To be Argued by:
DAVID H. TENNANT
(Time Requested: 10 Minutes)

Appellate Division Docket No. CA 17-00578
Monroe County Clerk's Index No. 2013-03525

New York Supreme Court

Appellate Division—Fourth Department

ALICE ELAINE SWEETMAN,

Plaintiff-Appellant,

– against –

SONJA G. SUHR,

Defendant-Respondent.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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I. Defendant Concedes That the Trial Court Erred as a Matter of Law in Applying the Clear and Convincing Standard In Finding The Testimony of Plaintiff and Her Husband Insufficient to Make Out a Prima Facie Case – And Thus Concedes That the Trial Court Committed Reversible Error.

Defendant Sonja Suhr acknowledges, as she must, that this Court in *Sweetman I* (126 A.D.3d 1438 (4th Dep't 2015) concluded that the statutory presumption of Banking Law § 675 does not apply here, and thus the heightened evidentiary standard required to rebut that presumption (proof by clear and convincing evidence) does not apply here. (Resp. Br. at 3-4.) Defendant begrudgingly assumes "arguendo" that the trial court in *Sweetman II* erred by applying the clear and convincing evidentiary standard in the course of finding the testimony of Plaintiff and her husband to be insufficient to make out a prima facie case—but claims the error is "harmless." (Resp. Br. at 6.) There is nothing "harmless" about the trial court's invocation and application of the wrong legal standard, i.e. the stricter clear and convincing evidentiary threshold. The lower court's mistake of law infects the trial court's entire consideration of the evidence offered at trial and its conclusion rejecting the sufficiency of Plaintiff's evidence. To call this manifest legal error "harmless" ignores the distinction between two very different standards of proof (preponderance of the evidence versus clear and convincing evidence) and the practical and legal consequences that flow from subjecting Plaintiff's proof to the substantially more rigorous evidentiary standard.

It is no answer for the Defendant to *speculate* that the trial court might have reached the same result if it had understood and applied the law correctly. Indeed, any such speculation runs contrary to common sense—and

the ample record evidence—inasmuch as the testimony of Plaintiff and her husband was based on personal knowledge and provided direct evidence of Plaintiff's intent in putting her husband's name temporarily on the bank accounts, with her husband corroborating that he never had anything to with the family's finances. In fact, the trial court initially granted summary judgment to Plaintiff based on affidavits offered by Plaintiff and her husband, even overcoming the then-applicable heightened statutory presumption. Even in reversing that decision, this Court recognized the summary judgment record could be read to support the finding that Plaintiff intended no present transfer of a beneficial interest in the account funds (noting that the affidavits "seemingly establish" and "support" that conclusion), but that Plaintiff's intent could not be conclusively resolved on the papers alone. *Sweetman I*, 126 A.D.3d at 1440.

On remand Plaintiff proved her intent in spades by her live testimony—the only way a party in her position could demonstrate her intent. Plaintiff's testimony was fully corroborated by the testimony of her husband. Such corroborating testimony from the newly added accountholder is considered especially probative evidence on intent. (See Appellant's Opening Brief (AOB) at 16-17.) The live testimony of Plaintiff and her husband, together with bank records and the series of stipulated facts that established Plaintiff treated her bank accounts as hers and hers alone, was more than sufficient to prove by a preponderance of the evidence that she did not intend to give her husband an immediate beneficial interest in the funds. And because the trial court invoked the wrong legal standard under the Banking Law, the trial court never reached the question of the sufficiency of the evidence under the controlling preponderance standard.

Indeed, the trial court never made any findings of fact whatsoever. The trial court did not even credit the parties' stipulated facts or make a single credibility determination. Instead, the trial concluded Plaintiff failed to meet her burden under the stricter clear and convincing evidentiary standard and dismissed her claims. That was and remains a fundamental legal error. It requires correction by this Court. It should not be excused as "harmless error" (as Defendant argues) because the error here clearly prejudiced "a substantial right." *See generally Mazella v Beals*, 27 N.Y.3d 694, 711 (2016) ("[U]nder CPLR 2002, 'an error in a ruling of the court shall be disregarded if a substantial right of a party is not prejudiced'"); e.g., *DiGrazia v. Castronova*, 48 A.D.2d 249, 252 (4th Dep't 1975) (erroneous jury charges were not harmless and required new trial). Defendant cites no case excusing as "harmless" a glaring legal error like the one committed here, where the trial imposed a much higher burden of proof than the law dictates.

II. *Sweetman I* Did Not Require Plaintiff To Come Forward with "Additional" Evidence.

This Court in *Sweetman I* found error in two respects in the trial court's grant of summary judgment to Plaintiff. First, this Court determined that the statutory presumption in Banking Law § 675 was inapplicable. Second, this Court remanded the case for trial on the intrinsically fact-based issue of Plaintiff's intent. On this latter point, the Court did not erect a baseline for the proof Plaintiff had to offer at trial in order to make out a prima facie case. To be sure, this Court held that the *untested affidavits* of Plaintiff and her husband "failed to establish as a matter of law that the account was a convenience account," (*Sweetman I*, 126 A.D.3d at 1440) but in remanding for a trial, this Court did not signal, suggest, or much less require

Plaintiff and her husband to come forward with "additional evidence" at trial (see Resp. Br. at 3-4, 15-16) —beyond the obvious fact of presenting her position through live testimony subject to cross-examination. (See AOB at 16-17.) Having the two affiants come into court and testify before the finder of fact, with Defendant able to cross-examine and point out conflicting evidence, was all that this Court could have required on remand.

III. Defendant Improperly Tries to Re-Try Her Defense Case on Appeal.

A. Defendant Did Not Cross-Examine Plaintiff at Trial in *Sweetman II* on Her Allegedly Inconsistent Affidavit Submitted in *Sweetman I*; Has Not Preserved That Argument on Appeal; And May Not Use Judicial Notice to Resurrect the Waived Argument or Introduce the Non-Record *Sweetman I* Affidavit.

If Defendant wanted to expose any inconsistencies between Plaintiff's affidavit submitted in *Sweetman I* and her trial testimony in *Sweetman II* (see Resp. Br. at 3, 6-9, 15), it was incumbent upon her to do so at trial in *Sweetman II* using the earlier affidavit as a prior inconsistent statement to impeach Plaintiff, as permitted under CPLR R. 4514. Defendant should have marked the prior affidavit as a trial exhibit, and used it to cross-examine Plaintiff, just as experienced trial lawyers do all the time when using prior written statements for impeachment. Defendant chose not to avail herself of this impeachment tool at trial and now seeks to wield it on appeal—through an entirely inappropriate use of judicial notice. Defendant seeks to inject into the appellate record non-record material on an unpreserved argument, to try to demonstrate alleged testimonial inconsistencies. Judicial notice is not to be used in this fashion. *See generally* APPELLATE PRACTICE IN FEDERAL AND STATE COURTS, Ch. 7, The Record on Appeal, § 702[1] (David M. Axelrad,

Editor, Law Journal Press 2011) ("Judicial notice is not a panacea for gaps in the record that should have been filled below.") Judicial notice is not designed to provide an end run on the preservation rule and or allow back-door supplementation to an otherwise stipulated (closed) record. Under the circumstances presented here, this Court should deem Defendant to have waived the right to argue any inconsistencies between Plaintiff's affidavit and her trial testimony and deny the request for judicial notice.

Defendant relies on completely distinguishable cases where the appellate court took judicial notice of court records; none of those cases were decided under circumstances like those presented here. In no case cited by Defendant did the party requesting judicial notice fail to introduce the subject document at trial, and then attempt to add it to the record on appeal, to make an unpreserved argument. For example, in a parental termination case, *In re Liliana G (Orena G.)*, 91 A.D. 3d 1325 (4th Dep't 2012), this Court addressed a gap in the appellate record concerning the status of the mother's two other children, who were not subjects of the parental termination order on appeal. In that context, this Court took judicial notice of family court records relating to the two other children, which documented the termination of the mother's rights as to those children as well, as reported in a published case. That straight-forward use of judicial notice and the other judicial notice cases cited by Defendant do not support Defendant's present request for judicial notice where she seeks to resurrect an unpreserved (waived) argument about impeachment through a prior inconsistent statement by sneaking a document (Plaintiff's prior affidavit) into the appellate record even though it was never used in the trial.

Defendant's request for judicial notice should be denied.

B. There Is No Material Inconsistency Between Plaintiff's Affidavit in *Sweetman I* and Her Trial Testimony in *Sweetman II;* Defendant Misrepresents and Exaggerates The Differences.

Whenever a person re-tells a story of what happened, some variation is bound to occur. This may include differences in emphasis or actual additions or omissions. That is why prior written statements followed by live testimony provide fertile ground for impeachment. Not only did Defendant fail to seek to impeach Plaintiff *at trial* with her prior affidavit—and thus waived any claim of inconsistency for purposes of *this appeal* (see above)—the record evidence actually shows Plaintiff's affidavit and trial testimony contain at most inconsequential variations and nothing material for purposes of impeaching Plaintiff, even if that argument were preserved. In her affidavit, Plaintiff emphasized the dreadful circumstances that led her to abruptly depart for the murder trial in Texas—to convey to the motion court the pressure and emotional upset she was experiencing when she added her husband to the bank accounts. She expressed her motivation in terms of her deep-felt fear that she might not return from Texas; she wanted to give her husband access to the money to care for her granddaughter if harm befell her in Texas. At trial, Plaintiff also explained how her traumatic departure for Texas also produced immediate practical concerns for her household since her disabled husband was left at home and he never took care of the bills. (R. 34, 38-39.) Plaintiff reiterated her fear of confronting the woman who murdered her son, and who hated her, and her deep-seated worries about something happening to her while in Texas. (R. 44.) If the murder trial were lengthy (as expected), Plaintiff testified that her husband might have to pay the bills, buy his medications, pay other household expenses, and "[h]e would also have to pay for my granddaughter when she came to visit." (R 39.) In this way

Plaintiffs' trial testimony reaffirmed her prior affidavit. Any variations were immaterial. And, of course, if Defendant wanted to argue otherwise it was her obligation to use the affidavit at trial to try to impeach Plaintiff. Defendant apparently failed to pursue that line of cross-examination knowing the testimonial variations were inconsequential.

Defendant speculates that the trial court ruled against Plaintiff because of her testimonial inconsistencies. (Resp. Br. at 15.) But the trial court issued no such findings because it wrongly accepted Defendant's argument that *Sweetman I* required Plaintiff to come forward with additional evidence on remand.

IV. Defendant's Focus on the "Missing Witness" from the Bank is Misguided.

Defendant criticizes at length Plaintiff's limited recollection of her interaction at the bank where she obtained the bank form to add her husband to the account (Resp. Br. 10, 16) and even argues for an adverse inference. (Resp. Br. at 10). Plaintiff was in a distraught frame of mind on the eve of embarking for Texas to attend a murder trial where she had to confront her son's murderer. She understandably felt enormous dread and fear. The ministerial task of getting a bank form to add her husband to the account—to deal with her imminent departure—understandably did not leave much of an impression. That Plaintiff failed to inquire about possible alternative forms of bank accounts is not surprising.

The trial court did not make any credibility findings—or any factual findings of any kind. Nor did the trial court pass on the request for an adverse inference, which is misguided in any event. That charge is appropriate only where the missing witnesses "would normally be expected to

support that party's version of events" such as the plaintiff's treating physicians. *DeVito v. Feliciano*, 22 N.Y.3d 159, 165 (2013). Under Plaintiff's theory of the case, the bank employee possessed little or no probative evidence because the transaction at the bank was brief with little discussion. If Defendant thought otherwise, she should have taken the bank employee's deposition. This is not a case where an adverse inference would be permissible to draw.

V. The Record Is Completely Devoid of Any Evidence That John Suhr Held an Undivided 50% Beneficial Interest in the Money Contained in in the Accounts.

The record evidence shows both Plaintiff and her husband understood that none of the money in the two accounts belonged to him. He had never had access to the funds before Plaintiff left for the murder trial in Texas. When Plaintiff was away for the trial, he had the right to access the checking funds to pay household expenses but did not do so. When Plaintiff returned from Texas, the couple resumed their normal ways. All funds were moved back to accounts in Plaintiff's sole name. At all tike material to the lawsuit, Plaintiff managed the family's finances on her own. Her husband never deposited funds, withdrew funds or used the debit card attached to the checking account. (AOB at 4, 6.) With those facts undisputed in the record, there was no basis in fact to find Suhr had acquired equitable title to any of the funds at any time. Rather, he was a co-owner *of the accounts* and held zero equitable title *in the funds* contained in those accounts. (See AOB at 19-20 and authorities cited there.) Defendant thus wrongly contends that John Suhr automatically held a one-half interest in the funds in the accounts by virtue of being a "joint owner" of the accounts. (Resp. Br. at 4, 12.) Equitable title does not arise that way. As explained in Appellant's Opening Brief, the

County's lien could only reach funds to which Suhr held equitable title. (AOB at 19-20.) Since he had contributed none of the monies and Plaintiff did not gift a present beneficial interest in the monies, Suhr did not possess equitable title to any of the funds in the accounts. Accordingly, none of the funds could be levied against to satisfy Suhr's 12-year old child support obligation. Plaintiff owned (legally and equitably) 100% to of the funds in the nominal joint accounts and she did not owe any of the support obligation.

Defendant apparently argues that the issue of the equitable title was resolved in *Sweetman I.* (Resp. Br. at 16-17.) Not so. As *Viggiano v. Viggiano*, 136 A.D.2d 630 (2d Dep't 1988) and other authorities make clear (see AOB at 19-20), a joint account holder owns half of the account but not the funds in the account. A levy is limited to the accountholder's "actual interest" in the funds in the account. *Viggiano*, 136 A.D.2d at 631. Before dismissing Plaintiff's claims, the trial court was required to determine if John Suhr held equitable title to the funds in the bank accounts that were reached by Monroe County. The trial court did not make any factual determination in this regard. But the record is clear: John Suhr did not hold equitable title to the funds. Those funds therefore could not be levied to satisfy Suhr's child support obligations even under the child support enforcement rules followed by New York State. (AOB at 20.)

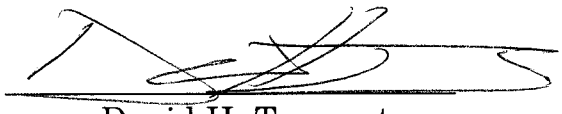
CONCLUSION

Plaintiff-Appellant Alice Elaine Sweetman respectfully requests that the Court to set aside the judgment and order of the trial court and enter judgment in her favor, or, in the alternative, remand the matter to the trial court with instructions as to the correct legal standards to apply in

considering the evidence, to enable the lower court to render the required findings of fact and conclusions of law.

Dated: July 14, 2017

NIXON PEABODY LLP



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