

**THE STATE OF NEW YORK  
SUPREME COURT**

**FULTON COUNTY**

BALBOAA LAND DEVELOPMENT CORPORATION,

Plaintiff,

-against-

TOWN OF CAROGA,

Defendant.

**VERIFIED ANSWER &  
COUNTERCLAIM**

**Index No.: 07599**

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COMES NOW Defendant Town of Caroga, by and through its attorneys Dunn & Dunn, PLLC (Gregory T. Dunn & Kirsten E. Dunn), and hereby answers the Verified Complaint as follows:

1. Defendant (hereinafter "Town of Caroga") admits the allegations set forth in Paragraphs 1-4 and both Paragraphs 5 of the Verified Complaint (two (2) Paragraphs are numbered five (5) in the Verified Complaint).

2. Town of Caroga is without sufficient information to form a belief as to the truth of the allegations set forth in Paragraphs 6-9, 11-13, 16-17, 20, 25-26 of the Complaint, and therefore denies the same.

3. Town of Caroga denies the allegations set forth in Paragraphs 10, 14-15, 19, 22-24, 27-28, 30-39 and states that the terms and conditions of the Parties' agreements speak for themselves.

4. Town of Caroga admits the allegations set forth in Paragraph 18 to the extent that in or about March 2015 the Town Board passed Resolution 2015-34 concerning the conveyance of real property and improvements (hereinafter the "Sherman's Amusement Park Property") by Plaintiff to the Town of Caroga, but denies the remaining allegations and states that Resolution 2015-34 speaks for itself. *Attached hereto as Defendant's Exhibit A is a true and correct copy*

*of the Minutes of March 11, 2015 Town of Caroga Board Meeting, along with Resolution 2015-34 included therein.* The Town of Caroga affirmatively states that on May 7, 2015 it passed Resolution 2015-40 rescinding Resolution 2015-34 and ratifying the conveyance of the Sherman's Amusement Park Property by Warranty Deed in fee simple absolute, free and clear of any condition subsequent alleged to be imposed in and/or by the Donation Agreement, including but not limited to a restraint on alienation, a maintenance obligation imposed by Plaintiff and/or burden placed upon the Town of Caroga or Sherman's Amusement Park Property for the private benefit of Plaintiff. *Attached hereto as Defendant's Exhibit B is a true and correct copy of the Minutes of May 7, 2015 Town of Caroga Board Meeting, along with Resolution 2015-40 included therein.*

5. Town of Caroga repeats, reiterates and realleges its admissions and/or denials to the allegations included in Paragraphs 21 and 29 of the Verified Complaint as if fully set forth herein.

#### **AFFIRMATIVE DEFENSES**

6. The Complaint fails to state a claim upon which relief may be granted.
7. Plaintiff's claims are barred by the doctrine of judicial, equitable and/or promissory estoppel.
8. Plaintiff's claims are barred by the doctrines of unclean hands and/or laches.
9. Plaintiff's claims are barred by the doctrines of merger, waiver, release, ratification, acquiescence and/or novation.
10. Plaintiff's claims are barred in whole or in part by the Parol Evidence Rule.
11. Plaintiff's claims are barred in whole or in part because unreasonable restraints on alienation are void as against public policy.

12. Plaintiff's claims are barred because the Donation Agreement was entered into without the authority required under New York Town Law and/or General Municipal Law and is not legally binding.

13. Plaintiff cannot enforce certain terms and conditions of the Donation Agreement because they are ambiguous and/or overburdensome.

14. Plaintiff has not suffered a concrete injury and lacks standing to file a lawsuit and/or claim damages against the Town of Caroga.

15. The damages claimed by Plaintiff are speculative in nature and/or are barred in whole or part by the doctrine of setoff, the failure to mitigate damages, unjust enrichment and/or misrepresentation.

16. Town of Caroga reserves its right to assert additional defenses as they may arise.

### **COUNTERCLAIM**

COMES NOW Town of Caroga, by and through its attorneys Dunn & Dunn, PLLC (Gregory T. Dunn and Kirsten E. Dunn) and hereby sets forth its Counterclaim against Plaintiff, as follows:

### **GENERAL ALLEGATIONS**

1. Upon information and belief, on or about December 29, 2014, Plaintiff and Town of Caroga Supervisor Ralph Ottuso signed a Donation Agreement whereby Sherman's Amusement Park Property owned by Plaintiff was to be donated and/or transferred by Plaintiff to the Town of Caroga.

2. Upon information and belief, the terms and conditions set forth in said Donation Agreement were agreed to and the Donation Agreement signed by Plaintiff and said Supervisor without Town of Caroga Board approval as required by New York State Law.

3. Upon information and belief, on or about December 30, 2014, Plaintiff signed and delivered to said Supervisor a Warranty Deed conveying title in and to Sherman's Amusement Park Property to the Town of Caroga without Town of Caroga Board approval as required by New York State Law. *Attached hereto as Defendant's Exhibit C is a true and correct copy of said Warranty Deed.*

4. Said Warranty Deed conveyed title in and to the Town of Caroga in fee simple absolute not subject to any condition subsequent. *See Defendant's Exhibit C.*

5. Upon information and belief, in or about March 2015, the Town Board of the Town of Caroga passed Resolution 34 of 2015 concerning the transfer of Sherman's Amusement Park Property to the Town of Caroga, but rescinded said Resolution in May 2015 for the purpose of clarifying the Town of Caroga's acceptance and/or ratification of the transfer of Sherman's Amusement Park Property to the Town of Caroga in fee simple absolute, free and clear of the restrictions, requirements, obligations and burdens purported to be imposed on the Town of Caroga in and/or by the Donation Agreement.

6. Upon information and belief, since May 2015, Plaintiff has been on notice that the Town of Caroga did not accept title to Sherman's Amusement Park Property subject to any condition subsequent, but accepted title in fee simple absolute with the right to quietly enjoy use and possession of the property free from any restraint on alienation, maintenance obligation imposed by Plaintiff and/or burden placed upon the Town of Caroga or upon Sherman's Amusement Park Property for the private benefit of Plaintiff.

7. Despite the allegations set forth in Plaintiff's Verified Complaint, Plaintiff has failed to heretofore take legal action to enforce any condition subsequent, has not produced evidence that any claimed conditions subsequent were not merged into the Warranty Deed and has, contrary to its claim that the Town of Caroga is permanently restrained from alienating

Sherman's Amusement Park Property, approved its pending sale by the Town of Caroga to the Caroga Arts Collective, a New York Not-For-Profit Corporation.

8. Since May 2015, the Town of Caroga has and continues to own, maintain, use, possess and enjoy Sherman's Amusement Park Property free and clear of any condition subsequent claimed to be imposed upon the Town of Caroga or upon Sherman's Amusement Park Property by Plaintiff, but not set forth in the Warranty Deed and/or ratified by the Town of Caroga.

9. Since conveyance of title to the Town of Caroga, Plaintiff has not owned, maintained, used, possessed, had the right to enjoy Sherman's Amusement Park Property and/or suffered any real or concrete damage associated with said Property, and therefore, lacks standing to file a lawsuit against the Town of Caroga that seeks to impose conditions subsequent on the Town's use of Sherman's Amusement Park Property, requests rescission of the Property or claims the right to recover damages against the Town of Caroga.

10. Under law and in equity, the Town of Caroga is entitled to: 1) retain, use, possess, maintain, quietly enjoy, lease and/or dispose of Sherman's Amusement Park Property free and clear of any restraint, restriction, requirement, obligation and/or burden sought to be enforced by Plaintiff; 2) an award of damages for Plaintiff's interference with such rights; or, in the alternative, 3) rescission of the contract and/or conveyance of title and recovery of any and all compensatory, consequential and incidental damages incurred by the Town of Caroga during its term of ownership.

### **COUNT I DECLARATORY JUDGMENT**

11. The Town of Caroga repeats, reiterates and realleges the allegations set forth in Paragraphs 1-10 of its Counterclaim as if fully set forth herein.

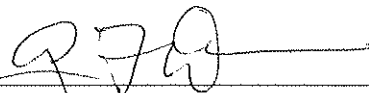
12. The Town of Caroga is entitled to a declaratory judgment adjudicating the rights and legal relations of and remedies available to the Parties relative to the conveyance of Sherman's Amusement Park Property as described by the Parties in their pleadings.

WHEREFORE, Defendant Town of Caroga respectfully requests that the Court:

- 1) deny the claims and request for relief and/or damages set forth in Plaintiff's Verified Complaint;
- 2) grant it the relief requested in its Counterclaim, and;
- 3) grant it any such other and further relief as the Court deems just and proper.

Dated: August 14, 2019

DUNN & DUNN, PLLC



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**VERIFICATION**

STATE OF NEW YORK            )  
COUNTY OF FULTON         ) ss.:

Defendant Town of Caroga, by and through its Supervisor, **JAMES SELMSER**, being duly sworn, states that a majority of the Councilmembers of the Town Board of the Town of Caroga have read the foregoing Verified Answer and Counterclaim, that said Councilmembers know the contents thereof and that the same is true to said Councilmembers own knowledge except as to those matters which are alleged upon information and belief to be true, and that he has received authority from the Town Board of the Town of Caroga to verify the same.

TOWN OF CAROGA, a New York Municipality,

By \_\_\_\_\_  
James Selmser, Town Supervisor

Sworn to before me this \_\_\_\_ day  
of August, 2019.

\_\_\_\_\_  
Notary Public