of limitations and the doctrines of res judicata and collateral estoppel preclude relitigation of the factual issues established by the Agency and of any legal issues that could have been litigated at the administrative level or in a proceeding pursuant to Article 78.

upon which the Spiegels rely in their attempt to invoke the Court's equity jurisdiction in their favor are inaccurate.

The Spiegels' plea that the Court overextend its equity jurisdiction to endorse their Permit violations depends upon a distorted view of the facts intended to make the Spiegels appear to be victims of the Agency, their surveyor, and the subdivision's developer or its successor, rather than the deliberate architects of their own undisputed violations. *See* Defs.' MOL at 5-8 (identifying "twenty findings of fact" asserted to be "material to this Court's fair disposition of this case"); *see also id.* at 17 (Agency failed to investigate neighbors' complaint promptly and thus failed to stop the Spiegels from violating the Permit); *id.* at 17-18 (Agency obviously contemplated a highly visible house on Lot 39); *id.* at 18 (neighbors' houses also violate the Permit); *id.* at 18 (developer is at fault for issuing deeds containing an inaccurate restriction on height of 35 feet); *id.* (Agency faulted for neither taking action against developer nor warning future homeowners); *id.* at 18-19 (Agency faulted for "vagueness" of Permit); *id.* at 19 (Permit violations were the fault of local surveyor Bob Marvin).[3]

The Permit Violations Were Not "Inadvertent"

In order to invoke the Court's equity jurisdiction in their favor, defendants repeatedly characterize their violations of the Permit as "inadvertent." MOL at 4, 12, 18, 19. But the District Court made no such finding of fact. Moreover, the record before the Court demonstrates that the Spiegels' actions were deliberate and willful, and far from inadvertent.

[3] The papers that accompany the Spiegels' Memorandum of Law are also rife with misrepresentations and claims that are simply false. *See, e.g.,* Nov. 13, 2009 Affidavit of Jacob F. Lamme ¶ 11 (suggesting that a 1987 memorandum authorized the Spiegels' confessed violation of Permit Condition 15(j) (20' setback from abrupt change in slope)); *id.* ¶ 12 (implying that the house may not violate Condition 15(i)); *id.* ¶ 17 (current location of house conforms with "Agency's original understanding of the visual impact of Fawn Ridge"); *id.* ¶ 23 (alleging that the Agency has never evaluated the visual impact of the Spiegels' settlement proposals despite the sworn testimony to the contrary of Deputy Director Mark Sengenberger); *id.* ¶ 31 (suggesting that the Agency misled the Court with respect to a penalty).

New York Law provides that Agency permits must be recorded within 60-days of their issuance. Exec. L. § 809(7)(a). A properly recorded permit "shall operate and be construed as actual notice of the right to undertake the project and of the terms and conditions imposed by the permit . . . . and such terms and conditions shall be binding upon all subsequent grantees of the land area subject to the permit." *Id.* § 809(7)(b). Further, the deed to Lot 39 expressly provides that "[i]n addition to the restrictions contained herein, the party(ies) of the second part [the buyer] shall be subject to and abide by the terms and conditions in the Adirondack Agency Permit No. 87-28, issued to the party of the first part [the developer] for the Fawn Ridge Subdivision[,] which Permit was recorded in the Essex County Clerk's Office on May 4, 1988 in Liber 21 APA at Page 333." The Spiegels' deed and the title search that preceded their purchase put them on notice.

And the Spiegels did not simply fail to read the small print. Arthur Spiegel has admitted that, at the time he purchased Lot 39, he knew it was governed by an Agency permit. Mar. 14, 2007 A. Spiegel Depo. Tr. at 59-61 (attached to Jan. 5, 2010 Affirmation of Susan L. Taylor as Exh. 6). His knowledge is not surprising, since Lot 39 was the second lot that he owned in Fawn Ridge. The defendants had built a house on Lot 38, right next door, a few years earlier. Sessions Op. at 5. That deed, too, contained the proviso that construction must be in conformity with Agency Permit No. 87-28. Mr. Spiegel has constructed and sold several other houses in Fawn Ridge, including two on speculation, and one that violated a deed restriction prohibiting log homes. *See* A. Spiegel Depo. Tr. at 22-31 at 127-128, 152-155.

Moreover, Mr. Spiegel also served on the Fawn Ridge Architectural Review Committee (ARC) for more than three years, offering advice to homeowners, talking to their builders, and approving site plans. *See* Sessions Op. at 5. Mr. Spiegel's multi-year service on the ARC

included 2004, when his house on Lot 39 was "approved" by the committee. *See id.* The ARC expressly warned lot owners about the need to comply with the restrictions set forth in the Permit through correspondence and an informational sheet called "Lot Development Control Notes." *Id.*

If the Permit, the deed restrictions to multiple lots, the Spiegels' other Fawn Ridge building projects, and Mr. Spiegel's service on the ARC were not enough to put them on notice as to the Permit's restrictions, defendants also had actual notice of the potential violations, personally delivered. Dr. Eugene Byrne, the Spiegels' across-the-street neighbor, called the looming problems to Mr. Spiegel's attention in both April and August 2004. *See* Jun. 29, 2005 E. Byrne Aff. ¶¶ 4-9 (Dr. Byrne called the potential problems to Art Spiegel's attention in the spring and summer of 2004 before the foundation was poured); Aug. 31, 2005 E. Byrne Aff. ¶ 5; *see also* Jun. 27, 2005 A. Spiegel Aff. ¶ 16 (he showed Dr. Byrne the house plans in the spring). Dr. Byrne testified that Mr. Spiegel's response to him, at a social function, was that "even an outhouse" would spoil the Byrnes's view. Jun. 29, 2005 E. Byrne Aff. ¶ 5. In fact, Mr. Spiegel acknowledges having shown Dr. Byrne his plans. Notably, these conversations occurred *before* the Spiegels poured a foundation or began framing their house. *See* Aug. 31, 2005 E. Byrne Aff. ¶ 5.

Notwithstanding the evidence that they should have known about the Permit's restrictions, and Mr. Spiegel's sworn testimony that he, in fact, knew about the Permit's restrictions before he poured a foundation, the Spiegels continue to blame their Permit violations on others. There is no truth to the claim that land surveyor Bob Marvin is responsible for the house's location, which violates Permit Condition 15(j). *See* MOL at 19; *see also* Nov. 13, 2009 Affidavit of Jacob F. Lamme ¶¶ 14-17; Nov. 11, 2009 Affidavit of Arthur Spiegel ¶¶ 7-9. In

fact, Mr. Marvin testified that, after he staked the location for the house, it was moved down slope without his knowledge. May 21, 2007 Marvin Depo. Tr. at 118-119; 122-24. To the best of Mr. Marvin's knowledge, it was moved by Mr. Spiegel and perhaps others in connection with securing the ARC's approval. *Id.* at 122-24. Regardless of which Spiegel team member made the decision, Mr. Marvin testified definitively that he did not determine the house's eventual location and was not responsible for its move from a Permit-compliant location to its present, noncompliant location. *Id.* The Spiegels' repeated claims that Mr. Marvin is responsible for the house's present location are nonsense.

The Spiegels also attempt to blame the Agency for their Permit violations, faulting the Agency for not stopping them from committing their egregious violations. But as the District Court found, in fact, the Agency immediately wrote the Spiegels a letter advising them of Dr. Byrne's complaint. In light of their response to their neighbors' efforts to stop them from violating the Permit ("even an outhouse" would ruin the Byrnes' view, *see* Jun. 29, 2005 E. Byrne Aff. ¶ 5), it is astonishing for the Spiegels to contend that the Agency failed to fulfill some obligation to stop them from violating the Permit. In any event, it is undisputed that the Agency, did, in fact, try to prevent the violations.

After blaming the Agency, the developer, and their surveyor, the Spiegels next point out that some of the neighbors have also violated the Permit. *See, e.g.,* MOL at 18. They complain that the Agency has not sought to enforce the Permit against the neighbors whose houses also violate the Permit. But the claim that the Spiegels were unfairly singled out by the Agency from among others similarly situated is precisely the claim that the federal court rejected in September 2009. *See* Sessions Op. at 20, 31-32. As the Agency properly found in its Enforcement Orders, the Spiegels' house is the only one that is 21.7 feet taller than the Permit allows, is the only one

that is located on top of the steep slope, is the only one that violates the vegetative screening provisions, and, consequently, is the most visible in the subdivision. *See* Jan. 5, 2010 Taylor Aff. ¶¶ 11-13 and Exh. B to the Aug. 9, 2006 Affirmation of Paul Van Cott) (NOI). The Spiegels did not appeal the Agency's Final Enforcement Order. Sessions Op. at 14. Even the Spiegels concede that their house is the most visible. *See* Jan. 5, 2010 Taylor Aff. ¶ 12. Defendants can no longer challenge "the wisdom, or the legal correctness of, the Agency's conclusions in its Final Order." Sessions Op. at 29. As the district court found, the Agency did not single the Spiegels out, nor had it received other complaints about other ridge line homes violating the Permit, and the Agency determined that "the Spiegel house egregiously violated three Permit conditions and was by far the most visible ridge line house." *Id.* at 20. Equity does not favor the Spiegels, who are not similarly situated to their neighbors.

In addition to attempting to invoke the Court's sympathy by distorting the facts, the Spiegels also improperly ask the Court to make findings of fact. *See, e.g.,* MOL at 12 (asking the Court to find that the Spiegels' proposed remedy would make the Spiegel house 10% lower than the average home in the subdivision); *id.* (alleging that their settlement proposal will make the house lower than 2 other houses on the ridge line); *id.* (settlement proposal allegedly will make the house lower than 23 other homes in the full subdivision); *id.* at 13 (effectively screen the house); *id.* at 13, 14, 16 (asking Court to determine that their settlement proposal "will have virtually the same visual impact" as Permit compliance); *id.* at 12, 17 (asking the Court to find that the Spiegels' settlement proposal will cost approximately $115,000). None of these "facts" is true. Even if the "facts" were true, however, the Agency alone has the jurisdiction to make such findings in the first instance. Finally, all of the "facts" are disputed making the Spiegels' cross-motion for summary judgment improper. *See* Taylor Aff. ¶¶ 10-19.

ARGUMENT

I.

ADIRONDACK PARK AGENCY ACT § 813(2) DOES NOT AUTHORIZE THE "RELIEF" SOUGHT

The Spiegels concede that granting summary judgment to the Agency is appropriate. *See* Spiegels' Notice of Cross-Motion; MOL at 3 (the Spiegels "welcome the opportunity for this Court to enter an order enforcing the Agency's Final Enforcement Order"). They seek, however, to characterize the pending motions as simply different proposals for resolving a vexing and unfortunate situation for which they have no responsibility. They further advise the Court that, sitting in equity, there are no limits on its exercise of "discretion" and that the Court should choose the Spiegels' proposed "amelioration project" over the Agency's proposed "amelioration project." *See* MOL at 19 (equity favors "the Spiegels' proposed 'amelioration project' over that of the Agency"); Lamme Aff. at 9 ("The Agency Has Not Studied the Visual Impact of the *Equitable Remedy that it Seeks*") (emphasis added). They also ask the Court to spare them any financial penalty.

But this is not a settlement conference and the parties are not asking the Court to choose between competing settlement proposals. The Agency seeks the relief to which it is statutorily entitled: enforcement of the September 7, 2005 Final Enforcement Order, which, in turn, requires compliance with Permit No. 87-28 and the imposition of civil penalties. *See* Exec. L. § 813(1), (2). By contrast, the Spiegels seek to modify the Permit by imposing upon the Agency a repeatedly-rejected settlement proposal to which neither law nor equity entitles them.

The Court's Jurisdiction is Limited

The Agency seeks to enforce the terms of Executive Law § 809 and Permit No. 87-28, which the Spiegels violated. *See* Sept. 7, 2005 Final Enforcement Order. The Final

Enforcement Order directed the Spiegels to come into compliance with the Permit and the Agency commenced a proceeding to enforce the terms of the Permit. *See* Complaint. But the Spiegels now argue that that the Court has the power to direct them to merely "ameliorate" the violations as an alternative to compliance with the Permit. *See* MOL at 9-11 (arguing that courts sit in equity and can fashion any remedy whatsoever). The Spiegels dismiss as "of no consequence" the lack of any precedent for their demand that the Court award them relief notwithstanding their undisputed Permit violations and the Agency's entitlement to summary judgment. MOL at 11. The Spiegels err.

APA Act § 813 provides

> 1. Any person who violates any provision of this article or any rule or regulation promulgated by the agency, or the terms or conditions of any order or permit issued by the agency pursuant to this article shall be liable to a civil penalty of not more than five hundred dollars for each day or part thereof during which such violation continues. The civil penalties provided by this subdivision shall be recoverable in an action instituted in the name of the agency by the attorney general on his own initiative or at the request of the agency.
>
> 2. Alternatively or in addition to an action to recover the civil penalties provided by subdivision one of this section, the attorney general may institute in the name of the agency any appropriate action or proceeding to prevent, restrain, enjoin, correct or abate any violation of, or to enforce any provision of this article or any rule or regulation promulgated by the agency, or the terms or conditions of any order or permit issued by the agency pursuant to this article. The court in which the action or proceeding is brought may order the joinder of appropriate persons as parties and may order the appropriate person or the person responsible for the violation to take such affirmative measures as are properly within its equitable powers to correct or ameliorate the violation, having regard to the purposes of this article and the determinations required by subdivision ten of section eight hundred nine.
>
> 3. Such civil penalty may be released or compromised by the agency before the matter has been referred to the attorney general, and where such matter has been referred to the attorney general, any such penalty may be released or compromised and any action or cause of action commenced to recover the same may be settled or discontinued by the attorney general with the consent of the agency.

The plain language of § 813 provides that, alternatively or cumulatively to the penalties provided by subsection (1), the Attorney General may institute an action or proceeding "to prevent, restrain, enjoin, correct or abate any violation of, or to enforce, any provision of this article or any rule or regulation promulgated by the agency, or the terms or conditions of any order or permit issued by the agency pursuant to this article." Exec. L. § 813(2). The court in which the Attorney General brings suit may "order the joinder of appropriate persons as parties and may order the appropriate person or the person responsible for the violation to take such affirmative measures as are properly within its equitable powers to correct or ameliorate the violation." *Id.* The court's power must effectuate the purposes of the Act and must be consonant with Exec. L. § 809(10). The section thus makes clear that a court has equitable jurisdiction to enforce the Act and direct "affirmative measures" toward that end.

Turning § 813 on its head, the Spiegels ask the Court to limit the Agency's jurisdiction over Permit No. 87-28 and the subdivision it authorizes in the name of "equity," granting them "relief." This the Court cannot do. In *Sohn v. Calderon*, 78 N.Y.2d 755 (1991), the Court of Appeals reversed a preliminary injunction granted by Supreme Court (and affirmed by the Third Department) on the ground that the Department of Housing and Community Renewal (DHCR) had exclusive jurisdiction in the matter. After reviewing the Rent Stabilization Code, the Court held that it was "clear beyond question that the Legislature intended disputes over a landlord's right to demolish a regulated building to be adjudicated by the DHCR and, to a lesser extent, HPD [New York City's Housing Preservation Department]. The question presented here is whether by virtue of its general original jurisdiction, the Supreme Court has concurrent authority to adjudicate such disputes." *Id.* at 765-66. The Court concluded that the Legislature had vested exclusive original jurisdiction in DHCR as a consequence of that agency's "administration of a

statutory regulatory program." *Id.* at 767. Where that is the case, "Supreme Court's power is limited to article 78 review, except where the applicability or constitutionality of the regulatory statute, or other like questions, are in issue." *Id.*

Similarly, the APA Act vests jurisdiction in the Agency alone to make findings of fact, establish regulatory guidelines, and otherwise administer and enforce the Act. *Compare* Exec. L. §§ 804(6), (7), (9) (setting forth Agency's specific powers); § 805 (Agency shall review and evaluate land use and development plan and map based upon findings it must make); § 806 (setting forth shoreline restrictions to be administered by Agency, which must conduct project review); § 807 (Agency authorized to review and approve local land use programs to be administered by local municipalities following Agency's findings of fact); § 808 (Agency has jurisdiction to commence court proceeding to revoke approval of local land use programs); § 809 ("agency shall have jurisdiction to review and approve all" class A and class B regional projects); § 810; § 811 (setting forth additional provisions relevant to Agency's project review jurisdiction and application of shoreline restrictions); § 812 (Agency can conduct public hearings); § 813 (penalties and enforcement); § 814 (Agency as jurisdiction over proposed projects by other state agencies); § 818 (acts or omissions of the Agency are subject to judicial review pursuant to article 78) *with Sohn,* 78 N.Y.2d at 764-766 (detailing statutory language that clearly vested jurisdiction to resolve disputes within the agencies' area of expertise to administrative agencies, not courts).

Unlike *Sohn*, this case is before the Court at the request of the APA, an agency charged with administering a "statutory regulatory program." But the Agency's commencement of an enforcement action does not constitute a relinquishment of the Agency's exclusive jurisdiction. In *Adirondack Park Agency v. Hunt Bros. Contractors, Inc.*, 244 A.D.2d 849 (3d Dep't 1997),

the Agency sought to enforce a permit that approved a concrete site project. The permit contained a requirement that respondents prepare a noise abatement plan. When respondents failed to comply with the permit requirement, the Agency commenced an action, "seeking enforcement." 244 A.D.2d at 849. The Agency sought and eventually obtained (following an appeal to the Third Department) a preliminary injunction that allowed use of rock crushing machinery only for purposes of preparing and testing a noise abatement plan in conformity with the permit. *Id.* at 849-850. Respondents again failed to submit the required plan and sought to use this rock crushing machinery anyway.

After reversing a second injunction by the lower court in favor of defendants and against the Agency, the Third Department reminded the defendants that "the commencement of a proceeding in Supreme Court pursuant to Executive Law § 813 for purposes of enforcement by no means constitutes a relinquishment by plaintiff [APA] of its jurisdiction over this project site." *Id.* "The court's purpose is only to decide whether the agency's enforcement of its requirements was arbitrary and capricious." *Id.* Because "'all challenges to the inclusion of [the noise abatement] condition in [the] permit [are] now foreclosed,'" the court's jurisdiction was even more limited." 244 A.D.2d at 851. The Third Department "emphasize[d] that plaintiff [APA] will retain jurisdiction over this project site until a contrary determination is rendered by it or an appropriate challenge to its exercise thereof is determined by Supreme Court." *Id.*

The Court's jurisdiction here is equally circumscribed: All challenges to the terms and conditions in Permit No. 87-28 are long since foreclosed as are any substantive challenges to the Agency's Final Enforcement Order. *See* State's Nov. 13, 2009 Reply MOL at 5-21; Sessions Op. at 14. The Agency's request that the Court enforce Permit No. 87-29 does not constitute a relinquishment of its jurisdiction. As in *Hunt Bros.*, the Agency "will retain jurisdiction," and

equity does not permit the Court to curtail it or to substitute its judgment for that of the Agency. *See Sohn*, 78 N.Y.2d at 768 ("Since concurrent Supreme Court jurisdiction was not contemplated in this situation and the Constitution does not require it, Supreme Court erred in entertaining plaintiff's claims on the merits"). The Agency is entitled to an Order directing full compliance with the Permit.

The Spiegels Have Unclean Hands And Cannot Invoke Equity

Even if the Court had the authority to grant the relief sought by the Spiegels, which it does not, the Spiegels are not entitled to equity. A party seeking equitable relief must "come before the court with clean hands." *Harte v. Turbosystems, Inc.*, 91 A.D.2d 757, 757 (3d Dep't 1982); *see also Kallman v. Krupnik,* 2009 WL 3644366 (3d Dep't Nov. 5, 2009) (attached as Exh. A); *Uciechowski v. Ehrlich*, 221 A.D.2d 866, 868 (3d Dep't 1995).

The record before the Court plainly demonstrates that the Spiegels personally, knowingly or with gross negligence, caused the Permit violations. *See* Jan. 5, 2010 Taylor Aff. ¶¶ 29-40. Permit No. 87-28 was properly recorded with the County Clerk; the deed to lot 39 contains an express reference to the Permit and advises that compliance with the terms of the Permit are required. Mr. Spiegel testified that he was aware that the lot was subject to Agency restrictions when he closed title. A. Spiegel Depo. Tr. at 61 (Exh. 6 to Jan. 5, 2010 Taylor Aff.). Lot 39 was the second lot the Spiegels had purchased in Fawn Ridge, and they later obtained interests in other lots. *See* Sessions Op. at 5 & n.1. Mr. Spiegel served on the Fawn Ridge Architectural Review Committee for three years, including during the time period when he began construction on Lot 39. *See id.* at 4-5. The professional land surveyor who was hired to assist the Spiegels testified that the house was not constructed where and how he laid it out. *See* May 21, 2007 Marvin Depo. Tr. at 118-119; 122-24. He further testified to his understanding that the house

had been moved, by someone other than himself, to a down slope location that violates the Permit. *See id.* Further, before the Spiegels poured a foundation or began any framing on lot 39, a neighbor twice warned them that their proposed house would violate the terms of Permit No. 87-28, which was properly recorded and expressly referenced in their deed. *See* Jun. 29, 2005 E. Byrne Aff. ¶¶ 4-5. They ignored the warnings and proceeded with construction anyway.

Throughout and following the APA administrative proceeding, the Spiegels and the Agency negotiated a possible settlement. But the Agency repeatedly rejected the Spiegels' proposals because they repeatedly failed to address the Agency's concerns. Although the Agency was willing to leave the house on the abrupt change in slope, a permanent violation of Permit Cond. 15(j), the Spiegels never made a settlement proposal that adequately addressed the Agency's concerns about the adverse visual impacts of the house. *See* Mar. 31, 2009 Sengenberger Aff. ¶¶ 35-36; Feb. 11, 2008 Affidavit of Mark Sengenberger ¶ 52 and Exh. 11 (Spiegel settlement proposal); *id.* ¶ 57 and Exh. 16 (Spiegel settlement proposal that involved reducing the height of the house to more than 40'); *id.* ¶ 60 and Exh. 18 (explanation of Agency Executive Director Richard Lefebvre of Agency's rejection of settlement proposal); *id.* ¶ 61 (Agency rejected another settlement proposal in November 2005); *see also* Jun. 28, 2005 Sengenberger Aff. ¶¶ 2-10 (explaining Agency's rejection of June 27, 2005 settlement proposal). While the Spiegels now claim that the Agency never evaluated the visual impact of their proposal, Defs.' MOL at 14, the record is clear: "The Agency and I personally, evaluated the visual impact of the Spiegels' various settlement proposals (I am a licensed landscape architect); none were satisfactory to the Agency." Mar. 31, 2009 Sengenberger Aff. ¶ 36.

The Spiegels remain in continuing violation of the Final Enforcement Order. After four years of litigation, they continue to blame their violations variously on their realtor, their

contractor, their surveyor, the subdivision's Architectural Review Committee, their neighbors, as well as the Agency and its staff members. They have litigated aggressively and unsuccessfully for four years in a federal forum in order to avoid complying with the Agency's lawful Final Enforcement Order. They now seek to have the Court substitute its judgment for that of the full bipartisan Agency, which has considered and rejected the Spiegels' proposals several times since 2005. *See* Taylor Aff. ¶¶ 20-26. The Court lacks the jurisdiction to substitute its judgment for that of the Agency. *See Sohn*, 78 N.Y.2d at 765-67; *Hunt Bros.*, 244 A.D.2d at 851.

Even If The Court Could Assume The Agency's Jurisdiction, It Could Not Find That The Spiegels' "Absolution Project" Comported With Executive Law § 809(10)

The Spiegels claim that the proposed settlement project offer would be permit-able and that the Court could make the requisite determinations pursuant to Exec. L. § 809(10), as required by Executive Law § 813(2). Defs.' MOL at 19-23. But the determinations required by Executive Law § 809(10) are findings of fact within the exclusive province of the Agency. *See* Exec. L. § 809(10) ("The agency shall not approve any project proposed to be located in any land use area not governed by an approved local land use program, or grant a permit therefore, unless it first determines that such project meets the following criteria"). These findings, like the absolution project's alleged visual impacts, may not be made by a court, but must be made the Agency in the first instance. In *Sohn*, the Court of Appeals pointed out the many provisions of the rent control and stabilization laws that contemplated the findings of fact to be made by the agency charged with enforcing those laws. *See Sohn*, 78 N.Y.2d at 767-68. Relying on the administrative statutes at issue and the doctrine of primary jurisdiction, the Court concluded that courts should "refrain from adjudicating disputes within an administrative agency's authority, particularly where the agency's specialized experience and technical expertise is involved." *Id.* at 768. The Court reversed Supreme Court's permanent injunctions "because it was premised on

factual determinations that the Supreme Court had no authority to make." *Id.* That is the case here. *See, e.g.,* Exec. L. § 809(10) ("The agency shall not approve any project proposed to be located in any land use area not governed by an approved local land use program, or grant a permit therefore, unless it first determines that such project meets the following criteria").

Here, the Agency has repeatedly rejected as insufficient settlement proposals that were more robust and credible than the one before the Court, which is itself sufficient evidence that the absolution project would not serve the purposes of the Adirondack Park Agency Act. *See, e.g.*, Final Enforcement Order; Mar. 31, 2009 Sengenberger Aff. ¶¶ 35-36; Feb. 11, 2008 Affidavit of Mark Sengenberger ¶ 60 and Exh. 18 (explanation of Agency Executive Director Richard Lefebvre of Agency's rejection of settlement proposal); *id.* ¶ 61 (Agency rejected another settlement proposal in November 2005); *see also* Jun. 28, 2005 Sengenberger Aff. ¶¶ 2-10 (explaining Agency's rejection of June 27, 2005 settlement proposal).

Nor does the Spiegel proposal meet each of the criteria set forth in Executive Law § 809(10). First, it is apparent that the absolution project would result in a house that still exceeds 40 feet, making it a Class A regional project that would ordinarily require full review and findings of fact by the Agency pursuant to § 809. *See* Jan. 4, 2010 LaLonde Aff. ¶ 8. Moreover, the Agency has already determined that the house has an undue adverse impact on the "scenic, aesthetic" resources of the Park. *See* Final Enforcement Order (finding that the Spiegels violated Permit Conds. 15(g) (height); 15(i) successional growth; and 15(j) (setback)); *see also* Jul. 13, 2005 Enforcement Order (only the Spiegels' house is highly visible from offsite vantage points, impacts that the Permit specifically intended to prevent). The Final Enforcement Order further determined that compliance with those Permit conditions was necessary to address those impacts. Subsequently, the Agency repeatedly rejected settlement offers from defendants

because they were insufficient. Even those inadequate offers would have done more than the present settlement proposal to abate the house's undisputed adverse impacts. The proposed project simply does not comport with the findings of fact necessary pursuant to Executive Law § 809(10), which, in any event, are the exclusive province of the Agency in the first instance. *See Sohn*, 78 N.Y.2d at 767 ("The only issues raised by plaintiff's complaint were his satisfaction of the regulatory conditions for obtaining certificates of eviction and demolishing a structure containing protected apartment units. The earlier described provisions of the rent control and rent-stabilization laws demonstrate that the Legislature intended DHCR and HPD to be the *exclusive* initial arbiters of whether an owner has, in fact, met these regulatory conditions").

Conclusion

First, the Agency has exclusive jurisdiction over the alleged satisfaction of the regulatory conditions set forth in Exec. L. § 809(1). The Agency does not forfeit its jurisdiction by seeking the Court's assistance in enforcing the Permit and the Final Enforcement Order, which the Spiegels failed to challenge pursuant to article 78. Second, for the reasons set forth here and in the accompanying affirmations and affidavits, the equities do not favor the Spiegels. *See, e.g., Adirondack Park Agency v. Hunt Bros. Contractors, Inc.*, 234 A.D.2d 737, 738 (3d Dep't 1996) (reversing injunction granted to permit violator and finding that Agency was granted "formidable powers" to enable it to discharge its "awesome responsibilities" and therefore the equities were not evenly balanced). The Court should deny the Spiegels' request that the Court exercise its equitable powers to subvert the law and undermine Permit No. 87-28.

II.

THE AGENCY'S PENALTY DEMAND IS LAWFUL

The Spiegels also argue that the Agency's demand for a penalty pursuant to APA Act § 813 "is without basis in law" as "this Court has no jurisdiction to impose a civil penalty because when the Agency commenced its administrative proceeding against the Spiegels, it never sought to impose a civil penalty." Lamme Aff. ¶ 28. Similarly, the Spiegels also argue that the Attorney General cannot seek these penalties if they were not imposed by the Agency in the first instance.

This Affirmative Defense is Waived

To the extent this argument is made against the Attorney General, it is meritless. First, it was not preserved as an affirmative defense. Civ. Prac. L. & R. § 3018(b) requires a party to "plead all matters which if not pleaded would be likely to take the adverse party by surprise." Defendants did not plead that the Agency's decision not to impose a penalty at the administrative stage precluded any subsequent attempt to collect such penalties. *See* Ver. Answer (Exh. B to Lamme Aff.). To the contrary, as a factual matter, they took the position that the Agency *had* sought penalties. *See* Taylor Aff. ¶¶ 45-49. Accordingly, the argument is waived. *See, e.g., Apex Two, Inc. v. Terwilliger*, 211 A.D.2d 856, 857-58 (3d Dep't 1995) (defense of reformation was waived); *Costa v. Finke*, 162 A.D.2d 936, 937 (3d Dep't 1990) (defense of "improper party" was waived).

More than three years later, the Spiegels continued to assert that the Agency had imposed a penalty on them. At oral argument on the parties' motions for summary judgment in federal court, Mr. Privitera argued that the Agency had said that "the house must be razed, and a $200,000 fine must be paid." Oral Arg. Tr. at 45 (Lamme Aff. Exh. R). The Court tried to

clarify that representation, asking "They always demanded $200,000. They always demanded the destruction of the building?" to which Mr. Privitera responded, "Yes, your honor." *Id.*[4] The Court tried one more time: "And pay the $200,000," to which Mr. Privitera again responded, "That's their position." *Id.* at 46. In response to the Court's third attempt to clarify the record, Mr. Privitera explained that it was, in fact, the Attorney General that sought the $200,000 penalty, not the Agency. *See id.* at 46. Indeed, the Spiegels argued that the Attorney General's demand caused the Spiegels to "file[] this case because we had no choice." *Id.* Plainly, then, the Spiegels have known since January 2006 that the Agency imposed no penalty but the Attorney General would seek one if compelled to seek judicial enforcement of the Agency's Final Enforcement Order. They failed, however, to plead the alleged illegality of the State's demand for penalties when they filed their verified answer in June 2006, only four months after being "forced" to file their federal complaint. "Waiver is appropriate where, as here, the revelation surprises the opposing party, there has been pretrial discovery and the defendant has offered no satisfactory excuse for the significant delay." *Costa*, 162 A.D.2d at 937.

The Argument is Without Merit

Even if not waived, the Spiegels' penalty argument is meritless. The Adirondack Park Agency Act subjects "[a]ny person who violates any provision of this article or any rule or regulation promulgated by the agency, or the terms or conditions of any order or permit issued by the agency pursuant to this article" to a civil penalty "of not more than five hundred dollars

[4] In fact, as the Spiegels now concede, the Agency did not impose a financial penalty. Likewise, the Agency did not "always demand[] the deconstruction of the building." *See, e.g.*, Mar. 31, 2009 Sengenberger Aff. ¶ 35 ("All of the Spiegels' settlement proposals were based on the house remaining on the 'abrupt change in slope,' a position the Agency was willing to consider"); Jan. 31, 2006 Taylor letter (describing settlement posture that included reducing the height of the house, screening it, and a substantial penalty but not moving, or razing, the house); Oral Arg. Tr. at 50-1 (State's representation that the proposed "$200,000 penalty was in lieu of an order directing the moving of the house," and "the agency understood that settling the case meant not moving the house. Had the house been moved, there would have been very little to settle. So the agency's position was that a substantial penalty would be required if the house were to stay where it is").

for each day or part thereof during which such violation continues." Exec. L. § 813(1). The Act provides that such penalties are "recoverable" by the Attorney General, on his own initiative or at the Agency's request. *Id.*

The Spiegels read into "recoverable" a condition precedent: that the Agency impose penalties at the commencement of "its administrative proceeding[s]." *See* Lamme Aff. ¶ 28; MOL at 15. It is now undisputed that the Agency did not impose a penalty on the Spiegels in September 2005 when it issued the Final Enforcement Order. The Spiegels now claim that both the Attorney General and the Court lack the ability to seek civil penalties at this juncture. *See* MOL at 15; Lamme Aff. ¶ 28. Despite the Spiegels' claim that the "plain language" of the Act "clearly" so provides and that such clear intent is supported by the Agency's regulations, they cite no authority for this novel proposition. *See* MOL at 15. In short, there is none nor is there support in the "plain language" of the Act, the legislative history, or the Agency's regulations.

The plain language of § 813(1) says that "any person" who violates the Act, Agency regulations, or the terms or conditions of a permit or order of the Agency "shall be liable to a civil penalty." Exec. L. § 813(1). The Legislature, not the Agency or the Attorney General, has imposed the penalties at issue here. The only condition precedent to these statutory penalties is that a person have violated "any provision of this article or any rule or regulation promulgated by the agency, or the terms or conditions of any order or permit issued by the agency pursuant to this article." It is undisputed that the Spiegels have violated the Agency's regulations and the terms and conditions of both the Agency's Final Enforcement Order and Permit No. 87-28. Accordingly, they "shall be liable to a civil penalty."

The Spiegels' claim that there is an unwritten condition precedent is unsupported by case law or the statutory scheme. First, in many cases, there is no administrative proceeding: the

Attorney General goes directly to court on the Agency's behalf to enforce a violation of regulation, permit or order. *See, e.g., Hunt Bros.*, 244 A.D.2d at 849 (upon continued failure to comply with permit, plaintiff commenced action in Supreme Court). The Agency's regulations expressly authorize referral to the Attorney General for civil action in the absence of administrative enforcement proceedings. *See* 9 NYCRR § 581-2.8. Even where there is an administrative proceeding, courts have imposed penalties that were recovered by the Attorney General where the Agency itself had not demanded penalties. *See, e.g., Adirondack Park Agency v. Bucci*, 2 A.D.3d 1293, 1295 (remitting to Supreme Court with directions to enter injunctive order and determine whether to assess penalties, which had not been imposed by APA order).[5] The legislative history upon which the Spiegels heavily rely also clearly indicates the Attorney General's ability to obtain penalties in these circumstances. *See* Jan. 5, 2010 Taylor Aff. Exh. 3 (statement by Senator B. C. Smith) (legislature intended to "do[] away with the criminal penalties and substitute[] thereof the civil penalties, which . . . are administered in effect by the Attorney General").

There is no condition precedent to the collection of penalties. But if there were, it has been amply satisfied. First, Agency staff made very clear, during the administrative enforcement proceeding, that staff would forego penalties *if* the parties settled the matter before it reached the full Agency for review and determination. *See, e.g.,* Exhs. 22 (May 9, 2005 letter from Van Cott to Ulasewicz) and 26 (June 21, 2005 letter from Van Cott to Ulasewicz) to Feb. 12, 2009 Van Cott Aff. Second, the Spiegels were also on notice that the Agency would seek civil penalties in a court of law if they failed to comply with the Final Enforcement Order. On January 31, 2006, following the Agency's referral of the matter to the New York State Attorney General, Assistant Attorney General Susan L. Taylor wrote to the Spiegels' attorneys and advised them of the terms

[5] The APA's administrative order in *Bucci* is attached as Exh. 7 to the Jan. 5, 2010 Affirmation of Susan Taylor.

the State would seek in any settlement of the matter. *See* Taylor Aff. ¶ 46 and Exh. 4 (Jan. 31, 2006 letter from Susan L. Taylor to Thomas Ulasewicz and John Privitera). That letter very clearly advised the Spiegels that the State would only consider a settlement offer that (1) reduced the house's height to 30 feet; (2) included a technically feasible screening plan; and (3) included "a very substantial negotiated penalty," which it described as "necessary to serve the purposes of a civil penalty as described by New York courts: retribution, deterrence and restitution." Jan. 31, 2006 Taylor letter at 2. In fact, it was the January 31, 2006 letter that triggered the filing of the Spiegels' federal action. *See* Taylor Aff. ¶ 47; *see also* Jul. 21, 2009 Oral Arg. Tr. at 46. The Spiegels clearly understood that failure to comply with the Final Enforcement Order would subject them to penalties for lack of compliance. Moreover, even if the State had not advised the Spiegels of its intention to seek penalties, the penalties are statutory. *See* Exec. L. § 813(1) (any person who violates the Act, Agency regulations or the terms or conditions of a permit or order "shall be liable to a civil penalty").

Nor does the Spiegels' reading of the statute make sense as a policy matter. If the Spiegels' interpretation of § 813(1) is correct, the statute bars the Agency, the Attorney General and this Court from penalizing recalcitrant or willful violations of an Agency order. For instance, assume that the Agency enters an order directing a violator to remedy a violation of the Freshwater Wetlands Act by removing the offending fill. At the time it enters its enforcement order the Agency elects not to impose a penalty. The Agency might not impose a penalty for any number of reasons, including the violator's demonstrated or perceived inability to pay, the violator's perceived cooperation with the Agency, the nature of the violation or its cause, or the costliness of the remediation. But if the violator subsequently fails to comply with the Agency's remedial enforcement order, even if the violator acts willfully or with gross negligence, the

Spiegels say that no one -- including the Court -- can subsequently require a financial penalty. That is not the law.

Defendants' interpretation would effectively deprive the Agency of its discretion and that of its Enforcement Committee. *See* 9 NYCRR §§ 581-2.1, 2.2 (Agency or its Enforcement Committee may "decide on an appropriate disposition of any enforcement action"). The Spiegels' interpretation would compel the Agency to impose a financial penalty in each and every instance simply as a protective measure so that it could later seek to "recover" the penalty in the event that the violator subsequently gave it cause to do so, even where it did not, think a penalty was warranted at the time of its initial enforcement determination. Absent such "magic language," inserted prophylactically in every Agency order, the Agency would have to commence an administrative proceeding seeking to impose a penalty for the violation of its previous enforcement order. Presumably, this iterative process would go on interminably. Neither the plain language nor the policy of the Act supports an interpretation that would lead the Agency to require penalties in all of its enforcement orders or, in the alternative, to commence repeated administrative enforcement actions.

The Spiegels' proposed interpretation would also subvert the deterrence principal of civil penalties. The Spiegels would compel the Agency to engage in costly and repetitive litigation. Alternatively, they would require the Agency to deploy "magic words" simply to preserve its ability to impose penalties at a later time. Absent such language in the Agency's enforcement determination, even a court could not impose penalties in an appropriate case. Section 813(2) authorizes the imposition of penalties in a court proceeding whether penalties were part of the original order or not. Any other interpretation would preclude the Agency, the Attorney General

or the Court from penalizing recalcitrance or the intentional violation of an enforcement order, such as that before the Court in this case.

III.

SUBSTANTIAL PENALTIES ARE WARRANTED IN THIS CASE

Section 813(2) authorizes the imposition by the Agency of civil penalties for the violation of, *inter alia*, an Agency permit. Civil penalties are imposed by a court of law, not a court sitting in equity. *See Tull v. United States,* 481 U.S. 412, 422 (1987) (penalty imposed by Clean Water Act § 1319(d) is a penalty, which constitutes legal relief). "Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity." *Id.*

In this case, the imposition of substantial civil penalties is abundantly justified. In 2005, following lengthy settlement negotiations with Agency staff, the Agency commenced an administrative enforcement proceeding against the Spiegels for their violations of Permit 87-28. Represented by experienced counsel (a former Executive Director of the Agency), the Spiegels waived their right to a trial-type hearing and made their arguments to the Agency on papers. They continued, through their counsel, to engage in settlement negotiations with the Agency, although those settlements ultimately failed because the Spiegels did not propose measures sufficient to screen the house, even though the Agency was willing to consider leaving the house in its non-compliant location. Consequently, the Agency entered an interim Enforcement Order followed by a Final Enforcement Order. In response, the Spiegels filed an action in federal court, which their attorney confessed was done in order to avoid paying a civil penalty. *See* July 21 Oral Arg. Tr. at 46 (Agency's penalty demand was "why we filed this case because we had no choice"); Lamme Aff. ¶ 31 (same). Four years later, the Spiegels have not complied with the

Final Enforcement Order, which required that they comply with the terms of Permit No. 87-28. It is undisputed that the Spiegels' house violates three material provisions of the Permit, which took special care to avoid precisely the adverse visual impacts caused by the house. A substantial civil penalty is thoroughly warranted. For the reasons set forth in the Taylor Affirmation, the State asks the Court to impose penalties in the amount of $273,450 in addition to entering an order directing full compliance with the terms and conditions of Permit No. 87-28. *See* Taylor Aff. ¶¶ 53-75.

CONCLUSION

The Agency has shown, by competent evidence, that it is entitled to summary judgment enforcing the Final Enforcement Order. Defendants have failed to carry their burden with respect to any affirmative defense, each of which is barred by both the statute of limitations and one or more preclusion doctrines. Defendants' cross-motion would require the Court to exceed its jurisdiction. *See Sohn,* 78 N.Y.2d at 768. The cross-motion is unsupported by fact, admissible evidence, law or equity. *See, e.g., Hunt Bros.*, 2 A.D.3d at 1296 ("the Buccis do not invoke equity to protect a right legally and rightfully obtained. Moreover, because they helped lay the groundwork for the alleged injustice, we conclude that they are not entitled to the benefit of equity"). Accordingly, the State respectfully seeks denial of the cross-motion and entry of judgment in its favor, including an Order directing full and prompt compliance with Agency Permit No. 87-28 and the Final Enforcement Order, and directing payment of a substantial civil penalty.

Dated: January 6, 2010
Albany, New York

Respectfully submitted,

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EXHIBIT A

--- N.Y.S.2d ----, 67 A.D.3d 1093, 2009 WL 3644366 (N.Y.A.D. 3 Dept.), 2009 N.Y. Slip Op. 07903
(Cite as: 2009 WL 3644366 (N.Y.A.D. 3 Dept.))

H

Supreme Court, Appellate Division, Third Department, New York.
Robert KALLMAN, Appellant,
v.
Sheldon M. KRUPNICK, Respondent.
Nov. 5, 2009.

Background: Client brought action against attorney for breach of fiduciary duty and rescission of joint venture contract related to purchase of real property. The Supreme Court, Greene County, Teresi, J., after nonjury trial, entered judgment in favor of attorney. Client appealed.

Holdings: The Supreme Court, Appellate Division, Peters, J., held that:
(1) attorney did not breach fiduciary duty to client;
(2) attorney's alleged prior transgressions were not proximate cause of any harm sustained by client; and
(3) client's conduct constituted unclean hands precluding equitable relief.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ⚿0

30 Appeal and Error
When reviewing an appeal from a nonjury trial, appellate division has broad authority to independently consider the evidence and render a determination warranted by the record.

[2] Appeal and Error 30 ⚿0

30 Appeal and Error
Appellate division will accord considerable deference to the trial court's factual findings, particularly where they rest largely upon credibility determinations.

[3] Joint Adventures 224 ⚿0

224 Joint Adventures
Attorney did not breach any fiduciary duty to client, with whom attorney entered into joint venture to purchase real property; joint venture agreement was fair and reasonable, as agreement purportedly created equal partnership in which both parties offered valuable consideration to business arrangement, attorney's failure memorialize terms of partnership agreement, even if in violation of Code of Professional Responsibility, did not give rise to cause of action, and attorney neither exploited opportunity he learned of through client nor took affirmative steps to benefit himself at client's expense. Code of Prof.Resp., DR 5-104, McKinney's Judiciary Law App.

[4] Attorney and Client 45 ⚿0

45 Attorney and Client
An attorney is not prohibited from entering into a contract with a client, but if the attorney enters into a business relationship with a client while also acting as the client's attorney with respect to the relationship, the attorney must fully and fairly inform the client of the consequences of any action taken in furtherance of the relationship and may not exploit the client's trust for his or her own benefit.

[5] Attorney and Client 45 ⚿0

45 Attorney and Client
An attorney's violation of a disciplinary rule does not, without more, generate a cause of action.

[6] Joint Adventures 224 ⚿0

224 Joint Adventures
Attorney's alleged prior transgressions were not proximate cause of any harm that client allegedly sustained, precluding attorney's liability for breach of fiduciary duty arising from joint venture with client for purchase of real property; client was represented by independent counsel and still elected to

enter into purchase agreement with attorney, while at same time taking advantage of attorney's ability to fund acquisition.

[7] Joint Adventures 224 ⇦0

224 Joint Adventures
Client's conduct of first breaching joint venture agreement with attorney and pursuing purchase of real property on his own, and subsequently agreeing to enter into transaction with attorney while simultaneously commencing present action to rescind that agreement, constituted unclean hands barring equitable relief in his action for breach of fiduciary duty.
McCabe & Mack, L.L.P., Poughkeepsie (Richard R. DuVall of counsel), for appellant.

Hiscock & Barclay, L.L.P., Albany (John R. Casey of counsel), for respondent.

Before: CARDONA, P.J., PETERS, LAHTINEN and MALONE Jr., JJ.

PETERS, J.

*1 Appeal from a judgment of the Supreme Court (Teresi, J.), entered May 23, 2008 in Greene County, upon a decision of the court in favor of defendant.

Defendant, an attorney, began representing plaintiff's mother in a number of legal matters. He later became a personal friend of plaintiff and provided various legal services for him. An experienced real estate developer, plaintiff approached defendant in 2001 about the prospect of purchasing an undeveloped subdivision, known as Windy Ridge, in Greene County. Plaintiff had been advised by Dime Savings Bank, which owned Windy Ridge, that his weak finances and recent personal bankruptcy would prevent him from purchasing the property on his own, and that he needed to bring in someone with financial wherewithal. When he asked defendant to become a partner in the purchase, defendant agreed, and the parties entered into a verbal partnership agreement for the joint purchase of Windy Ridge. Upon concluding that defendant was financially sound, the bank agreed to move forward with the transaction in light of his involvement and, in January 2002, the parties forwarded executed copies of a purchase and sale contract, signed by each of them as purchasers, to the attorney for Dime Savings Bank. The purchase was delayed as a result of the takeover of Dime Savings Bank by Washington Mutual, which then insisted on selling the stock of Windy Ridge Corporation, the sole shareholder of Windy Ridge, rather than the real property itself.

In May 2003, unbeknownst to defendant, plaintiff retained an attorney to facilitate the purchase. Plaintiff then proposed that his brother become a one-third partner in the venture, a proposition that defendant rejected because, according to him, the agreement had always been to be "50/50 partners." Shortly thereafter, plaintiff wrote to defendant notifying him that he was being replaced as counsel and that plaintiff and his brother were going to purchase the Windy Ridge property without him because of his failed efforts to acquire funding for the property's development which, according to plaintiff, was a precondition to defendant becoming an equal partner. In response, defendant advised plaintiff that he "disagree[d] with [plaintiff's] statement of the facts" and "intended to pursue [his] interest in the sale of the property as a '[p]urchaser.' " Shortly thereafter, defendant communicated with the bank's attorney and informed him that he was interested in acquiring Windy Ridge on his own behalf. Despite these developments, defendant continued his efforts to purchase the property jointly with plaintiff and, in August 2003, the parties executed a contract for the Windy Ridge stock purchase. That very same day, plaintiff commenced this action against defendant for, among other things, rescission of the contract.

After joinder of issue, the parties cross-moved for summary judgment. Supreme Court (Ceresia Jr., J.)

dismissed all but plaintiff's first two causes of action, each of which alleged that defendant breached his fiduciary duty to plaintiff in connection with the Windy Ridge transaction. Following a nonjury trial, Supreme Court (Teresi, J.) directed the parties to submit proposed findings of fact. The court ultimately dismissed plaintiff's remaining causes of action, prompting this appeal.

***2** [1][2][3] We affirm. Initially, although we note certain inconsistencies in Supreme Court's findings of fact, we are not precluded from engaging in intelligent appellate review. "When reviewing an appeal from a nonjury trial, we have broad authority to independently consider the evidence and render a determination warranted by the record" (*Gonzalez v. State of New York,* 60 A.D.3d 1193, 1194 [2009] [citations omitted]; *see Chase Manhattan Bank v. Douglas,* 61 A.D.3d 1135, 1136 [2009]). It is equally true, however, that this Court will accord considerable deference to the trial court's factual findings particularly where, as here, they rest largely upon credibility determinations (*see Chase Manhattan Bank v. Douglas,* 61 A.D.3d at 1136, 877 N.Y.S.2d 488; *State of New York v. Industrial Site Servs., Inc.,* 52 A.D.3d 1153, 1157 [2008]). Upon our review of the record, we find that Supreme Court properly dismissed plaintiff's claims for breach of fiduciary duty.

[4] Plaintiff contends that defendant breached his fiduciary obligations to him by engaging in a business transaction that was not fair and reasonable, failing to memorialize the terms of their partnership agreement and ultimately competing with him in the acquisition of Windy Ridge. We begin our analysis with the recognition that "[a]n attorney is not prohibited from entering into a contract with a client" (*Greene v. Greene,* 56 N.Y.2d 86, 92 [1982]). However, if "an attorney enters into a business relationship with a client while also acting as the client's attorney with respect to the relationship, the attorney must fully and fairly inform the client of the consequences of any action taken in furtherance of the relationship and certainly may not exploit the client's trust for his or her own benefit" (*Beltrone v. General Schuyler & Co.,* 252 A.D.2d 640, 641 [1998]; *see Greene v. Greene,* 56 N.Y.2d at 92-93, 451 N.Y.S.2d 46, 436 N.E.2d 496; *Howard v. Murray,* 43 N.Y.2d 417, 420-421 [1977]).

[5] The proof at trial revealed that plaintiff lacked the financial means to purchase Windy Ridge himself and, for this reason, asked defendant to become his partner in the transaction. The credible evidence further established that plaintiff and defendant agreed to become "50/50 partners" in this venture and that both parties offered valuable consideration to the business arrangement; plaintiff discovered this business opportunity and agreed to handle the marketing and development aspects of the project, while defendant would provide legal services for the partnership, seek funding for the development of the project and, most notably, supply the financial capacity for the two to acquire the property. Indeed, there is no dispute that defendant prepared and reviewed documents for the partnership, successfully negotiated the purchase price down from $280,000 to $140,000, obtained the necessary financing for the purchase and contributed equally to the down payment on the property. Simply stated, we find that Supreme Court's determination that the agreement was fair and reasonable and that defendant did not get the better of the bargain is supported by a fair interpretation of the evidence and, therefore, it will not be disturbed (*see Sherwood v. Brock,* 65 A.D.3d 738, 739 [2009]; *Chase Manhattan Bank v. Douglas,* 61 A.D.3d at 1136, 877 N.Y.S.2d 488). Although plaintiff testified that the parties agreed that defendant would be an equal partner only if he could raise the $1.6 million needed to purchase and develop the property, this assertion is not only contradicted by documentary evidence in the record, but Supreme Court found plaintiff's testimony to be incredible on this point, a determination that we will not disturb due to its advantage of observing the witness as he testified (*see Chase Manhattan Bank v. Douglas,* 61 A.D.3d at 1136, 877 N.Y.S.2d 488; *Gonzalez v. State of New York,* 60 A.D.3d at 1194, 875 N.Y.S.2d 327; *Con-*

olly v. Thuillez, 58 A.D.3d 973, 974 [2009]). Further, while defendant certainly should have memorialized the terms of the partnership agreement, even assuming that this failure constituted a violation of former Code of Professional Responsibility DR 5-104, as plaintiff claims, " '[t]he violation of a disciplinary rule does not, without more, generate a cause of action' " (*Guiles v. Simser,* 35 A.D.3d 1054, 1056 [2006], quoting *Schwartz v. Olshan Grundman Frome & Rosenzweig,* 302 A.D.2d 193, 199 [2003]; *see William Kaufman Org. v. Graham & James,* 269 A.D.2d 171, 173 [2000]; *Brainard v. Brown,* 91 A.D.2d 287, 289 [1983]).

***3** [6][7] Nor do we find that defendant impermissibly competed with plaintiff in the purchase of Windy Ridge in violation of his fiduciary obligations as an attorney. Defendant neither exploited an opportunity that he learned of through representation of plaintiff, nor took affirmative steps to benefit himself at plaintiff's expense (*compare Beltrone v. General Schuyler & Co.,* 252 A.D.2d at 641-642, 675 N.Y.S.2d 198; *Schlanger v. Flaton,* 218 A.D.2d 597, 600-602 [1995], *lv denied* 87 N.Y.2d 812 [1996]). Rather, it was plaintiff who approached defendant with the prospect of jointly purchasing Windy Ridge because defendant's financial assistance was necessary in order for him to go forward with the transaction, and the two agreed to become equal partners in that venture. Although defendant did advise the bank that he was interested in acquiring Windy Ridge on his own behalf, this was only after plaintiff breached the partnership agreement and sought to purchase the Windy Ridge property on his own, and defendant nonetheless continued in his efforts to purchase the property jointly with plaintiff and did, in fact, enter into the stock purchase agreement with plaintiff, submit the required down payment and obtained financing for the purchase. Under these circumstances, we simply cannot conclude that defendant breached a fiduciary duty to plaintiff. Notably, plaintiff had obtained independent counsel to represent his interests as early as May 2003, when he informed defendant that he and his brother were proceeding with the purchase on their own. Thus, inasmuch as plaintiff was represented by independent counsel and still elected to enter into the purchase agreement with defendant-while at the same time taking advantage of defendant's ability to fund the acquisition-we agree with Supreme Court's additional finding that any alleged prior transgressions on the part of defendant are not the proximate cause of any harm that plaintiff has allegedly sustained (*see R.M. Newell Co. v. Rice,* 236 A.D.2d 843, 844-845 [1997], *lv denied* 90 N.Y.2d 807 [1997]; *see also Laub v. Faessel,* 297 A.D.2d 28, 30 [2002]). Moreover, plaintiff's conduct in first breaching the partnership agreement and pursuing the property on his own, and subsequently agreeing to enter into the transaction with defendant while simultaneously commencing the present action to rescind that agreement, constituted unclean hands barring the equitable relief he now seeks (*see Hytko v. Hennessey,* 62 A.D.3d 1081, 1085-1086 [2009]). For all of these reasons, we find that Supreme Court properly dismissed plaintiff's breach of fiduciary duty claims.

Finally, Supreme Court did not commit reversible error in declining to admit a certain letter into evidence on the grounds of lack of foundation and hearsay.

ORDERED that the judgment is affirmed, with costs.

CARDONA, P.J., LAHTINEN and MALONE Jr., JJ., concur.

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