SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003105-23-T1

PRO CAP 4 LLC, FIRSTTRUST BANK, BY ITS CUSTODIAN US BANK

PLAINTIFF-RESPONDENT,

V.

JOHN T. KEMP A/K/A JOHN KEMP; DENISE CHILINSKAS; MR./MRS.KEMP, Spouse of JOHN KEMP; MR./MRS. CHILINSKAS, spouse of DENISE CHILINSKAS; VIST BANK s/b/m/t MADISON BANK a division of Leesport Bank; GELT FINANCIAL CORPORATION; JOHN DOE AND JANE DOE; JOANNE AUNGST; MR./MRS. AUNGST, spouse of Joanne Aungst

DEFENDANTS-APPELLANTS.

CIVIL ACTION

ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, CAMDEN COUNTY

SAT BELOW:
HONORABLE SHERRI L. SCHWEITZER, P.J.CH.

TRIAL COURT DOCKET NO.:
F-24686-18

APPELLATE BRIEF AND APPENDIX

FOR

APPELLANT JOHN T. KEMP

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PRELIMINARY STATEMENT

The longstanding tax sale law's equity theft scheme is now barred. New law provides safeguards to ensure no one else loses their home or equity due to the unconstitutional law. However sadly, John and his home have been allowed to fall between the cracks. The Courts and legislature in New Jersey have been working hard the past year to align the tax sale law with the landmark May 25, 2023 US Supreme Court's decision in Tyler v. Hennepin County, 598 U.S. 631, 143 S. Ct. 1369, 215L.Ed. 2d 564 (2023) declaring a taxing authority's confiscation of a property owner's equity violated the Fifth Amendment Takings Clause. Governments and tax lien holders are prohibited from taking above the amount of the tax debt. Despite same, John lost over $300,000.00 in equity for approximately $50,000.00 in unpaid tax. Fortunately however, in fighting for so long to save his home, John's appeal of the denial of his motion for reconsideration of the unconstitutional tax foreclosure judgment was a pending case, in the pipeline, at the time of the May 25, 2023 US Supreme Court's decision in *Tyler*. As such, retroactivity is afforded and the application of *Tyler* was mandated and provided grounds on its own for vacating John's judgment under Rule 4:50-1(f). This leaves no doubt that John was legally entitled to save his home from unconstitutional foreclosure and the appeal should have vacated the judgment and permitted redemption. However this case is unique because John's appeal and the *Tyler* case

were practically simultaneous. The appellate decision in John's case was entered June 8, 2023 within days of *Tyler*. The appellate division affirmed the trial court's denial of the motion to vacate judgment stating that John failed to establish entitlement to relief under Rule 4:50-1(f) and not mentioning *Tyler*. Since the case was decided simultaneously with the decision in *Tyler*, it appears the Court likely reviewed John's appeal before the *Tyler* decision and the Court therefore did not recognize that, after *Tyler*, as a case in the pipeline, vacating judgment was in fact mandated. Despite not being addressed (which neither the Appellate division nor John knew about *Tyler*), John was and is entitled to relief based upon the new law which again, provided separate grounds for vacating judgment under R. 4:50-1(f) on its own especially since, at said time, there was not yet a procedure in place for how homeowners in tax foreclosure could protect their surplus equity which was not signed into law until July 10, 2024. John has spent many years renovating and building equity in his home and after suffering through the pandemic and other serious hardships, it would be unconscionable and unlawful to deny John the right to save his home when the tax foreclosure judgment in this case is unconstitutional. The Courts have an obligation to ensure compliance with the *Tyler* decision and protect John's rights. Similarly, the lower Court opined that they did not have jurisdiction to rule on our motion for reconsideration, however by the time that John learned about *Tyler*, the time to file a motion for reconsideration before the

Appellate Court already expired. The issues before the lower court in the recent motion for reconsideration in consideration of *Tyler* were never addressed or an issue before the Appellate Court and as such equitably should have been addressed to support the mandates of the US and NJ Supreme Courts. Thus, John's case fell through the cracks. The merits of this case strongly support John's appeal as stated above. If procedurally the appellate division prefers that John file a motion for reconsideration of the prior Appellate Decision, we are happy to file same. However, the Appellate Division has the authority to manage and direct proceedings and for efficient judicial administration, the Appellate Division has the flexibility and discretion to review this case and address the merits of this appeal, at this time, even if there are procedural irregularities and there was no prior remand order. Either way, the extraordinary circumstances of this matter support the fact that the Appellate Division should vacate judgment and permit John to redeem to ensure a just result is reached. Under the circumstances the Court should be extremely flexible in situations like this regarding loss of equity especially since the Plaintiff is not prejudiced by permitting redemption and Plaintiff will still receive all amounts due plus hefty interest on its investment. John will be greatly prejudiced if foreclosure judgment is not vacated. The severe consequences of Plaintiffs foreclosure in this case are exactly what the Supreme Courts are confirming is unlawful and have stopped.

PROCEDURAL HISTORY

On October 18, 2016, Plaintiff predecessor Pro Cap 4 purchased tax sale certificate number 16-00025 for $2,330.07. (Da21) On December 17, 2018, Pro Cap 4 filed a foreclosure complaint. (Da8) Plaintiff filed an amended complaint on February 25, 2019. (Da8) John filed a contested answer on April 1, 2019. (Da22) May 1, 2019 John filed chapter 13 petition for bankruptcy (which was dismissed four months later.) (Da8) On June 21, 2019 the Court granted Plaintiff Pro Cap 4 summary judgment, struck John's answer and entered default. (Da8-Da9) The Court set February 28, 2020 as the last date for redemption. (Da9) Plaintiff filed a motion for final judgment on May 24, 2020 (Da9) and the Court entered final judgment in favor of Plaintiff on June 29, 2020 barring John's right to redeem and vesting title to John's property over to Plaintiff. (Da1) December 2, 2021 John filed a motion to vacate judgment. (Da9) On January 7, 2022 the Court denied the motion finding that John failed to satisfy Rule 4:50-1 noting the judgment was over a year old, John did not certify he had funds to redeem and circumstances were not compelling. (Da11) The Court denied John's request to carry the motion to finalize the loan and redemption due to the fact that the lender did not file a motion to intervene (despite the fact that same is not required by law.) (Da12) On January 11, 2022 the Court entered Plaintiff's writ of possession. (Da12) On January 11, 2022 John filed Chapter 7 petition for bankruptcy which was dismissed February 28,

2022. (Da12) On January 31, 2022 John filed a motion for reconsideration and informed the Court that John had the funds of $111,095.40 to redeem the tax sale certificate (Da12) On February 18, 2022 the Court denied the motion for reconsideration stating there "was nothing new" and the judgment was 18 months old. (Da13) John filed an appeal arguing that the Court errored in entering judgment and again in denying the motion to vacate and motion for reconsideration. (Da14) On June 8, 2023, the Appellate Court denied the appeal stating there was not adequate proof that John's loan was approved and John did not properly certify and show proof to substantiate his hardships and did not certify as to why he waited 18 months. (Da14) However on May 25, 2023 the US Supreme Court's decision in Tyler v. Hennepin County, 598 U.S. 631, 143 S. Ct. 1369, 215L.Ed. 2d 564 (2023) declared a taxing authority's confiscation of a property owner's equity violated the Fifth Amendment Takings Clause. (Da29) As the Court and all parties are aware, the NJ Appellate Division in light of the US Supreme Court decision in Tyler v. Hennepin County has made it clear that it is unconstitutional for a tax lien holder, who is already earning hefty interest, to also steal an owner's equity in their homes. Both the NJ Supreme Court and State Legislature recognized the holding in *Tyler* by introducing legislature amending the TSL and implementing the Notice to the Bar. (Da35) Application of Tyler to this matter which was pending and in the pipeline is mandated. 257-261 20th Ave.

Realty LLC v. Roberto 2023 N.J. Super LEXIS 121. (Da58) Upon realizing same, John filed motion for reconsideration March 5, 2024 (Da20) and the court denied same for lack of jurisdiction on April 26, 2024 (Da59). John filed this appeal on June 10, 2024.(Da62) New law was established July 10, 2024 to set procedures to protect homeowners surplus equity however same did not exist at the time of the foreclosure judgment in this matter. (Da79)

STATEMENT OF FACTS

Defendant John Kemp (hereinafter "John") has owned property located at 1316 Kings Hwy, Haddon Heights, NJ (hereinafter the "property" or "John's home") since May 31, 2006. (Da6) John spent his hard-earned money and worked hard to renovate the property from a three bedroom to a four bedroom house for his family's future and retirement. (Da21) John subsequently unfortunately over the years suffered severe hardships including but not limited to divorce, bankruptcy, undergoing multiple surgeries, suffering from death in the family and job loss as a result of the pandemic. (Da21) Plaintiff filed a motion for final judgment on May 24, 2020 (Da9) and the Court entered final judgment in favor of Plaintiff on June 29, 2020 barring John's right to redeem and vesting title to John's property over to Plaintiff. (Da1) John was then removed from his home after Plaintiff's ejectment action. (Da22) As stated above in the procedural history, after years of John fighting to save his home and asking to be permitted to redeem, on June 8, 2023,

the Appellate Court denied John's appeal. (Da5) However on May 25, 2023 the US Supreme Court's decision in Tyler v. Hennepin County, 598 U.S. 631, 143 S. Ct. 1369, 215L.Ed. 2d 564 (2023) declared a taxing authority's confiscation of a property owner's equity violated the Fifth Amendment Takings Clause. (Da29) As the Court and all parties are aware, the NJ Appellate Division in light of the US Supreme Court decision in Tyler v. Hennepin County has made it clear that it is unconstitutional for a tax lien holder, who is already earning hefty interest, to also steal an owner's equity in their homes. Both the NJ Supreme Court and State Legislature recognized the holding in *Tyler* by introducing legislature amending the TSL and implementing the Notice to the Bar. (Da35) Application of Tyler to this matter which was pending and in the pipeline is mandated. 257-261 20th Ave. Realty LLC v. Roberto 2023 N.J. Super LEXIS 121. (Da58) Upon realizing same, John filed motion for reconsideration March 5, 2024. (Da20) and the court denied same for lack of jurisdiction on April 26, 2024.(Da59) John filed this appeal on June 10, 2024. (Da62) New law was established July 10, 2024 to set procedures to protect homeowners surplus equity however same did not exist at the time of the foreclosure judgment in this matter.(Da79) In this case, if judgment is not vacated and John is not permitted to redeem the taxes, John will lose his home of many years and substantial equity he spent years building to a tax lien holder. (Da24) Under the circumstances, it would not be a just result for John to lose over

$300,000.00 of John's equity for only approximately $50,000.00 in unpaid tax where the lienholder was only owed approximately $120,000.00 in tax liens with lienholder fees. (Da23-Da24) These are drastic consequences which resulted from an unconstitutional foreclosure judgment. John cannot afford to lose his home and substantial equity to an unconstitutional foreclosure. John is ready willing and able to redeem the taxes upon entry of order permitting same. (Da24) In said circumstance, the lien holder is made whole and Plaintiff will still receive all amounts due plus hefty interest on its investment and any legitimate costs incurred.

LEGAL ARGUMENTS

I. THE TRIAL COURT ERRORED IN DENYING JOHN'S MOTION FOR RECONSIDERATION AND MOTION TO VACATE JUDGMENT AND PERMIT JOHN TO REDEEM TAX SALE CERTIFICATE WHERE JOHN IS LEGALLY ENTITLED TO RELIEF FROM JUDGMENT UNDER NJSA 54:5-87 PURSUANT TO RULE 4:50-1 AS MANDATED.

(Raised Below: 1M7-1M8,Da87)

A. THE TRIAL COURT ERRED IN DENYING THE MOTION FOR RECONSIDERATION BASED UPON LACK OF JURISDICTION BECAUSE THE NEW LEGAL STANDARD SET BY THE TYLER CASE (ONLY DAYS BEFORE THE PRIOR APPELLATE DECISION IN JOHN'S CASE) EXISTED BUT WAS UNKNOWN TO JOHN AND LIKELY THE COURT WHEN THIS CASE WAS ACTUALLY REVIEWED SINCE IT WAS

ENTERED SIMULTANEOUSLY AND THEREFORE THE TYLER DECISION WAS NOT ADDRESSED AS PART OF THE PRIOR APPEAL WHICH VIOLATED JOHN'S CONSTITUTIONAL RIGHTS AND EQUITY DICTATES THE JUDGMENT STILL BE VACATED AS MANDATED BY THE TYLER CASE. (Raised Below: 1M7-13,Da87)

The following analysis addresses the following questions:

1. Did the Trial Court err in denying the motion to reconsider the motion to vacate judgment and permit redemption under R. 4:50-1 in consideration of the US Supreme Court decision in Tyler v. Hennepin County, 598 U.S. 631, 143 S. Ct. 1369, 215L.Ed. 2d 564 (2023)?
2. Was this case in the pipeline at the time of the US Supreme Court decision in *Tyler* (declaring a tax authority confiscation of a property owners equity violates the 5th amendment takings clause)?
3. Did the Trial Court err in failing to recognize this case as a pipeline case where the trial judge stated: "I don't even consider it a pipeline case" ?
4. Does NJ law require the retroactive application of *Tyler* in this case to create a cohesive rule of law?
5. Does the retroactive application of *Tyler* separately mandate grounds to vacate judgment?

6. Did the Trial Court err in failing to follow the mandates of the NJ Supreme Court and Appellate Court post *Tyler*.
7. Is it unconstitutional and a prohibited taking/forfeiture of equity for the Court to permit the tax lien holder to retain John's equity in his home without just compensation?

In the matter at hand, as the Court is aware, on May 25, 2023 the US Supreme Court's decision in Tyler v. Hennepin County, 598 U.S. 631, 143 S. Ct. 1369, 215L.Ed. 2d 564 (2023) declared a taxing authority's confiscation of a property owner's equity violated the Fifth Amendment Takings Clause. (1M7-20) The NJ Appellate Division further has held that the TSL foreclosure of an owner's equity is a prohibited taking after *Tyler*. (Da48-Da58)

Pipeline retroactivity refers to the application of a new rule of law to cases that are still pending on direct appeal at the time the new rule is announced. State v. Covil, 240 N.J. 448, State v. Earls, 214 N.J. 564. The doctrine of pipeline retroactivity ensures that new rules of law are applied not only to future cases but also to cases that are still pending on direct appeal when the new rule is announced State v. Covil, 240 N.J. 448, State v. Earls, 214 N.J. 564.This approach aims to maintain consistency and fairness in the application of legal standards.

The factors considered in determining the degree of retroactivity are crucial in ensuring that the application of new rules is just and consonant with public policy

Rutherford Education Asso. v. Board of Education, 99 N.J. 8, Roik v. Roik, 477 N.J. Super. 556.The Court evaluates the reliance placed on the old rule, the purpose of the new rule, and the potential impact on the administration of justice. These considerations help balance the interests of fairness and legal stability.

The purpose of the new rule is clearly to stop lien holders from stealing whole homes from families over a small amount of taxes owed.

The appellate case in this matter was argued March 22, 2023 and decided June 8, 2023 (Da6) and as such, this case was "in the pipeline" when *Tyler* (which was at the time controlling interpretation of federal law) was decided. (Da48-Da58)
To further cement the above position, see also Virella v. TLOA of NJ, LCC (In re Virella), 23-12179 which case is even further removed from this case and where the court still found petitioner was in the pipeline because of a pending bankruptcy which included issues related to the property

The trial court in this matter erred in not finding this case to be in the pipeline.

The retroactive application of Tyler provided separate grounds to vacate the final judgment. 257-261 20th Ave. Realty, LLC v. Roberto, 477 N.J. Super.339. (Da58,Da87) As such, the law mandates the application of *Tyler* to this case be given full retroactive effect in order to create a cohesive rule of law.(Da48-Da58)

Despite the above, the Courts did not permit John to vacate judgment and redeem under Rule 4:50-1(f) and further did not have a procedure in place to protect

John's surplus equity until July 10, 2024. (Da5) The US Supreme Court and the NJ Appellate Court has clearly opined that the NJ tax lien structure was wholly unconstitutional and these changes in the law are specifically to protect people like John from the devastating results rendered previously in this matter whereby John has lost approximately $300,000.00 or more in hard earned equity in his home, built over almost 20 years, for a small amount of unpaid taxes. (Da48-Da58,Da87) The foreclosure judgment must be vacated to avoid a grossly unjust result.

As stated, the Tyler decision (May 25, 2023) was entered almost simultaneously with the prior appellate decision in John's case (entered June 8, 2023) (Da5) and therefore was not addressed by the Court as part of the appeal, likely as an oversight error since the cases were simultaneous and the appellate court likely reviewed John's case and prepared the decision before Tyler even though the Order was not entered until a few days after Tyler. Since the Tyler case was so new at the time, John did not know of same and did not know that the court was in fact mandated to vacate his judgment. As such, John did not know to file the request with the court at said time however despite same, John's constitutional rights were still violated when the courts failed to vacate judgment as mandated by the Tyler case and the consequences of same are disastrous for John whereby he lost his home and all surplus equity due to the prior law already barred as unconstitutional. The

foreclosure judgment in this case where John lost his home and all equity in his home was unconstitutional and should be vacated as void.

As stated above, the Courts have an obligation to correct the violation of John's constitutional rights afforded by the Tyler decision (which barred equity theft and mandated grounds for granting John's pending/pipeline case for vacating the unconstitutional foreclosure judgment).

This issue was not an issue that was before the appellate court or the trial court at any time in the previous pleadings for John's case and was the reason for the filing of the motion for reconsideration that was denied and appealed here. The appellate division since the time of the Tyler decision has been remanding cases back to the trial courts to rule on pending/pipeline cases in light of the Tyler decision. The trial court denied the motion for reconsideration because the court stated: "I do not believe that this court has the authority or the jurisdiction to modify and/or vacate the findings of the appellate division." (1M18-12) The appellate division however did not enter findings related to the Tyler mandate and only addressed that the trial court did not make an error in its ruling entered prior to the Tyler case, i.e. the trial court's January 7, 2022 order and the February 18, 2022 order denying the previous motion for reconsideration. Therefore, the trial court would not have been vacating the findings of the appellate division by ruling on the March 5, 2024 motion for reconsideration

filed after John learned that the judgment in his case was actually unconstitutional and state governments were federally barred by entering such judgments before his appellate decision was entered.

B. EVEN IF THE TRIAL COURT DID NOT HAVE JURISDICTION TO GRANT THE MOTION FOR RECONSIDERATION, THE APPELLATE DIVISION HAS THE DISCRETION TO HEAR THIS CASE ON THE MERITS AT THIS TIME IN LIEU OF JOHN FILING A SEPARATE MOTION FOR RECONSIDERATION OF THE 2023 APPEAL WHERE EFFECTUALLY THE CASE WILL THEN BE IN THE SAME POSITION IT IS NOW(BACK BEFORE THE APPELLATE COURT). (Not Raised Below)

The general rule in New Jersey is that motions for reconsideration must be filed within 20 days of the service of the judgment or order, and this time period is non-relaxable. Despite these stringent requirements, there are exceptions where the Appellate Division has granted reconsideration in the interest of justice. For instance, under Rule 4:50-1, relief from a final judgment may be granted for reasons such as mistake, inadvertence, surprise, or excusable neglect, or any other reason justifying relief. Mancini v. Eds ex rel. N.J. Auto. Full Ins. Underwriting Ass'n, 132 N.J. 330, In re ESTATE OF NUESE, 15 N.J. 149. This rule aims to balance the finality of judgments with the need to avoid unjust results. The court may exercise its discretion to correct procedural errors to ensure fairness and justice. In Alberti v. Civil Service Com., 78 N.J. Super. 194, the appellate

division granted a motion for reconsideration despite procedural defects, emphasizing the importance of the interests of justice. The court allowed the appellant to join an additional party and serve a notice of appeal within the extended time frame, recognizing the need to correct procedural errors to ensure fairness Alberti v. Civil Service Com., 78 N.J. Super. 194. In State v. Vanness, 474 N.J. Super. 609, the appellate division upheld the denial of a motion for reconsideration as untimely but noted that the defendant was entitled to a new PCR proceeding and an evidentiary hearing due to procedural errors by PCR counsel. In State v. Lodzinski, 248 N.J. 451, the New Jersey Supreme Court granted a motion for reconsideration, acknowledging that the appellate division applied an incorrect standard in reviewing the defendant's post-verdict motion for a judgment of acquittal. The court recognized the procedural error of constitutional magnitude and corrected its own oversight to ensure due process rights were upheld State v. Lodzinski, 248 N.J. 451.

In this matter, the appellate court should appropriately consider this matter on the merits in the interest of justice. It would be inappropriate and a grave injustice to allow the unconstitutional equity theft judgment to stand because of the procedural errors. John's motions were filed within a reasonable time frame considering the complexity and the evolving nature

of the case, including the impact of the Tyler decision. It is understandable that John did not know at the time of his appeal that only days before, the US Supreme Court has declared the NJ tax sale law procedure and his judgment to be unconstitutional.

As such, the appellate division can exercise its discretion to address the merits of an appeal if it finds that doing so would serve the interests of justice and judicial efficiency. The current judgment of foreclosure where the Plaintiff in the foreclosure matter was permitted to retain John's substantial equity is unconstitutional and cannot stand. The appellate court can exercise its prerogative to dictate how to procedurally remedy the application of the new law to this matter.

Equity does dictate that this matter be addressed by the Appellate Court at this time to avoid a grave injustice. John has lost his home and all equity in his home to an unconstitutional law and a judgment affirmed after the law was declared unconstitutional and vacating judgment was mandated. Tyler was controlling law at the time of the June 8, 2023 appellate decision in John's case and the court now has the opportunity to correct the oversight and vacate the unconstitutional judgment so that John can save his home. This is the only just result in this matter.

John's mistake in realizing the court's oversight sooner should be forgiven. It is not surprising that there was an oversight when the Tyler decision was entered only days before the appellate court entered its order in John's case affirming the foreclosure judgment. It is likely that the matter was reviewed, and the opinion was prepared prior to the entry of the decision in Tyler. As such, the Court would not have addressed same in review of the case. This is understandable but still must be corrected. Further it is not surprising and should be forgiven that John also did not realize the decision in Tyler permitted him grounds to vacate judgment and declaring the confiscation of his equity to be unconstitutional. It would not be a just result for the court to permit the unconstitutional judgment to stand because John did not know about the Tyler case when in fact, even the appellate court overlooked same. This is evidenced by the fact that the appellate opinion in John's case did not mention Tyler or a reason as to why Tyler was not applied to John's case and there was not even an address by the Court in the appellate decision as to how to protect John's surplus equity when the judgment was entered or a remand related to same and there was no procedure in place until July 10, 2024 addressing said constitutional rights. As stated above, the

foreclosure judgment in John's case was unconstitutional equity theft and was unlawful and void.

CONCLUSION

This Court has a unique opportunity to rectify this outrageous circumstance. More specifically, since the lien holder still maintains title to the property, the Court reasonably can permit John the opportunity to redeem and pay the taxes and reimburse any reasonable expenses incurred by the lien holder. In this circumstance, the lien holder is made whole and John gets his property back along with its substantial equity. This result is exactly the purpose of a court of equity. This appeal requesting an Order to vacate judgment and permit John to redeem the tax foreclosure were submitted in light of New Jersey's recent seismic shift in the law which in finally putting a stop to the tax lien holders being permitted to steal property owner's equity in their homes. This case was a textbook example of an appropriate scenario for the Court to exercise its authority to avoid a grossly unjust result.

As such, the defendant-appellant, John T. Kemp respectfully requests that the Appellate Court reverse the trial court order denying reconsideration, vacate foreclosure judgment and permit John to redeem his home. Thank you for your consideration in this regard.

Dated: September 30, 2024

Respectfully Submitted,
Brian L. Whiteman
BRIAN L. WHITEMAN, ESQ.
For the firm

PC4REO LLC	: SUPERIOR COURT OF NEW JERSEY
Plaintiff/Respondent	: APPELLATE DIVISION
vs.	: DOCKET NO. A-003105-23
JOHN T. KEMP A/K/A JOHN KEMP; DENISE CHILINSKAS; VIST BANK s/b/m/t MADISON BANK a division of Leesport Bank; GELT FINANCIAL CORPORATION; JOANNE AUNGST	: PRIOR APPELLATE DOCKET NO. A-3105-23T1 : ON APPEAL FROM: : SUPERIOR COURT OF NEW JERSEY : CAMDEN COUNTY
Defendant/Appellant	: CHANCERY DIVISION : Docket No.: F-24686-18 : SAT BELOW: : HON. SHERRI L. SCHWEITZER, P.J.CH.

PLAINTIFF/RESPONDENT PC4REO, LLC'S BRIEF AND APPENDIX

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PRELIMINARY STATEMENT

The overarching theme of the Defendant's conduct in this matter since 2018 is delay. This case comes before the Appellate Division for a second time by the Defendant, who seeks relief from a four (4) year old final judgment of tax foreclosure. This Court previously affirmed the trial court's order denying the Defendant's motion to vacate final judgment and denying the Defendant's motion for reconsideration of the same, finding that the Defendant failed to articulate a cognizable basis for relief from the final judgment, and that he did not suffer a forfeiture of equity. The Appellate Division order and opinion was issued after the United States Supreme Court decided Tyler v. Hennepin Cnty. 598 U.S. 631 (2023). Nearly one (1) year after the Appellate Division denied the Defendant's first appeal, he filed a second motion for reconsideration before the trial court wherein he requested entry of an order vacating the final judgment to bootstrap this case back to the Appellate Division for a second time on the exact same record. The Defendant's frivolous prosecution of the instant appeal for the second time was commenced to impede closure of this protracted case, to thwart the Plaintiff's pending sale of the subject property, to exploit the Court's resources, and to further the Defendant's abusive practice of harrasing the Plaintiff and its employees. As such, the trial court's order denying the second motion for reconsideration should be affirmed, and

sanctions should be imposed against the Defendant and his attorney to firmly discourage and avert further frivolous litigation in this matter.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

John T. Kemp ("Defendant") was the owner of the property located at 1316 Kings Hwy, Haddon Heights, New Jersey, Block 81, Lot 4 (the Property") by virtue of deed dated May 31, 2006. (Pa5). On October 18, 2016, PRO CAP 4 LLC, FIRSTRUST BANK, BY ITS CUSTODIAN US BANK purchased tax sale certificate no. 2016-00025 (the "Tax Lien") from the City of Haddon Heights Tax Collector. (Pa13). The Tax Lien was subsequently assigned to PC4REO LLC ("Plaintiff"). (Pa21). The Tax Lien was for taxes due for 2015. (Pa13).

On June 28, 2018, Defendant conveyed the Property to himself and Denise Chilinskas ("Chilinskas") by virtue of a deed recorded with the Camden County Clerk on July 9, 2018. (Pa23). Chilinskas subsequently conveyed her interest in the Property to Defendant and Joanne Aungst ("Aungst"). (Pa23). Throughout the Defendant's ownership of the Property, and during the foreclosure, the Defendant filed several bankruptcy cases as follows:

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[1] The Statement of Facts and Procedural History are combined to avoid repetition, for clarity, and for the convenience of the Court.

1. Chapter 13 Case No. 19-18909, filed on May 1, 2019, dismissed on September 3, 2019.
2. Chapter 13 Case No. 19-29114, filed on October 8, 2019, dismissed on November 8 2019.
3. Chapter 7 Case No. 22-10386, filed on January 11, 2022, dismissed on February 28, 2022. (Pa23).

The Property was encumbered by two mortgages executed by the Defendant, which totaled $295,000.00. (Pa3). Vist Bank s/b/m/t Madison Bank held a mortgage recorded on November 14, 2006 in the principal amount of $85,500.00 and Gelt Financial Corporation held a mortgage recorded on January 1, 2007 in the principal amount of $210,000.00. (Pa3).

On December 17, 2018 Plaintiff filed a Complaint for foreclosure of the Tax Lien. (Pa1). The Defendant filed a contesting Answer to the Complaint. (Pa23).Plaintiff filed a motion for summary judgment. (Pa25). An order granting summary judgment was entered on June 21, 2019. (Pa25). The order fixing amount/time/place for redemption ("OST") was entered on December 30, 2019. (Pa56). The Defendant was served with the entered OST on January 2, 2020. (Pa56). The Defendant was served with the Motion for Final Judgment March 24, 2020. (Pa56). Final Judgment was entered on June 29,

2020, thereby vesting Plaintiff with title to the Property. (Da1). Defendant was served with a copy of the Final Judgment on July 2, 2020. (Pa30).

Defendant filed a motion to vacate the Final Judgment on December 2, 2021, which was almost 18 months after entry of the Final Judgment. (Pa31). The motion to vacate lacked a legal basis upon which it was based, nor did it contain a certification from Defendant providing a legal or factual basis upon which he believed the Final Judgment should have been vacated. (Pa59). Instead, Defendant's prior counsel annexed a non-certified mortgage loan commitment to the belated and deficient motion. (Pa56). Although not articulated by Defendant in a certification, it appears that he intended to finance a redemption of the 5 year old Tax Lien through a mortgage secured by the Property. (Pa56).

The trial court held oral argument on January 7, 2022 and entered an order denying Defendant's motion to vacate the final judgment (the "January 7, 2022 Order") since there was no basis upon which the Final Judgment could have been vacated pursuant to R. 4:50-1, the Final Judgment was more than a year old, and the Defendant did not have the funds readily available to redeem the Tax Lien if the Final Judgment were vacated. (Pa27). On January 11, 2022, Defendant filed a Voluntary Petition seeking relief under Chapter 7 of the

United States Bankruptcy Code in an apparent effort to prevent his removal from the Property. (Pa31).

Defendant filed a first motion for reconsideration of the January 7, 2022 Order on January 31, 2022. (Pa31). The motion for reconsideration still did not include a certification from Defendant asserting that he had the requisite funds to redeem the Tax Lien and make Plaintiff whole if the Final Judgment were vacated. (Pa31). On February 18, 2022, the court entered an order denying Defendant's first motion for reconsideration. (Pa28). On February 28, 2022, the Bankruptcy Court dismissed Defendant's Chapter 7 petition. (Pa32). The Defendant was evicted from the Property on March 30, 2022. (Pa32).

On March 2, 2022, Defendant filed an appeal of the January 7, 2022 Order and the February 18, 2022 order denying his motion for reconsideration. (Pa55). On May 25, 2023, the Tyler decision was issued by the United States Supreme Court. The Defendant did not file a letter as permitted by R. 2:6-11(d)(1) requesting relief pursuant to the recent Tyler decision. (Pa32). On June 8, 2023, the New Jersey Appellate Division affirmed the trial court's order denying the Defendant's motion to vacate Final Judgment and his motion for reconsideration of the order denying such motion. See PC4REO, LLC v. John Kemp, A-1944-21 (N.J. App. Div. June 8. 2023). (Pa55). The Appellate Division did not vacate the Final Judgment. (Pa55). The Defendant did not file

a motion for reconsideration in the Appellate Division as permitted by R. 2:11-6. (Pa32). Similarly, the Defendant did not petition the New Jersey Supreme Court for certification as permitted by R. 2:12-3. (Pa32).

On December 22, 2023, the Defendant began sending terroristic threats to Plaintiff's CEO Marc Rubinsohn and his wife. (Pa41). Such threats were promptly reported to the Philadelphia, Pennsylvania police department and the Gloucester County Prosecutor's office. (Pa41). Defendant's vulgar threats included statements such as, "I am going to be the biggest pain in the [expletive] you have ever met for the rest of your life. Like I said, you [expletive] the wrong person. I'm going to violate your constitutional rights just like you did to me." Defendant continued, "If you continue to ignore me and if you don't engage in meaningful dialogue, I'll be sure to introduce myself when we meet at a time and place of my choosing." (Pa50).

On March 5, 2024, Defendant filed a motion for reconsideration of the June 8, 2023 Order from the Appellate Division before the trial court. (Da20). The Defendant did not have the requisite monies to redeem the Tax Lien and make Plaintiff whole when he filed his second motion for reconsideration on March 5, 2024. See T17-17-18 (The trial court remarked that there was still no competent proof or evidence that the Defendant had the necessary funds to redeem); See, Malinowski v. Jacobs, 189 N.J. 345, 514 (2007) (confirming that

a lender acquiring a mortgage interest may not redeem a tax lien without first complying with N.J.S.A. 54:5-89.1 and N.J.S.A. 54:5-98).[2] The Defendant's second motion for reconsideration was filed without any recognizable legal basis, was an apparent effort to cloud Plaintiff's title to the Property, and furthered Defendant's harrassment of the Plaintiff. On March 12, 2024, Plaintiff served the Defendant and his counsel with a frivolous litigation letter pursuant to R. 1:4-8 and N.J.S.A. 2A:15-59.1. (Pa35). The Defendant and his counsel failed and refused to withdraw the frivolous motion. Although the Defendant was unsuccessful in his appeal and Plaintiff has held title to the Property for nearly four (4) years, the Defendant recorded a lis pendens against the Property on March 20, 2024 in a further effort to erroneously cloud Plaintiff's title. (Pa33). On April 2, 2024, the Defendant began sending threatening correspondence to Plaintiff's realtor with regard to the Property, thereby demonstrating his knowledge of Plaintiff's efforts to sell the Property and the Defendant's bad-faith intention to preclude same in retaliation. (Pa53).

As of April 12, 2024, Plaintiff was owed the approximate sum of $143,917.72 with respect to the Tax Lien. (Pa40). In addition, Plaintiff has

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[2] The Defendant's unauthenticated proposal to redeem the Tax Lien with funds obtained from a third-party lender is precluded by Malinowski. Thus, even if the Defendant had provided the trial court with competent proofs regarding his desire to finance the redemption, the Tax Sale Law precludes post-judgment redemption of tax sale certificates utilizing funds obtained from third parties.

incurred costs to maintain, improve, and renovate the Property in the sum of $94,688.21 and has expended attorney's fees and costs in prosecuting the foreclosure and defending Defendant's motion to vacate final judgment, first motion for reconsideration, appeal, and the second motion for reconsideration in the sum of $30,197.92. (Pa40, Pa34). Thus, as of April 12, 2024, the Plaintiff would have been owed the approximate sum of $268,803.85 to make it whole if the Final Judgment were vacated. (Pa40, Pa34). On April 15, 2024, the Plaintiff filed a cross-motion to discharge the Defendant's lis pendens and for the imposition of sanctions. (T4-14).

On April 26, 2024, the trial court entered two orders, which denied Defendant's motion for reconsideration. (Da59). In addition, one of the April 26, 2024 trial court orders granted Plaintiff's cross-motion to discharge Defendant's lis pendens and denied Plaintiff's cross-motion for sanctions (collectively hereinafter referred to as the "April 26, 2024 Orders"). (Da60). In denying Plaintiff's cross-motion for sanctions, the trial court characterized the Defendant's motion for reconsideration almost a year after Tyler and almost a year after the decision by the Appellate Division as "a very tough pill for

anyone to swallow". T[3]26-19-23. In addition, the trial court suggested that Plaintiff renew its application for fees to the Appellate Division. T27-12-14.

On June 10, 2024, the Defendant filed a notice of appeal of the April 26, 2024 Orders. (Da62). On June 17, 2024, the Plaintiff filed a notice of cross-appeal of the April 26, 2024 order with respect to the trial court's denial of Plaintiff's cross-motion for sanctions. (Pa155). On June 19, 2024, Plaintiff served the Defendant and his counsel with a frivolous litigation letter pursuant to R. 1:4-8 and N.J.S.A. 2A:15-59.1 as a demand that the Defendant and his counsel withdraw the frivolous second appeal. (Pa153).

The Defendant's continued prosecution of his frivolous claims has caused the Plaintiff to incur additional attorney's fees and costs in the sum of $7,486.40 since the Plaintiff's service of the frivolous litigation letter on June 17, 2024 and in response to the Defendant's second notice of appeal. (Pa159). In light of the foregoing, and for the reasons set forth more fully hereinbelow, the trial court's order denying Defendant's motion for reconsideration be affirmed, and that an order granting the Plaintiff's cross-appeal be entered. In addition, the Plaintiff requests entry an award of attorney's fees and costs in

[3] T refers to the transcript of the hearing on the Defendant's motion for reconsideration and the Plaintiff's cross-motion to discharge lis pendens and for sanctions dated April 26, 2024.

the sum of $14,324.40 for the Defendant's frivolous prosecution of the second motion for reconsideration and the instant appeal.

LEGAL ARGUMENT

I. THE TRIAL COURT'S ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION MUST BE AFFIRMED BECAUSE THE ORDER ENTERED BY THE APPELLATE DIVISION ON JUNE 8, 2023 IN DOCKET NO. A-1982-22 IS THE LAW OF THE CASE.

First and foremost, the Defendant's appeal of the trial court's April 26, 2024 order denying the Defendant's motion for reconsideration should be affirmed because the trial court properly denied the motion for reconsideration based upon its lack of jurisdiction to modify or vacate the findings of the Appellate Division. Likewise, Plaintiff's cross-appeal should be granted because the Defendant's continued vindictive prosecution of his frivolous claims warrants the imposition of sanctions.

A trial court's determination and its decision will be left undisturbed, absent a clear abuse of discretion. Deutsche Bank Trust Co. Ams v. Angeles, 428 N.J. Super. 315, 319 (App. Div. 2012). An abuse of discretion occurs when a decision is "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Iliadis v. Wal-Mart Stores, Inc., 191 N. J. 88, 123, 922 A.2d 710 (N.J. 2007) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571, 796 A.2d 182 (N.J. 2002)).

In the within matter, it is indisputable that the trial court lacked jurisdiction to consider the Defendant's second motion for reconsideration after the June 8, 2023 Order and Opinion from the Appellate Division, which established the "law of the case". It is well-settled that after the filing of a notice of appeal, a trial court lacks jurisdiction to act further in a matter unless directed to do so by an appellate court, or jurisdiction is reserved by statute or court rule. Rolnick v. Rolnick, 262 N.J. Super. 343, 365-66, 621 A.2d 37 (App. Div. 1993); Manalapan Realty v. Township Committee, 140 N.J. 366, 376 (1995) (The ordinary effect of the filing of the notice of appeal is to deprive the court below of jurisdiction to act further in the matter under appeal unless directed to do so by the appellate court).

In the within matter, the Defendant's request to seek reconsideration of the "law of the case" created by the Appellate Division was inappropriate. The "law-of-the-case" doctrine is applicable where an issue has been litigated and decided during the course of a particular case. United States v. U.S. Smelting Refin. & M. Co., 339 U.S. 186, 198, 70 S. Ct. 537, 94 L. Ed. 750 (1950). The "law of the case" doctrine provides that a court should respect the decision of a higher court in the same controversy. Lombardi v. Masso, 207 N.J. 517, 538 (2011). The order and opinion from the Appellate Division become the law of

the case and require conforming judicial action by the trial court. In re Sanford Fork & Tool Co., 160 N.J. 247, 16 S. Ct 291, 40 L.Ed. 414 (1895).

Trial courts have a duty to obey the decision of the Appellate Division precisely as written. Flanigan v. McFeely, 20 N.J. 414, 420 (1956). "The mandate is a judicial precept that must be enforced as written. Relief from its directions, even though manifestly erroneous, can be had only in the appellate court whose judgment it is." In Flanigan, the New Jersey Supreme Court opined:

> The subordination of the inferior tribunal is of the very essence of the appellate function; the mandate is the process directed to the execution of the appellate judgment, and is therefore a command to be obeyed. The reinvestiture of jurisdiction in the inferior tribunal is in consonance with that judgment, and qualified accordingly.

Flanigan at 421. An opinion from the Appellate Division is binding on all parties in the case in which the opinion was rendered. Eherenstorfer v. Div. of Public Welfare, 196 N.J. Super. 405, 411 (App. Div. 1984). Likewise, it is binding on the court whose opinion is being reviewed. Tomaino v. Burman, 364 N.J. Super. 224, 232-234 (App. Div. 2003), certify. den. 179 N.J. 310 (2004). Trial judges are bound to follow the rulings and orders of the Appellate Division and are not free to disregard them. Kosmin v. New Jersey State Parole Bd., 363 N.J. Super. 28, 40, 830 A.2d 914, 921-22 (App. 2003). "Trial judges are privileged to disagree with the pronouncements of appellate courts;

the privilege does not extend to non-compliance." Reinauer Realty Corp. v. Borough of Paramus, 34 N.J. 406, 415 (1961).

In the within matter, the Defendant already filed an appeal of the order denying his motion to vacate the final judgment and the order denying his first motion for reconsideration. The Appellate Division affirmed both orders on June 8, 2023. The June 8, 2023 Order and Opinion from the Appellate Division recognized that, "[t]he record is also bereft of any evidence or reason that defendant waited eighteen months to file a motion to vacate final judgment." Kemp at 12. It further emphasized that the Defendant never demonstrated that he had the ability to satisfy the tax lien, or provide a certification explaining or substantiating his claim that he suffered an alleged "severe hardship". Id. at 13. Importantly, the Appellate Division did not remand the matter back to the lower court for further proceedings, despite the U.S. Supreme Court's pronouncement in Tyler. Thus, the Defendant's only recourse was to file a motion for reconsideration before the Appellate Division pursuant to R. 2:11-6, which was required to be made within ten (10) days after entry of the June 8, 2023 order and opinion. In the alternative, the Defendant could have petitioned the New Jersey Supreme Court for certification within 20 days of the June 8, 2023 order and opinion pursuant to R. 2:12-3. However, both deadlines elapsed more than 1 year ago.

Instead of seeking permissible remedies enumerated hereinabove, the Defendant filed a second bad faith motion for reconsideration in order to stymie Plaintiff's right to sell the Property and to needlessly increase Plaintiff's attorney's fees and costs without regard to the lack of a procedural or legal basis. In fact, the trial court recognized the Defendant's disingenuous intentions by stating:

> I can't – do not understand if it was such a slam dunk or guaranteed result, why it took from the Appellate Division decision being released on June 8, 2023, almost a year post Tyler, why it's being brought almost a year later. I think this is another mechanism of delay, which I am not going to consider.

T18-5-10. In addition, the trial court remarked that the Defendant was in the same position as he was when the Appellate Division upheld the trial court's order the first time. T17-24. Clearly, the trial court lacked jurisdiction and authority to upend the Final Judgment since the decision from the Appellate Division was the "law of the case" that the trial court was obligated to obey as written. As such, the trial court did not abuse its discretion by holding that it lacked the authority to modify and/or vacate the findings of the Appellate Division. T18-11-15.

Consequently, the trial court's order denying Defendant's motion for reconsideration must be affirmed because there was no cognizable basis upon which the trial court could have granted Defendant's second motion for

reconsideration of the four (4) year old final judgment after the conclusion of his first appeal. As such, the trial court's order denying Defendant's motion for reconsideration should be affirmed.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BECAUSE THE DEFENDANT'S MOTION FOR RECONSIDERATION LACKED MERIT.

The truth is that the Defendant's blatantly obstructive appeal of the trial court's order denying his second motion for reconsideration amounts to an end-run around his failure to seek timely reconsideration of this Court's June 8, 2023 Order and Opinion as required by R. 2:11-6. Thus, the Defendant's attempt to bootstrap the trial court's order as a substitute for a timely motion for reconsideration under R. 2:11-6 should not be countenanced by the Court. As such, the trial court did not abuse its discretion because the Defendant's motion for reconsideration was (a) untimely, (b) did not meet the reconsideration standard, and (c) was not an "exceptional situation" as required by R. 4:50-1(f).

A. The trial court's order denying Defendant's second motion for reconsideration should be affirmed because the Defendant failed to meet the reconsideration standard.

Notwithstanding the trial court's inability to issue an opinion contrary to the July 8, 2023 order and opinion from the Appellate Division, Defendant's Motion for Reconsideration was properly denied since he failed to meet the

standard for same. Motions for reconsideration are governed by Rule 4:49-2 which requires that it be made within 20 days after service of the judgment or order. R. 4:49-2. The proper object of such a motion is to correct a court's error or oversight, and not to "re-argue [a] motion that has already been heard for the purpose of taking the proverbial second bite of the apple." State v. Fitzsimmons, 286 N.J. Super. 141, 147 (App. Div. 1995), certif granted, remanded on other grounds, 143 N.J. 482 (1996). A motion based on new legal arguments that were not presented to the court in the underlying motion is properly denied. Medina v. Pitta, 442 N.J. Super. 1, 18 (App. Div.) certify. den. 223 N.J. 555 (2015).

In this case, the Defendant's second motion for reconsideration was indisputably untimely since the motion was filed four (4) years after the final judgment, three (3) years after the court denied his first motion to vacate final judgment and first motion for reconsideration, and nine (9) months after the Appellate Division affirmed the order denying his motion to vacate final judgment and the order denying his first motion for reconsideration. Likewise, the trial court held that the motion for reconsideration seeking relief from the Appellate Division's Order and Opinion, brought almost one (1) year post Tyler, was a mechanism of delay and not appropriate for reconsideration. T18-

6-10. As such, the trial court's order denying Defendant's second motion for reconsideration should be affirmed.

Furthermore, the Defendant failed to meet the standard for reconsideration since his second motion for reconsideration presented the same arguments that were, or could have been, presented to the trial court and the Appellate Division in the first instance. Similarly, the trial court's order denying Defendant's motion for reconsideration should be affirmed because the June 20, 2020 Final Judgment could not be vacated under R. 4:50-1(f) as an "exceptional situation".

Here, the Appellate Division already denied the Defendant's request for relief pursuant to R. 4:50-1(f) as follows:

> [W]e conclude the court here did not exceed its discretion in refusing to vacate the judgment based on Rule 4:50-1(f). Contrary to defendant's arguments, he did not demonstrate an ability to 'reverse the merits of the default judgment' or that he had the ability to satisfy the tax sale certificate. We reiterate defendant never filed a certification detailing the alleged 'severe hardship' he experienced the past five years, and he provided no proof to substantiate his claim. Moreover, defendant did not certify as to why he waited eighteen months to move for relief and failed to provide competent proof he had the funds necessary to redeem the certificate.

Kemp at 12-13. The Court further held, "Defendant's arguments supporting his claim for relief under Rule 4:50-1(f) are devoid of any showing 'a grave

injustice would occur' if relief from the final judgment is not granted." Kemp at 13.

Likewise, in addressing the Defendant's request for equitable relief at the oral argument on Defendant's post-appellate motion for reconsideration, the trial court remarked the following:

> On top of these are the statements, which I haven't been able to process, is that you believe your client is losing equity. There is nothing here to support that statement, other than surmised or bold face allegations with no supporting documentation. And two, that he has the money. And three, that the final judgment that was entered four years ago that was affirmed, this court has the authority to vacate.

12T-9-17. In light of the foregoing, and for the reasons enumerated in the well-reasoned opinions in the Kemp decision and by the trial court, the order denying Defendant's second motion for reconsideration should be affirmed.

B. Defendant's March 5, 2024 Motion for Reconsideration of the June 8, 2023 Order and Opinion from the Appellate Division was also Untimely Pursuant to R. 4:50-2.

Notwithstanding Defendant's inability to satisfy the standard for reconsideration, his motion to vacate the Final Judgment was likewise time-barred pursuant to R. 4:50-2, which requires that the motion shall be made within a reasonable time, and for reasons (a), (b) and (c) of R. 4:50-1 not more than one year after the judgment. Further, a motion to vacate a final judgment filed pursuant to subsections (d), (e) and (f) must be brought within a

"reasonable time". Romero v. Gold Star Distribution, 468 N.J. Super. 274, 295-296 (App. Div. 2021); See United Pacific Ins. Co. v. Lamanna's Estate, 181 N.J. Super. 149 (Law Div. 1981)(A motion to vacate a final judgment made under R. 4:50-1(d) must also be made within a reasonable time, even in circumstances where an order is void).

In the instant matter, this Court already determined that the Defendant was time-barred from seeking relief from the June 29, 2020 Final Judgment. Specifically, this Court previously remarked the following:

> Defendant claims he presented a reasonable explanation for the delay in filing his motion. He contends that he 'had funding available after extraordinary circumstances prevented him from satisfying the tax [sale] certificate sooner.' Despite that representation in defendant's merits brief, and before the motion court, he produced no legally competent evidence to support his contention.
>
> ....
>
> Moreover, defendant did not certify as to why he waited eighteen months to move for relief and failed to provide competent proof he had the funds necessary to redeem the certificate.

Kemp at 10, 13. Certainly, lodging the same arguments nearly four (4) years subsequent to the Final Judgment cannot generate a different result. As enumerated in the trial court's opinion, if the Defendant was not satisfied with the Appellate Division's Order and Opinion, then his only recourse was to file a motion for reconsideration under R. 2:11-6. T15-1-8.

In addition, the trial court recognized that the Defendant and Mr. Whiteman pursued the baseless motion, even though they knew that the motion for reconsideration should have been brought before the Appellate Division. T6-17-19. However, since the Defendant was time-barred from filing a timely motion under R. 2:11-6, he deviously requested that the trial court reconsider the Appellate Division's Order and Opinion in order to obtain an appealable order and thwart the time limitation imposed by R. 2:11-6. As such, the order denying Defendant's second motion for reconsideration should be affirmed.

C. The issuance of the Tyler decision on May 25, 2023, does not provide a basis upon which the Defendant can file a motion for reconsideration of the June 8, 2023 Kemp decision 9 months later.

Lastly, affirming the April 26, 2024 Order denying reconsideration is appropriate because the Defendant is prohibited from asserting arguments related to Tyler since he failed to raise them before the Appellate Division. Since Tyler was decided on May 25, 2023, and the Appellate Division did not issue its opinion until June 8, 2023, the Defendant could have filed a supplemental submission asserting his Tyler arguments pursuant to R. 2:6-11(d)(1). However, Defendant's Tyler claims are deemed waived since they were not raised on appeal. See Green Knight Capital, LLC v. Calderon, 469 N.J. Super. 390, 396 (App. Div. 2021)("[a]n issue not briefed on appeal is deemed waived").

Moreover, although Defendant was precluded from raising new legal arguments in his untimely second and post-appeal motion for reconsideration, neither Tyler nor Roberto provide the Defendant with automatic entitlement to relief from the four (4) year old Final Judgment. See 257-261 20th Ave. Realty, LLC v. Alessandro Roberto, A-3315-21 (N.J. App. Div. Dec. 4, 2023). First, there are numerous other cases decided by the Appellate Division after Roberto where the Court did not vacate the final judgment or remand despite the pendency of such matters "in the pipeline" at the time Tyler was decided.[4]

In Poppy Holdings v. Ruslan Milov, just decided by the Appellate Division on October 2, 2024, the defendants who lost title to their property by virtue of a final judgment of tax foreclosure entered on February 3, 2022, sought relief from the Appellate Division because of the Roberto and Tyler decisions. Poppy Holdings v. Ruslan Milov, A-2549-22 (N.J. App. Div. Oct. 2, 2024). In that case, the foreclosed property owners asserted that they suffered a forfeiture of "substantial equity" and that their case was "in the pipeline" at the time of the Tyler decision. Poppy Holdings at 10. In declining to provide

[4] See Fidelity Asset Management, LLC v. Lore Smith, A-1982-22, (N.J. App. Div. March 4, 2024); US Bank Cust for PC7 Firstrust v. Block 5.04, Lot 16, A-2384-21, (N.J. App. Div. Dec. 15, 2023); US Bank Cust/Procap8/MgtII v. Block 268, Lot 7, No. A-2193-21 (N.J. App. Div. Jan. 18, 2024)(The Appellate Division did not upend the final judgment of tax foreclosure because of Tyler in the post-Roberto pipeline case).

the defendants with relief from the final judgment, despite the status of their case "in the pipeline", the Appellate Division held the following:

> Having found as a threshold matter that vacating the final judgment was not warranted, because service of process was proper, we need not address defendants' supplemental argument seeking the application of pipeline retroactivity of the United States Supreme Court's decision in Tyler, 598 U.S. at 631, in accordance with our decision in Roberto, 477 N.J. Super. at 349. We note defendants raised before the trial court the application of equitable principles but did not fully establish their loss of property equity before the court. **As we conclude the court had jurisdiction to enter final judgment against defendants, pipeline retroactivity is not afforded to defendants.**

Poppy Holdings at 21 (emphasis supplied).

Similarly, on October 16, 2024, the Appellate Division just declined to vacate 2 final judgments of tax foreclosure entered in October 2017 and August 2019. City of Newark v. GML, LLC, Docket No. A-1939-22 (N.J. App. Div. Oct. 16, 2024). In that case, the defendant filed a motion to vacate the final judgments on June 13, 2022 wherein it contended that it was never served with the complaint and was unaware of the foreclosure action. Id. at 4. The defendant's motion to vacate final judgment was denied on February 15, 2023. Id. at 4. The defendant requested relief from the final judgments pursuant to the Tyler decision on appeal. Id. at 7. In its post-Roberto analysis of defendant's Tyler argument, the Appellate Division opined, in pertinent part:

> Without anything in the record to establish surplus equity, we see no basis upon which to vacate the judgment. Cf. 257-261 20th Ave.

> Realty, LLC v. Roberto, 477 N.J. Super. 339, 363, 366 (App. Div. 2023). Moreover, we do not read Tyler or Roberto as precluding foreclosure sales to pay off outstanding tax liabilities.

Id. at 8. As such, the Appellate Division affirmed the trial court's order denying the defendant's motion to vacate the final judgments.

Consequently, although the Appellate Division imposed pipeline retroactivity in Roberto, it is apparent that the Court is not compelled to vacate or otherwise provide a defendant with relief from a final judgment of tax foreclosure in all pipeline cases based upon the facts and circumstances of the particular case. Likewise, Roberto does not afford Defendant relief from the law of case established by the Appellate Division since the trial court indisputably had jurisdiction to enter the June 29, 2020 final judgment.

Lastly, analogous to the defendants in Poppy Holdings and City of Newark, although the Defendant raised equitable principles before the trial court, he never fully established a loss of property equity before the trial court. Contrariwise, the record establishes that the Plaintiff would be owed in excess of the approximate sum of $268,803.85 to make it whole if the final judgment were vacated and the Property was encumbered by mortgages in the total approximate amount of $295,000.00. Thus, the total debts encumbering the Property would exceed the sum of $563,803.85 if the final judgment were vacated. As such, the trial court's order denying Defendant's motion for

reconsideration should be denied for the same reasons articulated by this Court in Poppy Holdings. Id. at 21.

Furthermore, the Defendant's reliance on the Johnson opinion, which was issued 1 day after the Kemp decision, is nonsensical. PC7REO, LLC v. Joanne Johnson, A-1274-21 (N.J. App. Div. Jun. 9, 2023). First, the Appellate Division did not vacate the Final Judgment in Johnson; rather, it vacated the order denying the former property owner relief from the final judgment pursuant to R. 4:50-1(f). Thus, the Appellate Division left the final judgment intact after its consideration of Tyler. Contrariwise, even knowing Tyler had been issued, the Appellate Division in this case affirmed the trial court's order denying Defendant's motion to vacate final judgment and motion for reconsideration. Of course, the Appellate Division could have remanded this case back to the trial court for consideration in light of Tyler, but it declined to do so, despite its awareness of Tyler as evidenced by the Johnson case. Instead, it specifically stated, "we conclude the court here did not exceed its discretion in refusing to vacate the judgment based on R. 4:50-1(f)." Kemp at 12. As such, affirmance of the April 26, 2024 order is appropriate because the Defendant's untimely new legal argument related to Tyler did not provide a mechanism upon which the trial court could grant reconsideration.

III. PLAINTIFF'S CROSS-APPEAL SHOULD BE GRANTED BECAUSE THE MERITLESS MOTION AND APPEAL WERE FILED IN BAD FAITH AND LACKED A COGNIZABLE BASIS UPON WHICH RELIEF COULD BE GRANTED. (T18-19).

The Defendant and Mr. Whiteman's deplorable prosecution of the motion for reconsideration, recording of the lis pendens, and institution of the appeal is (1) frivolous, (2) generating a cloud on Plaintiff's title to the Property, (3) designed to hamper Plaintiff's rights with respect to the Property, and (4) needlessly causing Plaintiff to incur extensive litigations costs. It is apparent that the filing of Defendant's motion for reconsideration was a flagrant attempt to further Defendant's terroristic threats without any legal basis. Further, such threats were brought to Mr. Whiteman's attention by Plaintiff's counsel; yet, Mr. Whiteman refused to withdraw the untenable motion. Thus, Mr. Whiteman's continued prosecution of the motion was unjustifiable. As such, the trial court should have granted Plaintiff's cross-motion for sanctions and awarded Plaintiff its reasonable attorney's fees and costs incurred in defending frivolous claims filed by Defendant and his counsel. Likewise, the filing of the instant (second) appeal, which continues the Defendant's and Mr. Whiteman's vexatious conduct, warrants the imposition of sanctions.

As Mr. Whiteman is aware, there was no cognizable basis upon which the trial court could have vacated the 4 year old Final Judgment as a result of a

post-appeal second untimely motion for reconsideration. Thus, the prosecution of the motion and appeal is a clear attempt to retaliate against the Plaintiff, is wholly frivolous and amounts to a violation of the New Jersey Rules of Professional Conduct by Mr. Whiteman and frivolous litigation by the Defendant and Mr. Whiteman in violation of R. 1:4-8.

The Rules of Professional Conduct also require truthfulness in statements made by attorneys. See RPC 3.1, RPC 3.3, RPC 4.1. Additionally, pursuant to R. 1:4-8, which governs frivolous litigation, "the procedures prescribed by this rule shall apply to the assertion of costs and fees against a party other than a pro se party pursuant to N.J.S.A. § 2A:15-59.1." Rule 1:4-8(d) permits the court to impose sanctions on an attorney who has filed a frivolous pleading, written motion or other paper. Further, N.J.S.A. 2A:15-59.1 permits prevailing parties in a civil action to apply for attorney's fees and litigation costs "if the judge finds at any time during the proceedings or upon judgment that a complaint, counterclaim, cross-claim or defense of the non-prevailing person was frivolous." The statute is "designed to deter and ultimately eliminate the filing of non-meritorious claims and defenses." Somerset Trust Co. v. Sternberg, 238 N.J. Super. 279, 285 (Ch. Div. 1989). Pursuant to N.J.S.A. § 2A:15-59.1, in order to find that a defense was frivolous, the defense must be commenced, used or continued in bad faith,

solely for the purpose of harassment, delay or malicious injury. N.J.S.A. § 2A:15-59.1(b)(1) Also, a defense will be considered frivolous if the person filing the motion knew, or should have known that the motion was filed without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law. N.J.S.A. § 2A:15-59.1(b)(2).

The second prong has been interpreted to put "nonprevailing parties on notice that they will be held to both a subjective and objective standard regarding their level of knowledge." Chernin, 244 N.J. Super. at 384. Such a standard would thus deter plaintiffs from engaging in a "shotgun approach" to litigation and suing anyone and everyone for anything and everything. Id. The appropriate method for asserting one's rights under the Frivolous Claims Statute is filing a motion. Evans v. Prudential Property and Casualty Insurance Co., 233 N.J. Super. 652, 664 (1989). "A motion carries with it none of the disadvantages of a counterclaim or crossclaim. It can be filed in a timely and not premature manner, immediately following the establishment of the movant as a prevailing party." Id.

In the within matter, the Plaintiff served the Defendant and Mr. Whiteman with 2 frivolous litigation letters. First, they were served with a frivolous litigation letter on March 12, 2024 upon Plaintiff's receipt of the

belated and second motion for reconsideration. Then, the Plaintiff served the Defendant and his counsel with a second frivolous litigation letter on June 10, 2024 after the institution of the second appeal, and based on the suggestion of the trial court that the Appellate Division review Plaintiff's request for the imposition of sanctions.

Certainly, the refusal of Mr. Whiteman and the Defendant to withdraw the motion and voluntarily dismiss the instant appeal mandates the imposition of sanctions against both individuals since the motion for reconsideration and second appeal were solely filed in vengeance, as an obstructive measure, and without any basis in law or in equity. Specifically, Mr. Whiteman and the Defendant filed the motion to seek revenge against Plaintiff despite the following: (1) Plaintiff prevailed on Defendant's first untimely motion to vacate final judgment; (2) Plaintiff prevailed on Defendant's first untimely motion for reconsideration; (3) Plaintiff prevailed in Defendant's appeal; (4) the trial court lacks jurisdiction to reconsider the holding from the Appellate Division; (5) the review by the Appellate Division of the Kemp June 8, 2023 decision is untimely; and (6) Defendant and his counsel refused to withdraw the motion after receipt of the frivolous litigation letter dated March 12, 2024.

Despite the foregoing, Defendant and his counsel continued to harass Plaintiff and cloud its title to the Property by filing the second motion for

reconsideration and the second appeal in bad faith. Consequently, the Defendant and Mr. Whiteman's false statements of fact and law, and frivolous motion and appeal should be viewed and asserted with R. 1:4-8, RPC 3.1, RPC 3.3 and RPC 4.1 in mind. As such, the court should reverse the order of the trial court denying Plaintiff's cross-motion for sanctions.

Of course, Mr. Whiteman and the Defendant knew that their actions would preclude a sale of the Property by the Plaintiff. In addition, the Plaintiff continues to incur attorney's fees and costs to defend its title to the Property against Defendant's vengeful litigation, which Mr. Whiteman has shamelessly filed. Consequently, for the reasons set forth herein, Plaintiff requests that (1) the order denying Plaintiff's cross-motion for sanctions be reversed, (2) sanctions be imposed against the Defendant and Mr. Whiteman for Plaintiff's attorney's fees and costs incurred in defending the motion and filing the cross-motion to discharge lis pendens in the sum of $6,838.00; and (3) sanctions be imposed upon the Defendant and Mr. Whiteman in the additional sum of $7,486.40 representing Plaintiff's attorney's fees and costs in defending the second appeal.

CONCLUSION

In light of the foregoing, Plaintiff respectfully requests that the trial court's order denying Defendant's motion for reconsideration be upheld, that

the order denying Plaintiff's cross-motion for the imposition of sanctions be reversed, and that judgment be entered against the Defendant and Mr. Whiteman in the total sum of $14,324.40 representing Plaintiff's attorney's fees and costs in defending the frivolous motion for reconsideration and appeal.

Dated: 10/29/24

GARY C. ZEITZ, L.L.C.

ROBIN I. LONDON-ZEITZ
Attorney for Plaintiff

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003105-23-T1

PRO CAP 4 LLC,FIRSTTRUST BANK, BY ITS CUSTODIAN US BANK

PLAINTIFF-RESPONDENT,

V.

JOHN T. KEMP A/K/A JOHN KEMP; DENISE CHILINSKAS; MR./MRS.KEMP, Spouse of JOHN KEMP; MR./MRS. CHILINSKAS, spouse of DENISE CHILINSKAS; VIST BANK s/b/m/t MADISON BANK a division of Leesport Bank; GELT FINANCIAL CORPORATION; JOHN DOE AND JANE DOE; JOANNE AUNGST; MR./MRS. AUNGST, spouse of Joanne Aungst

DEFENDANTS-APPELLANTS.

CIVIL ACTION

ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION,CAMDEN COUNTY

SAT BELOW:
HONORABLE SHERRI L. SCHWEITZER,P.J.CH.

TRIAL COURT DOCKET NO.:
F-24686-18

CROSS RESPONDENT BRIEF

FOR

APPELLANT JOHN T. KEMP

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PRELIMINARY STATEMENT

Plaintiff's cross motion brief only further highlights how important it is for this specific case to be heard by the Appellate Court not just for the sake of John's family but for all homeowners. Plaintiff claims the matter is frivolous because Plaintiff fails to recognize how significantly the law has changed. We must recognize this change and that many tax foreclosure judgments in New Jersey were simply unconstitutional. Although this case did fall through the cracks as stated herein, once reviewed on the merits, we are confident the Court will apply Tyler and vacate John's judgment. Plaintiff's brief, as expected, provides no logical basis to dispute that vacating judgment is mandated. Plaintiff in fact cites case law in the cross appeal showing that the Appellate Court has confirmed that where there is surplus equity, there is basis to vacate judgment in light of Tyler. This seems to be agreed upon. Plaintiff however argues that applying Tyler is not mandated here because Plaintiff alleges John did not establish proof of surplus equity. This is where the Plaintiff is wrong on both points. First, in consideration of Tyler, retaining even one dollar of equity above the amount of the tax debt without just compensation is unconstitutional and vacating judgment is mandated. Second, The Tyler court determined surplus equity based upon the property value in relation to the tax debt, nothing else. This means any amount above the tax debt requires just compensation otherwise judgment is unconstitutional. This is not subject to any

other New Jersey law governing the calculation of surplus equity. It was never disputed that the house is worth significantly more than the tax debt. Further, the house is worth more than the tax debt alleged by Plaintiff even to this day and even with Plaintiff's unconscionable calculations. When the foreclosure judgment was entered (despite John fighting for permission to redeem), the amount due on the tax sale certificate was $45,310.23 yet the judgment gave full ownership of John's home to the Plaintiff and the family had to vacate their home. The Court and Plaintiff did not claim there was no surplus because the home was not worth significantly more than the tax debt. This would be impossible to argue. Plaintiff instead argued inaccurately that the amount due on the mortgages/liens was higher than John's surplus equity amount and therefore there was no equity. We recognize New Jersey statutory provisions have calculated equity in a property for tax foreclosure purposes by determining whether the total unpaid balance of all liens and encumbrances against the property is equal to or greater than 92% of the fair market value of the property whereby if this condition is met, the property is deemed to have no equity. Again, the U.S. Supreme Court however made it clear that any taking of more than the amount due on the tax debt is the proper calculation for determining if the judgment is a violation of John's constitutional rights, mandating vacating judgment. Although there is no doubt that, in John's case, John had significant surplus equity in his home and debts did not exceed

equity, the U.S. Supreme Court decision in Tyler did not require an owner like John to have to demonstrate an amount of equity in relation to debts in a property for a tax foreclosure judgment, like John's, to be considered a violation of the Fifth Amendment. Although the amount of equity was a factor in the court's decision in Tyler, it was not the primary legal ground for vacating the judgment. The decision in Tyler is based simply upon the principle that the government (or the tax foreclosure) cannot take more than what is owed in taxes without providing just compensation. Therefore, since all parties agree the home fair market value was in excess of $45,000.00 at the time of the taking, the judgment was unconstitutional despite any other factors, lien or mortgage debts. It is therefore the Plaintiff's argument that lacks merit. No just compensation was provided for the $300,000 in equity lost by John and his family and the matter was not even addressed by the Court in the prior opinion. The Plaintiff made out like a bandit at John and his family's expense. John was left with no home and no money to live or pay debts. This judgment and the NJ tax sale law violated John's constitutional rights as confirmed by the US Supreme Court in Tyler with John's case still in the pipeline. When the prior appellate decision failed to address Tyler and the trial court refused to rule on the motion for reconsideration based upon jurisdiction, as stated previously, John's case fell through the cracks and the Court has not yet ruled on the issue of whether to apply Tyler to John's case.

PROCEDURAL HISTORY

On October 18, 2016, Plaintiff predecessor Pro Cap 4 purchased tax sale certificate number 16-00025 for $2,330.07. (Da21) On December 17, 2018, Pro Cap 4 filed a foreclosure complaint. (Da8) Plaintiff filed an amended complaint on February 25, 2019. (Da8) John filed a contested answer on April 1, 2019. (Da22) May 1, 2019 John filed chapter 13 petition for bankruptcy (which was dismissed four months later.) (Da8) On June 21, 2019 the Court granted Plaintiff Pro Cap 4 summary judgment, struck John's answer and entered default. (Da8-Da9) The Court set February 28, 2020 as the last date for redemption. (Da9) Plaintiff filed a motion for final judgment on May 24, 2020 (Da9) and the Court entered final judgment in favor of Plaintiff on June 29, 2020 barring John's right to redeem and vesting title to John's property over to Plaintiff. (Da1) December 2, 2021 John filed a motion to vacate judgment. (Da9) On January 7, 2022 the Court denied the motion finding that John failed to satisfy Rule 4:50-1 noting the judgment was over a year old, John did not certify he had funds to redeem and circumstances were not compelling. (Da11) The Court denied John's request to carry the motion to finalize the loan and redemption due to the fact that the lender did not file a motion to intervene (despite the fact that same is not required by law.) (Da12) On January 11,

2022 the Court entered Plaintiff's writ of possession. (Da12) On January 11, 2022 John filed Chapter 7 petition for bankruptcy which was dismissed February 28, 2022. (Da12) On January 31, 2022 John filed a motion for reconsideration and informed the Court that John had the funds of $111,095.40 to redeem the tax sale certificate (Da12) On February 18, 2022 the Court denied the motion for reconsideration stating there "was nothing new" and the judgment was 18 months old. (Da13) John filed an appeal arguing that the Court errored in entering judgment and again in denying the motion to vacate and motion for reconsideration. (Da14) On June 8, 2023, the Appellate Court denied the appeal stating there was not adequate proof that John's loan was approved and John did not properly certify and show proof to substantiate his hardships and did not certify as to why he waited 18 months. (Da14) However on May 25, 2023 the US Supreme Court's decision in Tyler v. Hennepin County, 598 U.S. 631, 143 S. Ct. 1369, 215L.Ed. 2d 564 (2023) declared a taxing authority's confiscation of a property owner's equity violated the Fifth Amendment Takings Clause. (Da29) As the Court and all parties are aware, the NJ Appellate Division in light of the US Supreme Court decision in Tyler v. Hennepin County has made it clear that it is unconstitutional for a tax lien holder, who is already earning hefty interest, to also steal an owner's equity in their homes. Both the NJ Supreme Court and State Legislature recognized the holding in *Tyler* by introducing legislature amending

the TSL and implementing the Notice to the Bar. (Da35) Application of Tyler to this matter which was pending and in the pipeline is mandated. 257-261 20th Ave. Realty LLC v. Roberto 2023 N.J. Super LEXIS 121. (Da58) Upon realizing same, John filed motion for reconsideration March 5, 2024 (Da20) and the court denied same for lack of jurisdiction on April 26, 2024 (Da59). John filed this appeal on June 10, 2024.(Da62) New law was established July 10, 2024 to set procedures to protect homeowners surplus equity however same did not exist at the time of the foreclosure judgment in this matter. (Da79)

STATEMENT OF FACTS

Defendant John Kemp (hereinafter "John") has owned property located at 1316 Kings Hwy, Haddon Heights, NJ (hereinafter the "property" or "John's home") since May 31, 2006. (Da6) John spent his hard-earned money and worked hard to renovate the property from a three bedroom to a four bedroom house for his family's future and retirement. (Da21) John subsequently unfortunately over the years suffered severe hardships including but not limited to divorce, bankruptcy, undergoing multiple surgeries, suffering from death in the family and job loss as a result of the pandemic. (Da21) Plaintiff filed a motion for final judgment on May 24, 2020 (Da9) and the Court entered final judgment in favor of Plaintiff on June 29, 2020 barring John's right to redeem and vesting title to John's property over to

Plaintiff. (Da1) John was then removed from his home after Plaintiff's ejectment action. (Da22) As stated above in the procedural history, after years of John fighting to save his home and asking to be permitted to redeem, on June 8, 2023, the Appellate Court denied John's appeal. (Da5) However on May 25, 2023 the US Supreme Court's decision in Tyler v. Hennepin County, 598 U.S. 631, 143 S. Ct. 1369, 215L.Ed. 2d 564 (2023) declared a taxing authority's confiscation of a property owner's equity violated the Fifth Amendment Takings Clause. (Da29) As the Court and all parties are aware, the NJ Appellate Division in light of the US Supreme Court decision in Tyler v. Hennepin County has made it clear that it is unconstitutional for a tax lien holder, who is already earning hefty interest, to also steal an owner's equity in their homes. Both the NJ Supreme Court and State Legislature recognized the holding in *Tyler* by introducing legislature amending the TSL and implementing the Notice to the Bar. (Da35) Application of Tyler to this matter which was pending and in the pipeline is mandated. 257-261 20th Ave. Realty LLC v. Roberto 2023 N.J. Super LEXIS 121. (Da58) Upon realizing same, John filed motion for reconsideration March 5, 2024. (Da20) and the court denied same for lack of jurisdiction on April 26, 2024.(Da59) John filed this appeal on June 10, 2024. (Da62) New law was established July 10, 2024 to set procedures to protect homeowners surplus equity however same did not exist at the time of the foreclosure judgment in this matter.(Da79) In this case, if judgment is not vacated

and John is not permitted to redeem the taxes, John will lose his home of many years and substantial equity he spent years building to a tax lien holder. (Da24) Under the circumstances, it would not be a just result for John to lose over $300,000.00 of John's equity for only approximately $50,000.00 in unpaid tax where the lienholder was only owed approximately $120,000.00 in tax liens with lienholder fees. (Da23-Da24) These are drastic consequences which resulted from an unconstitutional foreclosure judgment. John cannot afford to lose his home and substantial equity to an unconstitutional foreclosure. John is ready willing and able to redeem the taxes upon entry of order permitting same. (Da24) In said circumstance, the lien holder is made whole and Plaintiff will still receive all amounts due plus hefty interest on its investment and any legitimate costs incurred.

LEGAL ARGUMENTS

I. PLAINTIFF IS NOT ENTITLED TO SANCTIONS AGAINST DEFENDANT OR DEFENDANTS COUNSEL BECAUSE THERE HAVE BEEN NO FRIVOLOUS ACTIONS AND THE MOTION FOR RECONSIDERATION AND APPEAL HAVE MERIT AND WERE IN FACT NECESSARY BECAUSE JOHN'S CASE FELL THROUGH THE CRACKS AS OUTLINED IN JOHN'S APPELLATE BRIEF FILED WITH THE COURT.

A. THIS APPEAL IS NECESSARY TO GIVE THE APPELLATE DIVISION A CHANCE TO CORRECT AN UNJUST RESULT WHERE JOHN'S CONSTITIONAL RIGHTS HAVE BEEN VIOLATED. THE NEW LEGAL STANDARD SET BY THE TYLER CASE WAS NOT ADDRESSED AS PART OF THE PRIOR APPELLATE DECISION AND THE TYLER DECISION MANDATED VACATING THE JUDGMENT IN JOHN'S CASE.

As stated more specifically in the appellate brief, the landmark May 25, 2023 US Supreme Court's decision in Tyler v. Hennepin County, 598 U.S. 631, 143 S. Ct. 1369, 215L.Ed. 2d 564 (2023) declared a taxing authority's confiscation of a property owner's equity violated the Fifth Amendment Takings Clause. Governments and tax lien holders are prohibited from taking above the amount of the tax debt. Despite same, John lost over $300,000.00 in equity for approximately $50,000.00 in unpaid tax. John's appeal however was a pending case, in the pipeline, at the time of the May 25, 2023 US Supreme Court's decision in *Tyler.* As such, retroactivity is afforded and the application of Tyler was mandated and provided grounds on its own for vacating John's judgment under Rule 4:50-1(f).

However as stated in the appellate brief, the appellate division affirmed the trial court's denial of the motion to vacate judgment without applying or even mentioning Tyler. The appellate decision in John's case was entered June 8, 2023 within days of Tyler. Since the case was decided simultaneously with the decision

in Tyler, it appears the Court likely reviewed John's appeal before the Tyler decision and same was an oversight.

Since the controlling law was overlooked and the matter was decided based upon an impermissible basis, John did meet the standard for a motion for reconsideration in New Jersey. Kornbleuth v. Westover, 241 N.J. 289, Palombi v. Palombi, 414 N.J. Super. 274, Fusco v. Board of Educ. of City of Newark, 349 N.J. Super. 455.

However the trial court declined to rule on the same and opined that there was lack of jurisdiction and thus, the matter was never decided on the merits and fell through the cracks. As such, this appeal was filed to provide an opportunity for the Court to decide the matter in light of Tyler.

Although John was not aware of the Tyler decision originally since the decision was entered only days before John's prior appellate matter, when John found out about the Tyler decision, he took steps to file the motion for reconsideration as soon as possible. The motion was timely under the circumstances and the failure to file the supplemental submission originally should be forgiven to avoid an unjust result especially in consideration of the fact that the Court also did not mention the Tyler case in the opinion despite the Tyler case being the controlling law.

In addition to the fact that vacating judgment was mandated, the motion filed also included a certification of John reminding the Court of his many hardships and evidence that John was ready, willing and able to redeem upon an order permitting same.

Plaintiff claims that the Supreme Court in Malinowski v. Jacobs, 189 N.J. 345 precludes John from obtaining a loan to redeem the tax foreclosure which is inaccurate. The requirement for third party investors to intervene is to make sure buyers are paying fair market value not to tie a homeowner's hands behind their back when they are trying to redeem their tax and keep their homes from through, for example, refinance.

Under the circumstances outlined in the appellate brief filed with the court, John is entitled to have the Appellate Court address whether the Tyler decision should be applied to his case.

John has spent many years renovating and building equity in his home and after suffering through the pandemic and other serious hardships, it would be unconscionable and unlawful to deny John the right to save his home when the tax foreclosure judgment in this case is unconstitutional. The Courts have an obligation to ensure compliance with the Tyler decision and protect John's rights.

John will be greatly prejudiced if foreclosure judgment is not vacated. The severe consequences of Plaintiffs foreclosure in this case are exactly what the Supreme Courts are confirming is unlawful and have stopped.

B. THE TRIAL COURT DID NOT ERROR IN ITS DENIAL OF PLAINTIFFS CROSS MOTION FOR SANCTIONS. THE MOTION FOR RECONSIDERATION (AS WELL AS THE APPEAL) WERE NOT FILED IN BAD FAITH DESPITE THE TRIAL COURT'S DECISION NOT TO GRANT THE MOTION FOR RECONSIDERATION DUE TO JURISDICTION AND THERE WAS NO VIOLATION OF NJ RULES OF PROFESSIONAL CONDUCT.

In New Jersey, an action is considered frivolous if it meets one of two criteria. First, the action must have been commenced, used, or continued in bad faith, solely for the purpose of harassment, delay, or malicious injury. Second, the non-prevailing party must have known, or should have known, that the action was without any reasonable basis in law or equity and could not be supported by a good faith argument for the extension, modification, or reversal of existing law. Shore Orthopaedic Group, LLC v. Equitable Life Assur. Soc. of U.S., 397 N.J. Super.

614, Savona v. Di Giorgio Corp., 360 N.J. Super. 55, In re Farnkopf, 363 N.J. Super. 382.

N.J.S.A. § 2A:15-59.1 outlines these criteria and provides that reasonable litigation costs and counsel fees may be awarded to the prevailing party if the judge finds that the action was frivolous. Shore Orthopaedic Group, LLC v. Equitable Life Assur. Soc. of U.S., 397 N.J. Super. 614, Savona v. Di Giorgio Corp., 360 N.J. Super. 55, In re Farnkopf, 363 N.J. Super. 382.

However sanctions for frivolous litigation are intended to be awarded only in exceptional cases. Wolosky v. Fredon Tp., 472 N.J. Super. 315, Belfer v. Merling, 322 N.J. Super. 124, Venner v. Allstate, 306 N.J. Super. 106.

Further a violation of the Rules of Professional Conduct (RPC) in New Jersey must be established by clear and convincing evidence.

In the matter at hand, it is clear that John's case has merit and there is no evidence to support that the argument is baseless or made in bad faith. First, the Court to date has not yet addressed whether or not to apply Tyler to John's case which is the whole subject of this appeal. The prior Appellate opinion did not mention Tyler and the trial court refused to rule on the motion for reconsideration in light of Tyler because of jurisdiction. Thus, John's case fell through the cracks. Second, the briefs submitted in this case clearly outline that John's case has merit and that his judgment was unconstitutional. Third, it would be

unreasonable to find that John is acting in bad faith just to harass plaintiff and does not truly believe that he has a basis for this appeal when so many homeowners have been asking the Court for the very same relief believing they are entitled to have the Court vacate their tax foreclosure judgments based upon Tyler as well.

The merits of this case strongly support John's appeal as stated above. However, no matter how the Court rules in this appeal, there is no justification for determining the matter to be frivolous, to determine there was a violation of rules of professional conduct or to impose sanctions. The cross motion should be denied.

CONCLUSION

As stated in the appellate brief, this Court has a unique opportunity to rectify this outrageous circumstance. More specifically, since the lien holder still maintains title to the property, the Court reasonably can permit John the opportunity to redeem and pay the taxes and reimburse any reasonable expenses incurred by the lien holder. In this circumstance, the lien holder is made whole and John gets his property back along with its substantial equity. This result is exactly the purpose of a court of equity.

As such, the defendant-appellant, John T. Kemp respectfully requests that the Appellate Court deny the Plaintiffs cross motion, reverse the trial court order denying reconsideration, vacate foreclosure judgment and permit John to redeem his home. Thank you for your consideration in this regard.

Dated: December 27, 2024

Respectfully Submitted,
Brian L. Whiteman
BRIAN L. WHITEMAN, ESQ.
For the firm

PC4REO LLC	: SUPERIOR COURT OF NEW JERSEY
Plaintiff/Respondent	: APPELLATE DIVISION
vs.	: DOCKET NO. A-003105-23
JOHN T. KEMP A/K/A JOHN KEMP; DENISE CHILINSKAS; VIST BANK s/b/m/t MADISON BANK a division of Leesport Bank; GELT FINANCIAL CORPORATION; JOANNE AUNGST	: PRIOR APPELLATE DOCKET NO. A-3105-23T1 : ON APPEAL FROM: : SUPERIOR COURT OF NEW JERSEY : CAMDEN COUNTY
Defendant/Appellant	: CHANCERY DIVISION : Docket No.: F-24686-18 : SAT BELOW: : HON. SHERRI L. SCHWEITZER, P.J.CH.

PLAINTIFF/RESPONDENT PC4REO, LLC'S REPLY BRIEF AND APPENDIX

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiff relies upon and incorporates by reference the Statement of Facts and Procedural History previously submitted in its initial appellate brief.

LEGAL ARGUMENT

I. NEITHER TYLER NOR ROBERTO PROVIDE THE DEFENDANT WITH AUTOMATIC ENTITLEMENT TO RELIEF FROM THE FOUR (4) YEAR OLD FINAL JUDGMENT AS CONFIRMED BY THE NEW JERSEY SUPREME COURT.

Although Defendant was precluded from raising new legal arguments in his untimely second and post-appeal motion for reconsideration, it is abundantly clear that neither Tyler nor Roberto provide the Defendant with automatic entitlement to relief from the four (4) year old Final Judgment. See Tyler v. Hennepin County, 598 U.S. 631 (2023) and 261 20th Ave. Realty v. Allesandro Roberto, A-29-23 (N.J. Jan. 9, 2025)(Pa162). In fact, Defendant's main point of contention has been addressed and dismissed by the New Jersey Supreme Court. Although in Roberto, the New Jersey Appellate Division stated that the application of Tyler separately mandated grounds to vacate the final judgment, 257-261 20th Ave. Realty, LLC v. Alessandro Roberto, 477 N.J. Super. 339 (App. Div. 2023), on January 9, 2025, the New Jersey Supreme Court declined to adopt the portion of the Appellate Division decision stating that Tyler provided an independent basis for relief from a final

judgment. 261 20th Ave. Realty v. Allesandro Roberto, A-29-23 *18 (N.J. Jan. 9, 2025)(Pa162). Consequently, the Court vitiated Defendant's argument that Tyler alone provides a basis to vacate the Final Judgment. Likewise, the United States Supreme Court in Tyler did not vacate the final judgment of foreclosure, nor did it restore Geraldine Tyler with title to the property. Instead, it determined that Geraldine Tyler had plausibly "stated a claim under the Takings Clause" that entitled her to just compensation. Id. at 639, 647.

In this case, there is no dispute that Tyler is applicable to the within matter since the matter was pending and on direct review at the time Tyler was decided. However, as confirmed by the New Jersey Supreme Court in Roberto, the application of Tyler does not entitle the Defendant with automatic relief from the final judgment. In fact, both Roberto and Tyler acknowledge that tax lienholders are authorized to enter a final judgment and recover debts they are owed. See Roberto at *34 ("[L]ienholders are entitled to recover debs they are owed –the value of tax sales certificates they purchased at public auction along with interest and related costs"); Tyler at 639 ("The County had the power to sell Tyler's home to recover the unpaid property taxes"). As such, the implication of Tyler and Roberto only afford the Defendant with standing to invoke a claim under the Takings Clause of the Fifth Amendment. Such decisions do not serve as a vehicle to upend the Final Judgment, which was not

vacated or otherwise challenged in Tyler. In light of the foregoing, the order denying Defendant's second motion for reconsideration of the four (4) year old final judgment should be upheld.

II. THE DEFENDANT HAS FAILED TO ARTICULATE THE LEGAL AUTHORITY UPON WHICH THE TRIAL COURT HAD JURISDICTION TO RECONSIDER THIS COURT'S DECISION.

Notwithstanding the lack of merit to Defendant's argument under Tyler, the Defendant's reply lacks an analysis of the trial court's decision with regard to the jurisdictional defect, which correctly held that the Kemp decision issued by this Court is the law of the case. See PC4REO, LLC v. John Kemp, A-1944-21 (N.J. App. Div. June 8. 2023). The Defendant purposefully disregards the well-settled precedent that after the filing of a notice of appeal, a trial court lacks jurisdiction to act further in a matter unless directed to do so by an appellate court, or jurisdiction is reserved by statute or court rule. Rolnick v. Rolnick, 262 N.J. Super. 343, 365-66, 621 A.2d 37 (App. Div. 1993). Thus, the trial court did not abuse its discretion because it lacked authority to reconsider the "law of the case" created by the Appellate Division. As such, the trial court's order denying Defendant's motion for reconsideration must be affirmed because there was no cognizable basis upon which the trial court could have provided relief contrary to the decision of the Appellate Division in its Kemp decision.

III. THE PROSECUTION OF THE FRIVOLOUS MOTION AND APPEAL BY THE DEFENDANT AND HIS COUNSEL IS THE CAUSE FOR THE IMPOSITION OF SANCTIONS.

The frivolous prosecution of the instant appeal is further amplified by the Defendant's respondent brief wherein he erroneously misrepresents facts and law.[1] The Defendant's repetitive and meritless assertions did not warrant the vacating of the Final Judgment on the initial motion to vacate final judgment, first motion for reconsideration or appeal, and certainly have not gained favor by reiterating same in the instant miscellany of litigation. However, it is undeniable that the Defendant and Mr. Whiteman's prosecution of the motion for reconsideration, recording of the lis pendens, and appeal is (1) frivolous, (2) generating a cloud on Plaintiff's title to the Property, (3) designed to hamper Plaintiff's rights with respect to the Property, and (4) needlessly causing Plaintiff to incur extensive litigations costs. Again, the Defendant and his counsel have failed and refused to articulate a single legal basis upon which the trial court could have conceivably had jurisdiction to reconsider the Kemp decision by the Appellate Division. Furthermore, the

[1] The Defendant's respondent brief erroneously claims that (1) the final judgment was vacated in Tyler, (2) his motion before the trial court after the appeal was timely under the circumstances, (3) he had substantial equity in the property, and (4) that the tax sale law does not require pre-judgment intervention by a lender who provides funds to redeem a tax sale certificate.

New Jersey Supreme Court has now confirmed that Tyler does not provide an independent basis to vacate the Final Judgment.

Further, the Defendant's respondent brief noticeably fails to address his terroristic threats, which have been brought to Mr. Whiteman's attention. Additionally, the Defendant's harassment of the Plaintiff and its representatives has continued throughout the duration of his second appeal. (Pa200). As such, and for the reasons previously enumerated in Plaintiff's brief, the filing of the instant (second) appeal, which continues the Defendant's and Mr. Whiteman's vexatious conduct, warrants the imposition of sanctions. Consequently, Plaintiff requests that (1) the order denying Plaintiff's cross-motion for sanctions be reversed, (2) sanctions be imposed against the Defendant and Mr. Whiteman for Plaintiff's attorney's fees and costs incurred in defending the motion and filing the cross-motion to discharge lis pendens in the sum of $6,838.00; and (3) sanctions be imposed upon the Defendant and Mr. Whiteman and that they be ordered to reimburse Plaintiff for its attorney's fees and costs in defending the second appeal.

CONCLUSION

In light of the foregoing, Plaintiff respectfully requests that the trial court's order denying Defendant's motion for reconsideration be upheld, that the order denying Plaintiff's cross-motion for the imposition of sanctions be

reversed, and that judgment be entered against the Defendant and Mr. Whiteman for Plaintiff's attorney's fees and costs in defending the frivolous motion for reconsideration and appeal.

GARY C. ZEITZ, L.L.C.

Dated: 1/13/25

ROBIN I. LONDON-ZEITZ
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