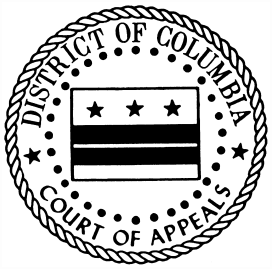

No. 22-CV-869

DISTRICT OF COLUMBIA
COURT OF APPEALS

CONSYS, INC.,

Plaintiff-Appellant

v.

CITYPARTNERS 5914, LLC

and

EAGLE BANK

Defendants-Appellees.

Appeal from the D.C. Superior Court Findings of Fact and Conclusion of Law
Case No. 2020 CA 002042 R(RP)

BRIEF OF APPELLEE

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March 30, 2023

RULE 28(a)(2) CERTIFICATE AS TO PARTIES
RULE 28

A. Parties and Counsel

Appellant:	Consys, Inc. 732 Kennedy Street, N.W. Washington, D.C. 20011
Appellant Counsel:	Brad C. Friend, Esquire Kraftson Caudle 1600 Tysons Boulevard, Suite 250 McLean, Virginia 22102
Appellee:	CityPartners 5914, L.L.C. 1817 Adams Mill Road, N.W. Suite 200 Washington, D.C. 20009
Counsel for Appellee City Partners 5914, L.L.C.:	Barry A. Haberman, Esquire The Law Office of Barry A. Haberman 51 Monroe Street Suite 1507 Rockville, Maryland 20850
Appellee:	Eagle Bank 7815 Woodmont Avenue Bethesda, Maryland 20814
Counsel for Appellee Eagle Bank:	Michael J. Lichtenstein, Esquire Shulman Rogers 12505 Park Potomac Avenue 6th Floor Potomac, Maryland 20854

B. Rule 26.1 Disclosure Statement

City Partners 5914 L.LC. has no parent corporation, and no publicly held corporation owns 10% or more of its stock. City Partners 5914, L.L.C. has no subsidiaries.

/s/ Barry A. Haberman
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TABLE OF CONTENTS

Table of Authorities..... 5
Statement of Facts..... 6
Summary of Argument..... 9
Argument..... 10

TABLE OF AUTHORITIES

	Page
D.C. Code Section 40-301.01, *et seq.*;	11,12,13, 14
D.C. Code § 42–3651.01, *et seq.*;	16,17,18,19,20
Mcnair Builders v. 1629 16TH Street, 968 A.2d 505 (D.C. 2009);	10
Ruffin v. Temple Church of God In Christ, 749 A.2d 719 (D.C. 2000);	15
Lewis v. Washington Metropolitan Area Transit Authority, 463 A.2d 666 (D.C. 1983);	16
Taylor v. Sternberg Duty v. Same, 293 U.S. 470, 55 S.Ct. 260, 79 L.Ed. 599, 97, A.L.R. 1355 (1935);	17
Capitol Terrace v. Shannon & Luchs, Inc., 564 A.2d 49 (D.C. 1989);	17
John v. District of Columbia, 813 A.2d 178, 181 (D.C. 2002);	19
Makins v. District of Columbia, 861 A.2d 590 (D.C. 2004);	23
Kritsidimas v. Sheskin, 411 A.2d 370 (D.C.1980).	24

STATEMENT OF FACTS

On September 26, 2017, D.C. Superior Court entered an order appointing David Gilmore ("Gilmore") as receiver for the following properties: (i) 1309 Alabama Avenue, SE, Washington D.C. 20032; (ii) 1331 Alabama Avenue SE, Washington D.C. 20032; (iii) 1333 Alabama Avenue, SE, Washington D.C. 20032; and (iv) 3210 13th Street SE, Washington D.C. 20032 (collectively, the "Project"). A176.

On November 10, 2017, Gilmore submitted his initial plan (the "Plan") for the remediation of the Project. A180. Gilmore estimated that it would cost a minimum of $848,202.00 to fund his remediation plan (the "Plan"), based, in part, on an estimate provided by Appellant. A185 Gilmore further indicated that the cost to remediate the Project under the Plan could exceed $2.0 million. A186.

In January 2018, Appellee acquired the Project and thus became involved with the receivership case and Gilmore's remediation Plan. A630. In the June 27, 2018 hearing Appellee countered Gilmore's Plan and showed that remediation would cost well less than $2.0 million. A631.

On July 13, 2018, the Court approved the revised Plan and ordered Appellee to pay to Gilmore an amount totaling $895,159.60, representing the cost to fund the Plan, which included amounts to be used to relocate tenants and a 20% contingency. A299. The Court ordered such amount "based on the understanding that, as the parties discussed at the June 27, 2018 hearing, if this amount is insufficient to cover remediation costs, [Gilmore] is free to apply for additional funds.". A299 It is undisputed that Appellee paid that amount in full (A631)and the funds were to be used by the Receiver as follows:

Replace Windows and Balcony doors	$176,786 (work never done)
Perform Mold Remediation	108,150(work never done)

Replace Roofing	209,876 (Appellant's claim 50% of work not complete)
Interior Compliance: Code	48,700
Other repair work	267,271
20% contingency	140,527

A077

Appellant's invoice was for the following amounts

General Conditions	$82,695 (not part of the approved Plan)
Mobilization	59,107 (not part of the approved Plan but paid in full)
Bulk removal	37,740 (arguably part of the Plan and paid in full)
Asbestos Abatement	214,536 (not part of the Plan)
Structural Repairs-Fire	44,162 (not part of the Plan)
Roof Repair	342,944.86 (part of the Plan but approved for the cost of $209876 per Court order)
Additional Asbestos Abatement	36,990
Total	$818,174.86

A077

The Court approved amount was over $950,000 and Consys' invoice for work, some of which was still not complete, was for $713,175. A077.

On November 1, 2018, a fire broke out at the Property causing extensive damage thereto. A077. On November 9, 2018, Appellee, through counsel, emailed Gilmore advising him that "[Appellee] does not believe the funds [to implement the Plan] can be used to remediate the [fire damage to the Properties] without further Order of Court." A316. Gilmore disagreed and did not seek any additional court-authorization. A316. On January 28, 2019, Appellant submitted a proposal (the "Proposal") to Gilmore related to the performance of certain work (the "Work") at the Property. A321.

On January 30, 2019, Gilmore emailed Appellant accepting the Proposal subject to the need for Appellant to provide additional information and Gilmore to issue notices to proceed with respect to certain stages of the Work. A326. Gilmore also authorized Appellant to proceed with

the removal and disposal of asbestos at the Property which was not part of the approved Court Plan. A326. By February 2019, all tenants had been relocated to apartments offsite the cost of which was covered by Appellee. A631.

On February 1, 2019, Gilmore informed Appellee that Appellant discovered asbestos and mold at the Project. A331. In response, Appellee, through counsel, noted that the discovery of such discovered asbestos and mold would "change the cost [of the Plan]" and "may be a significant change to the [Plan]." A331. Appellee, through counsel, requested Gilmore provide an update as to whether Gilmore anticipated requesting additional funding for the Plan. A329. On February 4, 2019, Gilmore responded to Appellant claiming that it did not need to file an amendment to the Plan or request additional funding until "the exact [additional] amount is known". A329.

On April 2, 2019, Appellant informed Gilmore that it was scheduled to commence work on the roof of the Properties. A398. On April 4, 2019, Gilmore informed Appellant that he was preparing to request the Court to authorize Appellee to pay additional funds necessary to fund the Work. A399.

On April 25, 2019, Appellant submitted to the Receivership an invoice in the amount of Three Hundred Fifty-One Thousand Three Hundred Eighty-Five and 00/100 Dollars ($351,385.00) related to its performance of the Work. A402. Appellant completed the Work on or before April 25, 2019. A402 and A405. The Receiver only paid $50,000 on that invoice even though Appellee had fully funded the plan approved by the Court and therefore the Receiver should have had sufficient funds to pay for any work engaged by the Receiver as shown above. A405.

Following the completion of the Work, Gilmore requested the Court to order Appellee to provide additional funding for the Plan in the amount of $190,144.00. A403. The Court expressly rejected Gilmore's request for additional funds, noting that such amounts were "extreme and

unwarranted under the circumstances." A426. The Court further removed the Property from the receivership, removed Gilmore as receiver and appointed Melissa Steele ("Steele") as successor receiver of the properties that remained under receivership. A426.

Appellant filed a Notice of Mechanic's Lien on November 15, 2019. A464.

SUMMARY OF ARGUMENT

Appellant did not timely file its notice of mechanic's lien in this case as it admitted in the trial and pursuant to documents that it stopped all work on the project as of April 25, 2019. Appellant's claim that the term "project" relates to unknown contract rights tied to when the property in question was removed from the Receivership is not supported by the facts or the statute or case law. Further, Appellant's claim that the Receiver had express authority to act for Appellee as its agent is not supported by the TRA law nor the Orders of the Superior Court in the Receivership case. This case is not about the Receiver having an express or implied ability to act for or as agent for the Appellee but is really about the Receiver failing to use the funds provided to it to pay Appellant's bills even though the undisputed facts show that the Receiver had been provided more than sufficient funds to pay Appellant for any work claimed to have been performed. Lastly, the filing of the letter of credit by Appellee and the subsequent release of the recorded Mechanic's lien can only be viewed as dismissing that claim in the Complaint. Further, a Mechanic's lien is a remedy (a lien on real property) based on either an underlying breach of contract or quantum meruit claim. There is no such claim for Appellant in this case and therefore there is no basis to assert a lien as there was no claim of breach of contract and Appellant did not appeal the dismissal of the quantum meruit claim in this case.

ARGUMENT

I. Appellant's Mechanic Lien was not timely filed and the Release of the Lien terminated such claim.

Appellee is entitled to affirmation of the judgment with respect to Appellant's claim to enforce its mechanic's lien because: (i) Appellant's mechanic's lien terminated and was not enforceable; and (ii) the Receiver did not act at the direction of Appellee or as Appelle's agent and (iii) Appellant's execution and recording of a Release of the Lien in the land records of the District of Columbia released and discharged such claim.

a. Appellant's mechanic's lien was terminated and was no longer enforceable.

Appellee is entitled to affirmation of its judgment with respect to Appellant's claim to enforce its mechanic's lien because Appellant released such claim when it executed and recorded a release of Mechanic Lien. "The District of Columbia's mechanic's lien statute has been traditionally construed narrowly in keeping with the fact that the remedy it creates is solely a creation of statute." McNair Builders v. 1629 16TH Street, 968 A.2d 505 (D.C. 2009) (internal citations omitted). Pursuant to D.C. Code Section 40-301.02:

> A contractor desiring to enforce the lien shall record in the land records a notice of intent that identifies the property subject to the lien and states the amount due or to become due to the contractor. The notice of intent shall be recorded during the construction or within 90 days after the earlier of the completion or termination of the project. If the notice of intent is not recorded in the land records during the construction or within 90 days after the earlier of the completion or termination of the project, the contractor's lien shall terminate upon the expiration of the 90-day period. A notice of intent that does not comply with subsection (b) of this section shall be void.

Thus, this Court has already recognized that the lien statute is a remedy, not an actual independent claim as Appellant appears to argue. In this case, Appellant executed and recorded a Release of the Mechanic's Lien claim. As such, the claim cannot be

construed as continuing to exist. As the statute expressly states, the Contractor has to identify an amount due to the Contractor, thus implying that there must be a separate claim for collection of monies owed. Without a claim of monies owed, there is no lien remedy. As noted above, in this case, Appellant did not appeal the denial of the quantum meruit claim in the underlying case nor is there any breach of contract claim. The underlying case had only two claims, one to enforce a mechanic's lien and one for quantum meruit. A001. Thus, without a collection claim pending, there is no remedy of a Mechanic's lien under the statute.

D.C. Code 40-301.03 defines project as follows:

"Project" means any work or materials provided by a contractor for the erection, construction, improvement, repair of, or addition to any real property in the District of Columbia at the direction of an owner, or an owner's authorized agent, or the placing of any engine, machinery, or other thing therein or in connection therewith so as to become a fixture, though capable of being detached."

The key wording here is the language "any work or materials provided by a contractor". Appellant is asking this court to ignore that language and define project as some type of contractual obligation to do work versus actually supplying work or materials. As noted above, that would simply create a large loophole for contractors who walk off jobs for non-payment to wait months and then file for a lien claiming the "project"/contract was not terminated and until that occurs, they maintain what is tantamount to never ending lien rights. That makes no sense in light of the D.C.Code requirement for notice of intent to claim a lien to be issued within 90 days (presumably shortly after the work or materials were last provided) and to file a lawsuit to enforce

such lien claim also in a short period of time. Appellants argument would extend those deadlines potentially for many months and possibly years longer and create a very haphazard methodology for property owners to determine (as well as title companies) if there are potential lien rights for contractors performing work on a property.

As regards Appellant's argument that the term project is to be broadly construed, that is just not consistent with mechanic lien case law. A project is defined as "any work or materials provided by a contractor for the erection, construction, improvement, repair of, or addition to any real property in the District of Columbia at the direction of an owner, or an owner's authorized agent..." See D.C. Code Section 40-301.03(7). Appellant has admitted it stopped work on the job on April 25, 2019 and never returned. A402. Yet Appellant is now arguing that since it could have come back at some point in the future, its lien rights did not start to run until that future date is determined. That is a very slippery slope for property owners to have to address if Appellant's argument is accepted as the time for a lien claim to be pursued can be left open for months if the Contractor (who presumably stopped work but still has an "open" contract) can lien the property months and years down the road as long as the contract/project is still open. That is simply not how project has been defined in any cases in existence nor in any legislative history.

There is no ambiguity as to the date a contractor must file a notice of mechanic's lien. The deadline to file a notice of mechanic's lien is based on the date that the contractor stops performing work or providing materials. See D.C. Code Section 40-301.02(a)(1) ("The notice of intent shall be recorded during the construction or within 90 days after the earlier of the completion or termination of the project."). See also D.C. Code Section 40-301.03(7) (A project is defined as "any work or materials provided by a contractor..,"). Here, Appellant completed the Work on April 25, 2019, and performed no additional work at the Property, (A402) requiring Appellant to file its

notice of intent to claim a mechanic's lien ninety (90) days thereafter (i.e. July 24, 2019). Appellant failed to file a notice of mechanic's lien by July 24, 2019 and its mechanic's lien rights terminated. See D.C. Code Section 40-301.02(a)(1) ("If the notice of intent is not recorded in the land records during the construction or within 90 days after the earlier of the completion or termination of the project, the contractor's lien shall terminate upon the expiration of the 90-day period."). Appellant has no mechanic's lien for the Court to enforce. The facts are clear that Appellant failed to file its notice of mechanic's lien within ninety (90) days after the completion of its work at the Property. Appellant completed the Work on or before April 25, 2019, and submitted an invoice to the Receiver at that time. A402. Appellant performed no additional work at the Property.

Appellant certified that it completed the Work on August 21, 2019. A464. This certification directly contradicts Appellant's prior statements and testimony. Appellant informed Steele, the successor receiver, that it completed the Work on or about April 25, 2019. A471. ("[Appellant] proceeded to complete the roofing work...and submitted its invoice to [Gilmore] on April 25, 2019..."). Appellant also informed Gilmore that it would not return to the Property prior to August 21, 2019. ("Because of the uncertainty of the future of the receivership...[Appellant] has indicated he will not be returning to the [Property]"). Based on these statements, Appellant actually completed the Work on April 25, 2019 and refused to return the Property to perform additional (i.e. un-contracted) work on or before June 21, 2019. It is impossible that Appellant completed the Work on August 21, 2019. Appellant's position that it has an open ended contract that did not terminate until the two properties were removed from the Receivership case is not supported by any underlying facts or caselaw.

August 21, 2019 bears no connection to Appellant's performance of the Work, but corresponds solely with the date the Court issued an order in the Receivership Case removing

two properties from the Receivership. Appellant indicated that it selected August 21, 2019 as the date of completion because it no longer reasonably believed that it would perform any additional work at the Property after August 21, 2019 (due to the removal of the Property from the Receivership). The deadline to file a notice of mechanic's lien is based on the actual completion or termination of a project, not Appellant's expectations. See D.C. Code Section 40-301.02(a)(1). Appellant completed the Work and issued an invoice on April 25, 2021 and had not entered into any other agreement to perform work at the Property. Also, on or before June 21, 2019, Appellant informed the Receiver that it would not return to the Property. Such facts are incompatible with Appellant's statement that it completed the Work on August 21, 2019. Appellant clearly selected August 21, 2019 as the date of completion fraudulently and for the sole purpose of maintaining its mechanic's lien after its rights had terminated.

b. Appellant did not perform the Work at the direction of Appellee because Gilmore lacked authority.

Gilmore did not act at the direction of Appellee or as Appellee's agent. Pursuant to D.C. Code Section 40-301.01, in order to claim a Mechanic's lien, there must be an express contract with the owner or the Contractor must be working at the "direction of the owner, or the owner's authorized agent". As set forth hereinabove, Gilmore did not act at the direction of Appellee or as Appellee's agent because: (i) Gilmore lacked actual authority to enter into a contract with, or otherwise accept the services of, Appellant on Appellee's behalf; (ii) Appellant did not believe Gilmore had apparent authority to enter into a contract with, or otherwise accept the services of, Appellant on behalf of Appellee; and (iii) to the extent agency exists, Gilmore's actions fell outside the scope of his agency.

Appellee did not accept the services of Appellant because Appellee had no dealings with Appellant at any time prior to the filing of this lawsuit and at no time did Gilmore have court approval to engage Appellant to perform work beyond the authority granted in the initial plan approved by the Receivership court. It was undisputed during trial that this Court, in the Receivership case, ordered Appellee to pay over $895,000 to the Receiver to pay for the following work:

Replace Windows and Balcony doors	$176,786 (work never done)
Perform Mold Remediation	108,150(work never done)
Replace Roofing	209,876 (Appellant's claim 50% not complete)
Interior Compliance: Code	48,700
Other repair work	267,271
20% contingency	140,527

A077.

As noted above, much of the approved work was not done (thereby leaving those funds available to pay for work performed) and the math is clear that the Receiver had been paid by Appellee sufficient funds to pay for any and all work performed by Appellant. In fact, in the Receiver's own filing seeking additional funding (which was denied by this Court), the Receiver only requested $190.144, not the amount Appellant requested in the case, as further proof that the issue for the claim for funding is not with Appellee, who had fully performed as required by the Receivership case, but with Gilmore, who failed to account for the monies paid to him by Appellee which were more than sufficient to pay Appellant for any work performed at the property (whether authorized or not by Appellee) A463. In addition, despite

Appellant's claims that Gilmore acted as the express agent of the Appellant, that claim is contrary to the Receiver statute and case law.

c. Gilmore lacked actual authority to enter into a contract with Appellant on Appellee's behalf.

Gilmore lacked actual authority to enter into a contract with Appellant on Appellee's behalf. Actual authority may be established by written or spoken words (i.e. express) or "inferred from the circumstances, such as the relationship between the parties and conduct of the principal toward the agent manifesting the principal's consent to have the agent act for him." Ruffin v. Temple Church of God In Christ, 749 A.2d 719 (D.C. 2000)(internal citations omitted). "It is well settled that, where the evidence permits reasonably conflicting inferences, as here, the existence of agency, and its nature and extent, are questions of fact; and the party relying upon the agent's authority to bind his principal bears the burden of proving that the agent's act was authorized initially or nunc pro tunc by ratification." Lewis v. Washington Metropolitan Area Transit Authority, 463 A.2d 666 (D.C. 1983).

It is clear that Appellee did not authorize Gilmore to act as its agent. Gilmore was appointed by the Court through an adversarial proceeding—the Receivership Case. A176. Appellee objected to Gilmore's appointment as receiver and the manner in which he carried out the Receivership. A334 and A416. An agency may only be inferred from the circumstances surrounding the receivership of the Project. To establish such inference, an analysis of the Tenant Receivership Act ("TRA") is required.

The TRA does not empower a receiver to act on behalf of an owner of a rental accommodation. The TRA provides the statutory framework "to safeguard the health, safety, and security of the tenants of a rental housing accommodation if there exists a violation of District of

Columbia or federal law which seriously threatens the tenant's health, safety, or security" through the appointment of a "receiver of rents or payments for use and occupancy for the affected rental housing accommodation." See D.C. Code § 42–3651.01. See also D.C. Code § 42–3651.03(a). The District of Columbia petitions the Court for "the appointment of a receiver of the rents or payments for use and occupancy for the affected rental housing accommodation [to abate certain violations of District of Columbia or federal law which seriously threatens the tenant's health, safety, or security]." See D.C. Code § 42–3651.03(a).. The owner is then afforded an opportunity to object to the imposition of a receivership and to present its own plan to remediate such violations. See D.C. Code § 42–3651.04 (a)(1) "The Court may [then] appoint a receiver for a rental housing accommodation or continue the appointment of a receiver made ex parte if it finds that the petitioner has proven, by a preponderance of the evidence, the existence of the grounds for receivership as set forth in § 42-3651.02 and finds that the respondent has not provided the Court with a sufficient plan for abatement of the conditions alleged in the petition." D.C. Code § 42–3651.05(a)(1). If necessary, the Court appoints a receiver to exercise specific powers and duties, as "enumerated by statute, and 'any other duties established by the Court'", to further the rehabilitation of the rental accommodation. "[A] receiver is an officer of the court which appoints him." Taylor v. Sternberg Duty v. Same, 293 U.S. 470, 55 S.Ct. 260, 79 L.Ed. 599, 97 A.L.R. 1355 (1935). See also Capitol Terrace v. Shannon & Luchs, Inc., 564 A.2d 49 (D.C. 1989)("[A receiver] has only such power and authority as are given him by the court, and must not exceed the prescribed limits.")

Under the TRA[1], a receiver shall:

[1] The TRA also restricts a receiver from "mak[ing] capital improvements to the property except those necessary to abate housing code violations" and "enter[ing] into contracts which affect the ownership of the property." D.C. Code

(1) Take charge of the operation and management of the rental housing accommodation and assume all rights to possess and use the building, fixtures, furnishings, records, and other related property and goods that the owner or property manager would have if the receiver had not been appointed;
(3) Have the power to collect all rents and payments for use and occupancy;
(7) Assume all rights of the owner to enforce or avoid terms of a lease, mortgage, secured transactions, and other contracts related to the rental housing accommodation and its operation; and
(8) Carry out any other duties established by the Court.
D.C. Code § 42–3651.06(a)

A receiver's utilization of these powers is not unfettered. The TRA requires a receiver to develop "a viable financial and construction plan for the satisfactory rehabilitation of the rental housing accommodation." See generally D.C. Code § 42–3651.05(b).See also D.C. Code § 42–3651.06(a)(4)(A)("A receiver shall [p]rovide the Court, within 30 days following the issuance of the order of appointment, with a plan for the rehabilitation of the rental housing accommodation, including the projected dates when all causes giving rise to the appointment will be abated and a financial forecast indicating how the rehabilitation will be paid for...") See also D.C. Code § 42–3651.06(a)(5)(A)("A receiver shall [r]eport to the Court every 6 months after the filing of the report required under paragraph (4) of this subsection, describing the progress made in abating the conditions giving rise to the appointment, updating the financial forecast for the rehabilitation, and describing any changes in the condition of the rental housing accommodation that may change the proposed completion dates submitted under paragraph (4) of this subsection..."). This plan (i.e. a remediation plan) is subject to the approval of the Court and guides the manner in which the receiver implements its powers under the TRA. See D.C. Code § 42–3651.06(c)("The receiver shall, under the plan described in subsection (a)(4) of this section, make payments in accordance with the following priorities: (1) As a first priority, using monthly rental income, to abate housing

§ 42–3651.06(d)-(e). Further, the TRA enjoins an owner from "collecting rents and payments for use and occupancy for the duration of the receivership." D.C. Code § 42–3651.06(i).

code violations if abatement is required within 7 days of service of notice, and, after abatement of the conditions, to abate housing code violations if abatement is required within 30 days of service of notice; and (2) As a second priority, for other purposes reasonably necessary in the ordinary course of business of the property, including maintenance and upkeep of the rental housing accommodation, payment of utility bills, mortgages and other debts, and payment of the receiver's fee.")(emphasis mine).

The TRA also establishes the process for funding the remediation plan.[2] A receiver is required to fund the remediation plan through the collection of the Monthly Rental Income. See generally D.C. Code § 42–3651.01 *et seq.* A426. ("[T]he default under the TRA is that the remediation should be funded by the rents collected by the receiver, with only supplemental funding as necessary in appropriate circumstances"). When such funds are insufficient to implement the remediation plan, the Court, in limited circumstances, may order an owner to contribute funds in excess of the Monthly Rental Income. See D.C. Code § 42–3651.05(f)(1). The TRA empowers the Court, not the receiver, to determine the extent of an owner's liability to fund the remediation plan so that the Court may "exercise its oversight of a [r]eceivership...in a way that it designed to achieve the purposes of the TRA." See John v. District of Columbia, 813 A.2d 178, 181 (D.C. 2002)("the whole focus of the statute is not on punishing the owners or

[2] The D.C. Council passed the Abatement of Nuisance Properties and Tenant Receivership Amendment Act of 2008 ("the Act") to address certain issues with the statutory framework of Tenant Receiverships, including the amount and source of funding for the remediation of properties under receivership. See generally D.C. Council, Report on Bill 17-0729. Prior to the passage of the Act, "a receiver ha[d] access to only 50%of the rent proceeds from which to abate housing code violations...[;]" a receiver had no access to or authority to use any other funds, including the funds of an owner. Id. at p. 5. The D.C. Council determined that, under the existing framework, 50% of the rent proceeds were" an often insufficient amount to comprehensively deal with building where severe and long standing violations persist[ed]." Id. To address this issue, the Act amended the statutory framework of Tenant Receiverships to "authorize [a] receiver to use 100% of rent proceeds to abate violations..." and to "grant[] to the court the authority to order a violative property owner to contribute funds in excess of the rent proceeds...." Id. at 5, 8. The D.C. Council intended to require a receiver to fund a remediation plan through Monthly Rental Income and other amounts as ordered by the Court, but no other amounts. See generally D.C. Council, Report on Bill 17-0729. The TRA clearly reflects such intent. A100.

others who have caused the housing violations, but instead is on remedying the violations to protect the tenants")("the receivership invokes an equitable remedy as it orders a receiver to manage the property, subject to court review")("a receivership itself has not historically been regarded as punishment, but rather a mechanism to achieve equitable ends'). The TRA is clear as to the funds a receiver is authorized to use in implementing its court-approved remediation plan—the Monthly Rental Income and other amounts as ordered by the Court. See generally D.C. Code § 42–3651.01. See also D.C. Code § 42–3651.05(f)(1).

Gilmore lacked actual authority to enter into an open ended, uncontrolled cost, contract with Appellant on Appellee's behalf because: (i) Appellee did not authorize Gilmore to act as its agent; and (ii) the TRA does not expressly create an agency relationship between a receiver and an owner of a rental accommodation. Gilmore was acting as a Court appointed Receiver with limited authority subject to the Remediation Plan approved by the Court and with funding approved by the Court. To allow Gilmore to enter into a "blank check" contract for any work he wanted and for any price he wanted would violate the Court Orders in the Receivership case and be inconsistent with the TRA express provisions. With respect to the TRA, there is also no implicit grant of authority to the receiver to act as the owner's agent. If the Council intended to authorize a receiver to act as the agent for an owner of a rental accommodation, the TRA would expressly reflect such intent. Further, such agency is not necessary to achieve the purpose of the TRA—"to safeguard the health, safety, and security of the tenants of a rental housing accommodation if there exists a violation of District of Columbia or federal law which seriously threatens the tenant's health, safety, or security" through the appointment of a "receiver of rents or payments for use and occupancy for the affected rental housing accommodation." See D.C. Code § 42–3651.01. Instead, the TRA requires a receiver to exercise specific power and duties in a specific manner, namely the

duty to implement a court-approved remediation plan using court-approved funding. Such specificity should be respected and no authority to act as the owner's agent should be read in to the TRA.

d. To the extent that Gilmore had actual authority to act on Appellee's behalf, Gilmore exceeded the scope of such authority.

Assuming *arguendo* the Court finds the TRA created an agency between a receiver and the owner of a rental accommodation, the TRA, along with orders issued in the Receivership Case, sets the scope of such agency. Looking to the Receivership Case, Gilmore had no authority to incur any liability on behalf of Appellee because the Court , when it appointed Gilmore, Court ordered the owner[3] to provide Gilmore with an amount of funds equal to the total estimated cost of the activities described in the Plan. A299. The Court noted that: (i) the owner reserved the right to object to any additional financial liability for expenses incurred by Gilmore in fulfilling his duties subsequent to the submission of the Plan; and (ii) nothing precluded Gilmore from requesting additional funds if necessary.A299. The Court when it approved the Plan determined Appellee was obligated to pay an amount totaling $895,159.60, representing the full cost to implement the plan, plus a 20% contingency thereon and certain relocation costs. A299. The Court ordered such amount "based on the understanding that, as the parties discussed at the June 27, 2018 hearing, if this amount is insufficient to cover remediation costs, **[Gilmore] is free to apply for additional funds**." (emphasis mine). A299. By requiring Gilmore to request additional funds, if necessary, the Court provided Appellee an opportunity to review and object to such requests. Gilmore was entirely aware of, and agreed to, this requirement.

[3] Then, the former owner, Sanford Capital, LLC.

Prior of the commencement of the additional work proposed by the Appellant, Gilmore was aware that he lacked sufficient funds to pay for such additional work. A329. Gilmore continued to implement the Plan despite such knowledge, preventing the Court from exercising its oversight function. A329.

Gilmore eventually requested the Court to order Appellee to provide additional funds related to the Work even though he had not accounted for the first tranche of funds provided by Appellee and which were sufficient to pay for any work previously performed. A403. (requesting the Court to order Appellee to provide additional funding for the Plan in the amount of $190,144.00.). The Court expressly rejected this request stating that "[The additional amounts requested to fund the Plan] [are] an extraordinary sum for the Court to order in additional remediation costs when the Court's initial order funding the implementation required payment of $895,159.60, and when the value of the buildings at [the Property] are estimated at $2,860,293.33....In concluding that this unanticipated cost is extreme and unwarranted under the circumstances,...the Court is looking to what is reasonable in light of all relevant circumstances when exercising its equitable power to oversee a receivership..."(emphasis mine). A426.

Gilmore further acted outside the scope of his authority in remediating damage caused by the fire, not the conditions caused by an owner. The fire damage fell outside the scope of the initial court approved remediation plan. The TRA is designed to remediate "conditions that are caused by an owner." A100. (referencing D.C. Council, Report on Bill 17-0729 at 2-3 ("when amending the law to allow the Court to order the owner to pay funds in excess of the rents, the Council identified as the "problem" it intended to solve the fact that "some landlords purposely neglected apartment units in the hope that conditions would become so intolerable that tenants would be forced to vacate their homes" so that the landlord could then sell the buildings)"). The fire

damage...[was] an unanticipated and undiscoverable condition. Gilmore proceeded to address damage caused by the fire (i.e. not the owner) without seeking the Court's guidance, thereby falling outside of the scope of the Plan and his authority.

Gilmore lacked actual authority to enter into a contract with, or otherwise accept the services of, Appellant on Appellee's behalf because: (i) the TRA does not explicitly grant such authority; and (i) to the extent such authority exists, Gilmore exceeded the scope of such authority by: (a) failing to request the Court to order Appellee to pay additional amounts to fund the Plan; and (b) entering into an agreement to address damage falling outside the scope of the remediation plan (i.e. damage caused by the fire).

e. Appellant did not reasonably believe Gilmore had authority to act on Appellee's behalf.

Moreover, Appellant did not and could not reasonably believe Gilmore had authority to act on Appellee's behalf (i.e. apparent authority).

> [Apparent authority is] the power to affect the legal relations of another person by transactions with third persons, professedly as an agent for the other, arising from and in accordance with the other's manifestations to such third persons. Thus, unlike actual authority, apparent authority does not depend upon any manifestation from the principal to her agent, but rather from the **principal to the third party**. This court has stated that apparent authority arises when a principal places an agent in a position which causes a third person to reasonably believe the principal had consented to the exercise of authority the agent purports to hold. This falls short of an overt, affirmative representation by a principal. In such circumstances, an agent's representations need not expressly be authorized by his principal. The apparent authority of an agent arises when the principal places the agent in such a position as to mislead third persons into believing that the agent is clothed with the authority which in fact he does not possess. Apparent authority depends upon the third-party's perception of the agent's authority. The third party's perception may be based upon written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on [its] behalf by the person purporting to act for [it]....
> Whether an agent had apparent authority is a question of fact and the party asserting the existence of apparent authority must prove it. In determining whether the agent had apparent authority to bind the principal, consideration should be given, inter alia, to the actual authority of the agent, the usual or normal conduct of the agent in the performance of his or her duties, previous dealings between the agent and the

party asserting apparent authority, any declarations or representations allegedly made by the agent, and lastly, the customary practice of other agents similarly situated.
Makins v. District of Columbia, 861 A.2d 590 (D.C. 2004)(internal citations and quotations omitted)(emphasis mine)

An agent "can[not] create apparent authority by his own actions or representations. Id. at 597.

Appellant could not reasonably believe Gilmore had authority to act on Appellee's behalf because Appellee had no communications with Appellant prior to the commencement of the Work and admitted during the trial that it's only contact for this job was with Gilmore and did not believe it was making any contract with Appellee. Such communications cannot support a finding of apparent authority. A633. (An agent "can[not] create apparent authority by his own actions or representations.) Without such direct communications between Appellant and Appellee and with Appellant's acknowledgement that it knew it was contracting with Gilmore only, there is no apparent authority.

As regards Appellant's claim that the law of case required the trial court to find Gilmore was the agent of Appellee, the case cited by Appellant, *Kritsidimos v. Sheskin*, 411 A.2d 370 (D.C. 1980) actually states otherwise. In that case the court concluded that for a preliminary ruling to be the law of the case, it has to have finality and clearly Motions to Dismiss or for Reconsideration as Appellee filed in this case did not have finality. Even the Appellee's summary judgment motion would not meet the test of finality as there was no court hearing, no evidence or testimony taken and no ruling other than a proforma denial in anticipation of trial. As stated in *Kritsidimos* at 373 in reviving a dismissal for failure to prosecute which was at issue in that case:

> "Unlike many other pretrial motions, which we have said generally lack the finality necessary to constitute the "law of the case." *United States v. Davis, supra*, these two types of motion often require hearings and findings of fact – exactly the kinds of judicial

exercises the "law of the case" doctrine is designed to prevent being repeated. We conclude, then, that the first limitation on the "law of the case" doctrine - lack of finality of the first order - is absent in the present appeal; a dismissal for failure to prosecute has sufficient finality to trigger the "law of the case" doctrine."

The facts of this case clearly fall in the exceptions to the law of the case analysis set forth in *Kritsidimos*. The pretrial motion to dismiss and for reconsideration of that motion were not subject to any hearings or argument, no evidence was presented, and testimony taken. Thus, those motions would not meet the finality test of *Kritsidimos*. As regards the summary judgment motion, the same analysis applies. No argument was taken, no hearing occurred, no findings of fact were issued. The Court simply denied the Motion without prejudice and pushed the case forward towards trial. Thus, the prior rulings should not be considered the law of the case in this matter and that was correctly decided by the trier of fact in this case. Lastly, this was also not raised by Appellant at trial.

Respectfully submitted,

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REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:
   - An individual's social security number
   - Taxpayer-identification number
   - Driver's license or non-drivers license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:
     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's Tax Payer identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-drivers license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to reveal the identify or location of the protected party," 18 U.S.C, § 2265(d)(3) (prohibiting public disclosure on the internet of such information); see also 18 U.S.C. §2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initial when referring to victims of sexual offense.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Barry A. Haberman
Signature

22-CV-869
Case Number(s)

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March 30, 2023
Date

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of March, 2023, the foregoing Brief was served via Federal Express and electronic mail upon the following:

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