Appeal No. 530141

To Be Argued By:
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Brendan P. Owens, Esq.
10 Minutes Requested

New York Supreme Court

Appellate Division – Third Department

PAUL SMITH'S COLLEGE OF ARTS AND SCIENCES,

Plaintiff-Appellant,

– against –

ROMAN CATHOLIC DIOCESE OF OGDENSBURG,

Defendant-Respondent.

BRIEF OF APPELLANT PAUL SMITH'S COLLEGE OF ARTS AND SCIENCES

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QUESTIONS PRESENTED

1. When a real property conveyance provides that it will become void upon the happening of a specified condition and then expressly states the rights that will revert to the grantor upon the grantee's breach of the condition, does the conveyance create a reverter that is freely assignable under the common law of New York?

Supreme Court, Franklin County erroneously held that the language of a deed from Paul Smith's Hotel Company (the "Hotel") to the Right Reverend Henry Gabriels, Bishop of Ogdensburg (the "Bishop"), the predecessor in interest to the Roman Catholic Diocese of Ogdensburg (the "Diocese"), providing that the conveyance of property "shall be void" upon a breach of the specified condition to use the property for church purposes, created a fee simple subject to a condition subsequent that could not be assigned under New York common law, rather than a possibility of reverter that gave the Hotel and its successors the automatic right to reenter the property and retake possession.

2. If the deed granted by the Hotel to the Diocese conveyed a fee simple subject to a condition subsequent, was Paul Smith's College of Arts and Sciences (the "College"), as a successor to the Hotel, entitled to

exercise the right of reentry upon a breach of the specified condition?

Supreme Court did not answer this question. Rather, Supreme Court erroneously held that the College could not exercise the right of reentry because the assignment of that right from the Hotel, as the original grantor, voided the right to reentry.

3. Did Supreme Court erroneously grant the Diocese summary judgment declaring that it owns the property in fee simple absolute?

Supreme Court erroneously held that no questions of fact existed precluding an award of summary judgment to the Diocese.

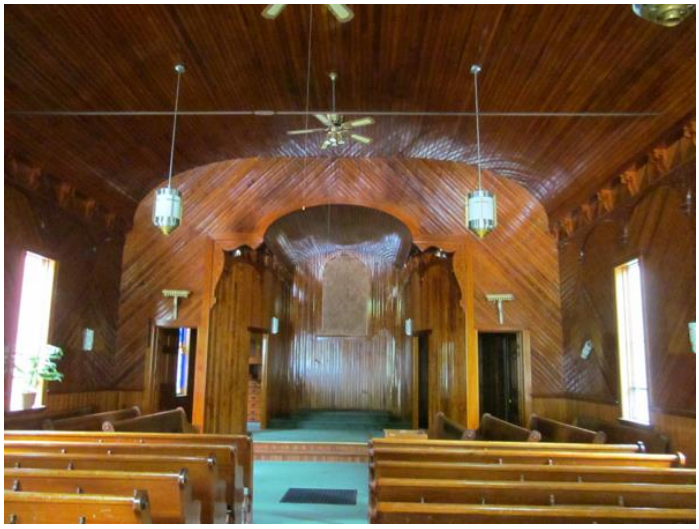
PRELIMINARY STATEMENT

Plaintiff-Appellant Paul Smith's College of Arts and Sciences respectfully submits this brief in support of its appeal from the Decision, Order, and Judgment of Supreme Court, Franklin County (Ellis, J.), which dismissed the College's complaint seeking to enforce its possibility of reverter to the property on which the former St. Gabriel the Archangel Church ("St. Gabriel's Church" or the "Church") was built over one hundred years ago.

St. Gabriel's Church is a historic and architectural gem in the heart of the Adirondacks. Built in 1896, the church is a distinctive and intact

example of a Queen Anne and Shingle Style wood-framed ecclesiastical building that exhibits characteristic features of the "summer churches" built in the Adirondack region in the later nineteenth and early twentieth century. Its rustic interior was likely assembled by local artisans, and features narrow tongue and groove boards arranged in picturesque designs. It's a place of great beauty and value.

But St. Gabriel's Church is about to be lost. The Diocese has relegated it to profane use, abandoned it, and now has designs to tear it down entirely.



That would not only destroy the Church's architectural and historic value, but also violates an express deed restriction that the original grantor of the property placed on the conveyance when it was made to the Diocese. The Diocese was required to use the property for church purposes only. If it ceased to do so, the conveyance provided that it "shall be void" and the original grantor could immediately reenter and retake possession.

That time has now come. By relegating St. Gabriel's Church to profane use, and removing all sacred objects, including the altar and stained glass windows, from the property, the Diocese has shown that it no longer will use the property for church purposes, in breach of the express deed restriction. Under the plain language of the deed, which conveyed the property to the Diocese subject to the possibility of reverter, the Diocese's breach automatically vested title to the property back in the College, which is the successor to the original grantor. Supreme Court's holding to the contrary overlooked the plain language of the deed and effectively rewrote the parties' agreed upon conveyance, in violation of settled principles of construction. The Supreme Court judgment, therefore, should be reversed, and the College should be declared the

rightful owner of the property in fee simple absolute so that the Church building may be used as it was originally intended, as a sanctuary and meeting place and as a non-denominational spiritual site for weddings and memorials, now for the students of the College.

Even if the grant conveyed the property subject to a condition subsequent with a right of reentry, however, Supreme Court's determination that the deed restriction and right of reentry were extinguished by the transfer of the property from the original grantor to the College, as its lawful successor, was reversible error. Although conditions subsequent with a right of reentry generally were not assignable at common law, that property interest could be devised to an heir or a successor when, as here, the original grantor was a corporation. The College is a successor to the legal entity "Paul Smith's Hotel Company" because it was the sole shareholder of the Hotel and the assets were distributed to it prior to the Hotel's dissolution. The College, therefore, has the clear legal right to enforce the condition subsequent contained in the deed through reentry as a successor to the Hotel.

For these reasons, the Supreme Court judgment should be reversed, the College should be awarded summary judgment, and this Court should

declare that the College is the owner of the property at issue in fee simple absolute. Alternatively, this Court should hold that questions of fact exist, at the very least, concerning whether the Diocese breached the deed restriction and whether the College is a successor-in-interest to the Hotel, which has the right to enforce a breach of a condition subsequent by reentering the property. Supreme Court, therefore, erred in granting the Diocese's motion for summary judgment.

STATEMENT OF FACTS

At issue here is a title dispute over a one-acre property in Franklin County in Brighton, New York (the "Property"), on which a historic church with "exquisite wood paneling" that was built in 1896. The Church is "a distinctive and intact example of a Queen Anne/Shingle Style 'summer churches' built in the Adirondack region in the later 19th and early 20th century" (Governor Andrew M. Cuomo, Press Release, Nominations Recognize Locations That Have Contributed to New York's Diverse History, Mar. 25, 2019, *available at* https://www.governor.ny.gov/news/governor-cuomo-announces-state-historic-preservation-board-recommends-17-nominations-state-and [last accessed Nov. 26, 2019]). As a result, "the New York State Board for

Historic Preservation has recommended adding [the Property] . . . to the State and National Registers of Historic Places" (*id.*). It is an architectural and historic gem in the heart of the Adirondacks that is now threatened by the Diocese's plan to tear it down.

For over 100 years, the Diocese used the property for St. Gabriel the Archangel Catholic Church consistent with a deed restriction contained in the deed conveying the Property to the Diocese (R55-56). That has now come to an end, and thus the deed has automatically reverted title to the College, as the successor to the original grantor.

A. Paul Smith's Transfers the Property to the Diocese Subject to the Possibility of Reverter if the Property is not Used for Church Purposes.

The Hotel originally transferred the Property to the Bishop in Trust for the Catholic Congregation at Paul Smith's by deed executed on September 13, 1896 ("the 1896 Deed") (R47-51). The 1896 Deed transferred the Property "[a]s and for Church purposes only," and provided that "in case the [Property] shall be devoted to any other use than for Church purposes . . . this conveyance shall be void and [the Hotel] shall have the right to re-enter and take possession of said premises and every part thereof" (R47-48).

Apollos Paul Smith died in 1912, leaving two living sons – Paul Jr. and Phelps Smith (R40). In 1937, Phelps Smith died, and in his will (the "Will"), provided as follows:

> If I am not the owner of the entire capital stock of [the Hotel] . . . at the time of my death, I direct and empower my executor to purchase the balance of such capital stock not owned by me, provided it can be done for a sum not exceeding Two Hundred and Fifty Thousand Dollars ($250,000) for the said shares not owned by me.
>
> If I am the owner of the entire capital stock of the [Hotel] (excepting directors' qualifying shares) at the time of my death, or if my Executors are able to acquire the shares not owned by me for two Hundred and Fifty Thousand Dollars ($250,000) . . . and there shall be in existence at the time of my death an incorporated club known as Paul Smiths Country Club . . . then I direct that my Executrix . . . lease all the property of [the Hotel] . . . to such incorporated club

(R59-61). There was no "Paul Smiths Country Club" in existence at the time of Phelps Smith's death (*see Matter of Duprea*, 6 NYS2d 555, 559 [Sur Ct, Franklin County 1938]).

The Will further provides:

> I give, devise and bequeath all the rest, residue and remainder of my estate, of every name, nature and description wheresoever situate to the corporation hereinafter directed to be formed for the erection of and maintenance of a college for the higher education of boys and girls, to be forever known as "Paul Smiths College of Arts and Sciences"

(R61).

The Will then states:

> I direct my Executors . . . as soon as practicable after my death . . . to form a corporation to be known as "Paul Smiths College of Arts and Sciences"

(R61).

Under the Will, since there was no "Paul Smith's Country Club" in existence at the time of Mr. Smith's death, the executor was required (1) to obtain 100% ownership of all stock in the Hotel (if Mr. Smith owned all of the stock of the Hotel or the executor could obtain the remaining Hotel stock for under $250,000), (2) to create a corporation named "Paul Smith's College of Arts and Sciences," and (3) to transfer the 100% ownership of the Hotel stock to the College (R59-R62).

The Will was probated in Surrogate's Court for Franklin County (R41; R64-R84). The Executor of Phelps Smith transferred all assets of the Hotel to the College (R41).

After the Executor formed the College, the Hotel executed a deed dated September 18, 1963 (the "1963 Deed"), which transferred to the College "all of the tracts or parcels of land owned by the [Hotel] and located in the Towns of Brighton, Harrietstown and Santa Clara in the County of Franklin and State of New York, including rights of way,

easements, revisionary rights, rights of re-entry and any and all other rights, interest or contingent interest that said Hotel Company may have in any lands in said towns" (R86-88). This transfer included all rights that the Hotel had to the Property, including the possibility of reverter (R47-51; R86-88).

B. The Diocese Ceases to Use the Property and Church for Church Purposes.

For over 100 years, the Property and the Church were used by the Diocese for church purposes (R57). They no longer are. On November 24, 2002, the Bishop issued a decree suppressing the quasi-parish of St. Gabriel's Church of Paul Smith's, giving the Church the canonical status of an oratory, and extending the boundary of the nearby Roman Catholic Church of St. John in the Wilderness ("St. John") to include the area surrounding the Church (R42). The Church was then transferred into the care of the pastor of St. John (R42).

From November 24, 2002 through September 4, 2015, the Church was maintained as an oratory, and could be used for (1) the celebration of mass on a patronal fest day, as long as the date did not fall on a Sunday, (2) weddings and funerals for individuals who had a long-standing association with the Church, with the approval of the pastor or

parochial minister, and (3) daily mass and Sunday mass, with the approval of the Bishop. (R42-43).

On September 4, 2015, however, the Bishop issued another decree, providing that the Church's oratory status was removed, the Church was relegated to "profane but not sordid use," and the Church was required to remove all sacred objects from the Church (R43; R107-108). As a result, the stained glass windows and altar have been removed from the Church, and only the pews remain (R43). Upon the removal of the altar and all other sacred objects from the Church and its relegation to profane use, the Diocese unquestionably demonstrated that it no longer would use the Property for church purposes, and thereby violated the deed condition.

Upon learning that the Church was no longer an oratory, and that the altar and sacred objects had been removed, the College exercised its rights under the deed reverter to retake its ownership of the Property, based upon the Diocese's violation of the condition requiring it to use the Property for church purposes. Accordingly, the College placed signs on the Property prohibiting trespassing and asserting that the College owned the Property (R43; R153). The College then commenced this action

in Supreme Court, Franklin County to vindicate its ownership of the Property.

C. This Action

On October 26, 2017, Plaintiff filed a Summons and Complaint pursuant to Article 15 of the RPAPL in Supreme Court, Franklin County, seeking an order declaring that it is the lawful owner of the Property, based on (1) the Diocese's breach of the possibility of reverter or, alternatively, (2) the Diocese's breach of a condition subsequent, when it ceased using the Property for church purposes (R15-21).

On December 12, 2017, the Diocese filed and served an Answer and Counterclaim (R25-30). The counterclaim alleged that the possibility of reverter or condition subsequent were void and unenforceable and, as a result, the Diocese should be declared the owner of the Property in fee simple absolute. On or about December 27, 2017, the College filed and served a Reply to the Counterclaim (R27; R30).

On or about June 25, 2018, the parties appeared for a conference before Judge John T. Ellis at Supreme Court. At the conference, the parties agreed (1) to draft a Joint Stipulation of Settled Facts (the "Joint Stipulation"), which would constitute the entire record, and (2) to file

competing motions for summary judgment based on those facts (R39-45).

On January 2, 2019, the Diocese moved for summary judgment, arguing that the transfer of the property from the Hotel to the College extinguished the deed condition and that it was the owner of the property in fee simple absolute (R33-36). On January 10, 2019, the College cross-moved for summary judgment, arguing that the Diocese's breach of the deed condition automatically voided the transfer of the Property to the Diocese and vested title in the College (R154-159).

On March 8, 2019, Supreme Court issued a Decision and Order, which erroneously held that (1) the 1896 Deed conveying the Property from the Hotel to the Diocese manifested "an intent to convey a fee simple subject to a condition subsequent, thereby reserving a right to re-entry" in the Hotel, and not a possibility of reverter; and (2) the College could not enforce the Hotel's right to reenter the Property, because the right of re-entry was extinguished upon the Hotel's attempt to transfer it to the College through the 1963 Deed (R6-14).

In holding that the 1896 Deed created a condition subsequent and not a possibility of reverter, Supreme Court made two critical errors. First, Supreme Court wholly ignored the plain language of the 1896 Deed

stating that "in case the [Property] shall be devoted to any other use than for Church purposes . . . this conveyance shall be *void*" (R11-12). Instead, Supreme Court focused solely on the next clause, which restated the rights that the Hotel would reacquire upon the reverter: "the right to re-enter and take possession of said premises and every part thereof" (R11-12). Supreme Court erroneously held that because the 1896 Deed restated those rights, it created a condition subsequent, not a possibility of reverter.

Second, Supreme Court failed to address the College's argument that it was a successor to the Hotel and, thus, entitled to exercise the right of re-entry even if the deed had created a condition subsequent, and not a possibility of reverter. If the College is the Hotel's successor, under the law for pre-1967 deeds, the right of re-entry would have been assignable and not extinguished when the Hotel transferred the Property to the College in the 1963 Deed, and the College could enforce the right of re-entry in the 1896 Deed. It was error for Supreme Court to ignore this issue.

The College now appeals the Supreme Court order to this Court.

ARGUMENT

POINT I

THE 1896 DEED CONVEYED THE PROPERTY TO THE DIOCESE SUBJECT TO A POSSIBILITY OF REVERTER, WHICH AUTOMATICALLY REVERTED TITLE TO THE COLLEGE UPON THE DIOCESE'S RELEGATION OF THE PROPERTY FOR OTHER THAN CHURCH PURPOSES

The primary question this Court must resolve on this appeal is what property interest did the 1896 Deed convey to the Diocese: fee simple subject to a possibility of reverter or fee simple subject to a condition subsequent with a right of reentry. This Court need not look further than the plain language of the grant to answer that question. The 1896 deed unambiguously declares the conveyance to the Diocese *void* upon the Diocese ceasing to use the Property for church purposes, and then provides that, upon that automatic voidance, the grantor shall have the right to reenter and take possession of the Property. The words that the parties intentionally chose are not subject to any other reasonable construction.

When the Diocese relegated the Property to profane use, and removed all sacred objects from the Church, including the altar and stained glass windows, it breached the deed restriction limiting the Diocese's use of the Property only to church purposes, and title reverted

automatically to the College, as successor to the original grantor. Supreme Court, therefore, erred in holding that the language of the 1896 deed created only a mere condition subsequent that was extinguished upon the transfer of property interest to the College. The Supreme Court judgment should be reversed.

A. The Plain Language of the 1896 Deed Creates a Possibility of Reverter.

The 1896 Deed, like all other property conveyances, must be construed according to the plain meaning of the language that the parties chose (*see* Real Property Law § 240 [3] ["Every instrument creating, transferring, assigning or surrendering an estate or interest in real property must be construed according to the intent of the parties, so far as such intent can be gathered from the whole instrument, and is consistent with the rules of law."]; *328 Owners Corp. v 330 W. 86 Oaks Corp.*, 8 NY3d 372, 381 [2007]; *Loch Sheldrake Assoc. v Evans*, 306 NY 297, 304 [1954]). Where, as here, those words are clear and unambiguous, this Court need not look beyond the face of the deed to determine its meaning (*see Loch Sheldrake Assoc.*, 306 NY at 304 ["It is only when language used in a conveyance is susceptible of more than one interpretation that the courts will look into surrounding circumstances,

the situation of the parties, etc." (internal quotation marks omitted)]; *Greenspan v Yaple*, 201 App Div 575, 577 [3d Dept 1922]). Indeed, the courts may not look to extrinsic evidence to vary the plain meaning of the deed's language or to introduce ambiguity into the grant where there is none (*see Loch Sheldrake Assoc.*, 306 NY at 305).

As New York courts have held, a deed creates a possibility of reverter when the language used indicates that the grantor automatically retakes title upon the happening of an event (*see NJCB Spec-1, LLC v Budnik*, 161 AD3d 885, 887 [2d Dept 2018]; *Fausett v Guisewhite*, 16 AD2d 82, 86 [3d Dept 1962]). "No precise language is necessary to create a possibility of reverter, but a characteristic of the type of expression which works automatic expiration of the grantee's fee seems to be one in which time is an important factor, such as use of the words 'until,' 'so long as,' or 'during'" (*NJCB Spec-1, LLC*, 161 AD3d at 887 [cleaned up]).

In *NJCB Spec-1, LLC*, for example, the deeds at issue conveyed property to the grantee

> "for so long as" each was used "for golf club purposes, and for no other purposes." Should either lot "ever cease to be used . . . for golf club purposes," then "the estate granted . . . shall thereupon become void, and title to said lands shall revert

> back" to the grantors or the grantors' successors in interest, "who thereupon may enter said lands as if this conveyance had never been made"

(*id.* at 886). Reviewing this language to determine whether the deeds created possibilities of reverter or conditions subsequent with rights of reentry, the Second Department held that the language used by the parties—"the estate granted . . . shall thereupon become void" if no longer used for golf club purposes—"unequivocally called for automatic forfeiture of the estate upon breach and thereby created for their respective grantors possibilities of reverter" (*id.* at 887).

A condition subsequent with a right of reentry is created, in contrast, when the parties provide that the grantor must take an action in the future to reenter the property upon a breach of the condition to terminate the conveyance and vest title once again in the grantor (*see Fausett*, 16 AD2d at 86-87). The distinction between these two interests is important here. At common law, a possibility of reverter was freely transferrable, while a condition subsequent with a right of reentry was not (*see Upington v Corrigan*, 151 NY 143, 147-148 [1896]; *Grant v Koenig*, 39 AD2d 1000, 1000 [3d Dept 1972]; *Fausett*, 16 AD2d at 87). A condition subsequent could only be devised to the grantor's heirs or

successors; any other transfer of that interest would operate to extinguish it (*see Upington*, 151 NY at 147-148).[1]

The plain language of the 1896 Deed here is clear. It provides that the Property must be used "for Church purposes only" (R47). If the Diocese used the Property for "any other use than for Church purposes . . . this conveyance shall be *void* and [the Hotel] shall have the right to re-enter and take possession of said premises and every part thereof" (R47-48 [emphasis added]). As Supreme Court acknowledged, the parties' use of the language "shall be void" clearly indicates their intent that the conveyance would be automatically terminated and title would revert back to the grantor if the Diocese no longer used the Property for church purposes (R12). Indeed, the language used in the 1896 Deed is remarkably similar to the language the parties used in *NJCB Spec-1, LLC*, which the Second Department held created a possibility of reverter. Both deeds provided that the property conveyed was to be used only for a specific purpose and that the conveyances shall be "void" if that was no

[1] In 1967, the law changed. Estates Powers and Trusts Law § 6-5.1 provides that conveyances subject to a condition subsequent with a right of reentry are now freely assignable and transferrable.

longer true.[2]

Because no particular language is necessary to create a possibility of reverter, reading the 1896 Deed as a whole establishes that the deed contained sufficient language to automatically void the conveyance if the Diocese no longer used the Property for church purposes in breach of the deed restriction. The relevant part of the 1896 deed provides that "in case the [Property] shall be devoted to any other use than for Church purposes . . . this conveyance shall be void" (R47-48). Use of the language "in case" of breach, the grant "shall be void" shows that the parties intended for an automatic reversion of title to the grantor if the Diocese ever breached the deed restriction by no longer using it for church purposes.

Indeed, the phrase "shall be void" is regularly held to mean an immediate and automatic voidance that cannot be waived by the actions or inactions of the parties (*see e.g. Matter of Spota v Jackson*, 10 NY3d 46, 52-53 [2008] ["This conclusion is supported by the clause, present in each version, that 'any lease, contract or agreement . . . shall be void,' as

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[2] Although the deed in *NJCB Spec-1, LLC* also contained additional language that further showed the parties' intent to create possibilities of reverter, the language used by the parties in the 1896 Deed here remains sufficient to create a possibility of reverter because it clearly indicates that an automatic voidance of the conveyance upon the Diocese's breach of the deed restriction.

such language would be meaningless if the tribe could, by its actions, 'agree' to accept an outsider and change such person's status as an 'intruder.'" (alteration omitted)]; *Allhusen v Caristo Const. Corp.*, 303 NY 446, 452 [1952] ["We have now before us a clause embodying clear, definite and appropriate language, which may be construed in no other way but that any attempted assignment of either the contract or any rights created thereunder shall be 'void' as against the obligor. One would have to do violence to the language here employed to hold that it is merely an agreement by the subcontractor not to assign. The objectivity of the language precludes such a construction."]; *People v Ricken*, 29 AD2d 192, 193 [3d Dept 1968] ["Although it is recognized that the words "shall" and "must" when found in a statute are not always imperative, in the absence of ameliorating or qualifying language or showing of another purpose, the word 'shall' is deemed to be mandatory."], *affd* 27 NY2d 923 [1970]; *see also e.g. Sphere Drake Ins. Ltd. v Clarendon Nat. Ins. Co.*, 263 F3d 26, 31 [2d Cir 2001] ["Unlike a void contract, a voidable contract is an agreement that '[u]nless rescinded . . . imposes on the parties the same obligations as if it were not voidable,'" quoting 1 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts, § 1:20, at 50 (4th ed

1990)]; *Campbell v Thomas*, 73 AD3d 103, 111 [2d Dept 2010] ["as a general rule, both void and voidable marriages are void ab initio, the difference between them being that the parties to a void marriage (and everyone else) are free to treat the marriage as a nullity without the involvement of a court, while a voidable marriage may be treated as a nullity only if a court has made the requisite pronouncement"]).

The parties' intent here was the same. The Diocese was granted title to the Property solely for use for church purposes until it no longer used the Property for that purpose. Upon the Diocese's breach of that restriction, the language of the 1896 Deed immediately voided the conveyance, and title to the Property and all rights that go along with it—entry and possession of the Property—reverted to the College, as the successor to the original grantor.

Supreme Court's error here was crediting the 1896 Deed language that "[the Hotel] shall have the right to re-enter and take possession of said premises and every part thereof" as transforming the possibility of reverter intended by the parties into a condition subsequent with a right of reentry, merely because the 1896 Deed specified the rights that would revert to the grantor upon the automatic voidance of the conveyance. The

language of the 1896 Deed specifying that the grantor would have the right to reenter the Property and retake possession upon the automatic voidance of the conveyance does nothing more than restate what the College's rights were if the Diocese ceased to use the Property for church purposes. That language does not change the nature of the possibility of reverter created here in the first instance.

Supreme Court's holding improperly rewrites the language of the 1896 Deed to provide that the conveyance to the Diocese was merely voidable, not void, if the grantor decided to exercise its right of reentry upon a breach (*see Fieldston Prop. Owners Assn., Inc. v Hermitage Ins. Co., Inc.*, 16 NY3d 257, 264 [2011]; *Greenfield v Philles Records*, 98 NY2d 562, 573 [2002]). That is not what the parties provided, however. The College was not required by the language of the 1896 Deed to take any action to ensure that title to the Property would revert upon the Diocese's breach of the deed restriction. Rather, the onus was on the Diocese to continue to use the Property exclusively for church purposes, at the risk that title would automatically revert if it failed to do so. This Court should, therefore, reverse the Supreme Court judgment.

B. The College Has the Right to Enforce the Possibility of Reverter.

Because Supreme Court erroneously held that the language of the 1896 Deed created a condition subsequent with a right of reentry, not a possibility of reverter, Supreme Court also erred in extinguishing the deed restriction and vesting title to the Property in the Diocese in fee simple absolute.

The common law provides that a possibility of reverter is freely assignable or transferrable to any party, not just to the original grantor's heirs or successors (*see NJCB Spec-1, LLC*, 161 AD3d at 887 ["[u]nder the applicable rules of the common law, a possibility of reverter could be freely assigned and alienated" (internal quotation marks omitted)]; *see also Fausett*, 16 AD2d at 86 ["the grantor's interest in the possibility of reverter is alienable by the grantor after, and perhaps before, the event occurs which determines the estate"]). As the Hotel's successor (*see* Point II, *infra*), the College has the right to enforce the possibility of reverter created by the 1896 Deed.

Even if the College is not deemed a successor, however, it still has the right to enforce the possibility of reverter because the property interest was properly transferred to it by the Hotel, the original grantor

of the 1896 Deed. In particular, the Hotel deeded "all rights of way, easements, reversionary rights, rights of re-entry and any and all other rights, interest or contingent interest that said Hotel Company may have in any lands in [the] towns [of Brighton, Harrietstown and Santa Clara]" to the College (R85-88). The Hotel's interest in the possibility of reverter is a reversionary right in the Property, which is located in the Town of Brighton, and thus was validly transferred to the College. The College, therefore, is the proper party to enforce that right here.

C. The Diocese Breached the Deed Restriction that the Property Must be Used Only for Church Purposes.

The 1896 Deed expressly provided that the Diocese shall use the Property only for church purposes. The Diocese's actions clearly establish that it has breached that condition, thereby automatically vesting title to the Property in the College.

Although "for Church purposes" is not defined in the 1896 Deed, it is commonly understood to mean "dedicated to worship, esp. Christian worship" or "a building dedicated to any type of religious worship" (Black's Law Dictionary [11th ed 2019], church; *see Matter of Winterton Properties, LLC v Town of Mamakating Zoning Bd. of Appeals*, 132 AD3d 1141, 1142 [3d Dept 2015] [using dictionary references to define the

proper scope of the term "neighborhood place of worship" in a zoning law]). Black's Law Dictionary relatedly defines "worship" as "[a]ny form of religious devotion, ritual, or service showing reverence, esp. for a divine being or supernatural power" (Black's Law Dictionary [11th ed 2019], worship). This legal definition of worship is consistent with its relevant common English language meanings (*see* Webster's Ninth New Collegiate Dictionary [9th ed 1989] [defining worship as the "reverence offered a diving being or supernatural power; also: an act of expressing such reference . . . a form of religious practice with its creed and ritual"]).

When the Diocese relegated the church building to "profane" use and removed all of the sacred objects from the Property, it clearly demonstrated that it would no longer use the Property for worship or other Church purposes in breach of the deed restriction (*see* Archdiocese of Boston, FAQ on Selling Church Properties ["What does relegation to profane use mean? This term is used in Church law for when a Church building will no longer be used for Catholic liturgical worship. Once a property has been relegated, any remaining sacred items are removed and the building can be sold for use in an appropriate and dignified manner."], *available at* https://www.bostoncatholic.org/About-The-

Archdiocese/Content.aspx?id=33982 [last accessed Nov. 26, 2019]; Good Shepherd Catholic Parish, Decree of Relegation to Profane but Not Sordid Use for Saint Theresa Church [providing that upon relegation, the church building was "no longer a sacred place and has lost its blessing, dedication, and consecration; it may no longer be used for divine worship"], *available at* https://gsparish.org/decree-of-relegation-to-profane-but-not-sordid-use-for-saint-theresa-church-july-20-2018/ [last accessed Nov. 26, 2019]).

In particular, in 2002, the Diocese relegated the Property to the status of an oratory (R42; R90). As an oratory, Mass could still be celebrated there on certain occasions and sacred items were kept on premises. In 2015, the Property was relegated to profane, but not sordid use and the status of oratory was removed (R43; R107-108). That relegation meant that church activities could no longer take place on premises and the sacred items, including the altar necessary for any Catholic mass and the stained glass windows, were ordered removed (R43; R107-108). Without the sacred objects present, the Property cannot be used for church purposes in the future. As a result, the Diocese has breached the 1896 deed restriction, triggering the possibility of reverter.

Title, therefore, should be awarded to the College, as the rightful successor to the original grantor.

The Supreme Court judgment should be reversed, and this Court should grant summary judgment instead to the College because the 1896 Deed creates a possibility of reverter that automatically voided the conveyance upon the Diocese's breach of the express deed restriction limiting use of the Property to church purposes only.

POINT II

EVEN IF THE DEED MERELY CREATED A RIGHT OF REENTRY, THE COLLEGE PROPERLY REENTERED THE PROPERTY AS THE HOTEL'S SUCCESSOR

A. If the Deed Did Not Create a Possibility of Reverter, the College Acquired a Right of Reentry From the Hotel as the Hotel's Successor.

As Supreme Court acknowledged, when moving for summary judgment, the Diocese argued that the 1896 Deed "expressly created a right of reentry or condition subsequent" (R35; *see* R10). The Diocese has, therefore, conceded that, at the very least, the 1896 Deed conveyed the Property from the Hotel to the Diocese subject to a condition subsequent, reserving a right to reentry in the Hotel (R35). Even if this Court holds that the 1896 Deed did not create a possibility of reverter in the Hotel

that was transferred to the College, but rather made the conveyance subject to a condition subsequent with a right of reentry, this Court should still award title to the Property to the College because as the Hotel's successor, the College may enforce the right of reentry.

Under the common law at the time that the 1896 Deed was executed, a "successor" of a grantor that was "an artificial person" could "take advantage of the breach of a condition subsequent, annexed to the grant of a fee" (*Upington*, 151 NY at 153). Although a right of reentry could be "rendered void at common law if an attempt was made to *assign* it[,]" the same was not true under the common law when a right of reentry passed instead to a "successor in interest" (*Board of Educ. of Ramapo Cent. School Dist. v Greene*, 112 AD2d 182, 184 [2d Dept 1985]).

For example, in *City of New York v Coney Island Fire Dept.* (285 NY 535 [1941]), the Court of Appeals held that the City of New York could enforce a right of reentry as the successor to the former Town of Gravesend. There, the Town conveyed property to the Coney Island Fire Department upon the condition that the "premises conveyed shall be used for fire purpose and for no other purpose whatsoever" (*id.* at 535). The Town was then annexed to the City of New York. The Court of Appeals

held that the City of New York, as the Town's successor, could enforce the right of reentry when the Coney Island Fire Department ceased to use the premises for fire purposes, and therefore breached the condition (*City of New York v Coney Island Fire Dept.*, 259 App Div 286, 288-289 [2d Dept 1940], *affd* 285 NY 535 [1941]). Similarly, in *Trustees of Union Coll. of Town of Schenectady v City of New York* (173 NY 38, 42 [1903]), the Court of Appeals held that City of New York was entitled to enforce a right of reentry upon the breach of a condition subsequent, because it was the successor of the original grantor, Long Island City.

Here, the grantor of the 1896 Deed—the Hotel—is "an artificial person" (*Upington*, 151 NY at 153). As a result, any "successors" of the Hotel may "take advantage of the breach of a condition subsequent" (*id.*).

"[A] grant to a corporation and its successors is a phrase to be interpreted according to the surrounding circumstances" (*Dunkley Co. v California Packing Corp.*, 277 F 996, 999 [2d Cir 1921]). "There is no set of definitive characteristics or hallmarks . . . that conclusively denotes an entity is a 'successor'" (*Leveraged Innovations, LLC v. Nasdaq OMX Grp., Inc.*, No. 11 Civ. 3203, 2012 WL 1506524, at *5 [SD NY 2012]). "There can be no doubt that one corporation may be the successor of another,

although there is neither a merger nor technical consolidation" (*Dunkley*, 277 F at 999). The word "successor" can be used to "designate such corporations or persons as may in any lawful manner acquire the proprietorship of the corporate rights and property through which they are to be exercised" (*id.* [citation omitted]).

Here, the College was granted the entire capital stock of the Hotel (R40-41; R59-62). In 1937, the executor of Phelps Smith's Will "transferred all assets" of the Hotel to the College (R41). At that time, the College had acquired "the proprietorship of the corporate rights" of the Hotel and "the property through which they [were] to be exercised[,]" and thus became the Hotel's successor (*Dunkley*, 277 F at 999).

The College became the Hotel's successor many years before the Hotel executed the 1963 Deed (R41-42). When the Hotel executed the 1963 Deed, therefore, it did not improperly attempt to assign its right of reentry to the Property to the College, but rather merely recognized that this right had been passed to College as the Hotel's successor (*see Board of Educ. of Ramapo*, 112 AD2d at 184).

Similarly, after paying or ensuring payment of liabilities, a corporation can sell its assets and distribute the proceeds of sale to the

shareholders or distribute assets directly to the shareholders (*see* Business Corporation Law § 1005). In this context, shareholders are routinely found to be successors with regard to the assets distributed to them by a dissolving corporation (*see Wells v Ronning*, 269 AD2d 690, 692-693 [3d Dept 2000] [holding that a cause of action exists, up to the value of assets distributed to a shareholder, under a successor in interest theory]; *Rodgers v Logan*, 121 AD2d 250, 253 [3d Dept 1986] [the estate of a deceased shareholder is a successor in interest to a corporation]).

Here, the College and the Hotel are uniquely linked through the Will of Phelps Smith. Phelps Smith, as the controlling shareholder of the Hotel, plainly intended that the College would be the Hotel's successor-in-interest and would preserve the Paul Smith's name affiliation with the Property (*see e.g. Matter of Paul Smith's Coll. of Arts & Sciences*, 2015 NY Slip Op 32705[U], *5 [Sup Ct, Franklin County 2015] [denying a petition to change the name of Paul Smith's College of Arts and Sciences], *available at* http://www.nycourts.gov/reporter/pdfs/2015/2015_32705.pdf).

In particular, at the time of his death, Phelps Smith was the sole shareholder of the Hotel, or upon administration of his will, he became the sole shareholder (R40-41; R59-62). The Will of Phelps Smith directed

the creation of the College and directed that the College receive all of the stock in the Hotel (R59-62).[3] After Phelps Smith's estate effected the transfer of stock, the College became the sole shareholder of the Hotel, and then went through the process of distributing the Hotel's assets, including the rights retained under the 1896 Deed, to itself, prior to the Hotel's dissolution.

The College, therefore, is properly deemed the successor to the Hotel, and as such, has the right to enforce the right of reentry contained in the 1896 Deed (*see Upington*, 151 NY at 153; *see also City of New York*, 285 NY at 535).

B. The College Properly Exercised its Right of Reentry When the Diocese No Longer Used the Property for Church Purposes.

"At the moment of breach of the condition subsequent the defendants, successors in interest to the original grantors, acquired a 'right of reacquisition'" (*United Methodist Church in West Sand Lake v Kunz*, 357 NYS2d 637, 640 [Sup Ct, Rensselaer County 1974]). When this

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[3] It is a valid testamentary disposition to bequeath property to an as yet created not-for-profit corporation (*see* Estates Powers and Trusts Law § 3-1.3; *see also Shipman v Fanshaw*, 98 NY 311 [1885] [holding that where entity is not in existence on death but will come into existence before the gift vests, it is a valid testamentary disposition]).

right of reacquisition or reentry is exercised, it terminates the grantee's right to the property (*see id.*).

The Diocese here breached the condition subsequent that the Property be used for church purposes by (1) relegating the Property to profane but not sordid use, (2) removing all sacred objects from the Property, and (3) ceasing all church services at the Property (*see* Point I). Once these steps were taken, the Property was no longer devoted to Church purposes, in direct violation of the condition subsequent in the 1896 Deed (*see* Point I). Once the Diocese breached the condition, therefore, the College acquired a right of reentry that it could exercise as the Hotel's successor (*see United Methodist Church*, 357 NYS2d at 640).

The College properly exercised its right of reentry when (1) on October 26, 2017, the College filed a Summons and Complaint pursuant to Article 15 of the RPAPL in Supreme Court seeking an order declaring that it is the lawful owner of the Property, and (2) on or about November 7, 2017, when the College "placed signs on the Property prohibiting trespassing and asserting that the Property is the property of [Plaintiff]" (R43; *see* R15-20).

This Court should, therefore, hold that, as the Hotel's successor, the College (1) acquired a right of reentry upon the breach of the condition subsequent in the 1896 Deed, (2) properly exercised its right of reentry, and, therefore, (3) has a current right to the Property that should be enforced by this Court. As a result, the Supreme Court judgment should be reversed. Even if this Court holds that the College's status as a successor or right to enforce a breach are not clearly established, however, this Court should still reverse the Supreme Court judgment, because questions of fact preclude an award of summary judgment to the Diocese on these issues.

CONCLUSION

For these reasons, Plaintiff-Appellant Paul Smith's College of Arts and Sciences respectfully requests that this Court reverse the Supreme Court judgment in its entirety, award the College summary judgment on its claims, declare that the College is the title owner of the one-acre property on which St. Gabriel's Church was built, and award such other and further relief as the Court deems just and proper.

Dated: November 26, 2019

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PRINTING SPECIFICATIONS STATEMENT

Pursuant to Rule 1250.8(j) of the Practice Rules of the Appellate Division (22 NYCRR § 1250.8 [j]), I hereby certify that this brief was prepared on a computer using Microsoft Word 2016.

I further certify that this brief complies with the typeface, point size, and line spacing requirements of Rules 1250.8(f)(1) and 1250.8(h) because it was prepared using a proportional typeface named Century Schoolbook, the body of the brief is 14-point type and double-spaced, the footnotes of the brief are 12-point type and single-spaced, and the margins of the brief are one inch on all sides of the page.

I further certify that this brief complies with the word count requirement of Rule 1250.8(f)(2) because the total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc. is **7,460** .

Dated: November 26, 2019

Brendan P. Owens

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, THIRD DEPARTMENT

PAUL SMITH'S COLLEGE OF ART AND SCIENCE,

Plaintiff-Appellant,

-against-

ROMAN CATHOLIC DIOCESE OF OGDENSBURG,

Defendant-Respondent.

AFFIRMATION OF SERVICE

Franklin County
Index No.:
2017-713

Appeal No. 530141

ROBERT S. ROSBOROUGH IV, an attorney duly admitted to the practice before the State of New York hereby affirms under the penalties of perjury as follows:

1. I am over 18 years of age, and not a party to this action.

2. I hereby certify that on November 27, 2019, I electronically filed, on behalf of Plaintiff-Appellant Paul Smith's College of Art and Science, the Brief of Plaintiff-Appellant and the Record on Appeal, using the NYSCEF electronic filing system, which sent notification of such filing to the following:

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