

**SUPREME COURT OF NEW JERSEY
DOCKET NO. 090953**

LYNETTE JOHNSON,

**SUPERIOR COURT OF NEW
JERSEY, APPELLATE DIVISION
DOCKET NO. A-2486-23**

Plaintiff/Respondent,

CIVIL ACTION

v.

**CITY OF EAST ORANGE,
ANNMARIE CORBITT, IN HER
OFFICIAL CAPACITY AS
COLLECTOR OF TAXES, AND
TED R. GREEN, IN HIS OFFICIAL
CAPACITY AS MAYOR OF EAST
ORANGE**

**ON APPEAL FROM:
SUPERIOR COURT OF NEW
JERSEY, ESSEX COUNTY,
CH. DIV., DOCKET NO.
ESX-C-16-24**

Defendants/Petitioners.

**SAT BELOW:
HON. HANY A. MAWLA, J.A.D.
HON. ARNOLD NATALI, J.A.D.
HON. ROBERT M. VINCI, J.A.D.
HON. LISA M. ADUBATO, PJ CH.**

**REPLY BRIEF OF
DEFENDANTS/PETITIONERS**

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PRELIMINARY STATEMENT

There is no good reason a party would be required to raise a constitutional claim or defense in one sort of action, but not another. In nearly every sort of action, a party would be precluded from asserting an affirmative claim if it had a fair and reasonable opportunity to litigate the claim within a prior suit. Tax foreclosure should not be treated differently. Yet this appears to be the only area of law in which a party can effectively ignore a legal process, and return years later with a viable claim that preclusionary doctrines are powerless to avoid. The decision under review, as well as Plaintiff's opposition, encourage this anomalous outcome, and provide no compelling reason for such differential treatment.

The only arguable rationale for this differential treatment is wrong as a matter of law. Plaintiff asserts, and the Appellate Division agreed, that a taking claim or defense was not "ripe" at the time of the tax foreclosure, and thus could not have been raised within. But this conclusion flows from a misunderstanding about when such a claim accrues, or moreover, that an injury need not ripen to assert a defense. The court's treatment of this issue is wrong, and Plaintiff's opposition to this petition does nothing to rehabilitate that flawed conclusion. Plaintiff's takings claim accrued upon the entry of final judgment. This is so because the entry of final judgment is what divested Plaintiff of the "surplus equity" in the foreclosed property, and left her without any mechanism by which to

recover it. This conclusion makes sense, and is supported by United States Supreme Court caselaw. Plaintiff's position, on the other hand, would make accrual of a claim a floating target dependent on circumstances that may never come to pass. For reasons that follow, the City respectfully asks that this Court grant their petition, clarify the state of the law, and grant the requested relief.

LEGAL ARGUMENT

I: THERE IS NO GOOD REASON TAX FORECLOSURE SHOULD BE TREATED DIFFERENTLY THAN ANY OTHER AREA OF LAW.

If a constitutional defense is commonly (and must be) raised in one sort of action, why would the same principle not be true in another sort of action? Plaintiff does not explain why an excessive-fine defense in a forfeiture action would be mandated by the ECD, but a takings defense in a tax foreclosure would not. And Plaintiff makes no effort to salvage the Appellate Division's analysis on this point: whether a right is "well-established" is irrelevant to the ECD analysis.

Instead, Plaintiff contends that it was not possible for her to raise the taking as a claim or defense within the tax foreclosure for three essential reasons: (1) the claim had not yet accrued; (2) the claim or defense would not have been prevailing at the time, since the tax foreclosure predated Tyler; and (3) she was unaware of the tax foreclosure. The City will address each of these arguments in turn.

A. A takings claim accrues upon the entry of final judgment.

According to Plaintiff, her takings claim did not accrue until after the

foreclosure judgment, since such judgment “did not require or command” that the City retain the surplus equity. (Pb8).¹ This argument does not square with the statutory law in effect at the time, or United States Supreme Court precedent.

Knick v. Twp. of Scott holds that a property owner has a takings claim “as soon as the government takes his property without paying for it.” 588 U.S. 180, 190 (2019). That moment arrived when the final judgment of foreclosure entered. This is an unassailable legal proposition because that order vested fee simple title to the property – along with all surplus equity – in the City, with no mechanism by which Plaintiff could have recovered such surplus. N.J.S.A. 54:5-87 (2018); Varsolona v. Breen Capital Servs. Corp., 180 N.J. 605, 619 (2004) (“If successful in such an action, the purchaser will take title to the property even if the property’s value exceeds the amounts owed.”). The final judgment, in the words of Knick, is the point when the government “took Plaintiff’s property without paying for it.” Whether the City kept the property for itself, or re-sold it and retained the proceeds, is an artificial and legally meaningless distinction. In either case, the City would have taken Plaintiff’s property (i.e. the equity) without paying for it.

Plaintiff relies on the decision of Sikorsky v. City of Newburgh, 136 F.4th 56 (2d Cir. 2025) to argue that her claim did not accrue until the foreclosing municipality re-sold the property and retained the surplus. Sikorsky is flat-out

¹ Pb# refers to Plaintiff’s brief and page number.

wrong on this issue, and cannot be squared with the controlling language in Knick. As Knick instructs, a takings claim accrues the moment that a government takes property and doesn't pay for it. The municipality in Sikorsky, as well as the City here, took the owners' property (i.e. both the real property and whatever surplus equity existed) when the final judgment entered, and did not make payment for it. Knick dictates that the taking occurred at that point. Why would it matter whether the City "retained" the equity in liquid form as a result of a later re-sale rather than through its fee simple ownership upon the entry of judgment? In either case, the City owned it, and did not pay Plaintiff for it. And because the City's ownership arose before the sale of the property, it is the former that marks the accrual of a takings claim, not the latter. The Sixth Circuit Court of Appeals agrees with the City: it is the taking of title by the foreclosing entity that marks the accrual of a takings claim. See Hall v. Meisner, 515 F.4th 185, 196 (6th Cir. 2022) (holding that "the event" giving rise to the takings claim "was the County's taking of 'absolute title' to the plaintiffs' homes" through tax foreclosure). Hall aligns with the Supreme Court's pronouncement in Knick. Sikorsky does not.²

² Plaintiff, and the opinion below, also rely on Harrison v. Montgomery Cnty., 997 F.3d 643 (6th Cir. 2021). But the tax foreclosure law of Ohio at issue in Harrison bears no resemblance to the procedure in New Jersey. The foreclosure procedure in Harrison did not transfer title at the conclusion of the court proceedings. Instead, title was transferred as a result of a later administrative procedure when the county board conveyed the property to a land bank. Id. at 650. There was no "final decision" as to the disposition of the plaintiff's property until that moment.

A contrary conclusion leads to an absurd outcome, which courts strive to avoid. See, e.g., N.J. Republican State Committee v. Murphy, 243 N.J. 574, 592 (2020). Rather than have a uniform action that marks the accrual of a takings claim, it would depend on when and whether the foreclosing municipality re-sells the property (which it may never do). If the municipality never re-sells the property, does that mean it has not taken the surplus equity? Of course not. But that is the absurd logical endpoint of Plaintiff's position, the Sikorsky case, and the decision under review, which relies on Sikorsky.

In short, a takings defense could have been raised in the tax foreclosure, no different than an excessive fine defense in a forfeiture proceeding. Given that the entry of judgment alone inflicts the constitutional injury, the constitutional defense should have and could have been raised within the tax foreclosure.

B. Whether a claim is prevailing does not bear on the ECD analysis, nor did any Court Rules forbid the raising of a takings defense.

Plaintiff asserts that the Court Rules did not permit a takings defense. (Pb12-14). This shows a misunderstanding of foreclosure practice and procedure in New Jersey. Whether Plaintiff wants to accept it or not, a defendant in a tax foreclosure can raise whatever affirmative defenses she wants. This proposition was true before Tyler, and it remains true after Tyler.³ Plaintiff's unstated

Ibid. New Jersey, for reasons already explained, operates differently.

³ Constitutional challenges are regularly made within the confines of the tax

argument is that a takings defense likely would not have prevailed prior to Tyler. True or not, it is beside the point. Application of the ECD does not turn on whether the claim would have been a prevailing one, or what level of precedent existed for such a claim. Plaintiff's effort to import that requirement into an ECD analysis has no precedent.

Plaintiff also continues to assert that the Court Rules forbade the raising of a takings defense. Plaintiff says that R. 4:64-6(a) "only" permits defenses relating to the "invalidity of the tax . . . or the invalidity of the proceedings to sell, or the invalidity of the sale." (Pb13). Plaintiff editorializes; R. 4:64-6(a) nowhere uses the qualifier "only" to describe what may be tried in the action. Furthermore, if a defendant had actually pled and argued a takings defense, the court would have had to make a determination whether it "create[d] an issue with respect to plaintiff's right to foreclose" the tax lien. R. 4:64-1(c)(2). Had Plaintiff done so, perhaps the court would have agreed with her. Perhaps not. But whether an argument is prevailing is not germane to the ECD analysis.

Ultimately, Plaintiff avoids addressing the fundament of the City's argument. If Plaintiff *had* asserted a takings claim or defense that failed, would

foreclosure docket. See, e.g., Montville v. Block 69, Lot 10, 74 N.J. 1 (1977); Simon v. Cronecker, 189 N.J. 304 (2007); Caput Mortuum, LLC v. S&S Crown Servs., Ltd., 366 N.J. Super. 323 (App. Div. 2004); City of E. Orange v. Kynor, 383 N.J. Super. 639 (App. Div. 2006); Savage v. Weissman, 355 N.J. Super. 429 (App. Div. 2002). The notion that a defendant would be precluded from raising a constitutional defense in a tax foreclosure lacks any basis whatsoever.

there be any doubt Plaintiff's present claim is barred by preclusionary doctrines? No. The question thus becomes: why would a defendant who fails to raise such a claim or defense not face a similar preclusionary bar, *particularly* where – as here – the failure to answer was due exclusively to the defendant's own derelictions? This would be a perverse incentive: a property owner who attended to the legal process and diligently asserted their rights would have no recourse; one who ignored the legal process and their statutory obligations would be rewarded.

C. “Actual awareness” for application of the ECD is coterminous with a fair and reasonable opportunity to have fully litigated the claim – which Plaintiff was afforded.

Citing Joel v. Morrocco, 147 N.J. 546, 549 (1997), Plaintiff claims that the ECD cannot apply because she did not have actual knowledge of the pendency of the tax foreclosure. Joel, in turn, refers to Ditrollo v. Antiles for this proposition. 142 N.J. 253, 273 (1995). As Ditrollo explains, this requirement of the ECD simply means that the party against whom the doctrine is invoked must have had a fair opportunity to litigate the claim within the prior action:

Fairness to the plaintiff must also be considered. The court must be mindful that “as in the case of all other preclusionary doctrines . . . the party whose claim is being sought to be barred must have had a fair and reasonable opportunity to have fully litigated that claim in the original action.

[Id. at 273 (alteration in original).]

Plaintiff was given a “fair and reasonable opportunity to have fully litigated” her

takings claim in the tax foreclosure. As explained in greater detail within the City's response to Plaintiff's cross-petition, the City did more than what was required by Court Rule to notice Plaintiff in the tax foreclosure. The notice of foreclosure was mailed to not only to Plaintiff's address as appeared on the municipal tax duplicate, but other addresses discovered during due diligence as well. The notice was also published in a newspaper and posted around the municipality in accordance with Court Rules. The notice was even physically posted on the subject property. The City did more than what was required.

Plaintiff, on the other hand, did not discharge *any* of her obligations. She mis-identified her mailing address on the deed to the property, which the City's tax office would have no reason to know. (Ja174#10). She failed to set up a mailbox. (Ja160#8). She did not request that the USPS forward her mail to a different address. (Ja173#7). She never informed the tax office that she wanted notices sent to a different address, in violation of N.J.S.A. 54:4-104.48, see also Berkeley v. Berkeley Shore Water Co., 213 N.J. Super. 524, 534 (App. Div. 1986) (explaining that under N.J.S.A. 54:4-104.48, it is the "taxpayer's obligation to keep taxing authorities informed of . . . his current address."). She failed to discharge her statutory obligation to ascertain from the tax office how much was due and owing even though she may not have received a tax bill. N.J.S.A. 54:4-64(a)(3). She did not pay her taxes. Yet she wants to fault *the City* because the Building Division

had a pre-purchase “Letter of Agreement” regarding the scope of renovations she would make to the property – a document that was not (and had no reason to be) transmitted to the City’s tax office, because it has nothing to do with taxation or assessment. (Ja288¶9). Without restating the entirety of its response to Plaintiff’s cross-petition, this argument is vacuous. See Brick v. Block 48-7, Lots 34, 35, 36, 202 N.J. Super. 246, 252 (App. Div. 1985) (holding that “unrelated communications” between a municipality and a property owner do not put the municipality on notice of a tax mailing address different than what appears on the tax duplicate). Plaintiff had a fair and reasonable opportunity to assert her present claims in the tax foreclosure. She did not, and the fault lies with her and her alone. There is no bar to application of the ECD.

D. Caselaw supports the City’s position with respect to the ECD.

Plaintiff says that the City cannot cite a case where a court has forbidden a Tyler-style takings claim based on application of the ECD. There is at least one such case. See Miranda v. TLB 2019 LLC, 667 B.R. 386, 397 (Bankr. E.D.N.Y. 2025) (forbidding a Tyler takings claim because the property owner “could have raised the unconstitutional takings claim in the underlying Quiet Title Action but failed to do so.”), aff’d, 2025 U.S. Dist. LEXIS 102326 (E.D.N.Y. May 18, 2025).

II: THE CITY, WHICH IS ACTUALLY PROTECTED BY DUE PROCESS, REITERATES ITS DUE PROCESS CONCERNS.

In its petition, the City expressed its concerns (unheeded by the Appellate

Division) that it is entitled under the Due Process clause to “fair notice” that its conduct is unlawful before being held liable. Plaintiff’s response, citing City of Sault Ste. Marie v. Andrus, 532 F.Supp. 157 (D.D.C. 1980), City of New Rochelle v. Town of Mamaroneck, 111 F.Supp.2d 353 (S.D.N.Y. 2000), and Newark v. N.J., 262 U.S. 192 (1923), is that the Due Process clause does not protect municipalities. (Pb15). Plaintiff fails to explain that these cases hold a municipality lacks due process rights vis-à-vis their creators, i.e. the State, or the superior federal government. See New Rochelle at 364. Research fails to reveal, and Plaintiff does not cite, any case standing for the proposition that municipal corporations lack Due Process protections in other contexts, and that argument appears untenable. If Plaintiff’s position were correct, any party could file a lawsuit against a municipal corporation, fail to effect service of a final judgment motion, and obtain a valid and enforceable judgment. That is the position Plaintiff advocates. It is wrong.

Respectfully submitted,

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BY:



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DATED: September 5, 2025



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