SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-001036-23T4

MARY ROSE 22, LLC	:CIVIL ACTION
	:
PLAINTIFF-APPELLEE,	:ON APPEAL FROM JUDGMENT OF
	:SUPERIOR COURT OF NEW JERSEY
VS	:CHANCERY DIVISION
	:ESSEX COUNTY
BLOCK 270, LOT 14;	:Docket No. F-6378-22
65 CLEREMONT AVENUE,	:
TOWNSHIP OF IRVINGTON;	:SAT BELOW
STATE OF NEW JERSEY;	:HON. JAMES R. PAGANELLI, J.S.C.
ASSESSED TO ROSA E. ALVAREZ-	:HON. LISA M. ADUBATO, J.S.C.
LOJA, ALFREDO ALVAREZ and	:
JOSE E. ANGAMARCA,	:
	:
DEFENDANTS-APPELLANTS,	:
	:
BLACKBALL, LLC,	:
	:
INTERVENOR-APPELLEE	:

BRIEF OF DEFENDANTS-APPELLANTS

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PROCEDURAL HISTORY

Citations herein shall be to the annexed Appendix prepared by Defendants-Appellants Rosa E. Alvarez -Loja, Alfredo Alvarez and Jose E. Angamarca ("Appellants").

On April 20, 2020, Appellants acquired 65-67 Cleremont Avenue, Irvington, New Jersey (the "Property") for consideration of $163,000. (92a-93a).

On December 16, 2021, the Irvington Township Tax Collector auctioned tax sale certificate no. 21-00761 as a lien against the Property (the "Certificate") to FIG Cust & FIG 19 LLC ("FIG") for the amount of $1,314.28 plus statutory interest of $29.57, for a total payment by FIG of $1,343.85. (30a,34a).

Holding this Certificate, FIG proceeded to pay subsequently accruing real property taxes for the first and second quarters of 2022, and on June 22, 2022, initiated the lower court in rem foreclosure action against the Property (the "Foreclosure Action," 28a-34a).

By Assignment of Tax Sale Certificate dated as of October 13, 2022, Mary Rose 22, LLC ("Mary Rose 22") acquired the Certificate for unstated consideration. (89a)

On November 7, 2022, an Order Substituting Plaintiff (89a) was entered by the lower court, substituting Mary Rose 22 for FIG. Also on November 7, 2022, Mary Rose 22 obtained Final

Judgment (the "Final Judgment")for an adjudicated delinquency of $4,246.67, thereby acquiring title to the Property. (85a-88a).

On or about December 12, 2022, thirty-five (35) days after entry of Final Judgment, Mary Rose 22 conveyed title to the Property to Blackball, LLC ("Blackball") by Quitclaim Deed for stated consideration of $140,000. (466a, 347a-348a, 351a-354a).

On February 2, 2023, eighty-seven (87) days after entry of Final Judgment, Appellants filed a motion in the lower court seeking to avoid the Final Judgment under Rule 4:50-1 (a), (d) and (f). (90a-147a). On February 27, 2023, Blackball sought permission to intervene. (335a-383a).

On March 17, 2023, the Honorable James R. Paganelli, J.S.C. heard oral argument on the pending motions.[1] On April 3, 2023, Judge Paganelli partially denied and partly reserved on Appellants' motion to vacate the Final Judgment in an Order (the "April 3, 2023 Order")(6a-23a), and also granted Blackball's request to intervene. (383a-402a).

The April 3, 2023 Order specifically made findings with respect to two issues raised by Appellants but reserved a final decision pending "further motion practice or a plenary hearing." (20a-23a). Those reserved issues were:

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[1] References to the April 3, 2023 Transcript are referred to herein as 1T 3/17/23.

(i) whether the Final Judgment was void, under 4:50-1(d), as being based upon the utilization of the expedited foreclosure procedure only available on a determination of the property's abandonment, which Judge Paganelli had earlier supplied in reliance upon the Plaintiff's expert report which attached pictures of a different property. Thus, Judge Paganelli opened discovery to investigate the propriety of the abandonment determination (20a-23a); and

(ii) whether the Final Judgment was avoidable under 4:50-1(f), for "any other reason justifying relief." (20a-23a).

The April 3, 2023 Order allowed ninety (90) days of discovery before the parties were to return "for further motion practice or a plenary hearing."

On August 11, 2023, Blackball filed a Notice of Motion to Compel Discovery. (403a-453a). The motion was unopposed and heard on September 27, 2023 by the Honorable Lisa M. Adubato, J.S.C., who had assumed the matter following the elevation of Judge Paganelli to the Appellate Division.[2] On September 27, 2023, Judge Adubato entered the Order Denying Blackball LLC's Motion to Compel Discovery and Reset Discovery Dates, determining that the April 3 Order remained "in effect" and effectively denying the Appellants' continuing efforts to seek adjudication of the reserved-upon issues in Appellants' pending motion to vacate (the "Sua Sponte Order")(24a-25a).

[2] References to the September 27, 2023 Transcript are referred to herein as 2T 9/27/23.

On October 17, 2023, Appellants filed a Motion to Reconsider the Sua Sponte Order (the "Reconsideration Motion")(454a-792a), and in that motion specifically raised Tyler v. Hennepin County, 143 S.Ct. 1369 (May 25, 2023) as an additional affirmative basis for relief under Rules 4:50-1(d) and (f).

On November 15, 2023, the lower court heard oral argument[3] and entered an Order denying the Reconsideration Motion. (26a-27a).

A Notice of Appeal was filed by Appellants on December 7, 2023, initiating this appeal. (1a-5a).

This appeal encompasses the rulings contained in the lower court's April 3, 2023 Order (6a-23a), the Sua Sponte Order(24a-25a) and the November 15, 2023 Order denying the Reconsideration Motion (26a-27a).

CONCISE STATEMENT OF FACTS

On April 20, 2020, Appellants acquired 65-67 Cleremont Avenue, Irvington, New Jersey (the "Property) for consideration of $163,000. (92a-93a). They acquired the Property as an investment, with the intention of renovating the Property and converting the Property from a two family to a three family use. (92a-93a).

[3] References to the November 15, 2023 Transcript are referred to herein as 3T 11/15/23.

Appellants are the victims of a tragedy in that they lost the Property after an accelerated tax sale for a single quarter of real property tax delinquency followed by an accelerated in rem foreclosure process predicated upon an allegation that the Property was abandoned. (92a-93a).

A. Appellants Were Not Serial Non-Payers of Property Taxes

Appellants were not ignorant of their obligation to pay real property taxes. From and after acquiring the Property in April 2020, they paid real property taxes to the Township of Irvington, through and including the third quarter of 2021, then missed the fourth quarter, which were due on November 1, 2021 and which were only delinquent after November 15, 2021. (95a-96a).

Unknown to Appellants, Irvington Township is an "accelerated tax sale municipality." (95a-96a). When a real property tax delinquency occurs, the Township typically sends a delinquency notice to the taxpayer. When the delinquency relates to the fourth quarter, however, Irvington does not send out a delinquent notice, but instead proceeds directly to tax sale. (110a-111a).

This happened to Appellants.

B. The Real Property Tax Delinquency and the December 2021 Tax Sale.

On December 16, 2021, the Irvington Township Tax Collector auctioned tax sale certificate no. 21-00761 (the "Certificate")

to FIG for the amount of $1,314.28 plus statutory interest of $29.57, for a total payment by FIG of $1,343.85. (30a,34a).

Holding this Certificate, FIG proceeded to pay subsequently accruing real property taxes for the first and second quarters of 2022, and on June 22, 2022, initiated an in rem foreclosure action against the Property (the "Foreclosure Action")(28a-34a).

C. Appellants' Contemporaneous Efforts to Obtain a Variance and Renovate the Property

In September 2020, shortly after acquiring the Property, Appellants paid $4,330 in fees to the Irvington Township Zoning Board of Adjustment (96a-97a), along with other significant fees and expenses to retained professionals related to a variance application. (96a-97a).

Those efforts were ultimately successful. After Appellants attended hearings before the Irvington Township Zoning Hearing Board on December 7, 2021 and January 18, 2022, they obtained Final Site Plan Approval for a variance. (123a-131a). This was after the tax sale. The resolution approving the Final Site Plan Approval was executed by the Chairman of the Irvington Zoning Hearing Board on February 15, 2022. (123a-131a).

After obtaining Final Site Plan Approval, unaware of the jeopardy from the sale of the Certificate, Appellants immediately initiated renovation efforts(97a-98a), retaining architect

Garabed Douradjian, to whom Appellants paid $7,250 on May 19, 2022, and engineer BABS Engineering, P.C., to whom Appellants paid $4,100 on October 10, 2022. (97a-98a).

Not only did Appellants pursue this variance and plan renovations expeditiously, but they always took reasonable care of the Property. (98a-99a). The Property was serviced by meters, and while vacant did not appear to be abandoned. (99a-99a).

D. FIG'S Foreclosure Action - The Decision to Not Wait Two Years

On June 22, 2022, FIG initiated the lower court Foreclosure Action utilizing the in rem procedure, which allowed FIG to ignore the two (2) year waiting period by alleging that the Property was "abandoned." (28a-34a). Paragraph 2 of the Complaint states:

> 2. The Property is abandoned as set forth in N.J.S.A. §55:19-78 et seq. The certificate holder has unsuccessfully sought a certificate of abandonment from the public officer or tax collector. The certificate holder seeks the entry of a court order declaring the property as abandoned pursuant to N.J.S.A. §54:5-86(b).

(28a).

FIG made this allegation notwithstanding that Irvington Township maintains a register of abandoned properties, and the Property was not listed on that register. (98a).

In order to obtain the determination that the Property was

abandoned that is the statutory predicate for the procedure it utilized, FIG chose to make a motion to the lower court in the Foreclosure Action on September 14, 2022(35a-84a), relying upon an inspection of the Property allegedly undertaken by Derek Leary on January 28, 2022, nine (9) months earlier. (66a-70a). That date was slightly more than one month after FIG's acquisition of the Certificate.

E. <u>The Faulty Leary Report</u>

In support of its abandonment motion, FIG offered the Certification in Support of Motion to Determine that Property is Abandoned executed by Brad Matos, a Manager for FIG, dated as of September 14, 2022 (the "Matos Cert.") in which Mr. Matos stated as follows:

> 10. Derek Leary performs property inspections on behalf of Plaintiff.
>
> 11. Derek Leary's professional qualifications, including building inspector, enable him to make a determination as to the abandoned status of a property. In addition, he is a Licensed Construction Official, Building Sub Code Official and Housing Code Official, which qualifies him to deliver an opinion as to the abandonment of real property.
>
> 12. On January 28, 2022, Mr. Leary inspected the exterior of the Property located at 65 Cleremont Avenue, Irvington, New Jersey, Block 270, Lot 14 (the "Property"). A copy of the inspection report and pictures of the Property are attached hereto as Exhibit "E" and made a part hereof.

> 13. Based upon Mr. Leary's inspection of the property, Plaintiff submits that the Property meets the definition of abandoned pursuant to N.J.S.A. 55:19-81.

(41a).

The Leary Report attached pictures which were not pictures of the Property. (66a-70a). After research, Appellants were able to ascertain that the property identified in the Leary Report is in fact 1470 Princess Avenue, Camden, New Jersey which was owned by PC8REO, LLC. (99a-102a).

In their motion to vacate, Appellants carefully reviewed Leary's written statements and checked off boxes as to the Property condition and categorically rebutted his conclusions, ultimately questioning whether Mr. Leary ever visited the Property based upon the demonstrable inaccuracy of his observations:

Leary Statement:	(i).	Leary states that the Property is "in need of rehabilitation and no rehabilitation has taken place in the prior six months."
Alvarez Rebuttal		I do not know how Leary could have supported this statement in January 2022. FIG only acquired the Certificate in December 2021. Leary had no basis for this conclusion and apparently made no effort to investigate the work undertaken at the Property and the variance process that was pending in Irvington Township.(99a-100a)
Leary Statement:	(ii)	Leary states that the Property is "unfit

		for human habitation, occupancy or use"
Alvarez Rebuttal		I do not know how Leary could support this statement. He did not gain access to the interior of the Property. An inspection of the exterior of the Property could not support this statement as the Property is reasonably well maintained and structurally intact and apparently fit for habitation. (99a-100a)
Leary Statement:	(iii)	The condition and vacancy of the property materially increases the risk of fire to the property and adjacent properties.
Alvarez Rebuttal		I do not know how Leary could support this statement. He did not gain access to the interior of the Property. An inspection of the exterior of the Property could not support this statement as the Property is reasonably well maintained and structurally intact and apparently fit for habitation.(99a-100a)
Leary Statement:	(iv)	The Property is subject to unauthorized entry leading to potential health and safety hazards; the owner has failed to take reasonable and necessary measures to secure the property; or the municipality has secured the property in order to prevent such hazards after the owner has failed to do so. (99a-100a)
Alvarez Rebuttal		I do not know how Leary could support this statement. He did not gain access to the interior of the Property. An inspection of the exterior of the Property could not support this statement as the Property is reasonably well maintained and structurally intact and apparently fit for habitation. (99a-100a)

Leary Statement	(v)	The presence of vermin or the accumulation of debris, uncut vegetation or physical deterioration of the structure or grounds have created potential health and safety hazards and the owner has failed to take reasonable and necessary measures to remove the hazards.
Alvarez Rebuttal		I do not know how Leary could support this statement. He did not gain access to the interior of the Property. An inspection of the exterior of the Property could not support this statement as the Property is reasonably well maintained and structurally intact and apparently fit for habitation. There are no debris or vermin.(99a-100a)
Leary Statement	(vi)	The dilapidated appearances or other condition of the property materially affects the welfare, including the economic welfare, of the residents of the area in close proximity to the property, and the owner has failed to take reasonable and necessary measures to remedy the conditions.
Alvarez Rebuttal		I do not know how Leary could support this statement. He did not gain access to the interior of the Property. An inspection of the exterior of the Property could not support this statement as the Property is reasonably well maintained and structurally intact and apparently fit for habitation.(99a-100a)

The Leary Report continues, in paragraphs 4 and 5, to offer hand written statements as to condition which might have been from personal observation, contending that the "soffit, fascia, gutter, window" are in need of repair. (66a-70a). Appellants

admitted that a small section of the soffit siding needed repair, as did several windows, but the gutters and fascia did not. (99a).

Leary also concluded that the Property lacks utilities. (66a-70a). However, the picture of the actual Property showed electrical meters on the side of the Property. (139a).

Leary's conclusion as to six months of vacancy could not have been based on knowledge when made in January 2022 as Leary had made no prior inspection.

F. Appellants Neglect of the Foreclosure Action

Appellants are native Spanish speakers and are not sophisticated in legal matters. (102a-103a). None of Appellants had has ever been involved in a legal proceeding before this action. (102a-103a). Appellants did not seek the advice of an attorney. (102a-103a).

Appellants specifically relied upon the fact that they had been so active with Irvington Township in December 2021 and January 2022, obtaining the Site Plan Approval at that time, and then proceeding with retaining an architect and engineer and moving forward to obtaining approval of our plans and pulling permits. (102a-103a). Appellants did not understand how FIG could move forward so rapidly while they were working so assiduously with Irvington to improve the Property.

Appellants were not serially delinquent on paying real property taxes, but merely got caught a few weeks short by Irvington's accelerated collection process, which resulted in the sale of the Certificate after only a few weeks of delinquency.

G. The Forfeiture of Equity in the Property Is Severe

The Property is Appellants' most significant investment. (103a-104a). Appellants invested their life savings into acquiring and obtaining the approvals for the use and renovation of the Property. (99a-101a). They purchased the Property for $163,000 in April 2020 (93a-94a), and were successful in having the Property converted to a three family dwelling.

Appellants did not supply the lower court with an independent valuation of the Property, but noted that the Web Site Zillow attributed a value of $294,400 to the Property as of January 31, 2023. (100a-101a). Appellants believed this value to be accurate or low, especially based upon the Site Plan Approval converting the use to three (3) family. (101a-102a).

According to Plaintiff's Final Judgment, the total due to redeem Plaintiff's certificate was $4,246.67 as of August 18, 2022. (85a-88a). Appellants estimated that with the addition of taxes for 2022, and statutory interest, that the amount necessary to redeem the Certificate was approximately $8,000 in mid-2023. (102a).

Final Judgment was entered in this matter on November 7, 2022. (85a-88a). Title was transferred by Quitclaim Deed to Blackball thirty-five (35) days later for consideration of $140,000.(465a-471, 344a-349a, 341a-343a).

H. Appellants' Motion to Vacate the Final Judgment and the Disposition Thereof

By motion filed on February 2, 2023, Appellants sought to avoid the Final Judgment under Rule 4:50-1 (a), (d) and (f). In the April 3, 2023 Order, Judge Paganelli partially denied certain requests for relief, but made multiple findings in favor of Appellants as to Appellants' claims under R.4:50-1(d) and (f). (6a-23a). Specifically, Judge Paganelli credited Appellants' claim that the abandonment determination was based upon a faulty Leary Report, which the Court had relied upon.(15a-18a). In addition, Judge Paganelli found that two of three considerations of Rule 4:50-1(f) favored Appellants (19a-23a), except he reserved to allow Appellants to rebut Blackball's claim to the status of a bona fide purchaser for value without notice. (23a). Judge Paganelli reserved final decision on those issues pending "further motion practice or a plenary hearing." (20a-23a). The Court allowed ninety (90) days for further discovery to address these reserved issues.

I. Blackball's Motion to Compel Discovery and the Sua Sponte Order

On August 11, 2023, after the ninety (90) day discovery period had run with discovery demands having been exchanged but not completed, Blackball filed a Notice of Motion to Compel Discovery.(395a-449a). The motion requested no relief other than compelling production and resetting dates. The motion was heard unopposed on September 27, 2023 by the Honorable Lisa M. Adubato, J.S.C., who assumed the matter following the elevation of Judge Paganelli to the Appellate Division. (2T 9/27/23).

After oral argument on September 27, 2023, Judge Adubato entered the Order Denying Blackball LLC's Motion to Compel Discovery and Reset Discovery Dates, determining instead that the April 3 Order would remain "in effect," effectively terminating Appellants' motion to vacate without further hearing (the "Sua Sponte Order")(24a-25a).

Shocked by Judge Adubato's sua sponte termination of their motion to vacate over the unopposed discovery motion, on October 17, 2023, Appellants filed a Motion to Reconsider regarding the Sua Sponte Order (the "Reconsideration Motion")(451a-524a).

J. Addressing the Bona Fide Purchaser for Value Without Notice Argument in the Reconsideration Motion

Notwithstanding being denied responses to discovery from Blackball and Mary Rose 22 in Judge Adubato's Sua Sponte Order,

Appellants filed the Reconsideration Motion to present to the lower court the significant public record information which Appellants' counsel had uncovered in seeking to establish the sophistication of Blackball and its principal Joseph Phillips, and thereby complete the inquiry laid out by Judge Paganelli in the April 3, 2023 Order. Judge Paganelli indicated he was inclined to vacate the Final Judgment under Rule 4:50-1(f), but for his reservations about Blackball's claim to the protection of bona fide purchaser for value status. (19a-23a).

Appellants' counsel inspected title records to ascertain instances where entities related to Mr. Phillips appeared in tax lien foreclosures or purchased properties after judgment, which review it summarized in a chart of the public documents.(533a-534a).

That research, undertaken as independent discovery, revealed that in the three (3) prior years that Mr. Phillips, through either Blackball or other entities he controlled (Peak Pointe, LLC ("Peak Pointe") and Echo Lake Enterprises, LLC ("Echo Lake")) filed public record documents with County Clerks throughout the state related to pending tax lien foreclosures in forty-five (45) instances. (525a-532a). These are categorized as follows:

(i) 28 instances in which Blackball, Peake Pointe or Echo Lake acquired deeds within 60 days of the entry of Final Judgment; (525a-532a).

(ii) 7 instances in which Echo Lake filed Notices of Lis Pendens, as plaintiff in a tax lien foreclosure; and (525a-532a).

(iii) 10 instances in which Echo Lake acquired assignments of certificates. (525a-532a).

According to public records obtained and attached to the attorney certification, Joseph Phillips is the sole member of Blackball, LLC and Peake Point, LLC (See Exhibit "1" - 12/19/22 signature page of mortgage attached to Counsel Cert)(555a), and the managing member of Echo Lake Enterprises, LLC (See Exhibit "2" of Counsel Cert)(556a-558a).

Appellants contended that this extent of activity established the "sophistication" of Blackball and its principal Joseph Phillips, a factor critical in Judge Paganelli's estimation. Appellants contended that what Blackball did in Appellants' case was Mr. Phillips' modus operandi, wherein he regularly acquired tax titles within sixty (60) days of entry of Final Judgment, operating a clearing house for recently acquired tax titles, and thereafter sporting the shield of "bona fide purchaser for value without notice" status as a deliberate tactic to insulate Final Judgments from reversal.

Mr. Phillips' modus operandi was aided and abetted by counsel for Mary Rose 22, The Law Offices of Gary C. Zeitz, LLC (the "Zeitz Firm"). (458a-459a). In not less than 4 of the 7

Notices of Lis Pendens identified in the Counsel Cert., the Zeitz firm represented Echo Lake. (525a-532a). In addition, a review of Ecourts for Echo Lake as a party revealed another seven (7) instances in which the Zeitz Firm represented Echo Lake as plaintiff in a tax foreclosure matter.[4] (458a-459a). These representations were in large part coincidental with the Zeitz Firm's representation of FIG or Mary Rose in Appellants' case. The Counsel Cert. reveals other transactions in which Mary Rose 22 transferred titles to Blackball and Echo Lake (See Exhibits "5", "34", "37" & "42" of the Counsel Cert)(528a-792a). In other instances, other clients of the Zeitz Firm transferred titles to entities controlled by Mr. Phillips.

Appellants argued that the extent of these frequent and concurrent representations of Blackball, Peak Pointe and Echo Lake with the representation of Mary Rose 22 or other Zeitz Firm clients should alone should be a basis to attribute to Blackball any knowledge known or knowable by the Zeitz firm and thus be sufficient to affirm Judge Paganelli's open question about Blackball's entitlement to "good faith purchaser for value without notice" status.

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[4] (1) F-3638-21; (2) F-7145-20; (3) F-7236-20; (4) F-7678-20; (5) F-8399-20; (6) F-8841-20; and (7) F-24854-18.

As to possession, Appellants were honest in acknowledging that they did not reside in the Property. (459a-460a). Appellants' extensive investment into the Property was directed to obtaining the Site Plan Approval pursuant to which the Property was legally converted from a two (2) family to a three (3) family use, all of which Appellants' actively pursued while Fig/Mary Rose 22 was pursuing foreclosure. This Site Plan Approval was public record and available to Mary Rose 22 and Blackball. (123a-131a). The Property was reasonably maintained, secure, and was not on the list of abandoned properties maintained by Irvington Township, notwithstanding Blackball's self-serving Leary Report. (463a). Further, the interior of the Property contained many tens of thousands of dollars of construction materials which Appellants' were storing pending the issuance of permits for the construction we planned following the legal conversion. (459a-461a).

While not "residence" at the Property, Appellants maintained a degree of possession sufficient to place the Zeitz Firm and Blackball on notice of Appellants' intention to renovate the Property and preserve their investment.

K. <u>The Raising of Tyler in the Reconsideration Motion</u>

The Reconsideration Motion also specifically raised arguments for vacation of the Final Judgment under Rules 4:50-

1(d) and (f) based upon Tyler v. Hennepin County, 143 S.Ct. 1369 (May 25, 2023) the precedential Federal Supreme Court case finding a tax foreclosure to be a taking under the Fifth Amendment where the tax law provided no mechanism for protection of the owner's equity. Tyler had only been issued after Appellants' initial motion to vacate and after the April 3, 2023 Order.

On November 15, 2023, the lower court entered an Order denying the Reconsideration Motion. (26a-27a).

A Notice of Appeal was filed by Appellants on December 7, 2023, initiating this appeal.

STATEMENT OF ISSUES ON APPEAL

POINT I. Whether the trial court erred in denying to vacate the Final Judgment under R.4:50-1(d) of (f) as an unconstitutional taking under Tyler v. Hennepin County, 143 S.Ct. 1369 (May 25, 2023); and

POINT II. Whether the trial court erred in declining to vacate the Final Judgment under R.4:50-1(d) or (f) as the accelerated in rem foreclosure procedure utilized by plaintiff was predicated upon an improper abandonment determination in which the plaintiff presented a report with manifest errors that was relied upon by the lower court; and

POINT III. Whether Blackball was entitled to the status of a bona fide purchaser for value without notice.

LEGAL ARGUMENT

POINT I

THE STANDARD OF REVIEW - TRIAL COURT'S DETERMINATIONS OF LAW ARE NOT ENTITLED TO SPECIAL DEFERENCE (Issue Not Addressed Below)

R. 2:2-3(a) sets out appeals allowed as of right to the Appellate Division:

> a) from final judgments of Superior Court trial divisions and Tax Court ...

The April 3 Order was converted to a denial of Appellants' motion to vacate the Final Judgment by the September 27 Order and thus is a final order of the Superior Court in that it finally determined the issues then outstanding between the parties.

The record below was set forth extensively in the parties certifications and the lower court's oral transcriptions of its decisions. No dispute is asserted in this appeal as to the factual conclusions in the lower court's statements.

This appeal thus accepts the facts as found, but challenges the conclusions of law on those facts. These are determinations of law.

"A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to

any special deference." Manalapan Realty v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995).

POINT II

VACATION OF THE FINAL JUDGMENT APPROPRIATE PURSUANT TO R. 4:50-1 (d) OR (f) IN LIGHT OF TYLER v. HENNEPIN COUNTY, 143 S.CT. 1369 (2023) AND 257-261 20th Avenue Realty, LLC v. Roberto, 477 N.J.Super 339 (App. Div. 2023)
(Issue Addressed Below, 454a-792a)

Appellants' motion to vacate the Final Judgment was initially filed in the lower court on February 2, 2023, argued before Judge Paganelli on March 3, 2023, and reserved upon in the April 3, 2023 Order.

Tyler v. Hennepin County, 143 S.Ct. 1369 (2023) was decided on May 25, 2023, after the April 3, 2023 Order but before the further "motion practice or a plenary hearing" anticipated in Judge Paganelli's April 3, 2023 Order as to the reserved upon issues. Tyler was then specifically raised by Appellants on October 17, 2023 in its next-filed significant pleading as a supplemental basis for vacation of the Final Judgment under Rule 4:50-1 in their Reconsideration Motion.

Thus, at all times relevant to the potential application of Tyler to Appellants' claim to vacate the Final Judgment, Appellants have been continuously and promptly seeking vacation of the Final Judgment under various sections of Rule 4:50-1.

Appellants' claim for relief from the Final Judgment is thus eligible for retroactive application of Tyler under the definition of "pipeline retroactivity" contained in 257-261 20th Ave. Realty, LLC v. Roberto, 477 N.J. Super 339 (App. Div. 2023).

A. Relief Appropriate Under Tyler As the Appellants' Forfeiture of Equity is Extreme

Tyler requires an unconstitutional forfeiture of equity. Appellants unquestionably satisfy this predicate. Appellants paid $163,000.00 for the Property in April 2020. (102a-107a). Appellants proceeded to convert the legal use from a two family to a three family, increasing its value. (92a-101a, 117a-127a). Zillow valued the Property at $294,000.00 as of January 31, 2023. (92a-93a). Blackball acquired the tax title for $140,000.00 from Mary Rose 22 in January 2021. (466a, 347a-348a, 351a-354a). The lowest analog to the present fair market value of the Property is $140,000, the consideration allegedly paid by Blackball to Mary Rose 22. For purposes of the equity forfeiture predicate of Tyler, Appellants posit that the lowest value attributed to the Property in any of these transactions or estimates was the $140,000 in consideration allegedly paid by Blackball.

The redemption value of the Certificate was $4,246.67 as of August 18, 2022. (84a-85a). The Property had no liens other than the tax Certificate when the Final Judgment was entered on

November 7, 2022. (85a-86a, 92a-101a). Appellants estimated that with the addition of taxes for 2022, and statutory interest, that the amount necessary to redeem Mary Rose 22's Certificate as of the date of entry of Final Judgment was approximately $8,000. (96a-99a). Even using the Mary Rose 22/Blackball quitclaim deed consideration as the base line of value, the extent of the forfeiture is $140,000-$8,000, or $132,000. This amount due in relation to value ($8,000/$140,000) is a ratio of approximately 5.7%. By any measure, this was an extreme forfeiture of equity and constitutionally offensive under Tyler.

The Court's Order granting Mary Rose 22 Final Judgment conveyed title to the Property but provided no means whatsoever for Appellants to recover their surplus equity. Accordingly, the Final Judgment was violative of Taking's Clause of the Fifth Amendment to the United States Constitution. Tyler v. Hennepin Cnty., 143 S. Ct. at 1376. "[A] government may not take from a taxpayer more than she owes" and any tax foreclosure must provide a mechanism for the recovery of a Defendant's surplus equity in a foreclosed property. Tyler v. Hennepin Cnty., 143 St. Ct. at 1376.

The Court may therefore vacate the Final Judgment as void pursuant to 4:50-1(d). Further, since the Final Judgment is abhorrent to the takings clause and to Tyler v. Hennepin Cnty.,

allowing the Final Judgment to stand would be "unjust, oppressive or inequitable" and said Final Judgment must therefore also be vacated pursuant to R. 4:50-1(f) and R. 1:1-2(a).

B. Appellants' Timely Motion to Vacate Has Been "In The Pipeline" Since Initiated. Appellants are thus Entitled to Retroactive Application of Tyler

Final Judgment was entered November 7, 2022. (279a-293a). Appellants' Motion under Rule 4:50-1 was filed on February 2, 2023, eighty-seven (87) days later. (90a-142a). Appellants' motion was thus filed within the three (3) month limitation contained in N.J.S.A. 54:5-87, as well as the generic one (1) year limitation for Rule 4:50-1 motions to vacate under to City of East Orange v. Kynor, 383 N.J. Super. 639, 646 (App. Div 2006).

On December 4, 2023, the Superior Court, Appellate Division, released its decision in 257-261 20th Ave. Realty, LLC v. Roberto, 477 N.J. Super 339. The decision came on appeal from a chancery court's grant of a defendant's motion for relief from judgment of foreclosure under Rule 4:50-1(f). Among other reasons, the chancery court granted the motion based on the high amount of equity in the property above the taxes owed. The initial motion was granted before the U.S. Supreme Court rendered its decision in Tyler. Although the Appellate Division upheld the vacation of the foreclosure judgment on the general equitable principles contemplated

by Rule 4:50-1(f), it also opined on the application of Tyler for prudential reasons, establishing direct applicability of Tyler to that matter. Roberto at 364.

(i) Tyler Applies to the New Jersey Tax Lien Law and to Private Investors in Tax Sale Certificates

The Roberto court first held that Tyler was equally applicable to New Jersey's Tax Lien Law and was not limited to municipal governments but applied to private lien investors in New Jersey. Roberto, 477 N.J. Super at 364. This was evident to the Roberto court from its reading of Fair v. Cont'l Res.,143 S. Ct. 2580 (2023), where the Supreme Court directed that an appeal concerning a tax certificate foreclosure by a private citizen in Nebraska be "remanded to the Supreme Court of Nebraska for further consideration in light of Tyler v. Hennepin Cnty..." See Fair v. Cont'l Res, 143 S. Ct. 2580 (2023) and Cont'l Res v. Fair 311 Neb. 184 (2022). Roberto explained that New Jersey's Tax Sale law "permitted foreclosure of a property owner's equity," and therefore effected a taking under Tyler. Roberto, 477 N.J. Super at 463-467.

(ii) Roberto Applied "Pipeline Retroactivity" to Cases Eligible For Relief Under Tyler

Applying the retroactivity factors from Coons v. American Honda Motor Co., 96 N.J. 419 (1984), the Roberto court concluded that Tyler must be afforded "pipeline retroactivity," i.e., the ruling in Tyler

should be applied retroactively to cases that were pending at the time it was decided. Roberto, 477 N.J. Super at 363.

Independent of the Coons factors, the Roberto Court also concluded that "pipeline retroactivity" was mandated under federal law. When the United States Supreme Court "applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review," even if such open cases predate or postdate the Supreme Court's decision. Roberto, 477 N.J. Super at 362, citing Harper v. Va. Dep't of Tax'n, 509 U.S. 86, 97, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1992).

In balancing the concerns relating to retroactivity, the Roberto court emphasized that tax sale certificate holders "know 'from the start that most tax certificate investments end not in windfall profits from foreclosure but rather in high yield interest returns upon redemption.'" Roberto, 477 N.J. Super at 360 (quoting Simon v. Cronecker, 189 N.J. 304, 315 (2007)). Thus, the Tax Sale Law did not create sufficient reliance interests to render retroactive application inappropriate. Roberto, 477 N.J. Super at 360.

(iii) Roberto Established the Applicability of Tyler to Appellants' Pending Motion to Vacate

The Roberto decision's discussion of Tyler bears squarely upon Appellants' case. It holds that the rule from Tyler applies with full force in New Jersey, that foreclosures which divest a property owner of significant equity pursuant to the Tax Sale Law effect an unconstitutional taking, and that Tyler applies retroactively to cases that were already pending when Tyler was decided.

POINT III

HE LOWER COURT ERRED IN FAILING TO VACATE THE FINAL JUDGMENT UNDER R.4:50-1(d) and (f) ON ACCOUNT OF THE PATENT FLAWS IN THE LEARY REPORT (Issue Addressed Below,6a-23a,24a-25a,26a-27a)

Even if Tyler and Roberto had not interceded to establish an independent basis for vacation of the Final Judgment, Appellants had already independently established the requirements for vacation of the Final Judgment under Rule 4:50-1(d) and (f).

On June 22, 2022, FIG initiated this Foreclosure Action under the in rem procedure, i.e., thereby avoiding the requirement for personal service of the Foreclosure Complaint upon Appellants. FIG then circumvented the statutory two (2) year waiting period for initiating a tax lien foreclosure by alleging that the Property was abandoned.

In order to obtain statutory predicate for the procedure it utilized, and to bypass the lack of an independent determination from a municipal official in Irvington as to abandonment, FIG chose to make a motion to the lower court on September 14, 2022 seeking a determination that the Property was abandoned, offering an inspection of the Property allegedly undertaken by Derek Leary nine (9) months earlier, on January 28, 2022. That date was slightly more than one month after FIG's acquisition of the Certificate.

The Leary Report attaches pictures which are not pictures of the Property. After research, Appellants were able to ascertain that the property identified in the Leary Report was in fact 1470 Princess Avenue, Camden, New Jersey which is owned by PC8REO, LLC, another tax lien investor typically represented by the Zeitz Firm. (92a-101a).

On October 7, 2022, the lower court entered the unopposed Order Determining that Property is Abandoned (the "Abandonment Order")(81a-84a) which attaches the Court's Statement of Reasons. It is clear that the lower court relied almost exclusively on the Leary Report, and the conclusions as to the statutory requirements for abandonment checked off therein. The lower court went so far in its reasoning to cite its own review of the photographs attached to the Leary Report, describing the property -

> "The Court's review of the Arthur [sic] Report reveals that the photographs depict a wood boarded front and front roofing torn and exposed."

Abandonment Order, Statement of Reasons (84a). Comparison of the actual picture of the Property (139a) with the pictures attached to the Leary Report reveals that this specific conclusion cited by the lower court can only have related to the incorrect property pictures. The Property is not boarded up nor does it have front roofing torn and exposed, as does the property in the

photographs analyzed in the Leary Report. In his April 3 Order, Judge Paganelli acknowledged that he relied upon these incorrect pictures. (15a-18a).

The inclusion of the wrong pictures in the Leary Report was not merely a harmless error correctable with a supplement or amendment. A careful review of Leary's written statements and checked off conclusions as to the Property condition reveal that they can not have been supported by the alleged inspection on January 28, 2022 but were simply conclusory statements tracked to the statute. Appellants questioned whether Mr. Leary ever visited the Property based upon the demonstrable inaccuracy of these statements. The Alvarez Cert. (92a-102a) contains a categorical consideration of and rejection of Mr. Leary's observations and conclusions. The lower court was required to go out of its way to review the Leary Report photographs to make its own finding in the Abandonment Order as to the boarding up and torn roofing. That was the lower court's, not Leary's, observations, upon which the Abandonment Order was predicated. Given the attachment of incorrect photographs, the lack of commentary or indication of personal knowledge, and the demonstrable inaccuracy of so many of the statements contained therein and refuted by Ms. Alvarez, Appellants presented enough for the lower court to revisit and

reject its reliance upon the Leary Report in the Abandonment Order.

The Leary Report's conclusion as to six months of vacancy also had no foundation when made in January 2022, as Leary provides no indication of a prior inspection, and this is a requirement of N.J.S.A. 55:19-81.

The Appellate Division has previously had occasion to consider final judgments predicated on prosecutions of in rem foreclosures of allegedly abandoned properties. These opinions urge caution when relying upon conclusory reports as to abandonment.

Appellants specifically cite the Court to Keystone Servicing, LLC v. Block 365, Lot 9, et al., 2021 WL 4933067 (App. Div.), an unreported Appellate Division decision in which the court criticized FIG for its reliance upon a report prepared by the very same Derek Leary who supplied the Leary Report offered to the Court in this Foreclosure Action:

> FIG moved in the trial court on June 25, 2019 seeking a determination that the property was abandoned. In support, FIG submitted a certification executed by Derek Leary, a licensed building inspector, who asserted the property had been abandoned and had not been legally occupied for at least the prior six months.
>
> ...

> In July 12, 2019, viewing it as unopposed, the motion judge granted the abandonment motion, by way of succinct written opinion that relied, for the most part, on Leary's certification.

Keystone Servicing, LLC v. Block 365, Lot 9, et al., 2021 WL at *3-4. The appellate court was critical of the trial court's unwillingness to entertain a pro se defendant's "significant showing that the claim of abandonment was incorrect."

> Leary's certification consisted of a preprinted form - delineating the facts set forth in N.J.S.A. 55:19-81 as to what constituted abandonment - on which Leary made or chose not to make certain markings in a way that generates doubt about the sufficiency of what he was attempting to convey.

Keystone Servicing, LLC v. Block 365, Lot 9, et al., 2021 WL at *3-4. The court also criticized the basis for Leary's conclusion as to the critical statutory issue of six months of vacancy:

> [Leary] declared that the property 'is abandoned pursuant to N.J.S.A. 55:19-81 because the property has not been occupied for at least 6 months preceding the date of this certification.' Leary does not explain how he knew that the property had not been legally occupied for the prior six months, not does the certification provide many other facts that would support this conclusion.

Keystone Servicing, LLC v. Block 365, Lot 9, et al., 2021 WL at *3-4.

Even if the Court was to overlook that the Leary Report in this Foreclosure Action analyzed the incorrect property, the deficiencies cited by the Appellate Division in Keystone

Servicing as to the form utilized by Leary apply with full force to this case. Leary's findings are unsupported by his own observations and contradicted by certification of the Appellant Alvarez. The Leary Report is not reliable nor dispositive of the findings the lower court was required to make under N.J.S.A. 55:19-81.

The Court is also directed to US Bank Cust for PC7 First Trust v. Block 64, Lot 6, 2020 WL 4196664 (App. Div.), unpublished, which notably instructs that abandonment can not be predicated upon vacancy alone. "Lack of occupancy is only the starting point, as N.J.S.A. 55:19-81 defines abandonment as 'any property that has not been legally occupied and which meets any of the following additional criteria.'" US Bank Cust for PC7 First Trust v. Block 64, Lot 6 2020 WL 4196664 at *4. Analyzing the report of the plaintiff's expert as to the property requiring rehabilitation, N.J.S.A. 55:19-81(a), the court rejected reliance on conclusory findings as follows:

> Cavalieri, however, did not show that the property was in need of rehabilitation beyond his conclusory assertion except for his mention of a need for some painting of some trim in the front and the rear deck and the need to repair the deck railing. On its face those assertions are hardly convincing that the property was in need of rehabilitation; as Salah pointed out, if it were otherwise, innumerable properties in this State could be deemed abandoned.

US Bank Cust for PC7 First Trust v. Block 64, Lot 6 2020 WL 4196664 at *4. The court continued as to the nuisance determination, that N.J.S.A. 55:19-82 which defines when a property is a nuisance and had to be consulted where, as here, there was no municipal determination to that effect. The Court rejected, again, reliance upon a report's conclusory determinations;

> As noted, no municipal official ever took the position or advised the owner of any of the conditions that might support such a finding. Moreover, even though Cavalieri checked boxes on his form certification to suggest some of these conditions were present, for the most part, his certification only presents conclusions that parrot the statutory language. The only actual detail Cavalieri provided suggested that the concerns were minor and could have been quickly remedied if they were known or reported.

US Bank Cust for PC7 First Trust v. Block 64, Lot 6 2020 WL 4196664 at *5.

The themes of Keystone Servicing and US Bank are the same. The Court should be hesitant to accept preprinted inspection forms containing conclusory statements parroting N.J.S.A. 55:19-81 as proof of abandonment. That determination is the basis for accessing the in rem foreclosure procedure under N.J.S.A. 54:5-86(a) where "the propriety of the commencement of these actions and the legitimacy of the judgments under review were dependent on whether the properties were abandoned." US Bank Cust for PC7

First Trust v. Block 64, Lot 6 2020 WL 4196664 at *1. The Leary Report presented to the lower court by FIG in this case as the basis for the Abandonment Order suffers from all of the deficiencies cited in both Keystone Servicing and US Bank.

POINT IV

APPELLANTS HAVE SUBSTANTIATED THE "PRIMA FACIE" CASE IDENTIFIED IN JUDGE PAGANELLI'S APRIL 3, 2023 ORDER THAT BLACKBALL IS NOT ENTITLED TO ASSERT THE PROTECTION OF A GOOD FAITH PURCHASER FOR VALUE WITHOUT NOTICE

(Issue Addressed Below,6a-23a,24a-25a,26a-27a)

In the April 3, 2023 Order, Judge Paganelli analyzed Appellants' Rule 4:50-1(f) argument under the four (4) factor test, and found that Appellants had established two (2) of three (3) factors, with a fourth (4th) undetermined. April 3, 2023 Order, pp. 12-15. (20a-23a). Those conclusions were:

(i) That the "extent of delay" favored Appellants, as Appellants had moved promptly to vacate the Final Judgment;

(ii) That the "underlying reason or cause," favored Appellants; and

(iii) That the "fault or blamelessness of the litigant," favored Plaintiff and Blackball.

(20a-23a).

Factor four (4) of the test applied by Judge Paganelli under Rule 4:50-1(f) required the Court to weigh "the prejudice that would occur to the other party." Judge Paganelli observed that

this factor would ordinarily also weigh in Appellants' favor, except for consideration of Blackball:

> "Ordinarily, allowing for a vacation of default final judgment, a mere three months after its entry, would not prejudice the plaintiffs. Indeed, in the matter at bar, plaintiff could collect all they were entitled to with the defendants' prompt payment of redemption.
>
> However, Mary Rose sold the property to Blackball. Therefore, in considering prejudice, this court must not only weigh the prejudice of vacating the final default judgment as to Mary Rose, but also the subsequent sale of the property to Blackball.

April 3, 2023 Order (22a-23a).

As to this consideration, the April 3, 2023 Order continued that Appellants had made a prima facie showing that Blackball was not a bona fide purchaser for value in the following observations:

> Defendants aver that the "circumstances warrant the attribution [o]f knowledge of the adverse claim of [d]efendants to the property" because: (1) the time between the final judgment and transfer "was incredibly short" (35 days); (2) the "court must assume" Blackball 'is sophisticated in tax lien foreclosure matters and for this reason alone may be charged with knowledge of the risk of [d]efendants' claim to vacate the [f]inal [j]udgment;' (3) Blackball received a quit claim deed which revealed that Mary Rose acquired titled by [f]inal [j]udgment" on November 7, 2022 at [d]ocket [n]urnber F-6378-22", and, therefore, Blackball was on notice 'that [p]laintiff held title by a tax lien foreclosure,' 'that [p]laintiff only held title for thirty-five (35) days", and the quit claim deed offered no "warranties;" (4) Blackball "had a duty to check the docket of the foreclosure" citing, I.E's LLC v. Simmons, 392 N.J. Super. 520 (Law Div. 2006) and the docket may have revealed that "[d]efendants had

> recently obtained Site Plan Approval" and '[d]efendants were in possession of the [p]roperty"; (5) "defendants] were in possession of the [p]roperty;" and (6) Blackball "can not in good faith claim ignorance of defendants' claim to both possession and title."
>
> While admittedly some of defendants' assertions may not ultimately withstand scrutiny, it nonetheless offers prima facie assertions that, if satisfactorily established, may lead the court to conclude that Blackball is not a bona fide purchaser for value without notice and thereby not prejudiced.

(22a-23a).

Appellants interpret Judge Paganelli's analysis as indicating that Appellants' contentions, if substantiated, met the fourth R. 4:50-1(f) factor and warranted vacation, and for this reason he invited discovery.

So what was discovery to reveal? Of these considerations highlighted by Judge Paganelli, only two were not already definitively established by documents in the record, to wit: (i) whether Blackball was sophisticated (factor (2) in the opinion), and (ii) whether Blackball was aware of Appellants' "possession" of the Property (factors (6) and (7) in the opinion).

Appellants thus interpreted this inquiry as requiring Appellants to show that Blackball was sophisticated in tax lien foreclosures, evidence which Appellants obtained notwithstanding the Sua Sponte Order depriving Appellants' of discovery from Blackball and Mary Rose 22.

Once established, Appellants believe that it was the intention of Judge Paganelli to deny Blackball the safe haven of "bona fide purchaser for value without notice" status and to grant the relief requested in the motion under Rule 4:50-1(f) as originally sought by Appellants.

Appellants posited in the original motion to vacate that Blackball was sophisticated in tax lien foreclosure matters and for this reason alone may be charged with knowledge of the risk that Appellants' would raise adverse claim to title by seeking to vacate Final Judgment.

Judge Paganelli asked for more proof than the mere proximity in time between the Final Judgment and the Quitclaim Deed to establish this "sophistication." Appellants supplied that in spades, presenting the Squiteri Cert. (528a-792a) which revealed that in the three (3) prior years that Mr. Phillips, the principal of Blackball, through either Blackball or other entities he controlled (Peake Pointe, LLC ("Peak Pointe") and Echo Lake Enterprises, LLC ("Echo Lake")) filed public record documents with County Clerks throughout the state related to pending tax lien foreclosures in forty-five (45) instances. Not only does this volume of activity establish the "sophistication" of Blackball and Mr. Phillips, a factor critical in Judge Paganelli's estimation, it further established that what

Blackball did to Defendants was Mr. Phillips' modus operandi, wherein he regularly acquired tax titles within sixty (60) days of entry of Final Judgment, operating a clearing house for recently acquired tax titles.

Denial of bona fide purchaser status to Blackball should also flow from the fact that Mr. Phillips' modus operandi was aided and abetted by the Zeitz Firm. In 4 of the 7 Notices of Lis Pendens identified in the Squiteri Cert., the Zeitz firm represented Echo Lake. (536a-537a). In addition, a review of Ecourts for Echo Lake as a party reveals another seven (7) additional instances in which the Zeitz Firm has represented Echo Lake as plaintiff in a tax foreclosure matter. (536a-537a).

The Quitclaim Deed to Blackball in this matter instructed the County Clerk to return the Quitclaim Deed to Mr. Zeitz's firm following recording, an observation not presented to Judge Paganelli, indicating that the Zeitz firm in fact represented Blackball and Mary Rose 22 in this transaction. (351a-354a).

The revelation of the extent and frequency of these concurrent representations of Blackball, Peak Pointe and Echo Lake with the representation of Mary Rose 22 or other Zeitz Firm clients should alone should be enough to disqualify Blackball from "good faith purchaser for value without notice" status. Judge Paganelli opened discovery so that he could be provided

with precisely this type of concurrent evidence of the sophistication of Blackball, the concurrent representation by counsel, and the numbers of transactions of similar nature undertaken by Blackball or its principal, and the Squiteri Cert. provides what the Court sought. Summarizing Appellants' arguments, the following established facts weigh against Blackball's bona fide purchaser claim:

A. Blackball Acquired a Quitclaim Deed Which Apprised Blackball of the Pendency of the Foreclosure Action

The proximity in time between the entry of Final Judgment (November 7, 2022) and the purported transfer of title to Blackball (December 12, 2022) was incredibly short. Blackball acquired title for $140,000 to the Property foreclosed by FIG/Mary Rose 22 thirty-five (35) days after Final Judgment.

Blackball's Quit Claim Deed (351a-354a), makes notice to Blackball specific, referring to the pendency of the Foreclosure Action -

> "**BEING THE SAME** land and premises acquired by Mary Rose 22 LLC , by Final Judgment entered by the Superior Court of New Jersey, Chancery Division, on November 7, 29022, at Docket Number F-6378-22."

Blackball was thus specifically apprised of the fact that Mary Rose 22 held title by a tax lien foreclosure, and also that Mary Rose 22 had only held title for thirty-five (35) days. Blackball accepted a quit claim deed which offered Blackball no warranties

but only conveyed such interest as Mary Rose 22 held. Blackball thus had specific knowledge of the recency of the foreclosure. Not only this, but Blackball and its principal Joseph Phillip were represented by the Zeitz Firm along with Mary Rose 22. This relationship is sufficient to charge Blackball with an intimate knowledge of the issues associated with the foreclosure, not just a passing knowledge.

B. I.E.'S LLC v. Simmons, 392 N.J. Super. 520 (Law. Div. 2006) Denied "Bona Fide Purchaser for Value Without Notice" Status to A Purchaser of Property Post Tax Lien Foreclosure

Appellants cite I.E.'s, LLC v. Simmons, 392 N.J. Super. 520 (Law Div. 2006), which denied "bona fide purchaser for value without notice" status to a purchaser of title following a tax lien foreclosure, holding that in such an instance, the court may attribute a duty to the purchaser to take "further steps" to inspect title:

> the bona fide purchaser for value purchased the property knowing that the property had gone through a tax sale foreclosure. This circumstance placed on it further steps when examining title... further steps must be taken when a property has gone through foreclosure, including review of the filings in the foreclosure action.

I.E.'s, LLC v. Simmons, 392 N.J. Super. at 534.

Imposition of such a "further steps" duty upon Blackball is warranted here by its actual experience with tax lien

foreclosures, the short time before acquiring title, and the concurrent representation by the Zeitz Firm. I.E.'s, LLC. v. Simmons included in these "further steps" an obligation to inspect the docket of the foreclosure, which in that case the court found would have revealed the risk that the interests of unnamed heirs allegedly served by publication were not properly extinguished:

> In addition, the fact that three unnamed heirs were served solely by publication also should have alerted the purchaser to the potential of notice problems.

I.E.'s, LLC v. Simmons, 392 N.J. Super. at 534.

Appellants' contend that Blackball should be held to an even higher duty than that imposed upon the buyer under Simmons by virtue of the fact that Blackball was concurrently represented by the Zeitz Firm. Because of the close proximity of time and the concurrent representation, Blackball likely possessed more than a mere awareness of the foreclosure, but a detailed knowledge of the docket, the procedures utilized and the vulnerabilities of the case. Inspection of the docket would reveal a foreclosure conducted accessing the accelerated procedures for abandoned properties under the in rem statute, on the basis of an abandonment determination not supported by a municipal official, but instead based upon an inspection report which attached the wrong photographs, for a delinquency totaling $4,246.67 on a

property that Blackball itself purchased for $140,000. In the aggregate, these factors ascertainable from the docket and the Zeitz Firm supply notice to Blackball that the Appellants had not relinquished their claim to title to the Property. Blackball can not in good faith claim ignorance of Appellants' claim to both possession and title.

I.E.'s, LLC v. Simmons highlighted the purchaser's lack of possession in that case:

> Further, and most significantly, the bona fide purchaser for value took title to the property knowing that the defendant family in the tax sale foreclosure action was still in possession of the premises. New Jersey law has long recognized that a bona fide purchaser for value of real estate who purchases the property knowing others are in possession of the property has a duty to make reasonable and diligent inquiry of the rights to the property by those in possession.

I.E.'s, LLC v. Simmons, 392 N.J. Super at 534-535, citing Hinners v. Banville, 114 N.J.Eq. 348, 168 A. 618 (E. & A.1933). Hinners was a mortgage foreclosure case where owners were served by publication. The property was sold at a sheriff's sale and then purportedly sold to a bona fide purchaser for value. The sale to the bona fide purchaser for value was set aside since the family was in possession of the property, and the court held that the bona fide purchaser for value had a duty to make a reasonable investigation of the rights of the party in possession. Id. at

356-57. See also, Michalski v. U.S., 49 N.J.Super. 104, 108-09 (Ch.Div.1958).

Here, while Appellants were technically not residing in the Property, they were in fact in possession, having just obtained the Site Plan Approval from the Irvington Township Planning Board, having paid real property taxes through and including the third quarter of 2021, and having reasonably maintained the Property in anticipation of their own intended renovation in light of the authorized conversion of use. These indications of Appellants' adverse interest, while not specifically ascertainable from a review of the docket report of the case, should nonetheless be attributed to Blackball based upon its experience, the short proximity of time between the foreclosure and its acquisition of the quitclaim deed, and the concurrent representation of the Zeitz Firm.

Tyler and Roberto also have relevance to Blackball's good faith purchaser defense, establishing the fairness of "pipeline retroactivity" to the equitable issues associated with reversing a tax title that is an unconstitutional forfeiture of equity. Appellants' equity forfeiture was plainly apparent to Blackball. Under I.E.'s Corp. v. Simmons, Tyler's constitutional analysis and the "pipeline retroactivity" endorsed by Roberto warrant

attribution of knowledge of the constitutional infirmity of the foreclosure to Blackball.

CONCLUSION

Based upon the foregoing, Appellant respectfully asks that the Appellate Court (i) reverse the lower court's April 3, 2023 Order, the September 27, 2023 Order and the November 14, 2023 Order and Vacate the Final Judgment for the reasons argued herein, and (ii) grant such other and further relief as the Court deems just and proper.

Dated: Newton, New Jersey
April 29, 2024

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

MARY ROSE 22, LLC, LLC, **Plaintiff/Respondent,** **v.**	**SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO. A-1036-23T4** **CIVIL ACTION**
BLOCK 270, LOT 14 65 CLAREMONT AVE, TOWNSHIP OF IRVINGTON, STATE OF NEW JERSEY; ASSESSED TO: ROSA E. ALVAREZ-LOJA, ALFREDO ALVAREZ AND JOSE E. ANGAMARCA, **Defendants/Appellants** **and**	**ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY, ESSEX COUNTY, CH. DIV., DOCKET NO. F-6378-22**
BLACKBALL, LLC **Intervenor/Respondent.**	**SAT BELOW: HON. JAMES PAGANELLI, JSC HON. LISA ADUBATO, JSC**

BRIEF OF INTERVENOR/RESPONDENT BLACKBALL, LLC

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PRELIMINARY STATEMENT

Blackball, LLC is the *bona fide* purchaser for value of abandoned real property foreclosed by Plaintiff for unpaid taxes. Defendants, the former owners of the property, appeal from the denial of their two motions to vacate judgment. As a result of the first motion, the court determined that the record needed amplification. The court thus denied the motion without prejudice and directed the parties to exchange discovery. Defendants did not meaningfully comply with that directive. They did not timely take any discovery, and their production was inadequate and deficient. Defendants then filed an essentially identical motion to vacate the judgment (or reconsider) eight months later. The judge concluded that Defendants failed to abide by the discovery order, that the record was not much different than it was in the first time, and that Defendants' proofs were inadequate to establish entitlement to relief.

This court should affirm. Blackball is a *bona fide* purchaser for value. Blackball bought the foreclosed property from Plaintiff for good and valuable consideration of $140,000 – nearly the same price Defendants had paid several years earlier. Defendants, who were given the opportunity to contest Blackball's status through discovery, took no action. Discovery was also to explore whether the property was actually abandoned. Defendants did not meaningfully participate. The record amply demonstrated that the property – which was in decrepit condition

– easily satisfied the definition of abandoned. In fact, the property at issue in this case exemplifies why the law permits expedited foreclosure of abandoned properties. Despite having owned the property for close to three years, the only thing Defendants did was obtain site plan approval. They did nothing to maintain or rehabilitate the property during that period, and even sat on their site plan approval for about nine months without doing anything. Support structures were crumbling, windows were boarded up, the roof and portions of the deck had gaping holes, siding was falling off leaving exterior walls exposed, the interior was gutted and completely uninhabitable, and debris littered the yard, which was overgrown and unkempt. The property was a blighted and tax-delinquent eyesore that Plaintiff had every right to foreclose, return to the active tax rolls, and convey to Blackball, which was ready and willing to fix the problem expeditiously.

Defendants received all the notice of this suit that was due. They simply ignored the matter until after judgment entered, invented a spurious reason to vacate, then did not participate in discovery when given the opportunity. The orders under review should be affirmed.

PROCEDURAL HISTORY[2]

Plaintiff's assignor filed the complaint to foreclose a tax sale certificate on June 22, 2022. (28a-34a). The matter was uncontested and final judgment entered on November 7, 2022. (85a-88a).

On February 2, 2023, Defendants Rosa E. Alvarez-Loja, Alfredo Alvarez, and Jose E. Angamarca ("Defendants") filed a motion to vacate the final judgment. (90a-142a).

On February 23, 2023, third-party Blackball, LLC ("Blackball") filed a motion to intervene and protect its title. (329a-376a).

On April 3, 2023, the court entered two orders which: 1) granted Blackball's motion to intervene, and 2) denied Defendants' motion to vacate without prejudice pending a 90-day discovery period. (6a-7a, 377a-378a).

On August 11, 2023, Blackball filed a motion to compel discovery, which the court denied on September 27, 2023. (395a-449a, 24a-25a).

On October 17, 2023, Defendants filed a motion for reconsideration and to vacate the judgment. (451a-788a). The court denied the motion on November 15, 2023. (26a-27a). Defendants filed an appeal on December 8, 2023. (1a-5a).

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#a refers to Defendants' appellate appendix and page number.
1T refers to the motion transcript of March 17, 2023.
2T refers to the motion transcript of September 27, 2023.
3T refers to the motion transcript of November 15, 2023.

STATEMENT OF FACTS

A. The prosecution of the tax foreclosure and the sale of the property.

Plaintiff's assignor ("assignor") held a tax sale certificate on certain property located in Irvington which was owned by Defendants. (143a¶¶2-3, 151a). The certificate represented unpaid 2021 property taxes. (151a).

The assignor filed an *in rem* complaint to foreclose the certificate in June 2022. (28a-34a). Despite that personal service is not necessary for *in rem* actions, the assignor had Defendants Rosa Alvarez and Alfredo Alvarez personally served with the complaint and notice of foreclosure in August 2022. (146a¶13, 248a-249a). In addition, all Defendants were served with the notice of foreclosure by simultaneous regular and certified mail at numerous addresses disclosed through due diligence, including the property at which personal service was effected. (145a¶¶9,11-146a¶12, 198a-207a). The certified mailings to Defendants were claimed and signed for. (215a-218a, 221a-232a, 237a-244a).[3]

In September 2022, the assignor filed a motion to declare the property abandoned, on notice to all Defendants (as well as the municipality). (147a¶15, 262a-265a, 35a-80a). The court granted the unopposed motion in October 2022,

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[3] In addition, and in compliance with the Court Rules respecting service for *in rem* tax foreclosure actions, the notice of foreclosure was also: 1) published in a newspaper of general circulation (145a¶10, 192a-194a), and 2) posted in several conspicuous places in the Township, including at the subject property (147a¶14, 252a-260a).

and the order was subsequently served on Defendants. (147a¶17, 81a-84a). In October 2022, a motion to substitute Plaintiff was filed and served in the same manner as the abandoned property motion. (148a¶20, 272a-278a). Final judgment entered on November 7, 2022, thereby vesting Plaintiff with title to the property. (280a-286a). On December 12, 2022, Plaintiff sold the property to Blackball for $140,000. (295a-299a).

B. Defendants' motion

In February 2023, Defendants filed a motion to vacate the judgment. (90a-142a). Defendants sought relief under the "excusable neglect" provision of R. 4:50-1(a) based on their lack of sophistication, their confusion over the mailings, their "inexperience in legal matters," and that they "did not seek the advice of an attorney." (100a¶26, 13a-14a).

Defendants also sought relief under R. 4:50-1(d), asserting that the foreclosed property was not actually abandoned because they had sought and obtained a variance before the municipal land use board. (93a¶2, 94a¶9-95a¶12). Defendants disputed the abandonment conclusions in the certification filed in support of the abandonment motion, which they alleged referred to the wrong property. (96a¶17-99a¶24, 15a-18a). Lastly, Defendants asserted that their forfeiture of equity in the property represented an exceptional circumstance entitling them to vacate under R. 4:50-1(f). (100a¶29-101a¶34).

C. Opposition by Plaintiff and Blackball's cross-motion

Plaintiff filed opposition that recounted its efforts to successfully notice Defendants. (143a-328a). With respect to the abandoned property certification, Plaintiff's counsel certified:

> Although the correct Abandoned Property Certification was filed and served, there was a clerical error when the Motion was filed inasmuch as the incorrect photographs were uploaded on New Jersey eCourts. However, the Abandoned Property Certification and correct photographs were mailed to the Court and the Defendants when the motion was served. Thus, the Defendants and the Court were in receipt of the full and accurate Motion containing the correct photographs.
>
> [(144a ¶16).]

Plaintiff provided a copy of abandonment certification "together with true and correct photographs of the Property taken by [the inspector] at the time of the Abandoned Property Certification[.]" (144a ¶5, 154a-160a). The photos showed a house and yard in poor condition, with boarded-up windows and a yard full of unkempt vegetation and debris. (154a-160a).

On February 23, 2023, Blackball filed opposition and a cross-motion to intervene. (329a-376a). Blackball asserted it was a *bona fide* purchaser for value, having acquired the property for $140,000. (341a ¶3, 345a-349a). This was a mere $23,000 less than Defendants had paid for the property several years prior. (102a-107a). Blackball provided photographs and video of the subject property

corroborating that the property was in fact abandoned. (342a¶¶5-10, 350a-376a). Blackball's photos and video, both of the exterior and interior of the property, depicted a property that was quite literally falling apart. (350a-376a). Structural support columns on the porch were broken (356a, 369a), the porch itself had holes in the flooring and was littered with debris (365a), the roof was sagging in places and had open holes in other areas (362a, 363a, 366a), exterior walls were bulging (357a), siding had fallen off parts of the house, leaving the walls exposed (360a, 370a), windows were boarded up or broken (354a, 360a, 370a), trash was strewn about the yard and vegetation was not maintained (355a, 356a, 367a, 370a), and the interior was gutted down to the studs and the subflooring in certain areas (371a-375a). Blackball also provided OPRA documents received from the municipality showing that Defendants had not sought or obtained any construction or building permits for as long as they had owned the property and thus had not performed any repair or rehab as they claimed. (331a¶¶3-4, 334a, 336a-340a). The court held oral argument on March 17, 2023, and reserved. (1T49:21-22).

D. The judge's decision

On April 3, 2023, the first judge issued two orders, one of which granted Blackball's motion to intervene, and the other of which denied Defendants' motion to vacate without prejudice "pending a 90 day discovery period." (6a-7a, 377a-378a). A sixteen-page statement of reasons accompanied the orders. (8a-23a,

379a-394a). With respect to Defendants' motion, the first judge rejected their "excusable neglect" argument. (13a-14a). The first judge, however, wanted to know more about the abandonment status of the property. (14a-18a). In order to create a fuller record, the first judge "permit[ted] a period of discovery, 90 days, for the parties to more fully explore the issue of abandonment." (18a). The discovery period was also to be used so Blackball's status as a *bona fide* purchaser could be explored. (21a-22a). The first judge contemplated that, following the discovery period, both the issues of abandonment and *bona fide* purchaser would be "the subject of further motion practice or a plenary hearing." (18a, 22a).

E. Defendants' failure to meaningfully participate in discovery, and subsequent motion practice.

In compliance with the court order, Blackball promptly drafted and served interrogatories and a notice to produce on Defendants. (387a¶6, 424a-437a). On June 23, 2023, nine days before the ninety-day discovery period was to expire, Defendants served a document production demand directed to Plaintiff (but nothing directed to Blackball). (790a¶5, 807a-811a). Defendants requested an extension of discovery from Plaintiff and Blackball (both of whom consented) and promised to circulate a consent order to that effect, but none was forthcoming despite several requests. (387a¶9, 790a¶¶5-6, 813a-814a, 817a-819a). Eventually, Defendants' counsel stopped responding to communications. (790a¶6). Due to Defendants' failure to produce discovery, Blackball filed a motion to compel on

August 11, 2023. (395a-396a).

The day before the motion was heard, Defendants produced responses to Blackball's discovery demands that were grossly deficient. (790a¶7). Defendants had not replied to many, if not most, of Blackball's interrogatories. (821a-826a, 828a-833a, 835a-840a). The second judge[4] conducted oral argument on September 27, 2023. (2T). The second judge criticized Defendants for propounding discovery demands a few days before the end date, and otherwise doing nothing despite that the first judge gave them the opportunity. (2T12:14-13:1, 2T17:17-25). The second judge observed that she was "literally in the exact same position" as the first judge when the motion to vacate was heard eight months earlier. (2T13:15-17). The second judge denied the motion to compel because Defendants had done nothing, and discovery was over. (2T23:1-27:15). The second judge memorialized her decision in an order dated September 27, 2023. (24a-25a).

F. Defendants' motion for reconsideration and to vacate the judgment.

On October 17, 2023, Defendants filed a motion for reconsideration and to vacate the judgment. (451a-452a). Defendants' motion to vacate and the arguments within mirrored what they had filed in February 2023, with two additions. First, through a certification of counsel, Defendants identified numerous acquisitions of tax-foreclosed property Blackball's principal had made through

[4] By this time, the first judge had been elevated to the Appellate Division. (2T12:7-13).

other business entities.[5] (525a-788a). Defendants admitted that all of these records were publicly available to them at the time they made their first motion. (3T30:13-25). Second, Defendants raised the case of Tyler v. Hennepin Cnty., 143 S. Ct. 1369 (2023) as a basis for relief. (461a¶21-464a¶32).

Plaintiff and Blackball again filed opposition. Blackball emphasized that Defendants' failure to participate in discovery should not redound to their benefit. (790a¶¶4-8). Blackball also reiterated that it paid valuable consideration for the property, it did not know (and would have had no reason to know) of Defendants' claim, and the property was in fact vacant and abandoned. (841a-842a).

The second judge conducted oral argument in November 2023, at the conclusion of which she denied Defendants' motion. (3T78:4-6, 3T98:4-7, 26a-27a). The second judge observed that the first judge permitted a ninety-day discovery period so the parties could explore the two issues that could bear on entitlement to relief: (1) the abandonment status of the property; and (2) whether Blackball was a *bona fide* purchaser. (3T5:1-23). The second judge held that Defendants did not undertake any discovery, so the record was not meaningfully different than what was before the first judge eight months earlier. (3T56:18-25, 3T73:4-74:14). The "only difference" was issuance of the Tyler decision in the

[5] Defendants' apparent purpose in doing so was to establish Blackball's "sophistication," (458a¶11), for reasons which will be explored in the legal argument section of this brief.

interim. (3T75:22-76:1). The second judge did "not count" Defendants' public-record documents that were available to them at the time of their original motion, but which they did not submit to the first judge. (3T76:2-12). The second judge also "reject[ed] outright" Defendants' argument that Blackball's "sophistication" bore on whether it was a *bona fide* purchaser for value. (3T76:12-15). The second judge held that Defendants had failed to rebut the presumption of Blackball's status as a *bona fide* purchaser. (3T76:20-78:3). The second judge summarized:

> [S]o the motion to vacate is denied. . . . I do find that there was nothing put in front of me that either was not already in front of [the first judge] or could have been in front of [the first judge].
>
> The record has not moved past exactly where it was when [the first judge] denied the motion in April of 2023.
>
> The defendant here chose not to take advantage of the discovery period provided to them by [the first judge]. The service of discovery on the plaintiff ten days or so before the end of discovery without an accompanying motion or request to extend the discovery end date, which never happened.
>
> [(3T78:4-19).]

The second judge also rejected Defendants' reliance on the Tyler decision as a basis for relief under R. 4:50-1(f).[6] (3T98:2-13). The court entered a conforming order of even date. (26a-27a). Defendants filed a timely appeal. (1a-5a).

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[6] Blackball will explore this in greater detail in the legal argument section.

LEGAL ARGUMENT

I: THE DECISIONS UNDER REVIEW ARE NOT AN ABUSE OF DISCRETION. (Not Raised Below).

Defendants lead off with the wrong standard of appellate review and also misidentify which orders are subject to review. To start, *only* the court orders of April 3, 2023 and November 15, 2023 denying vacation of judgment are subject to appellate review because those are the only ones identified in Defendants' notice of appeal. The discovery order of September 27, 2023 is not identified in Defendants' notice of appeal and hence is not under review. (1a-5a). See R. 2:5-1(e)(3)(i); Pressler & Verniero, Current N.J. Court Rules, comment 5.1 on R. 2:5-1 (Gann 2024) ("[O]nly the judgments, orders or parts thereof designated in the notice of appeal are subject to the appellate process and review."); 30 River Ct. E. Urban Renewal Co. v. Capograsso, 383 N.J. Super. 470, 473-74 (App. Div. 2006) (refusing to review order not identified in notice of appeal); 1266 Apt. Corp. v. New Horizon Deli, Inc., 368 N.J. Super. 456, 459 (App. Div. 2004) (same).

An appellate court reviews an order resolving a R. 4:50-1 motion under the deferential "abuse of discretion" standard. Deutsche Bank Nat'l Tr. Co. v. Russo, 429 N.J. Super. 91, 98 (App. Div. 2012). An abuse of discretion exists when "a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002).

Neither order is an abuse of discretion because they are supported by rational explanations that comport with prevailing legal principles. Given the parties' positions, the first judge believed the issue of abandonment required amplification. (15a-18a). For that reason, the first judge permitted discovery on that issue and contemplated that the parties would return on "further motion practice" with a fuller record. (18a). Discovery was also to explore Blackball's status as a *bona fide* purchaser, and what was learned would again "be the subject of further motion practice or a plenary hearing." (21a-22a). The decision to permit discovery and decide the matter on a fuller record accords with the principle cited by the first judge in his thoughtful opinion: justice is better-served when parties are given an adequate opportunity for discovery. Jenkins v. Rainner, 69 N.J. 50, 56 (1976). (18a, 22a).

Defendants did not undertake the discovery permitted by the order. They sat on their hands, did not timely respond to Blackball's demands despite Blackball's good-faith efforts to obtain compliance without court intervention, and then offered patently inadequate responses one day before return on Blackball's motion to compel (nearly three months late).[7] (790a¶7, 821a-826a, 828a-833a, 835a-840a). Defendants never served any discovery on, nor sought to take depositions of, Blackball. (790a¶5). As the second judge correctly concluded, Defendants'

[7] This effectively precluded Blackball from conducting depositions.

service of discovery demands on (only) Plaintiff nine or ten days before the expiration of the ninety-day discovery, without any accompanying motion to extend or reopen the discovery period, period cannot reasonably be considered compliance with the order. (3T73:4-22, 3T78:14-19).

In short, Defendants did not discharge the obligation to conduct discovery, and returned before the court with essentially[8] the same record as before. Given this, there is no reason the outcome should have been any different before the second judge. There was no abuse of discretion.

II: NEITHER TYLER NOR ROBERTO ENTITLES DEFENDANTS TO RELIEF GIVEN THE SUPREME COURT PRECEDENT OF HARTFORD. (3T88:21-91:4, 3T98:2-12).

The case of Tyler v. Hennepin Cnty., 143 S. Ct. 1369 (2023), issued more than six months after the final judgment entered here, invalidated the tax foreclosure laws of Minnesota as effecting an unconstitutional taking without just compensation. In that case, the Supreme Court determined that the municipality could not retain the "surplus" of a tax-foreclosed property, namely, the amount realized over and above the foreclosed tax debt when the property was re-sold. Id. at 1378-79. In 257-261 20th Ave. Realty, LLC v. Roberto, 477 N.J. Super. 339

[8] The only difference was the inclusion of numerous acquisitions of tax-foreclosed property Blackball's principal had made through other business entities. (525a-788a). Those records were publicly-available when Defendants made their first motion, so the second judge correctly concluded they were not properly before her on reconsideration. (3T76:2-15). Those records were also irrelevant because they did not bear on the *bona fide* purchaser issue, for reasons explored later.

(App. Div. 2023), a panel of this court held that Tyler "establishes a new principle of law," that it applies to New Jersey's Tax Sale Law, and that it should be afforded "pipeline retroactivity to pending tax sale foreclosures[.]" Id. at 363-66.

Defendants believe that Tyler entitles them to relief under R. 4:50-1(d) or -1(f), and that the trial judge erred in concluding otherwise. Defendants are mistaken. Initially, it is well-established that a change in caselaw is treated under subsection (f) of R. 4:50-1, not subsection (d).[9] See, e.g., Hartford Ins. Co. v. Allstate Ins. Co., 68 N.J. 430 (1975). In Hartford, the defendant received an adverse final judgment, which he timely appealed, and this court affirmed. He did not seek certification. Ibid. A short time later, in a separate case, the New Jersey Supreme Court issued a decision that changed the law in the defendant's favor on the identical issue. Ibid. The defendant then sought to vacate the judgment under R. 4:50-1 based on the change in caselaw. Ibid. Our Supreme Court held that new caselaw could not be invoked in support of a R. 4:50-1 motion where the time for direct appeal of the final judgment has expired:

> A change in the law or in the judicial view of an established rule of law is not such an extraordinary circumstance as to justify relief from a final judgment where the time to appeal has expired. This is unquestionably the general rule and rests principally upon the important policy that litigation must have an

[9] Moreover, Tyler has nothing to do with "voiding" a foreclosure judgment. Tyler is a putative class action where the only issue was whether the plaintiff had stated a valid claim for a taking without just compensation. Id. at 1373-74.

end.

[Id. at 434 (internal quotations and citation omitted).]

If a new case could be used to vacate preexisting final judgments, "[t]here would be no discernable basis for drawing any line in time between those to be barred and those to be relieved." Id. at 435. For this reason, the Court "found no basis . . . to grant relief from judgment under R. 4:50-1." Ibid.

In more basic terms, if a case is on direct appeal from the entry of final judgment, a change in caselaw may entitle a party to relief from judgment. But if the time to appeal the final judgment has expired, a change in caselaw does not qualify for relief under R. 4:50-1. See also A.B. v. S.E.W., 175 N.J. 588, 593-94 (2003) (same); Ross v. Rupert, 384 N.J. Super. 1, 9 (App. Div. 2006) (same); Smid v. N.J. Highway Auth., 268 N.J. Super. 306, 309 (App. Div. 1993) (same); Pressler & Verniero, Current N.J. Court Rules, comment 5.6.2 on R. 4:50-1 ("Relief under this rule will not be accorded simply because of a change in the case law following the entry of final judgment.").

The second judge, citing Hartford, correctly understood and applied this principle to reject Defendants' assertion that they were entitled to relief under Tyler. (3T92:1-23, 3T98:2-12). Defendants are not entitled to relief under either Tyler or Roberto because the final judgment here predated both decisions, and that judgment was not on direct appeal during their issuance. In fact, Defendants never

appealed the final judgment. Instead, eighty-seven days after its entry, Defendants filed a motion to vacate under R. 4:50-1. (90a-91a). Filing a motion to vacate judgment under R. 4:50-1 does not, as Defendants contend, place a case "back in the pipeline." First, there is no authority for that proposition. Second, if it were true, every case could be placed back into the pipeline at any point through the mere filing of an R. 4:50-1 motion. Third, that is not how pipeline retroactivity is defined. A case is considered "in the pipeline" if it is pending (i.e. pre-final judgment) or on direct appeal from a final judgment. See, e.g., Hand v. Philadelphia Ins. Co., 408 N.J. Super. 124, 146 (App. Div. 2009) (defining "in the pipeline" as cases that are "pending" or "on direct appeal"); N.H. v. H.H., 418 N.J. Super. 262, 285-86 (App. Div. 2011) (same); Zuccarelli v. State, Dep't of Envtl. Prot., 326 N.J. Super. 372, 379 (App. Div. 1999) (defining pipeline retroactivity to include "all future cases, the case in which the rule is announced, and any cases still on direct appeal."); Camacho v. Camacho, 381 N.J. Super. 395, 399-401 (Law Div. 2005) (observing that a case in the procedural posture of an R. 4:50-1 motion is not "in the pipeline" for retroactivity purposes).

Accordingly, the trial judge correctly concluded that Defendants are not entitled to relief under R. 4:50-1 based on the Tyler case.[10]

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[10] The Roberto case came out several weeks after the second judge denied Defendants' motion for reconsideration and to vacate. The identical reasoning applies: Hartford forbids use of a new case to vacate a judgment under R. 4:50-1.

III: THE PROPERTY WAS ACTUALLY ABANDONED. (1T31:14-32:22, 15a-18a).

The court permitted discovery to amplify the record regarding abandonment. Blackball complied. Defendants did not. Defendants served no discovery demands on Blackball. They did not serve a subpoena on, or seek to depose, the individual who certified to the abandonment determination. They served discovery demands on Plaintiff about one week before the close of ninety days' worth of discovery. Defendants failed to produce responses to Blackball's discovery demands – and when they finally did, about three months past due in response to Blackball's motion to compel – those answers were deficient. The evidentiary record with respect to abandonment was not any different between Defendants' first and second motions. It was inadequate to vacate judgment the first time and it was equally inadequate to vacate judgment the second time because of Defendants' own derelictions. Defendants seek a result before this court that is fundamentally unfair: that they should be rewarded and victorious for noncompliance with a court order, while depriving Blackball of the discovery necessary to protect its interests.

In any case, even the limited record before the court shows that the subject property did qualify as abandoned. To be deemed abandoned, the property must not have been "legally occupied for a period of six months," and also satisfy any **one** of four disjunctive criteria:

A. the property is in need of rehabilitation in the

> reasonable judgment of the public officer[11], and no rehabilitation has taken place during that six-month period;
>
> B. construction was initiated on the property and was discontinued prior to completion, leaving the building unsuitable for occupancy, and no construction has taken place for at least six months . . .
>
> C. at least one installment of property tax remains unpaid and delinquent on that property . . . or
>
> D. the property has been determined to be a nuisance by the public officer in accordance with [N.J.S.A. 55:19-82].
>
> [N.J.S.A. 55:19-81.]

Despite that Defendants' interrogatories were incomplete, they admitted that the property had not been legally occupied for six months. (823a#10, 830a#10, 837a#10). Thus, the first abandonment element was satisfied. N.J.S.A. 55:19-81. In addition, there was no meaningful dispute that another element was satisfied, namely, that at least one installment of property tax was unpaid and delinquent (i.e. the lien that Plaintiff had purchased and foreclosed). Those two elements alone would render a property "abandoned." N.J.S.A. 55:19-81. But the inspector also determined that the property constituted a "nuisance" in accordance with N.J.S.A. 55:19-82 because: (a) the property was unfit for occupancy, (b) the condition

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[11] While this statute speaks of the "public officer" making these determinations, N.J.S.A. 54:5-86(b) permits the lienholder to employ an appropriately-licensed individual for this purpose if the public officer or tax collector does not respond to the lienholder's request for an abandonment certification. Plaintiff did so in this case. (144a¶8, 179a-181a).

increases the risk of fire, (c) the property is subject to unauthorized entry and the owner had not taken steps to secure it, (d) the presence of vermin or debris, uncut vegetation, or physical deterioration that creates health and safety hazards, with no efforts to remove the hazards, or (e) the dilapidated appearance or condition of the property affects the area, and the owner has failed to take corrective action. (67a-68a).

This property exemplifies why the Abandoned Properties Rehabilitation Act exists: to give parties the tools to promptly ameliorate blighted eyesores. N.J.S.A. 55:19-79; N.J.S.A. 54:5-86(c). Even the most cursory review of photographs and video submitted to the court show that these purposes would be well-served in this case. (342a¶¶6-10, 350a-375a). The grounds of the property are unkempt, there is an accumulation of debris, the exterior of the house is falling apart, and the interior is gutted and completely uninhabitable.[12] (353a-375a). Defendants, despite having owned the property for about two years and seven months, did nothing to address these problems. Defendants purchased the property in April 2020 (104a-107a), obtained land use approvals in February 2022 (95a¶10, 120a-127a), and lost ownership via final judgment in November 2022, yet they failed to produce so much as a single construction permit during their entire ownership period, and Blackball's OPRA request corroborated that none had been issued during that time.

[12] While Defendants claimed that they were pursuing a land use application, that has no bearing on the statutory definition of abandonment. See N.J.S.A. 55:19-81.

(331a-339a). When the extent of an owner's action with respect to a property such as this over an almost three-year period is acquisition of land use approval (120a-127a), that property is correctly deemed abandoned. There is no meaningful dispute Defendants performed *no* rehabilitation during their period of ownership. There is no meaningful dispute that Defendants failed to maintain the property. All it takes is a look at the photographs. Thus, there was more than enough evidence to establish the property was abandoned under N.J.S.A. 55:19-81.

IV: BLACKBALL IS A *BONA FIDE* PURCHASER FOR VALUE. DEFENDANTS DID NOTHING IN DISCOVERY TO REBUT THE PRESUMPTION. (1T31:14-32:22, 15a-18a).

Lastly, Defendants claim that Blackball is not a *bona fide* purchaser for value whose title should be protected. Defendants proceed from the flawed premise that the first judge adopted and agreed with their argument that things such as Blackball's "level of sophistication" was relevant, or that a "review of the foreclosure docket" would have a bearing on the *bona fide* purchaser determination. In actuality, and as the second judge correctly held, the first judge's decision merely *recited* Defendants' arguments – it did not adopt and approve of them. (3T31:16-33:18, 3T51:18-53:4). If the first judge had made the determination that Blackball was not a *bona fide* purchaser for value, he would have said so in his ruling, and he would have vacated judgment. He did not. Instead, he permitted discovery on the issue – discovery that Defendants

completely failed to pursue. Defendants served no discovery on Blackball. Nor did Defendants attempt to depose Blackball's principal.

The *bona fide* purchaser analysis is straightforward. It asks two basic questions: (a) did the purchaser acquire title to property? and (b) did the purchaser pay valuable consideration? When these two elements are satisfied, a presumption arises that the purchaser is *bona fide*, "and the burden of showing to the contrary rests upon the party alleging that title was acquired by the purchaser with notice of an outstanding claim or equity." Monsanto Employees Fed. Credit Union v. Harbison, 209 N.J. Super. 539, 542 (App. Div. 1986); Venetsky v. West Essex Building Supply Co., Inc., 28 N.J. Super. 178, 187 (App.Div. 1953); Reaves v. Egg Harbor Township, 277 N.J. Super. 360 (Ch. 1994). If a party cannot overcome the presumption, the *bona fide* purchaser's title will be protected, even if there were abnormalities in the foreclosure process. See, e.g., Coryell v. Curry, 391 N.J. Super. 72, 81-82 (App. Div. 2006); Citibank, N.A. v. Russo, 334 N.J. Super. 346, 352-53 (App. Div. 2000); City of Newark v. 497 Block 1854, Lot 15, 244 N.J. Super. 402, 411-12 (App. Div. 1990); Last v. Audubon Park Assocs., 227 N.J. Super. 602, 607-09 (App. Div. 1988).

Here, there was no material dispute that Blackball acquired title to the property, and also that it paid valuable consideration of $140,000.[13] The burden

[13] This was only $23,000 less than Defendants had paid for the property several

thus shifted to Defendants to establish that Blackball acquired the property "with notice of an outstanding claim or equity." Monsanto, supra. Defendants failed to do so for several reasons. First, they sought no discovery from Blackball and produced nothing relevant to show Blackball had any knowledge of Defendants' outstanding claim or equity. Second, Blackball's "level of sophistication" is simply not relevant. Defendants made that argument out of whole cloth, tried to convince the second judge that the first judge had adopted their view (he hadn't, as the second judge recognized, 3T31:16-33:17), then admitted they had no authority establishing that such an inquiry has any bearing on the *bona fide* purchaser analysis. (3T37:24-38:3). Third, Defendants claimed that under I.E.'s LLC v. Simmons, 392 N.J. Super. 520 (Law Div. 2006), Blackball had a "duty to investigate the docket of the tax lien foreclosure" to avail itself of the *bona fide* purchaser protections. (3T38:5-10). As the second judge correctly held, Simmons, which is not binding in any event, does not impose such an obligation.[14] (3T76:20-78:3). And even if such an obligation existed, the second judge rhetorically (and correctly) queried "what would have been found in the docket?" (3T77:15-17). The answer is: a regularly-prosecuted foreclosure from beginning to end. If Blackball had reviewed the docket, it would have found notice above and beyond

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years earlier.

[14] Simmons simply recounts the testimony of one witness in the case who explained his view that a purchaser of tax-foreclosed property must "review the filings in the foreclosure action" for regularity. Id. at 534.

that required by the *in rem* rules. Not only was the notice of foreclosure served by simultaneous regular and certified mail (with signed green cards). It was also personally served, along with the complaint, on two of the three Defendants, despite that personal service is not required for *in rem* actions. R. 4:64-7(c). Blackball also would have seen that Plaintiff complied with the publication and posting requirements of R. 4:64-7(b) and -7(d), including posting of the foreclosure notice on the subject property. Blackball would have learned that Defendants were provided with notice of each and every notice of motion and order from beginning to end, including the motion seeking an abandonment order, at the addresses Defendants had already received process. In short, if Blackball had reviewed the docket prior to purchasing the property, it would have come to the very reasonable conclusion that Defendants had given up on the property. Defendants received more than ample notice and took no timely action. No review of the foreclosure docket would have alerted Blackball to Defendants' "outstanding claim or equity." Blackball's principal certified that he did not know, and had no reason to know, of Defendants' outstanding claim, given that it was not even filed until about two months after Blackball had purchased the property. (842a¶5). Blackball would not have spent $140,000 on the property if there was any indication Defendants had an outstanding claim to the property. (842a¶5).

Defendants ask this court to ignore the actual standards, and instead, as

below, they invent *ad hoc* and evidentially-unsupported reasons why Blackball is not a *bona fide* purchaser. Defendants assert that the following things matter: (1) Blackball was "concurrently represented" by the same firm that prosecuted the tax foreclosure[15]; (2) the "proximity" in time between the final judgment and the acquisition of the property; (3) an accelerated foreclosure using a private licensed individual's abandonment certification, rather than one from a municipal official[16], and (4) a disparity between the redemption amount and the fair market value of the property. None of these things are relevant because none of them adverts to any outstanding claim or equity of Defendants. These are features of many tax sale foreclosures. They are not exceptional, unusual, or unlawful.

Defendants also assert that, while "technically not residing in the Property, they were in fact in possession, having just obtained the Site Plan Approval from the . . . Planning Board, having paid real property taxes through . . . the third quarter of 2021, and having reasonably maintained the Property in anticipation of their own intended renovation[.]" (Db44-45). Most of this is false or misleading. Defendants did not "just" obtain site approval. They bought the property in April 2020 and obtained land use approval in February 2022, then sat on the property

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[15] This is not factually accurate. The firm that represented Plaintiff did not represent Blackball; it merely recorded the deed. (3T69:21-70:3). Defendants seek to impugn the law firm that conducted the foreclosure, but they cannot effectively do so given that they took no discovery. (3T70:4-8). The Zeitz firm did nothing wrong.

[16] This is explicitly permitted by N.J.S.A. 54:5-86(b).

and did nothing – including pay taxes, which they neglected from 2021 Q4 through the entirety of 2022. Plaintiff did not file its complaint until June 2022, and the foreclosure was not complete until November 2022. There is no evidence in the record that Defendants conducted any rehabilitation or maintenance during their period of ownership, and the photographs and OPRA responses corroborate that none was performed. (353a-375a, 331a-339a). Blackball did not know, and would have had no reason to know, of Defendants' claim or equity because the property was an empty, decrepit, overgrown, and abandoned mess.

Defendants failed to rebut the presumption that Blackball was a *bona fide* purchaser. Blackball is thus entitled to the protections of that doctrine, no different than any other purchaser of foreclosed property who took without notice. See, e.g., Coryell, supra. The lower court correctly refused to vacate judgment.

V: THE COURTS' DECISIONS FURTHERED THE PUBLIC POLICY OF THE TAX SALE LAW. (Not Raised Below).

An animating principle of the Tax Sale Law (TSL) is that final judgments should be held, rather than liberally vacated. This permits the foreclosing plaintiff to obtain marketable title. The relevant statute, N.J.S.A. 54:5-85, reads that the TSL "shall be liberally construed . . . to encourage the barring of the right of redemption by actions in the Superior Court to the end that marketable titles may thereby be secured." Through this statute, the Legislature has plainly stated its intention that lienholders who obtain valid final judgments have those judgments

protected so that they can convey marketable title. See, e.g., Town of Phillipsburg v. Block 1508, Lot 12, 380 N.J. Super. 159, 162 (App. Div. 2005) (observing that "protecting the marketability of titles" is "the underlying purpose and rationale of the Tax Sale Law[.]"); Malone v. Midlantic Bank, N.A., 334 N.J. Super. 238, 250 (Ch. Div. 1999) ("it must be remembered that the express policy of the Tax Sale Act is that it be liberally constructed so as to bar the right of redemption, not preserve it, the goal being that marketable titles to property be secured."); Cherokee Equities, LLC v. Garaventa, 382 N.J. Super. 201, 206 (Ch. Div. 2005) ("Protecting the marketability of tax titles enables municipalities to maximize the recovery of unpaid property taxes and return property to the tax rolls.").

By denying Defendants' efforts to undo the final judgment in this matter, the lower court furthered the policy of N.J.S.A. 54:5-85. The marketability of Plaintiff's title was protected, as was Blackball's as *bona fide* purchaser. If lienholders and those who acquire foreclosed properties from them cannot emerge from a lawfully-conducted foreclosure with the assurance that their ownership will not be undone for patently insubstantial reasons, lienholders will be less inclined to buy liens in the first place, the market for tax-foreclosed properties will evaporate, and the remedial purpose of the TSL will not be served.

CONCLUSION

Blackball respectfully asks the court to affirm the orders under review.

Respectfully submitted,
GOLDENBERG, MACKLER, SAYEGH, MINTZ, PFEFFER, BONCHI & GILL,
Attorneys for Third-Party Intervenor
Blackball, LLC

BY:_ _____
ELLIOTT J. ALMANZA, ESQ.

DATED: June 5, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-001036-23T4

MARY ROSE 22, LLC	:CIVIL ACTION
	:
PLAINTIFF-APPELLEE,	:ON APPEAL FROM JUDGMENT OF
	:SUPERIOR COURT OF NEW JERSEY
VS	:CHANCERY DIVISION
	:ESSEX COUNTY
BLOCK 270, LOT 14;	:Docket No. F-6378-22
65 CLEREMONT AVENUE,	:
TOWNSHIP OF IRVINGTON;	:SAT BELOW
STATE OF NEW JERSEY;	:HON. JAMES R. PAGANELLI, J.S.C.
ASSESSED TO ROSA E. ALVAREZ-	:HON. LISA M. ADUBATO, J.S.C.
LOJA, ALFREDO ALVAREZ and	:
JOSE E. ANGAMARCA,	:
	:
DEFENDANTS-APPELLANTS,	:
	:
BLACKBALL, LLC,	:
	:
INTERVENOR-APPELLEE	:

REPLY BRIEF OF DEFENDANT-APPELLANTS ROSA E. ALVAREZ-LOJA, ALFREDO ALVAREZ and JOSE E. ANGAMARCA

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PRELIMINARY STATEMENT

Appellants contend that the tax lien foreclosure of 65-67 Cleremont Ave., Irvington, NJ (the "Property") represented an unconstitutional taking under Tyler v. Hennepin County, 143 S.Ct. 1369 (May 25, 2023). The lower court refused to allow Appellants to raise Tyler, and in so doing committed reversible error.

While acknowledging Tyler, the lower court made it clear that in its view Tyler could not be applied retroactively because Appellants had not appealed the Final Judgment. In its bench ruling on Appellants' motion to reconsider, the court stated:

> The only new so to speak argument made in this motion to vacate default judgment was the Tyler argument. And based on the Hartford case, I am going to deny that as the sole basis to vacate the default judgment when the time for appeal of the order has very clearly passed.

3T, p. 98. The lower court made this ruling on November 15, 2023, prior to the publication of 257-261 20th Ave. Realty, LLC v. Roberto, 477 N.J. Super 339 (December 4, 2023), which ultimately endorsed retroactive application of Tyler to pending cases. Appellants ask this Court to reverse the lower court on the basis that the Appellants' claims are squarely within the "pipeline" of pending cases as defined in Roberto and thus the tax lien foreclosure herein was unequivocally a taking. The hard rule invoked by the lower court, i.e., that the "pipeline" is only open as to matters where a timely appeal is pending, is

specifically rejected by Roberto. Post-Roberto case law establishes that a case is within the "pipeline" so as to be eligible for retroactive relief under Tyler when there is a pending timely motion to vacate a final judgment, as here.

Plaintiff-Appellee Mary Rose 22, LLC ("Mary Rose 22") and Intervenor Blackball, LLC ("Blackball") claim that Blackball is entitled to the shield of bona fide purchaser for value ("BFP") status. Inquiry into this defense of Blackball was invited by Judge Paganelli in the April 3, 2023 Order where he indicated that while he would have been predisposed to vacate the Final Judgment under Rule 4:50-1(f) as to Mary Rose 22, the intervention of Blackball made the "prejudice to the other party" factor more difficult to determine if Blackball was truly a bona fide purchaser for value without notice. The Court found that Appellants had made a prima facie case that Blackball was not a BFP, but sought a fortified record to make that decision:

> While admittedly some of defendants' assertions may not ultimately withstand scrutiny, it nonetheless offers prima facie assertions that, if satisfactorily established, may lead the court to conclude that Blackball is not a bona fide purchaser for value without notice and thereby not prejudiced.

(30a). In the Reconsideration Motion (451a-424a), and particularly the Squiteri Cert.(525a-532a), Appellants supplemented the record presented to the lower court so as to

document the prima facie factors identified by Judge Paganelli.

Judge Paganelli and later Judge Adubato both considered Blackball's claim to BFP status prior to the issuance of Roberto, and Appellants ask this Court to consider that Roberto has essentially preempted the BFP analysis in relation to Appellants' Tyler claim. By limiting the retroactive application of Tyler to cases in the "pipeline," Roberto inherently balances the rights of parties who would be prejudiced by application of the "new rule" of Tyler, supplanting the equitable BFP defense where an aggrieved parties' constitutional claim remains actionable because the it is still in the "pipeline." Blackball's claim to BFP status must yield to the vulnerability of its title under the "new rule" established under Tyler, so long as Appellants' case is in the "pipeline" and thus eligible for relief under Roberto.

This result is neither unfair to Blackball nor unforseeable. Blackball is a sophisticated tax lien investor whose modus operandi includes trading tax titles shortly after entry of final judgment. Blackball assumes an inherent risk in such a business model and both Tyler and Roberto preferred the preservation of Appellants' access to a constitutional takings claim over any prejudice to Blackball so long as Appellants avoidance claims were open and diligently pursued. For this reason the lower court should be reversed.

POINT I

APPELLANTS' TIMELY MOTION TO VACATE THE FINAL JUDGMENT HAS KEPT APPELLANTS' CLAIMS CONTINUOUSLY UNDER REVIEW AND THUS ELIGIBLE FOR RELIEF UNDER 257-261 20th AVENUE REALTY, LLC V. ROBERTO, 477 N.J.Super 339 (App. Div. 2023)
(Issue Addressed Below, 454a-792a)

Final Judgment was entered November 7, 2022 divesting Appellants of title. (279a-293a). Appellants did not file a direct appeal of the Final Judgment. Appellants' Motion under Rule 4:50-1 was filed on February 2, 2023, eighty-seven (87) days later. (90a-142a). Appellants' motion was filed within the three (3) month limitation contained in N.J.S.A. 54:5-87, as well as the generic one (1) year limitation for Rule 4:50-1 motions to vacate under to City of East Orange v. Kynor, 383 N.J. Super. 639, 646 (App. Div 2006). Appellants' motion to vacate was timely and has been prosecuted continuously since filed.

Blackball essentially rejects Roberto when it contends that a final judgment must be on direct appeal to preserve the "pipeline" retroactivity of Tyler. The Roberto case was itself not a direct appeal of a final judgment, but was an appeal of the granting of a motion to vacate. So this is a direct misreading of Roberto.

Blackball cites Hartford Ins. Co. v. Allstate Ins. Co., 68 N.J. 430 (1977), for the proposition that "a change in the law or in the judicial review of an established rule of law is not such

an extraordinary circumstance as to justify relief from final judgment where the time to appeal has expired..." Hartford Ins. Co. v. Allstate Ins. Co., 68 N.J. at 434. Appellants acknowledge this case and its potential applicability, but distinguish it on the basis that Roberto specifically tailored its definition of what is on "direct review" to comport with the directive of Tyler and other related Federal decisions which were rightly seen as inconsistent with and superceding New Jersey law under Hartford.

When the U.S. Supreme Court "applies a rule of federal law to the parties before it, that rule ... must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the Court's] announcement of the rule." Harper v. Virginia Dep't of Tax'n, 509 U.S. 86, 97 (1993). Thus, the Appellate Division in Roberto recognized that where a federal constitutional issue is decided, "the new rule is applied 'retroactively to cases that were in the pipeline when it was decided.'" Roberto,(quoting State v. Adkins, 221 N.J. 300, 313 (2015)). Although the Roberto court weighed and balanced the Coons retroactively factors, see Coons v. American Honda Motor Co., Inc., 96 N.J. 419, 427 (1984), it ultimately noted that pipeline retroactivity is "mandated because the Court constitutionally recognized a property owner's interest in

surplus equity." Roberto, at 23; see also, e.g. First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty., 482 U.S. 304, 316 (1987) ("[T]he Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution.").

Where the U.S. Supreme Court decides a case and applies the legal ruling to the parties before it, then other courts must treat the same rule as retroactive, applying it "to all pending cases, whether or not those cases involve predecision events." Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 752 (1995). No state law considerations can change this outcome: the "Supremacy Clause, U.S. Const., Art. VI, cl. 2, does not allow retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law." Harper, 509 U.S. at 100. The Roberto court recognized this principle when it observed that "[w]hen the United States Supreme Court ' applies a federal law and must be given full retroactive effect in all cases still open on direct review.'" Roberto, at 21 (emphasis added); see also id. at 23 (the "retroactive pipeline application of the holding in Tyler to the [N.J. Tax Sale Law] is mandated because the Court constitutionally recognized a property owner's interest in surplus equity.") (emphasis added). The Tyler Court unquestionably applied its ruling to the parties

before it. Tyler v. Hennepin County, 598 U.S. at 647-48. Federal law therefore mandates that the same ruling apply to all pending cases, as Roberto explicitly recognized.

Separate from Tyler, the U.S. Supreme Court granted certiorari and reversed two cases following Tyler. These cases raised takings claims seeking just compensation after a tax sale and were not direct appeals from foreclosure. See Fair v. Continental Resources, 143 S. Ct. 2580 (2023) (vacating Cont'l Res. v. Fair, 971 N. W. 2d. 313, 316-317 (N.E. 2022)); see also Nieveen v. Tax 106, No. 22-237 (U.S. 2023).

Thus, the Roberto Court was balancing the Supremacy Clause, Tyler, Fair and Nieveen when determining how broadly to interpret the "pipeline." Roberto was not constrained by the holding of Hartford, which could appropriately be limited in application to retroactive application of new State law to the pipeline of cases.

The Court is further cited to the recent Memorandum Decision of the Honorable Andrew B. Altenburg, Jr., U.S.B.J., United States Bankruptcy Court, District of New Jersey, in In re Virella, Case No. 23-12179; Adversary No. 24-1084 (June 18, 2024), a copy of which is attached hereto as Exhibit "A." The Virella decision allowed an independent takings claim raised as an adversary proceeding in a bankruptcy case to proceed under

Roberto and Tyler based upon the fact that the property owner had filed the bankruptcy to save the property, notwithstanding that more than two (2) years had elapsed since entry of final judgment and the bankrupt judgment defendant had made two motions to vacate under Rule 4:50-1 in the Superior Court that had each been denied without prejudice.

What is clear from this case law is that the Tyler/Roberto pipeline is not limited to cases on direct appeal, as Blackball and Mary Rose 22 posit. Appellants' case is a direct analog to Roberto in that is presents a timely and continuously open and prosecuted motion to vacate a final judgment. Fair, Nieveen and Virella, by way of examples, interpret the pipeline far more expansively. On this basis, the Court should determine that Appellants takings claim is timely under Tyler and Roberto and overrule the lower court.

POINT II

BLACKBALL'S BONA FIDE PURCHASER DEFENSE IS LIKEWISE PREEMPTED BY TYLER AND ROBERTO AS TO APPELLANTS' TAKINGS CLAIM (Issue Addressed Below, 454a-792a)

Judge Paganelli and later Judge Adubato both considered Blackball's claim to "bona fide purchaser for value without notice" status under I.E.'s, LLC v. Simmons, 392 N.J. Super. 520 (Law Div. 2006), which is the seminal case denying "bona fide purchaser for value without notice" status to a purchaser of a tax title following a tax lien foreclosure. Appellants' contended to the lower court and argue in their primary appellate brief that Blackball manifestly fails to qualify as a BFP under I.E.'s, LLC v. Simmons as to Appellant's motion to vacate under Rule 4:50-1 and stands by those arguments.

Blackball's BFP defense must also fail as to Appellants' takings claim in light of Tyler and Roberto. By limiting the retroactive application of Tyler to cases in the "pipeline," Roberto inherently balances the rights of parties who would be prejudiced by application of the "new rule" of Tyler, mandating the preservation of an aggrieved parties' Federal takings claim over the equitable defenses of a subsequent title holder where an aggrieved parties' claim remains actionable and in the "pipeline." To hold otherwise would sidestep the supremacy of the

Federal version of "pipeline" retroactivity announced in Harper, 509 U.S. at 100, and adopted and applied in Roberto.

In balancing the concerns relating to retroactivity, the Roberto court emphasized that tax sale certificate holders "know 'from the start that most tax certificate investments end not in windfall profits from foreclosure but rather in high yield interest returns upon redemption.'" Roberto, 477 N.J. Super at 360 (quoting Simon v. Cronecker, 189 N.J. 304, 315 (2007)). Thus, the Tax Sale Law did not create sufficient reliance interests to render retroactive application inappropriate. Roberto, 477 N.J. Super at 360. Nothing in Roberto limits retroactive application to eligible "pipeline" cases raised against primary rather than secondary transferees, such as an alleged BFP.

The Roberto decision's discussion of Tyler bears squarely upon Appellants' case. It holds that the rule from Tyler applies with full force in New Jersey, that foreclosures which divest a property owner of significant equity pursuant to the Tax Sale Law effect an unconstitutional taking, and that Tyler applies retroactively to cases that were already pending when Tyler was decided.

Appellants respectfully offer that Blackball's claim to "bona fide purchaser for value without notice" status must yield to the vulnerability of its title under the "new rule"

established under Tyler, so long as Appellants' case is within the "pipeline" and thus eligible for relief under Roberto.

This result is neither unfair to Blackball nor unforseeable under the balancing analysis undertaken by the Roberto court. Blackball is a sophisticated tax lien investor whose modus operandi includes trading tax titles shortly after entry of final judgment. Blackball assumes an inherent risk in such a business model and both Tyler and Roberto weighed the preservation of Appellants' access to a constitutional takings claim as superior to any prejudice to Blackball so long as Appellants diligently pursued their avoidance claims while in the "pipeline." Appellants have been diligent in that pursuit, and for that reason the lower court should be reversed.

CONCLUSION

Based upon the foregoing, Appellant respectfully asks that the Appellate Court (i) reverse the lower court's April 3, 2023 Order, the September 27, 2023 Order and the November 14, 2023 Order and Vacate the Final Judgment for the reasons argued herein, and (ii) grant such other and further relief as the Court deems just and proper.

Dated: Newton, New Jersey
June 28, 2024

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By: /s/ Stephen B. McNally
Stephen B. McNally

Exhibit A

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In re: Luis Michael Virella, Debtor.	Chapter 13 Case No. 23-12179 (ABA)
Luis Michael Virella, Plaintiff/Debtor v. TLOA of NJ, LCC, Defendant.	Adversary Pro. No. 24-1084 (ABA)

MEMORANDUM DECISION

Before the court are the Motions filed by Luis Michael Virella (the "Debtor") to: (1) Reinstate the Automatic Stay as to creditor TLOA of NJ, LLC ("TLOA") in the above-referenced main bankruptcy case, Main Case Doc. No. 71; (2) Motion to Reconsider, Main Case Doc. No. 91; and (3) for a Preliminary Injunction filed in the above-captioned Adversary Proceeding, Adv. Pro. Doc. No. 13. The relief requested by all three Motions are inter-related as they basically rely on the identical premise of a substantial change in the law as a result of the decisions by the United States Supreme Court in *Tyler v. Hennepin County, Minnesota*, 598 U.S. 631 (2023) ("*Tyler*") and by the Appellate Division of the Superior Court of New Jersey in *257-261 20TH Avenue Realty, LLC, v. Roberto*, 477 N.J. Super. 339, 307 A.3d 19 (N.J. Super. Ct. App. Div. 2023) ("*Roberto*") holding that the retention of the excess value (or surplus) above the tax lien in a tax sale foreclosed property by a municipality or a third-party purchaser of tax sale certificate like TLOA violated the Takings Clauses of the United States and New Jersey constitutions. The court also queried whether it should abstain from deciding the issue. After conducting a hearing on the Motions on May 28, 2024, reviewing the submissions of the parties, and listening to their arguments, the court concludes that as a result of the substantial change in the law and this matter being "in the pipeline" when that substantial change in the law occurred, permissive abstention is not warranted and relief under the *Tyler* and *Roberto* cases must be afforded to the Debtor.

JURISDICTION AND VENUE

This matter before the court is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A),(G),(H) and (O), and the court has jurisdiction pursuant to 28 U.S.C. § 1334, 28

U.S.C. § 157(a), and the Standing Order of Reference issued by the United States District Court for the District of New Jersey on July 23, 1984, as amended on September 18, 2012, referring all bankruptcy cases to the bankruptcy court. The following constitutes this court's findings of fact and conclusions of law as required by Federal Rule of Bankruptcy Procedure 7052.

INTRODUCTION

We are here today because in the past year there has been a sea change in the law surrounding tax sales. In *Tyler*, the Supreme Court of the United States held that a local government's retention of the excess surplus equity in the home above the plaintiff's tax debt in a tax foreclosure plausibly alleged a violation of the Takings Clause of the United States Constitution.[1] Relying upon the new principle of law set forth in *Tyler* as well as Article 1, paragraph 20 of the New Jersey Constitution,[2] the Appellate Division of the Superior Court of New Jersey in *Roberto* then held that the Tax Sale Law, N.J. Stat. Ann. § 54:5-1 *et seq*. ("TSL"), which permits a municipality *or a third-party purchaser of a tax sale certificate* to retain a property owner's equity above the tax lien amount, is unconstitutional as the process results in a prohibited taking of a property owner's equity in a property. 477 N.J. Super. at 366. Its determination that the rule of law applies to third-party purchasers of a tax sale certificate in New Jersey and that "the TSL statutory framework that provides for the forfeiture of a property owner's equity after final judgment violates the Fifth Amendment Takings Clause in accordance with the decision in *Tyler*" *id.,* as well as, the New Jersey Constitution, persuades this court to conclude that under *Tyler* and *Roberto*, debtors in bankruptcy can seek to set aside the effects of a final judgment in foreclosure under the takings theory and address the claims related thereto in their bankruptcy cases.

Nevertheless, it is important to note that the *Roberto* court ruled that its new principle of law is limited, and it is only "accorded pipeline retroactivity to pending tax sale foreclosures involving a property owner's surplus equity." 477 N.J. Super. at 366. Thus, the issue to be addressed by the court today is whether the Debtor's cases, state court and/or current bankruptcy case, satisfy the "pipeline" requirement (i.e., are they in the pipeline) to afford the Debtor with the relief he seeks.

PROCEDURAL HISTORY

A detailed discussion of the procedural history of this case, and the underlying state court matter, is necessary as it is relevant to the court's decision.

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[1] The Takings Clause of United States Constitution provides "nor shall private property be taken for public use, without just compensation." U.S. Const., Amend. 5.

[2] Article I, paragraph 20 of the New Jersey Constitution provides: "Private property shall not be taken for public use without just compensation. Individuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners." N.J. Const., Art. I, Para. 20.

TLOA filed an *in personam* tax foreclosure (F-004638-22) on May 11, 2022, Adv. Pro. Doc. No. 27, Ex. A,[3] against real property located at 611 N. Indiana Avenue, Atlantic City, NJ (the "Property") in connection with its Certificate of Tax Sale bearing number 19-00611 dated December 30, 2019 originally in the amount of $8,457.87. Main Case Doc. No. 23 and Adv. Pro. Doc. No. 27, p.4. A notice of *lis pendens* was recorded with the Atlantic County Clerk on June 20, 2022.[4] *Id.* at Ex. B. On June 24, 2022, TLOA requested Entry of Default. Adv. Pro. Doc. No. 27, Ex. A. Then TLOA filed a Motion to Enter Order Setting Amount, Time, and Place for Redemption on July 1, 2022. *Id.* On July 15, 2022, the state court set and fixed September 13, 2022 as the date and time by which the Debtor must redeem the Property by tendering $23,986.46. *Id.* at Ex. C. The Debtor did not redeem the Tax Sale Certificate and on October 13, 2022, the state court granted final judgment ("Final Judgment") holding that the Debtor "and any and all persons claiming by, from or under them or any of them stand absolutely debarred and foreclosed of and from all right and equity of redemption of, in and to the [Property] and every part thereof, and that an absolute and indefeasible estate of inheritance in fee simple is hereby vested in [TLOA]." *Id.* at Ex. D. The Final Judgment was recorded with the Atlantic County Clerk on October 21, 2022. *Id.* at Ex. E. None of this is disputed.

The Debtor attempted to set aside the Final Judgment in the state court but failed to do so. *See* Main Case Doc. No. 29. Indeed, despite several attempts, as of the return date of the Motions, May 28, 2024, the Debtor has not been successful in doing so.[5]

Prior to his removal from the Property under the Final Judgment, on March 17, 2023, the Debtor filed his Chapter 13 bankruptcy case. Main Case Doc. No. 1. The Debtor claimed ownership in the Property as a single-family home with a value of $124,000.00. *Id.* at p. 2. The Debtor claimed his full exemption in the Property under 11 U.S.C. §§ 522(d)(1) and (d)(5). Main Case Doc. No. 16, p. 10. The Debtor listed TLOA as his only secured creditor against the Property with a secured claim in the amount of $26,573.00. Main Case Doc. No. 1, p. 10. The Claims Register in the Main Case reflects no other creditor asserting a secured claim against the Property.[6] Thus, the Property has significant equity above the liens against it and the exemptions claimed. This fact is undisputed.

The remaining procedural history of this case presents a tortured history leading to where we find ourselves today.

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[3] The court can take judicial notice of the docket entries in the state matters. Fed. R. Evid. 201, incorporated in these proceedings by Fed. R. Bankr. P. 9017. *See also, In re Soto*, 221 B.R. 343, 347 (Bankr. E.D. Pa. 1998).

[4] This is important for purposes of applying a statute of limitations. *See e.g., In re Stahlberger*, No. 20-23388-ABA, 2021 WL 509849, at *1 (Bankr. D.N.J. Feb. 10, 2021) (for preference or fraudulent claims, transfer of the property relates back to the date a *lis pendens* was filed).

[5] The Debtor's attempts to set aside the Final Judgment in state court will be addressed further below.

[6] The court can take judicial notice of the docket entries in this case. Fed. R. Evid. 201, incorporated in these proceedings by Fed. R. Bankr. P. 9017. *See In re Indian Palms Assocs., Ltd.*, 61 F.3d 197, 204 (3d Cir. 1995); *Maritime Elec. Co., Inc. v. United Jersey Bank,* 959 F.2d 1194, 1200 n. 3 (3d Cir. 1991); *In re Aughenbaugh*, 125 F.2d 887, 889 (3d Cir. 1942).

The Debtor's initial chapter 13 and subsequently filed modified plans, Main Case Doc. Nos. 18, 22, and 48, proposed to pay the claim of TLOA *without interest* through the life of the Plan contrary to the express provisions of the Bankruptcy Code. *See* 11 U.S.C. § 506(b) (over-secured creditors are entitled to interest on their allowed claims). While not unusual, the Debtor's plans are silent as to how the Debtor will set aside the Final Judgment and recover the Property from TLOA. In the normal course of most chapter 13 cases, where a debtor seeks to recover their residence after a foreclosure is completed and then address that default through their chapter 13 plan, the debtor promptly files an adversary proceeding to recover the property in order to implement their plan. Here, no adversary proceeding was filed.

On April 4, 2023, TLOA filed an objection to confirmation of the Debtor's plan arguing that the Debtor did not own the Property because it had obtained the Final Judgment in the state court. TLOA averred that as a result of the Final Judgment, the Debtor's and the other defendant's equity of redemption in the Property was debarred under the express terms of the Final Judgment. *See* Main Case Doc. No. 23.

On May 16, 2023, the Debtor responded to the objection of TLOA suggesting that the Final Judgment constituted a taking in line with the Supreme Court's ruling in *Tyler* and also was a violation of the Excessive Fines Clause of the Eighth Amendment of the United States Constitution.[7] Debtor's counsel indicated that the Debtor was pursuing the setting aside of the Final Judgment on these grounds in the state court. *See* Main Case Doc. No. 26.

Then, on August 29, 2023, the Debtor filed a Motion to Reduce the Claim of TLOA. Main Case Doc. No 52. The sole basis for the motion was that TLOA did not file a proof of claim in the Main Case. Without citing any legal authority, counsel for the Debtor claimed that TLOA must be limited to a claim in the amount of what the Debtor set forth on his bankruptcy petition. But, what counsel for the Debtor failed to recognize was that the Property was not property of the bankruptcy estate and the Final Judgment made TLOA the lawful owner of the Property. As TLOA did not have a claim against the Debtor but rather the Property, and the Property was not property of the estate, TLOA need not file a claim.[8] What is more, since the Debtor had not been successful in setting aside the Final Judgment, there simply was no basis for the motion. While raised only in oral argument on the motion, counsel to the Debtor did not and was unable to articulate how *Tyler* was applicable to a tax foreclosure sale conducted by a private, nongovernmental entity — let

[7] While the Debtor has asked the court to "consider" his claim under his Eighth Amendment theory, *see e.g.*, Main Case Doc. No. 62, to be sure, the court has never seen this argument and the Debtor never provided any law or facts that support such a claim for the court to consider. What is more, no such claim is made in his Adversary Proceeding. Therefore, the court deems the argument abandoned and as such, it need not be addressed here and/or reconsidered.

[8] A proof of claim filed by a party who is not a creditor is not a properly filed proof of claim. *In re FirstPlus Fin., Inc.*, 248 B.R. 60, 70 (Bankr. N.D. Tex. 2000) (citing *In re Ellington*, 151 B.R. 90, 95 (Bankr. W.D. Tex. 1993)). "[L]ogic dictates that if one does not own a claim against the debtor, one may not file a claim against the debtor." *Ellington*, 151 B.R. at 95.

alone did the Debtor brief it.[9] Because of all of this, the Motion to Reduce the Claim of TLOA was denied.[10]

On October 13, 2024, TLOA filed its Motion for Stay Relief against the Property. TLOA's position remained the same: the Final Judgment terminated the Debtor's right to redeem under the TSL and the Debtor's plan could not be confirmed without its consent because the Debtor lacked a cognizable interest in the Property that may be revived through his Chapter 13 plan. Main Case Doc. No. 61. The Debtor responded with the same arguments: that unless TLOA was willing to accept payment of its claim as proposed in the Debtor's plan, the Debtor would seek to set aside the Final Judgment. Main Case Doc. Nos. 62 and 65. To date, there was no success in the state court and the Debtor did not file an Adversary Proceeding in this court. Frustratingly, the Debtor's filed pleadings simply included suggestions of legal theories with no proper analysis and again, counsel to the Debtor was unable to articulate how *Tyler* was applicable to a tax foreclosure sale conducted by a private, nongovernmental entity.[11] As the Debtor failed to set aside the Final Judgment in state court, failed to take any action in this court by way of an adversary proceeding, and failed to articulate how the *Tyler* case applied in this case, the Motion for Stay Relief was granted in favor of TLOA. Main Case Doc. No. 69.

On November 20, 2023, the Debtor filed his current Motion to Reinstate the Stay. Main Case Doc. No. 71. The basis for the motion was so that he could again apply to the state court to set aside the Final Judgment. Inexplicably, the Debtor was/is proceeding in state court as a self-represented litigant and without the assistance of counsel.

On January 12, 2024, counsel to debtor filed a letter and a copy of the *Roberto* decision on the Docket. Main Case Doc. No. 83. Counsel simply stated: "I believe this case has relevance with respect to the Debtor's pending Motion to Reinstate Stay as to Creditor TLOA of NJ, LLC. [Docket No. 71]." *Id.* In response, TLOA correctly stated that it "is aware of this decision, but at present the Debtors have not raised any claim for avoidance or vacation of the Final Judgment in any court." Main Case Doc. No. 84.

On January 29, 2024, the Debtor filed a modified plan which accounted for a payment of interest on the claim of TLOA, Main Case Doc. No. 85, but the Final Judgment still had not been set aside in state court and no adversary proceeding to do so was filed in this court — something necessary for the implementation of the Debtor's plan.

Finally, on February 20, 2024, the Debtor filed his single Count Complaint in the Adversary Proceeding seeking to set aside the Final Judgment as a fraudulent transfer to TLOA under Section 548 of the Bankruptcy Code, 11 U.S.C. § 548. Adv. Pro. Doc. No. 1. Incredibly, despite having direct knowledge of the *Tyler* and *Roberto* cases, the Debtor failed to allege a cause

[9] *Roberto* had not been decided yet, the court was unaware that any such case was pending, and counsel to the Debtor provided no compelling argument.

[10] Astonishingly, as lately as the hearing on May 28, 2024, counsel to the Debtor still claims that TLOA should not be paid its full claim because it did not file a proof of claim — as if the issue had not already been decided!

[11] *Roberto* still had not been decided yet and the court was still not unaware of it pending.

of action in his Complaint under the Takings Clauses as established in those cases! Then, through an improper Order to Show Cause, the Debtor sought to enjoin any eviction action that TLOA may undertake with regard to its Final Judgment. Adv. Pro. Doc. Nos. 3 and 7. In its opposition to the Order to Show Cause, TLOA correctly noted that the relief sought must be by injunctive relief not an Order to Show Cause. Adv. Pro. Doc. No. 10.

At the hearing on the Order to Show Cause, the court reminded Debtor's counsel, that as a result of the court's rulings in *In re Wright*, 649 B.R. 625 (Bankr. D.N.J. 2023) and *In re Wright*, No. 20-12415-ABA, 2023 WL 3560551 (Bankr. D.N.J. May 18, 2023), *aff'd* Civil No. 2988 (RBK) (D.N.J. May 30, 2024), under his original Complaint, the recovery for the Debtor would be limited. The court afforded the Debtor an opportunity to amend his complaint to allege a claim under the *Tyler* and *Roberto* cases and to file a proper pleading with regard to injunctive relief.

On March 13, 2024, the amended pleadings were filed. Adv. Pro. Doc. Nos. 13 and 15. On that same day, despite the pending Motion to Reinstate the Stay in the Main Case and the Motion for Preliminary Injunction in the Adversary Proceeding, the Debtor also filed his Motion to Reconsider the court's order granting stay relief. Main Case Doc. No. 91. TLOA filed an opposition to the Motion for Preliminary Injunction, Adv. Pro. Doc. No. 17, and an opposition to the Motion to Reconsider. Main Case Doc. No. 93.

A hearing was held on the Motion for a Preliminary Injunction at which time the court advised the parties that it was inclined to adopt the reasoning of the *Tyler* and *Roberto* cases but issues remained as to whether this matter remained in the pipeline for application of the *Tyler* and *Roberto* cases as discussed by the *Roberto* court. A briefing schedule and return date were set. Counsel to TLOA graciously agreed TLOA would not take any action until the court rendered its final decision, and, thus the court did need not enter a temporary order staying everything.[12]

While preparing for oral argument, the court concluded that it required additional briefing from the parties regarding the "overarching issue" of "whether or not this case is still 'in the pipeline' to be governed under the new law presented." Specifically, in an April 8, 2024 email correspondence to counsel, Main Case Doc. No. 94, the court requested that parties brief "whether or not this case is 'in the pipeline' and whether because this bankruptcy case has not been confirmed, has sought to address the Debtor's claim from its inception, and the issue not having been resolved whether this constituted 'in the pipeline'." Finally, the court noted that the "in the pipeline" issue may more appropriately be decided by the state court and, consequently, the court would consider whether to permissively abstain from deciding the pipeline issue.

Thereafter, the Chapter 13 Trustee sought to file an *amicus curiae* brief and there was no opposition thereto filed. Adv. Pro. Doc. Nos. 19 and 26. The Chapter 13 Trustee timely filed his Answer to Amended Complaint. Adv. Pro. Doc. No. 27. The Chapter 13 Trustee argued that the Debtor satisfied the necessary requirement for pipeline retroactivity and that the court should decline to permissively abstain from deciding the pipeline retroactivity issue.

[12] Unfortunately, Debtor's counsel did not reciprocate with this graciousness in agreeing to maintaining the status quo because less than 2 hours before the hearing on the preliminary injunction and abstention, she directly requested the Clerk's Office to enter Default against TLOA.

The parties have made their submissions, Main Case Doc. Nos. 96 and 98, and Adv. Pro. Doc. Nos. 21, 23, 24 and 27, a hearing was held, and the matters were taken under advisement. The record is closed and the matter is ripe for disposition.

DISCUSSION

Debtor's Attempts to Set Aside Final Judgment in State Court[13]

On November 28, 2022, the Debtor filed a pro se motion alleging "Fraud in the conduct of the suit." Adv. Pro. Doc. No. 27, Ex. F. Because that motion was not submitted with the proper filing fee the Debtor resubmitted his *pro se* motion with the proper fee on December 12, 2022. Adv. Pro. Doc. No. 27, Ex. G. The December 16, 2022, docket entry notes that, "[t]he motion filed on 12/12/2022 will be decided on 01/06/2023. Oral argument has been requested. You will be notified when oral argument is scheduled. Do not come to the courthouse unless you are so notified." Adv. Pro. Doc. No. 27, Ex. A. TLOA filed its objection to the Debtor's motion on December 23, 2022. Ex. H. On January 6, 2023, the state court issued an order stating: "THIS MATTER having been opened to the Court for a Motion to Stay by Defendant Luis Virella *pro se*, who failed to appear…ORDERED: Defendant's Motion to Stay is hereby DISMISSED WITHOUT PREJUDICE for failure to appear." Adv. Pro. Doc. No. 27, Ex. I.

On November 20, 2023, the Debtor also filed a second *pro se* motion in the foreclosure action alleging "Fraud in the conduct of the suit." Adv. Pro. Doc. No. 27, Ex. K. Because that motion was not submitted with the proper filing fee on December 6, 2023, the Debtor refiled his motion and submitted the requisite payment. Adv. Pro. Doc. No. 27, Ex. A, and Ex. L. The December 7, 2023, docket entry reads: "The motion filed on 12/06/2023 will be decided on 01/05/2024. Oral argument has been requested. You will be notified when oral argument is scheduled. Do not come to the courthouse unless you are so notified." Adv. Pro. Doc. No. 27, Ex. A. On December 18, 2023, TLOA filed an objection to Debtor's motion. Adv. Pro. Doc. No. 27, Ex. M. The January 3, 2024, docket entry reads: "The motion filed on 12/06/2023 was rescheduled to 01/05/2024. Oral argument has been requested. You will be notified when oral argument is scheduled. Do not come to the courthouse unless you are so notified." Adv. Pro. Doc. No. 27, Ex. A. Only two (2) days after the Debtor *pro se* filed his second motion before the Superior Court, the Superior Court of New Jersey, Appellate Division, issued the *Roberto* decision.

On January 5, 2024, the state court issued an order on the Debtor's second motion which reads: "THIS MATTER having been opened to the Court for a Motion for Fraud in the Conduct of the Suit by Defendant Luis Virella pro se, who failed to appear…ORDERED: Defendant Luis Virella's Motion for Fraud in the Conduct of the Suit is hereby DENIED for failure to appear." Adv. Pro. Doc. No. 27, Ex. N. Nothing has transpired since then.

[13] These undisputed facts are taken directly from the Chapter 13 Trustee's submission. Adv. Pro. Doc. No. 27.

The Court Declines to Invoke Permissive Abstention

At first, the court believed it might be appropriate to permissively abstain under 11 U.S.C. § 1334(c) from deciding the issue of whether the case was in the pipeline for purposes of applying the *Tyler* and *Roberto* cases. Generally,

> [p]ermissive abstention "allows a court to abstain from hearing a particular matter arising under title 11 or arising in or related to a case under title 11, in the interest of justice or in the interest of comity with state courts or respect for state law." *In re Vanhook*, 468 B.R. 694, 700 (Bankr. D.N.J. 2012). New Jersey courts consider several factors in determining when to abstain. *See Shalom Torah Centers v. Philadelphia Indem. Ins. Cos.*, No. 10-6766 (FLW), 2011 WL 1322295, at *4 (D.N.J. Mar. 31, 2011). The courts recognize, however, that not all factors need to be considered in all cases and that their importance will "vary with the particular circumstances of each case" such that "no one factor is necessarily determinative." 2011 U.S. Dist. LEXIS 35726, [WL] at *4.

In re Mendez, 600 B.R. 321, 334 (Bankr. D.N.J. 2019). Generally, seven factors are considered when a court is evaluating whether permissive abstention is warranted. Those factors include:

> (1) the effect on the efficient administration of the bankruptcy estate;
> (2) the extent to which issues of state law predominate;
> (3) the difficulty or unsettled nature of the applicable state law;
> (4) comity;
> (5) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case;
> (6) the existence of the right to a jury trial; and
> (7) prejudice to the involuntarily removed defendants.

Jazz Photo Corp. v. Dreier LLP, No. Civ.A. 05-5198DRD, 2005 WL 354268 at *7-*8 (D.N.J. Dec. 23, 2005) (citing *In re Donnington*, 194 B.R. 750, 756-59 (Bankr. D.N.J. 1996)). A bankruptcy court exercises a "high degree" of inherent discretion in determining whether to exercise its authority to permissively abstain under Section 1334(c). *Wright v. Trystone Capital Assets, LLC*, No. 20-cv-15017 (RBK), 2021 WL 3561218, at *3 (D.N.J. Aug. 11, 2021) (quoting *In re Barsan Contrs., Inc.*, Civil No. 10-3081, 2010 WL 3907116 at *7 (Sept. 30, 2010)).

After considering the submissions of the parties, the court declines to permissively abstain. First, deciding the issue here has a positive effect on the administration of this case. Confirmation of the Debtor's chapter 13 plan that provides for the payment of TLOA's claim against the Property can only be implemented through the setting aside of the Final Judgment. The Adversary Proceeding seeks to do that. The Debtor has demonstrated that he is unable to achieve this necessary step in state court on his own. Indeed, equity weighs in favor of the court protecting the Debtor's interest in the Property in this forum rather than the state court where he lacks counsel to explain the applicability of *Tyler* and *Roberto.* Here, perhaps Debtor's counsel can achieve the desired result which will allow for an effective administration of the estate.

Next, while state law predominates, it only does so through the *Roberto* court's interpretation of federal law. Nonetheless, the court is not required to consider all factors when making its determination. *Mendez*, 600 B.R. at 334.

Third, *Roberto* was clear in its finding that the TSL is unconstitutional where a tax foreclosure sale results in the property owner being deprived of his equity above the tax lien and applies to third-party purchasers of a tax sale certificate in New Jersey. Therefore, the nature of the law is neither difficult nor unsettled.

Fourth, comity is achieved through this court's reliance on and application of the *Roberto* case thereby showing the court's mutual respect and courtesy to the state court.

Next, there is no remoteness as the issue presented in the Adversary Proceeding is fundamentally related to the main bankruptcy case as avoidance of the Final Judgment is crucial to the implementation of the proposed chapter 13 plan.

Finally, the remaining elements do not apply as there is no request for a jury trial and there is no prejudice to TLOA which is already the defendant in the Adversary Proceeding. There are no other parties involved.

Accordingly, the court declines to permissively abstain.

The Cases Are in the Pipeline

The Appellate Division of the New Jersey Superior Court recently noted that "[i]n the civil context, pipeline retroactivity of a new rule of law contemplates that three classes of litigants will be beneficiaries: those in all future cases, those in matters that are still pending, and the particular successful litigant in the decided case." *Roik v. Roik*, 477 N.J. Super. 556, 574, 308 A.3d 754, 765 (App. Div. 2024) (quoting *N.H. v. H.H.*, 418 N.J. Super. 262, 285 (N.J. Super. Ct. App. Div. 2011)); *Beltran v. Delima*, 379 N.J. Super. 169, 176-77, 877 A.2d 307 (N.J. Super. Ct. App. Div. 2005) (pipeline retroactivity applies to "to all prejudgment matters pending in the trial courts and to those matters that [were] on direct appeal").

Here, whether the court examines the proceedings in state court or the bankruptcy court, the Debtor has pending motions challenging the forfeiture of his equity in the Property in both forums.

The undisputed timeline shows that within five (5) months of the entry of the Final Judgment (October 13, 2022), the Debtor filed his Chapter 13 case and proposed a plan which provided for the payment of TLOA's claim. Then, within three (3) months of the bankruptcy filing, the United States Supreme Court decided *Tyler*. Questions remained as to the applicability of *Tyler* to third-party purchasers of a tax sale certificate. Then, within seven (7) months of the *Tyler* decision, the Appellate Division of the Superior Court of New Jersey decided *Roberto* finding that *Tyler* applied to third-party purchasers of a tax sale certificate. Less than three (3) months later, the Debtor filed the Adversary Proceeding.

Deficiencies and missteps aside, without question the Debtor immediately attempted to address the claim of TLOA against the Property via payment through his Chapter 13 plan. The plan could only be implemented through the setting aside of the Final Judgment. Undoubtedly, the Debtor could have avoided the Final Judgment — with limitation, *see Wright*, 649 B.R. 625 and *Wright*, 2023 WL 3560551 — under the original count in the original Complaint. And therefore, the plan which needed the avoidance of the Final Judgment could have been implemented. Since no confirmation hearing took place, the issue remained open.

While a judgment in foreclosure may seem to be final and remove the Debtor from the pipeline, this is not strictly the case. In state court, the Debtor has, albeit unsuccessfully, been trying to set aside the Final Judgment via motions alleging fraud in the conduct of the suit. The Debtor filed his first motion a mere ten weeks after entry of the Final Judgment. The state court has never considered the merits of any motion Debtor filed regarding the tax foreclosure sale opting at each instance to dismiss the motions for failure to appear. The state court's January 6, 2023 order specifically dismissed the Debtor's motion "without prejudice" and the state court's January 5, 2024 order did not specify that the motion was dismissed with prejudice, and, thus is construed to be a dismissal without prejudice. *Papera v. Pa. Quarried Bluestone Co.*, 948 F.3d 607, 611 (3d Cir. 2020) (a dismissal without prejudice is a dismissal that does not constitute an adjudication upon the merit)s; *Connors v. Sexton Studios,* 270 N.J.Super. 390, 393 (N.J. Super. Ct. App. Div. 1994) (holding that dismissal of a complaint for failure to appear should be without prejudice absent "egregious conduct"). Consequently, the Debtor may refile his motion.[14] As a court of equity, I am disposed to broadly interpret the facts in favor of the Debtor, who is proceeding *pro se* in state court, and conclude that the Debtor's past and current efforts to vacate the Final Judgment indicate that a matter is pending in the state court for purposes of pipeline retroactivity.

Additionally, the court also notes that the Third Circuit prefers matters be decided on their merits. *Hritz v. Woma Corp.*, 732 F.2d 1178, 1181 (3d Cir. 1984); *Scarborough v. Eubanks*, 747 F.2d 871, 878 (3d Cir. 1984). Given that the Debtor has the ability to re-file his motion in state court and the lack of a merits decision on any of his motions to vacate, the court would be remiss in concluding that the Debtor does not have a pending matter for purposes of pipeline retroactivity.

Even if a matter is not pending in state court for purposes of retroactivity, the Debtor has pursued the return of the Property since the inception of his bankruptcy case. In fact, the very purpose of this case was to regain the Property. Other than a car loan, TLOA is the Debtor's only secured creditor. The Debtor's plan, Main Case Doc. No. 18, and modified plans, Main Case Doc. Nos. 22, 48, and 85, specifically provide for the satisfaction of TLOA's claim. The Debtor initially filed an adversary complaint alleging a violation of 11 U.S.C. §548 because the amount TLOA paid was much less than a reasonably equivalent value. Adv. Pro. Doc. No. 1. The Debtor then amended his complaint to allege that the Final Judgment violated the Fifth Amendment Takings Clause and the New Jersey Constitution. These steps are necessary prerequisite to Debtor regaining an equitable or legal interest in the Property, the Property becoming part of the estate, and the Debtor satisfying TLOA's claim.

[14] During oral argument there were some representations made that the Debtor, acting *pro se*, was again attempting to vacate the Final Judgment in state court.

Tyler has upended the tax sale foreclosure process in numerous states and in my view established a new cause of action to void a property transfer. In New Jersey, the New Jersey Supreme Court issued a July 10, 2023 Order that temporarily suspended the Office of Foreclosure's recommendations of final judgment in tax sale certificate cases pending as of May 25, 2023. *Tyler* recognized a property owner's right to retain the equity above the amount of the tax lien. The Supreme Court of the United States acknowledged that equity theft resulting from tax sale foreclosures violated a constitutional property right. The Debtor has alleged the TSL as applied to the Property deprived him of his equity and an unconstitutional taking occurred. Although the court has not worked through all the ramifications of *Tyler* and *Roberto*, it appears that the Debtor has plausibly alleged an entitlement to recover either the property or money damages as a result of either his Section 548 claim or his Takings Clause claims. Thus, I conclude that this bankruptcy case and its related adversary proceeding constitute a pending matter sufficient to satisfy pipeline retroactivity.

The court is also not moved by TLOA's argument that the tax foreclosure action is fully and finally adjudicated, and that the Debtor may not use bankruptcy court proceedings to void the transfer of the Property.

The Bankruptcy Code offers debtors and trustees several ways to seemingly reverse final judgments under state law. The Bankruptcy Code sets forth several avenues to avoid transfers: 11 U.S.C. §§ 522, 544, 545, 547, 548, and 549. *See In re Hackler*, 938 F.3d 473, 475 (3d Cir. 2019) (affirming the bankruptcy court's conclusion that transfer of real estate title conducted via New Jersey's TSL was void preferential transfer under § 547(b)); *In re Smith,* 811 F.3d 228 (7th Cir. 2016) (setting aside Illinois tax sale foreclosure pursuant to Sections 522(h) and 548); *In re Hamilton*, 125 F.3d 292, 298 n.8 (5th Cir. 1997) ("By its own terms, section 544(a)(3) allows a party to avoid a foreclosure sale, and therefore to avoid the transfer that divested debtor of title to the foreclosed property, revesting title in the debtor."); *In re GGI Props., LLC*, 568 B.R. 231, 249 (Bankr. D.N.J. 2017) (voiding the transfer of property pursuant to the New Jersey TSL as a fraudulent under 11 U.S.C. § 548); *In re Elam*, 194 B.R. 412, 415 (Bankr. E.D. Tex. 1996) (noting debtor may bring avoidance action pursuant to Sections 522(h) and 549); *In re Wentworth*, 197 F. App'x 579 (9th Cir. 2006) (trustee, pursuant to Section 545, may avoid statutory lien enforced at foreclosure sale prior to filing of the bankruptcy case); 4 Collier on Bankruptcy P 522.12.

Additionally, I observe Congress has amended the Bankruptcy Code to aid debtors in preserving ownership of their homes via payment of arrearages of the course of a plan. Other courts have noted that "[t]he flexibility permitted in the formulation of Chapter 13 plans represents a central element in the implementation of the Congressional goal to encourage expanded use of Chapter 13. A main area of expansion was the Code's recognition of the desire of homeowners to save their homes through Chapter 13. . . Section 1322(b)(5) was intended to codify the practice under which foreclosure was enjoined during the pendency of a Chapter XIII, with the debtor given a reasonable time to cure defaults." *In re Placidi*, No. 5:07-bk-51657 R, 2008 WL 474239, at *2 (Bankr. M.D. Pa. Feb. 21, 2008) (quoting *In re Hoggle,* 12 F.3d 1008, 1110 (11th Cir.1994)). The court acknowledges that Sections 1322 and 1325 only allow a debtor to cure tax or mortgage arrearages prior to the foreclosure sale. Nevertheless, this statutory language demonstrates

Congress's commitment the importance of offering a debtor every opportunity to save a residence through the bankruptcy process.

The court is not swayed by TLOA's arguments regarding finality because the Bankruptcy Code and a plethora of cases demonstrate that bankruptcy courts are empowered to void property transfers effected by state tax sale foreclosures and state court proceedings.

Finally, the *Rooker-Feldman* doctrine does not apply. The *Rooker-Feldman* doctrine generally prevents parties from bringing claims in federal district courts when the plaintiff in federal court seeks to void the state court judgment. *Great Western Mining & Mineral Co. v. Fox Rothschild LLP,* 615 F.3d 159, 163–64 (3d Cir. 2010). The Debtor is alleging independent federal claims — which he could not allege in the state court action — under Section 548 to avoid the foreclosure as a fraudulent transfer and the Takings Clause to show equity theft. Although the Section 548 claim and the Takings Clause claim are closely related to the state foreclosure judgment, that by itself does not mean that *Rooker-Feldman* applies. *Skinner v. Switzer*, 562 U.S. 521, 532 (2011) (presenting independent claims that are similar to state court claims is not an impediment to federal jurisdiction). The court's consideration of the Section 548 and Takings Clause claims is not a review and rejection of the state court foreclosure judgment because the court can assume the state court reached a proper foreclosure judgment, but then independently decide whether the foreclosure could be avoided as a fraudulent transfer under Section 548 or as an impermissible taking under the Fifth Amendment and/or the New Jersey Constitution. *See In re Philadelphia Ent. & Dev. Partners*, 879 F.3d 492, 500-01 (3d Cir. 2018) (*Rooker-Feldman* does not apply to a fraudulent transfer action); *In re Lowry*, No. 20-1712, 2021 WL 6112972, at *3 (6th Cir. Dec. 27, 2021); *In re Isaacs*, 895 F.3d 904 (6th Cir. 2018) (*Rooker-Feldman* does not apply to causes of action brought under Code Section 544); *In re Sasson*, 424 F.3d 864, 871 (9th Cir. 2005) (*Rooker-Feldman* does not bar the exercise of federal bankruptcy power and bankruptcy courts may avoid state judgments in core bankruptcy proceedings, under Sections 544, 547, 548, 549, may modify judgments under 11 U.S.C. §§ 1129, 1325, and, may discharge judgments under 11 U.S.C. §§ 727, 1141, 1328).

What is more, New Jersey Court Rule 4:50-1(f) purports to allow a state court to vacate a final judgment due to a substantive change in law. That Rule reads:

> On motion, with briefs, and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment or order for the following reasons: (a)… or (f) any other reason justifying relief from the operation of the judgment or order.

N.J. Ct. R. 4:50-1. Along with that, the 1-year time limitation on a motion for relief from a judgment does not apply to subsection (f) but only requires a motion under subsection (f) "be made within a reasonable time." N.J. Ct. R. 4:50-2. Surely a substantive change in the law resulting in a fair and just result would be a proper reason justifying relief from the Final Judgment. *See Manning Eng'g, Inc. v. Hudson Cnty. Park Comm'n*, 74 N.J. 113, 122, 376 A.2d 1194, 1199 (1977) ("a court should have authority under it to reopen a judgment where such relief is necessary to achieve a fair and just result."). When setting aside a judgment within a reasonable time courts consider: "(1) the extent of the delay in making the application; (2) the underlying reason or cause; (3) the fault or blamelessness of the litigant; and (4) the prejudice that would accrue to the other party." *Parker v.*

Marcus, 281 N.J. Super. 589, 593 (N.J. Super. Ct. App. Div. 1995) (*citing Jansson v. Fairleigh Dickinson Univ.*, 198 N.J. Super. 190, 195 (N.J. Super. Ct. App. Div. 1985)).

The court agrees with the Chapter 13 Trustee in his pleading. The Debtor, proceeding as a self-represented litigant in the foreclosure action, clearly did not understand the complexities of the case and/or how to properly plead it. The motions were dismissed without prejudice and nothing has been decided on the merits. The Debtor's Chapter 13 case was filed only five (5) months following the foreclosure judgment and the proposed plan attempted to address TLOA's claim on the Property. The chapter 13 plan is still pending. There has been a substantial change in the law since the entry of the Final Judgment and the filing of the bankruptcy case that applies in this situation. The Debtor is not to blame as he has been trying to set aside the Final Judgment since almost immediately after it was entered. There is no prejudice to TLOA as it has not evicted the Debtor and will be satisfied on its entire claim. The status quo remains in place.

Thus, this court concludes that Debtor's had a pending cause of action at the time *Tyler* and *Roberto* were handed down and he is entitled to pipeline retroactivity in order to continue his challenge of the alleged taking of his excess equity.

The Debtor is Entitled to a Preliminary Injunction

"Preliminary injunctive relief is an extraordinary remedy and should be granted only in limited circumstances." *American Tel. & Tel. Co. v. Winback & Conserve Program, Inc.,* 42 F.3d 1421, 1427 (3d Cir. 1994) (citations omitted). "[O]ne of the goals of the preliminary injunction analysis is to maintain the status quo, defined as the last, peaceable, noncontested status of the parties." *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004) (citations omitted). In *In re Wedgewood Realty Group, Ltd.*, 878 F.2d 693 (3d Cir. 1989), the Third Circuit provided the necessary elements needed to be established to obtain a preliminary injunction:

(1) substantial likelihood of success on the merits;
(2) irreparable harm to the movant if the requested relief is denied;
(3) harm to the movant outweighs any harm to the non-movant; and
(4) granting the injunctive relief would not violate the public interest.

878 F.2d at 701. Here, the Debtor satisfies all four elements.

First, "[i]n the bankruptcy context, reasonable likelihood of success is equivalent to the debtor's ability to successfully reorganize." *In re Union Tr. Phila., LLC*, 460 B.R. 644, 660 (E.D. Pa. 2011) (citation omitted). What is more, a "plaintiff need only prove a prima facie case, not a certainty that he or she will win." *Highmark, Inc. v. UPMC Health Plan, Inc.,* 276 F.3d 160, 173 (3d Cir. 2001). The Debtor's chapter 13 plan here provides for the recovery of the Property through payment of the claim of TLOA in full. Recovery of the Property will be through the Adversary Proceeding which is needed to implement the chapter 13 plan. The court has already concluded that the Fifth Amendment Takings Clause and the New Jersey Constitution provide debtors in bankruptcy cases with the opportunity to set aside the effects of a final judgment in foreclosure and to address the claims related thereto in their bankruptcy cases. This case is in the pipeline and

there is a likelihood of success based on the current status of the law and the Debtor will be able to successfully reorganize upon effectively challenging the Final Judgment here. This element favors the Debtor.

Second, "[t]o establish irreparable harm, a movant must demonstrate 'an injury that is neither remote nor speculative, but actual and imminent'." *Tucker Anthony Realty Corp. v. Schlesinger,* 888 F.2d 969, 975 (2d Cir.1989) (quoting *Consolidated Brands, Inc. v. Mondi,* 638 F.Supp. 152, 155 (E.D.N.Y.1986)) (additional citations omitted); *In re Sterling*, 543 B.R. 385, 396–97 (Bankr. S.D.N.Y. 2015). Here, the harm is not remote or speculative, but rather actual and imminent. The Debtor has not prosecuted the Adversary Proceeding and likewise, there is no state court determination setting aside the Final Judgment. If the court does not currently enjoin TLOA at this stage, it would immediately evict the Debtor, depriving him of his home and income opportunity. In addition, the Debtor would be deprived of the equity in the Property — something the *Roberto* court said he is entitled to. *Roberto*, 477 N.J. Super. at 366. This element favors the Debtor.

Third, the harm to the Debtor outweighs any potential harm to TLOA, as the loss of the Debtor's home and rental income far surpasses any impact on TLOA, especially considering TLOA's claim is addressed in the Debtor's chapter 13 plan and would be paid in full, with interest as provided for by the TSL. TLOA will receive, albeit delayed, the full benefit of its bargain. This inconvenient delay in receiving full payment of its claim does not outweigh the immediate irreparable harm that would be incurred by the Debtor — loss of home and income. This element favors the Debtor.

Lastly, granting the preliminary injunction serves the public interest rather than violates it by giving citizens like the Debtor the opportunity to save their homes through the bankruptcy process (another Constitutional right, Art. I., Sect. 8.) and by further safeguarding them from unlawful takings by the government and/or a third-party tax sale certificate holder in violation of the Fifth Amendment Takings Clause and under the New Jersey Constitution. *Roberto*, 477 N.J. Super. at 366. Clearly, protecting the Debtor's rights at this stage does not violate public interest but rather promotes it. This element favors the Debtor.

With the necessary elements satisfied in favor of the Debtor and with the status quo being maintained, *Kos Pharms.,* 369 F.3d at 708, the request for a preliminary injunction is granted and TLOA may not enforce its rights and remedies under the Final Judgment without further order of this court.

This concludes the court's finding of facts and conclusions of law.

CONCLUSION

Accordingly, this court for all of foregoing reasons concludes the Debtor is entitled to retroactive application of *Tyler* and *Roberto* and that the Adversary Proceedings should go forward.

Because the Debtor has finally gotten around to pleading a proper cause of action invoking the takings theory set forth in the *Tyler* and *Roberto* cases, and because the court finds that this case was in the pipeline when those cases were decided, and finally, because the court declines to permissively abstain from deciding the matter, the Debtor may proceed with the Adversary Proceeding seeking to set aside the transfer of the Property to TLOA as an unlawful taking. Consequently, the court will grant the preliminary injunction enjoining TLOA from enforcing it rights and remedies against the Property until the Adversary Proceeding is finally concluded.

As a result of the issuance of the preliminary injunction, the Motion to reinstate the stay, Main Case Doc. No. 71, and the Motion for Reconsideration, Main Case Doc. No. 91 are moot – if not redundant.

The parties are instructed to confer to determine if proceeding with the Adversary Proceeding is necessary and if so, provide a joint scheduling order setting forth the time for: TLOA to file a responsive pleading (an Answer or otherwise); discovery; and dispositive motions. The court will set a trial date once that joint scheduling order is provided.

An appropriate judgment has been entered consistent with this decision.

The court reserves the right to revise its findings of fact and conclusions of law.

/s/ Andrew B. Altenburg, Jr.
United States Bankruptcy Judge

Dated: June 18, 2024

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February 13, 2025

Via eCourts - Appellate

Clerk, Superior Court of New Jersey
Appellate Division
R.J. Hughes Justice Complex
Trenton, New Jersey 08625

Re: Mary Rose 22, LLC (Respondent) v. Block 270, Lot 14, 65 Cleremont Ave., Irvington Tp., New Jersey, Assessed to Rosa E. Alvarez-Loja, Alfredo Alvarez and Jose E, Angamarca (Appellants); Blackball, LLC (Intervenor/Respondent)
Docket No.: F-06378-22

Superior Court - Appellate Division
Docket No. A-003843-21
Sat Below: Hon. James R. Paganelli, J.S.C.
and Hon. Lisa M. Adubato, J.S.C.

Honorable Judges:

We represent Rosa E. Alvarez-Loja, Alfredo Alvarez and Jose E, Angamarca, Defendant/Appellants in the above referenced tax lien foreclosure ("Appellants"). Please accept this letter memorandum in lieu of a more formal brief as allowed by R. 2:6-1(b) in response to the panel's January 14, 2025 request for

supplemental briefing on the impact of 257-261 20th Ave. v. Roberto, 2025 Lexis 2, on the issues raised in this appeal.

A. Appellants Raised Tyler While Their Case was "Presently Pending on Direct Review," Entitling Appellants to Retroactive Application of Tyler

In Roberto, the Supreme Court upheld the Appellate Division's determination that Tyler v. Hennepin County, 143 S.Ct. 1369 (May 25, 2023), should be applied retroactively to all matters "presently pending on direct review," citing Harper v. Va. Dep't of Tax'n, 509 U.S. 86, 97 (1993), and to cases on direct review in state court, citing Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995).

The Supreme Court concurred that Tyler applied in Roberto, but reached that conclusion because Harper and Reynoldsville so required, not based on a retroactivity analysis under the New Jersey precedent that was alternatively analyzed in the Appellate Division's Roberto opinion. While concurring that Roberto's claim was "presently pending on direct review," the Supreme Court declined to endorse the Appellate Division's proclamation that Tyler should not receive full retroactivity in other cases.

Appellants need no more, as the procedural posture of Appellants' case is so similar to Roberto that the breadth of "presently pending on direct review"

endorsed in Roberto captures Appellants' case.

Final Judgment in this case was entered November 7, 2022 divesting Appellants of title. (279a-293a). Appellants did not file a direct appeal of the Final Judgment. Appellants' Motion under Rule 4:50-1 was filed on February 2, 2023, eighty-seven (87) days later. (90a-142a). Appellants' motion was filed within the three (3) month limitation contained in N.J.S.A. 54:5-87, as well as the generic one (1) year limitation for Rule 4:50-1 motions to vacate under to City of East Orange v. Kynor, 383 N.J. Super. 639, 646 (App. Div 2006). Appellants' motion to vacate was thus timely and has been continuously prosecuted since filed.

Both Appellants' case and Roberto present raisings of Tyler during the pendency of timely motions to vacate final judgments under Rule 4:50-1.

In Roberto, following the granting of such a motion by the lower court, the plaintiff-appellants were seeking appellate relief when Tyler was decided and raised in the alternative by Roberto, the appellee.

In Appellants' case, Appellants' motion for relief under Rule 4:50-1 was made before Tyler was issued but denied by the lower court after Tyler. On Appellants' timely request for reconsideration, Appellants also raised Tyler. Prior to the issuance of the Appellate Division's Roberto decision, the lower court rejected Appellants' Tyler argument, declining to apply Tyler retroactively. After

Appellants' appealed that determination, the Appellate Division then issued its Roberto opinion.

Plaintiff/Appellee Mary Rose 22, LLC ("Mary Rose 22") and Intervenor/Appellee Blackball, LLC ("Blackball, " collectively with Mary Rose 22, "Appellees") attempt to whittle down Roberto by interpreting it as holding that the final judgment of foreclosure must itself be on direct appeal to preserve the "pipeline" retroactivity of Tyler. This is a misreading. The Roberto case itself was not a direct appeal of a final judgment of foreclosure, but an appeal of an order granting a motion to vacate. To the extent that Appellees attempt to identify Roberto as "an appeal from a final judgment (i.e., a the order dismissing with prejudice)," Blackball Supplemental Brief, p. 2, Appellants ask the Court to observe that the "final judgment" appealed from was not the final judgment of foreclosure, but the order granting Roberto's Rule 4:50-1(f) motion. The Court should reject this attempted rhetorical sleight of hand.

Appellees' rely upon Hartford Ins. Co. v. Allstate Ins. Co., 68 N.J. 430 (1977) in their primary briefs for the proposition that "a change in the law or in the judicial review of an established rule of law is not such an extraordinary circumstance as to justify relief from final judgment where the time to appeal has expired..." Hartford Ins. Co. v. Allstate Ins. Co., 68 N.J. at 434. Appellants

acknowledged this case and its potential applicability, but the Supreme Court's decision in Roberto definitively rejects Appellees reliance upon Hartford.

Where the U.S. Supreme Court decides a case and applies the legal ruling to the parties before it, then other courts must treat the same rule as retroactive, applying it "to all pending cases, whether or not those cases involve predecision events." Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 752 (1995).

Appellants also note that separate from Tyler, the U.S. Supreme Court granted certiorari and reversed two cases following Tyler. These cases raised takings claims seeking just compensation after a tax sale and were not direct appeals from foreclosure. See Fair v. Continental Resources, 143 S. Ct. 2580 (2023) (vacating Cont'l Res. v. Fair, 971 N. W. 2d. 313, 316-317 (N.E. 2022)); see also Nieveen v. Tax 106, No. 22-237 (U.S. 2023).

What is clear from this case law is that the Tyler/Roberto "pipeline" is not limited to cases on direct appeal, as Appellees posit. Appellants' case is a direct analog to Roberto in that is presents a timely and continuously open and prosecuted motion to vacate a final judgment, the adjudication of which was itself appealed. Fair and Nieveen, by way of examples, interpret the pipeline far more expansively. On this basis, this Court should determine that Appellants' takings claim is entitled to retroactive consideration under Tyler and Roberto and overrule the lower court.

B. The Supreme Court Did Not Rule on Roberto's Rule 4:50-1 Issues

Appellees also insinuate that the Supreme Court in Roberto overruled the Appellate Division's conclusions as to Roberto's alternatively pled Rule 4:50-1 arguments.

It is correct that the Supreme Court found Tyler sufficient alone, and thus declined to adopt the Appellate Division's Rule 4:50-1 analysis. This is not reversing or overruling, and Appellees' suggestion to this effect should be rejected by this Court.

The underlying nature of Appellants' Rule 4:50-1(f) equitable arguments made herein are manifestly distinct from those raised in Roberto. Appellants stand by their Rule 4:50-1 appellate arguments as made in their primary brief. The Supreme Court's reliance upon Tyler in the Roberto decision should not diminish Appellants' Rule 4:50-1 arguments in this case.

CONCLUSION

Based upon the foregoing, Appellants respectfully requests that the Court (i) grant Appellants' appeal; and (ii) grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

/s/ Stephen McNally

Stephen McNally
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cc: Robin London Zeitz, Esq. (by Ecourts)
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February 13, 2025

Superior Court of New Jersey
Appellate Division
Hughes Justice Complex
25 W. Market Street
P.O. Box 006
Trenton, NJ 08625

RE: MARY ROSE 22, LLC/Respondent v. Block 270, Lot 14
65 Cleremont Ave., Irvington Township, State of New Jersey
Assessed to: Rosa E. Alvarez-Loja, Alfredo Alvarez and Jose E. Angamarca (Appellants); Blackball, LLC (Intervenor/Respondent)
Docket No. A-001036-23T4
Docket Below: F-6378-22
Sat Below: Hon. James R. Paganelli, J.S.C. and Hon. Lisa M. Adubato, J.S.C.

Dear Judges of the Panel:

This office is counsel to Mary Rose 22, LLC ("Respondent") with regard to the above matter. Please accept this letter brief, in lieu of a more formal pleading, as Respondent's submission in response to the panel's January 14, 2025 request for supplemental briefing on the effect of 257-261 20th Ave. v.

Roberto, 2025 N.J. Lexis 2 on this appeal. The Respondent adopts, concurs with and supports the submission of Blackball, LLC ("Blackball").

Respondent further notes that the Roberto Court also considers whether it was appropriate to vacate the final judgment under R. 4:50-1(f). Id. at *20. While questioning whether truly exceptional circumstances were present in the case, the Court opts to allow the order vacating the final judgment to remain in place, and only notes that the motion to vacate final judgment was timely under the Court Rules. Id. at *21. Most significantly, however, the Court specifically indicates "that we do not adopt the Appellate Division's analysis under Rule 4:50-1(f). See Roberto, 477 N.J.Super. at 368-70." Id. Thus, the Court overruled the conclusion of the Appellate Division as follows: "In sum, we conclude that retroactive application of Tyler separately mandates grounds to vacate final judgment and the motion judge did not abuse his discretion in vacating final judgment under Rule 4:50-1(f) based on the substantial credible evidence presented." Roberto, 477 N.J.Super. at 370. Consequently, the New Jersey Supreme Court vitiated the argument that Tyler, alone, provides a basis to vacate a final judgment of foreclosure. Consequently, to the extent that the Appellant claims that Tyler provides a basis to vacate the final judgment, the

New Jersey Supreme Court in Roberto has clarified that the Appellant is barred from asserting same. Thus, and based upon all of the arguments presented in Respondent's brief and Blackball's brief, the order denying the Appellant's motion to vacate final judgment should be affirmed by this court.

Respectfully submitted,

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February 13, 2025

FILED VIA eCOURTS

RE: Mary Rose 22, LLC v. Block 270, Lot 14 (65 Claremont Ave., Irvington)
Docket No. A-1036-23

Dear Judges of the Appellate Division:

I represent Intervenor/Respondent Blackball, LLC ("Blackball"). Please consider this Blackball's response to the panel's January 14, 2025 request for supplemental briefing on the effect of 257-261 20th Avenue Realty, LLC v. Roberto, ___ N.J. ___ (2025) (Roberto) on this appeal.

LEGAL ARGUMENT

I: ROBERTO REAFFIRMS THE POSITION BLACKBALL ADVANCED IN ITS MERITS BRIEF: NEITHER THE EXISTENCE OF EQUITY, NOR THE ADVENT OF TYLER, IS A BASIS TO VACATE A JUDGMENT UNDER 4:50-1(F).

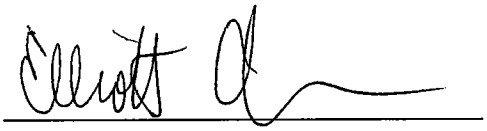
At the appellate level, a panel of this court held that the forfeiture of equity in a tax-foreclosed property qualifies as a truly exceptional circumstance justifying vacation of the foreclosure judgment under R. 4:50-1(f). 257-261 20th Avenue Realty, LLC v. Roberto, 477 N.J. Super. 339, 369-70 (App. Div. 2023). Our Supreme Court did not agree, stating: "we do not adopt the Appellate Division's

analysis under Rule 4:50-1(f)." Roberto, ___ N.J. ___ (2025) (slip op. at 18). This bears on the present appeal because it directly undermines Defendants' argument that they are entitled to relief under R. 4:50-1(f) due to their forfeiture of equity. They are not, and Roberto compels this conclusion.

Our Supreme Court also clarified another important point Blackball has already made. Roberto was on "direct review" because it was on appeal from a final judgment (i.e. the order dismissing with prejudice) when Tyler came down. Id. at 18. And for that reason, Tyler could be and was applied to the case. Id. at 22-24. This case is *not* on direct review because it is not an appeal from a final judgment, hence Tyler does not apply. As the plethora of caselaw cited in Blackball's merits brief explains, a R. 4:50-1 motion is not a substitute for a timely appeal of the final judgment. Where a party does not timely appeal the final judgment, advents in case law do not entitle a party to vacate a judgment under R. 4:50-1(f). See, e.g., Ross v. Rupert, 384 N.J. Super. 1, 6 (App. Div. 2006) (refusing to apply new published precedent in the context of a R. 4:50-1 motion, where the party seeking relief failed to timely appeal the entry of summary judgment); Camacho v. Camacho, 381 N.J. Super. 395 (Law Div. 2005) (same). This is because issuance of a new case is *never* a valid basis for relief from judgment under R. 4:50-1(f). Hartford Ins. Co. v. Allstate Ins. Co., 68 N.J. 430, 434-35 (1975). This bright-line rule is necessary because, otherwise, "[t]here would be no discernable basis for drawing any line in time between those to be barred and those to be relieved" from operation of the

judgment. Id. at 435. As in all of the preceding examples, Defendants here did not timely appeal the entry of final judgment. They instead filed a R. 4:50-1 motion, and we are on appeal from an order denying such relief. Accordingly, under Hartford and its progeny, Defendants are not entitled to have Tyler applied to this case.

Respectfully yours,



ELLIOTT J. ALMANZA, ESQ.