FILED, Clerk of the Supreme Court, 25 Jan 2024, **088959**

SUPREME COURT OF NEW JERSEY
DOCKET NO. 088959

257-261 20TH AVENUE REALTY, LLC,

Plaintiff/Petitioner,

v.

ALESSANDRO ROBERTO,

Defendant/Respondent.

and

FANNY ROBERTO, wife of ALESSANDRO ROBERTO, KELLER DEPKEN FUEL OIL COMPANY, INC., a/k/a HOP ENERGY LLC, and MIDLAND FUNDING LLC,

Defendants.

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION
DOCKET NO. A-3315-21

CIVIL ACTION

ON APPEAL FROM:
SUPERIOR COURT OF NEW JERSEY, PASSAIC COUNTY, CH. DIV., DOCKET NO. F-3349-21

SAT BELOW:
HON. THOMAS SUMNERS, PJAD
HON. MORRIS SMITH, JAD
HON. LISA PEREZ-FRISCIA JAD
HON. RANDAL CHIOCCA, JSC

REPLY BRIEF OF PETITIONER/PLAINTIFF 257-261 20TH AVENUE REALTY, LLC

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TABLE OF CONTENTS

FILED, Clerk of the Supreme Court, 25 Jan 2024, **088959**

TABLE OF AUTHORITIES

CASES

FILED, Clerk of the Supreme Court, 25 Jan 2024, **088959**

CONSTITUTIONAL PROVISIONS, STATUTES, COURT RULES, AND OTHER AUTHORITIES

PRELIMINARY STATEMENT

Defendant's opposition to this petition attempts to downplay the significance and impact of the decision under review. This is a stark about-face from one month ago, when Defendant's attorney was quoted by the New Jersey Law Journal as saying: "The court has essentially overturned the entire tax foreclosure law with this opinion."[1] Defendant had it right the first time. This is a case of great importance whose real-world ramifications are already being felt.

Defendant makes little effort to address the core constitutional problems with the decision under review, and when he does, the rebuttals are unpersuasive. Defendant does not dispute that the panel skipped the first step in the takings inquiry, but thinks the property right exists in New Jersey anyway. The only support Defendant can muster, however, is a rule and a statute that relate to mortgage foreclosure. But mortgage foreclosure and tax foreclosure have never been the same thing, either in form or substance. Defendant cannot point to a single statute, case, or rule that establishes a right to surplus equity following tax foreclosure. As the petition's historical analysis made clear, for the roughly one hundred and fifty years tax foreclosure has existed in New Jersey, there has been no recognized property right to "surplus equity." Defendant's opposition does nothing to contest this fact. Nor does Defendant dispute that Tyler does not create

[1] "Appellate Division 'Essentially Overturned Foreclosure Tax Law' With This Opinion," 229 N.J.L.J. 51 (Dec. 18, 2023).

a federal general common-law right, given the Erie doctrine.

This is not the only thing Defendant's opposition ignores. Defendant does not address that the portion of the New Jersey Constitution upon which the panel's opinion relied is inapposite to the realm of tax foreclosure. Nor does Defendant address the overbroad "state actor" test fashioned by the opinion. Defendant also refuses to engage with the Balthazar case, despite that it is directly on point.

Defendant is less interested in litigating the constitutional issues, and more focused on the parochial goal of ensuring he retains ownership of the property. But even that parochial aspect relies on a rule that fundamentally destabilizes tax titles, contrary to the express legislative policy of encouraging and preserving them. If all it takes to vacate a final judgment is to produce redemption monies post-judgment or surplus equity, then every such motion is granted. Indeed, the title insurance industry has already reacted to this decision by eliminating the one-year time limit in the standard exception relating to vacation of judgments under R. 4:50-1. That exception is now indefinite, even if the final judgment predated Tyler. In other words, it has become significantly more challenging to obtain marketable title to a tax foreclosure in New Jersey given this decision.

This Court should grant the petition and reverse. There is no constitutional infirmity with the Tax Sale Law. If the law is to be adjusted or done away with, it is the province of the Legislature.

LEGAL ARGUMENT

I: THERE IS NO PROPERTY RIGHT TO SURPLUS EQUITY IN A TAX FORECLOSURE.

Defendant does not dispute that the Appellate Division skipped the first question in any takings case: whether a property right exists. Nevertheless, Defendant cites R. 4:64-3 and N.J.S.A. 2A:50-37 for the proposition that New Jersey law enshrines an owner's right to surplus equity in a tax foreclosure. But those laws relate to the foreclosure of mortgages in which there is a sheriff's sale. Mortgage foreclosure and tax foreclosure are not the same, and have never been treated the same way. One is a consensual lien between a property owner and a lender. The other is a publicly-auctioned involuntary lien representing a property owner's proportionate share of her financial obligations for municipal services. The former is foreclosed via sheriff's sale. The latter is foreclosed strictly. Entirely different statutory schemes and rules govern each.

Petitioner's brief traced the history of tax foreclosure in New Jersey, conclusively establishing that there has *never* been a right to "surplus equity." That critical feature distinguishes New Jersey law from that of Minnesota – which long ago had recognized such right, both at common law and by statute. Farnham v. Jones, 32 Minn. 7, 11 (1884); 1859 Minn. Laws p. 58, §23. New Jersey, unlike

Minnesota, and unlike the plethora of Takings cases cited in Tyler,[2] has never "manipulated" its law to divest an owner of a previously-recognized property right. Defendant has no answer for this. Nor does Defendant dispute the vitality of the Erie doctrine, which means Tyler cannot reasonably be construed to create a federal general common-law property right to "surplus equity."

Defendant's opposition misunderstands. Of course our courts have the authority to declare laws unconstitutional. But courts have to apply the correct analytical framework before coming to that conclusion, and here, the Appellate Division did not. It presumed the property right existed, even though it does not, and even though Tyler did not create one. For that reason alone, the Takings analysis must fail. While the TSL may be "harsh," it is not unconstitutional. And that means it is up to the Legislature, and not the courts, to fashion a remedy. Cf. Balthazar v. Mari, Ltd., 301 F.Supp. 103, 106 (N.D. Ill.), aff'd, 396 U.S. 114 (1960).

II: DEFENDANT READS TOO MUCH INTO THIS COURT'S TEMPORARY RULE CHANGE OF LAST SUMMER.

Defendant claims this Court has already "recognized Tyler's impact" by implementing a temporary rule change to certain provisions of R. 4:64 in July 2023. Defendant reads far too much into this.

[2] Phillips v. Wash. Legal Foundation, 524 U.S. 156 (1998); Webb's Fabulous Pharms. v. Beckwith, 449 U.S. 155 (1980); Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2069 (2021).

First, the temporary rule change made no determination or conclusions about Tyler's impact in New Jersey. The rule change effectively permitted the issue to be decided in the lower courts by requiring that all motions to enter final judgment be decided by the vicinage judges rather than on "recommendation" to the Office of Foreclosure. Second, the temporary rule change established that "a responsive pleading that a party has existing equity in the property shall be treated as a contesting answer" to the complaint. The rule change does not say that such allegation is a valid and prevailing affirmative defense, but merely that a defendant can raise it and have the issue decided by a vicinage judge. Lastly, the rule change "enhanced" the notice provided at various procedural stages of a tax foreclosure.

It is not clear why Defendant thinks any of this represents the Court's determination on the merits of Tyler's application or reach. All it did was permit the lower courts to decide the issue in the first place.

III: DEFENDANT'S OPPOSITION IS NON- OR MINIMALLY RESPONSIVE TO NUMEROUS OF PETITIONER'S ARGUMENTS.

Defendant's opposition is notable more for what it avoids than for what it addresses. Defendant does not dispute or even mention numerous of Petitioner's arguments, including that:

- Tyler does not erode the Erie doctrine by announcing a federal general common-law property right to "surplus equity";
- The opinion under review relies on an inapposite portion of the New Jersey Constitution, art. I, ¶20, meant to address private corporations statutorily-

imbued with the power of eminent domain for public use or benefit;

- Balthazar, supra, holds a private lienholder foreclosure completed under an analogous statutory scheme in Illinois is not a taking, a decision summarily affirmed by the United States Supreme Court, 396 U.S. 114 (1960);

- This Court already gave its imprimatur to the strict nature of tax foreclosure sixty years ago in Bron v. Weintraub, 42 N.J. 87, 91-92 (1964);

- The Appellate Division did not apply the established multi-factor test, Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928 (2019), in concluding that Petitioner was a state actor.

Defendant concedes that the panel found Petitioner to be a state actor (Db18),[3] but believes this conclusion is correct because of the statutory "relationship" between a taxing authority and the lienholder. It is not possible to arrive at this conclusion without torturing the plain language of the TSL or aggressively misrepresenting the role of a tax collector in the foreclosure process.

The tax collector does not take either party's "side" in a tax foreclosure, does not offer assistance of any sort, and does not compel any action from any party. The tax collector's role is solely that of neutral intermediary between the lienholder and the parties with redeemable interests. The tax collector calculates the redemption amount, N.J.S.A. 54:5-54, keeps track of any subsequent taxes paid by the lienholder, N.J.S.A. 54:5-60 to -62, and processes redemptions by parties with redeemable interests, N.J.S.A. 54:5-54.1. The collector also holds onto any premium received at the auction, and refunds it if redemption is made before the

[3] Db# refers to Defendant's brief and page number.

statutory escheat period. N.J.S.A. 54:5-33. None of these responsibilities, either singularly or collectively, implicates the sort of relationship that can transform a private lienholder into a public actor. There is no "traditional, exclusive function" being performed by the private lienholder. Halleck at 1928. The tax collector does not compel the private lienholder to take a particular action. Ibid. And the tax collector does not "act jointly" with the private lienholder. Ibid. There is no good-faith argument to the contrary. If a private lienholder counts as a state actor, there is no principled reason why a property owner subject to tax foreclosure also would not be considered a state actor. A tax collector does not favor or assist a lienholder any more than a property owner – that is to say, the tax collector does not favor either, and simply acts as an unbiased record-keeper and a conduit for redemption.

Petitioner will reiterate another point, wholly unaddressed by Defendant's opposition. To the extent the panel's "state actor" conclusion derives from the fact that the private lienholder "proceeds with an interest conveyed by the taxing authority," that test is cavernously overbroad. (PPa26). A party does not become a state actor because it purchases a public entity's property right. If the contrary is true, then everyone who has purchased a property at a public land sale is now a state actor.[4] Moreover, Princeton Office Park – the case the panel apparently relied on for this proposition – has nothing to do with "state actor" status of lienholders.

[4] And presumably, all such landowners would now be able to avail themselves of the Tort Claims Act defenses for premises liability.

IV: INDEPENDENT OF TYLER, THE PANEL'S R. 4:50-1(F) ANALYSIS DOES NOT MEET THE PLAIN LANGUAGE OF "EXCEPTIONAL CIRCUMSTANCES," DIRECTLY CONTRAVENES THE PLAIN LANGUAGE OF N.J.S.A. 54:5-85, AND HAS ALREADY RESULTED IN TANGIBLE AND CATASTROPHIC CONSEQUENCES.

With respect to the non-Tyler R. 4:50-1(f) ruling, Defendant does little more than parrot the lower courts' analyses, and does not engage with Petitioner's arguments. Petitioner will reiterate: a "truly exceptional circumstance" cannot be ***the direct consequence of the selfsame statute whose judgment the motion seeks to vacate***,[5] coupled with the post-judgment ability to redeem. The former is logically absurd, and both the former and the latter are commonplace and not remotely exceptional. Put very simply, there is nothing "truly exceptional" about an owner forfeiting his income-producing commercial property after not paying taxes for more than a decade, then totally ignoring the legal process. Interpretation of court rules abides general canons of construction. Wiese v. Dedhia, 188 N.J. 587, 592 (2006). The fact pattern here simply does not meet any reasonable plain-language understanding of "exceptional circumstances."

But the problem runs deeper. If a former owner files a motion to vacate a tax foreclosure judgment, the decision under review mandates the grant of such motion so long as the movant "puts up" the redemption money. The stability of

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[5] I.e., the forfeiture of equity, which is the precise effect of the plain language of N.J.S.A. 54:5-87; Varsolona v. Breen Capital Servs. Co., 180 N.J. 605, 619 (2004) (noting that a lienholder who has foreclosed successfully becomes the fee simple owner "even if the property's value exceeds the amounts owed.").

tax titles, which our Legislature has sough to protect, N.J.S.A. 54:5-85, is gone. This is not idle conjecture or, as Defendant's opposition characterizes it, a hypothetical "parade of horribles." It is the natural, predictable, and devastating consequence of the overbreadth of the decision – and it is happening right now in New Jersey as a direct consequence of this decision. As explained more thoroughly in Petitioner's accompanying motion to supplement the record on appeal, title companies in New Jersey are now effectively refusing to insure tax titles – not because of Tyler,[6] but because of the panel's R. 4:50-1 holding. Prior to this decision, there was a standard exception in title policies for one year from the entry of judgment, in recognition of the time limits in R. 4:50-2. Title insurers are now removing the one-year limitation, and making the exception *indefinite* – regardless of when the final judgment entered (even pre-Tyler). This not only renders tax titles unmarketable. It also and as a practical matter affords Tyler's holding full retroactivity, notwithstanding the panel's apparent attempt to limit it to "pipeline" cases.

It does not take an advanced degree, or even an expert report, to conclude that this decision had, has, and will continue to have, a drastic effect on municipal budgets and revenue. It is just a matter of basic common sense and economics.[7] A

[6] The decision "limits" Tyler to pipeline retroactivity.

[7] Our courts often take judicial notice of the practical effect rulings relating to tax certificates may have on municipal finance. See, e.g., 21-23 Seidler Assocs,

lienholder cannot compel a property owner to redeem. And if the lienholder attempts to enforce the lien, the decision under review subjects the lienholder to constitutional liability. Why, then, would anyone buy a lien? Defendant offers no answer to this question, and none is readily apparent. The end result is that municipalities will not recover their delinquent revenue at tax sale auctions, they will end up owning a host of liens they cannot enforce without subjecting themselves to liability, and they will have to either raise taxes on conscientious taxpayers, or else cut municipal services. It is beyond apparent that this case meets all the criteria for certification in R. 2:12-4.

CONCLUSION

For the foregoing reasons, Petitioner respectfully urges this Court to grant certification and reverse.

Respectfully submitted,

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DATED: January 25, 2024

L.L.C. v. City of Jersey City, 391 N.J. Super. 201, 213 (App. Div. 2007); Phoenix Pinelands Corp. v. Davidoff, 467 N.J. Super. 532, 598 (App. Div. 2021).