257-261 20TH AVENUE REALTY, LLC, Plaintiff/Appellant, vs. ALESANDRO ROBERTO, Defendant/Respondent, -and- FANNY ROBERTO, wife of Alesandro Roberto; KELLER DEPKEN FUEL OIL COMPANY, INC. a/k/a HOP ENERGY LLC; MIDLAND FUNDING LLC; Defendants.	SUPREME COURT OF NEW JERSEY DOCKET NO. 088959 Civil Action On Appeal From: SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-3315-21 Sat Below: Hon. Thomas Sumners, P.J.A.D. Hon. Morris Smith, J.A.D. Hon. Lisa Perez-Frischia, J.A.D.

BRIEF OF DEFENDANT/RESPONDENT ADDRESSING IMPACT OF A.3772 (P.L. 2024, c.39) (2024)

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The defendant Alessandro Roberto ("Mr. Roberto") submits this supplemental brief at the Clerk's direction to address the "*the impact, if any, of the recent legislation [A.3772 (2024)] on the issues presented in this appeal.*"

LEGAL ARGUMENT

I. THE NEW JERSEY LEGISLATURE'S RECENT AMENDMENTS TO THE TAX SALE LAW VALIDATE TYLER AND SUPPORT THE LOWER COURTS' RULINGS GRANTING AND AFFIRMING VACATUR OF THE FINAL JUDGMENT OF TAX FORECLOSURE PURSUANT TO RULE 4:50-1(f), THUS AVOIDING FORFEITURE OF THE DEFENDANT'S SUBSTANTIAL EQUITY IN HIS PROPERTY

In I.E.'s, LLC v. Simmons, 392 N.J. Super. 520 (Law Div. 2006), a prescient trial judge recognized the harsh nature of a strict application of New Jersey's Tax Sale Law ("TSL"), N.J.S.A. 54:5-1 to -137, which for almost 75-years has enabled tax sale investors to rob New Jersey landowners of their most valuable asset – the equity in their real estate. As noted by the trial judge:

> Until the Legislature devises a better system, **courts of equity must do their best to balance the equities**, taking into account the necessity of allowing the transfer of clear title and the need to compel the payment of property taxes **against the necessity of ameliorating, in appropriate circumstances, the onerous impact of the procedure in circumstances where the party has remained in possession of the property and has substantial equity in it**.

Id. at 537 (emphasis added). Shortly afterwards, this Court remarked that one of the TSL's public policy goals is "to protect property owners from the

devastating consequences of foreclosure." Simon v. Cronecker, 189 N.J. 304, 315 (2007). Such is the case here.

In response to the United States Supreme Court's landmark decision of Tyler v. Hennepin County, 598 U.S. 631 (2023), and the Appellate Division's decision in the instant case (Roberto, 477 N.J. Super. 339 (2024), certif. granted, 256 N.J. 535 (2024)), which adopted Tyler and declared the procedural framework of the TSL permitting the practice of taking of private property without just compensation as unconstitutional, the Legislature finally addressed the long-standing problem of 'equity theft' by amending the TSL and the companion In Rem Tax Foreclosure Act (the "Act"), N.J.S.A. 54:5-104.29, et seq. On July 10, 2024, Governor Murphy signed into law Bill A.3772, P.L. 2024, c.39 (the "Bill"), offering limited protections for landowners to preserve surplus equity while also providing lienholders the right to bar claims to surplus equity. Indeed, the Assembly Appropriations Committee ("Committee") confirms the Bill's purpose is to revise the TSL and Act "to bring those laws into compliance" with Tyler "concerning the ability of a property owner, whose right to redeem a tax lien on their property has been foreclosed by the holder of a tax sale certificate, to receive any of the owner's equity remaining in the property after the tax lien foreclosure." Committee Statement to Assembly, No. 3772, June 24, 2024. (https://pub.njleg.state.nj.us/Bills/2024/A4000/3772_S2.PDF)

In private tax lien foreclosure suits, the Bill enables landowners to preserve their equity by granting the right to demand either a judicial sale "as in the manner of the foreclosure of a mortgage" or alternatively an "Internet auction" conducted by the county sheriff. P.L. 2024, c.39, amending N.J.S.A. 54:5-87(b). However, to avoid the automatic forfeiture of equity, as existed under the former TSL, the property owner must affirmatively "opt-in" by filing a "written request [for a judicial sale or Internet auction] to the Superior Court before the date that the final judgment is entered." Id. If the property owner files a timely demand for a judicial sale or Internet auction, "[t]he final judgment shall provide for a writ of execution to the sheriff of the county in which the property is located, and the holding of either a judicial sale or an Internet auction." Id. But if the owner does not timely demand a judicial sale or an Internet auction, then no judicial sale is required and the owner forfeits any "claim against the holder of the tax sale certificate for any equity in the property." Id.

Further, when a judicial sale or Internet auction is held and no bids are made, "the owner of the tax sale certificate obtains fee title from the sheriff," and "it shall be conclusively presumed that there is no equity in the property." Id. (emphasis added). If a judicial sale generates surplus proceeds, the sheriff must deposit those funds with the Superior Court, after deducting permitted

costs, and applications to release the funds "shall be made in accordance with N.J.S.A. 2A:50-37 and the applicable Rules of Court." Id.

Similarly, the Bill also changes in rem tax foreclosure procedures but negates the judicial sale requirement for abandoned properties unless "any federal statute or regulation requires a judicial sale . . . in order to debar and foreclose a mortgage interest or any other lien held by the United States or any agency or instrumentality thereof, ..." Id. (amending N.J.S.A. 104.64 (c)).

Despite the Bill saying that it "shall have no effect on any foreclosure action in which a final judgment has been entered prior to the effective date of this act,"[1] long-standing United States Supreme Court precedent establishes that newly enacted legislation applies to pending appeals, to wit:

> if subsequent to the judgment, and before the decisions of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied… In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of the law, the judgment must be set aside.

Carpenter v. Wabash Ry Co., 309 U.S. 23, 27 (1940) (quoting United States v. Schooner Peggy, 5 U.S. 103, 110 (1801)). Accord Linkletter v. Walker, 381 U.S.

[1] P.L. 2024, c.39, amending N.J.S.A. 54:5-98(9).

618, 627 (1965); Harper v. VA Dep't of Tax'n, 509 U.S. 86, 97 (1992).[2]

In view of controlling United States Supreme Court precedent, the Appellate Division's decision in Roberto granting pipeline retroactivity to the new principle of law established by Tyler, and our Legislature's enactment of the Bill in direct response to Tyler, how could the trial court's decision to vacate the final tax foreclosure judgment under Rule 4:50-1(f) "upon such terms as are just" possibly be considered an abuse of discretion? See e.g., Manning Eng'g, Inc. v. Hudson County Park Comm'n, 74 N.J. 113, 122 (1977) (noting the broad parameters of a court's discretion under subsection (f) "to reopen a judgment where such relief is necessary to achieve a fair and just result."). Indeed, not only does the Bill not remove a dispossessed owner's right to seek R. 4:50-1 relief, but it further supports findings of exceptional circumstances under R. 4:50-1(f).

Prior to the Bill's enactment, landowners like Mr. Roberto facing a tax lien foreclosure had no right to a judicial sale of the subject property and no

[2] Most recently, a federal judge in the United States Bankruptcy Court for the District of New Jersey held that Tyler and Roberto permit bankruptcy debtors "to set aside the effects of a final judgment in foreclosure under the takings theory and address the claims related thereto in their bankruptcy cases." Virella v. TLOA of NJ, LLC, 2024 Bankr. LEXIS 1447 *3 (Bankr. D.N.J. June 18, 2024). In Virella, the bankruptcy court held that the substantial change in the law brought about by Tyler and Roberto justified pipeline retroactivity, noting that the debtor was prosecuting motions challenging the forfeiture of his equity in both the Superior Court and bankruptcy court. Id. *19

remedy to prevent forfeiture of their equity except for redeeming the tax sale certificate before final judgment. However, redemption often proves difficult for most property owners because of statutory penalties and 18% statutory interest that accrues on subsequent advances paid by tax certificate holders. While most individuals are aware that a sheriff's sale in mortgage foreclosure cases is the end of the line to save their home,[3] the typical homeowner confronting a tax foreclosure suit is unaware of the TSL's draconian procedure of vesting title of the property (and forfeiture of any equity) to the tax sale plaintiff automatically once final judgment is entered. In practice, tax sale investors often target properties with substantial equity (usually unencumbered by a mortgage), take title by entry of a default judgment and pickpocket the equity, without any recourse for the landowner except to petition the Chancery Court for relief from the judgment, as Mr. Roberto did in the instant case.

Like here, where the elderly Mr. Roberto had over $400,000 of surplus equity in his property, the punitive procedure allowed under the former TSL

[3] Under the so-called "gavel rule," a property owner loses his/her federal right to cure a mortgage default after a sheriff's sale. See In re Connors, 497 F.3d 314, 322-323 (3d Cir. 2007). Under New Jersey state law, a property owner has the right to redeem the mortgage by tendering payment in full within the 10-day period provided by Rule 4:65-5 for objecting to sheriff's sales or until disposition of any filed objections. Hardyston Nat'l Bank v. Tartamella, 56 N.J. 508, 513 (1970); Brookshire Equities LLC v. Montaquiza, 346 N.J. Super. 310, 316 (App. Div. 2002), certif. denied, 172 N.J. 179 (2002).

often resulted in certificate holders receiving title to properties worth hundreds of thousands of dollars more than the redemption amount of their liens. The Tyler Court held this practice of 'equity theft' constitutes a violation of the 5th Amendment Takings Clause of the United States Constitution without due process. The Appellate Division in Roberto correctly followed Tyler in holding that this practice permitted under the TSL also violates the New Jersey Constitution.[4] Although the new Bill enables tax certificate holders to obtain surplus equity by burdening owners with "opting-in" to the judicial sale requirement, instead of first paying just compensation to owners, and thus falling short of the greater protections afforded by the New Jersey Constitution, the Bill eliminates the constitutional issues raised in Plaintiff's Petition for Certification.

II. THE LEGISLATURE'S AMENDMENTS TO THE TSL RESOLVE THE CONSTITUTIONAL ISSUES RAISED IN PLAINTIFF'S PETITION FOR CERTIFICATION AND BY THE AMICUS PARTIES SUPPORTING THE PETITION

In Point I of its Petition for Certification, Plaintiff faults the Appellate Division for allegedly skipping the first step of the takings inquiry about whether a property right exists in surplus equity in tax foreclosure case. "[I]ts [sic] beyond reasonable dispute in New Jersey – unlike Minnesota – never has

[4] N.J. Const. art. 1, ¶20 prohibits individuals or private corporations from "tak[ing] private property for public use without just compensation first made to the owners."

recognized a defendant's property right to 'surplus equity' in a tax foreclosure." Petition for Certification, at p. 7. "It is up to the New Jersey Legislature to create this right – something that it is actively pursuing." Id., n. 5. Consistent with Tyler, in enacting the Bill last month, our State's Legislature now recognizes a property owner's vested interest in surplus equity by providing some minimal safeguards enabling property owners to protect and recover their surplus equity. Consequently, the Legislature has resolved the constitutional issues raised in Point I of Plaintiff's Petition for Certification.

Likewise, the Bill makes it unnecessary for this Court to adjudicate the constitutional issues cited in Point II of Plaintiff's Petition for Certification about the "state actor" test. The distinction raised by Plaintiff regarding Tyler's application to the instant case – whereas Tyler involved a municipal or governmental tax foreclosure and the present case involves a private tax sale certificate holder – is of no moment now that our Legislature has amended the TSL and Act by recognizing a property owner's right to preserve equity and pursue surplus funds generated by a judicial sale or Internet auction, at least with respect to properties that are occupied and not deemed abandoned.

Stripped of the constitutional arguments raised in Points I and II of Plaintiff's Petition for Certification, and with the Legislature amending the TSL and Act in direct response to Tyler by declaring a homeowner's equity as an

independent protected right subject to foreclosure, the remaining issues for this Court to resolve are whether: (i) the Appellate Division properly found that the trial court did not abuse its discretion in vacating the final tax foreclosure judgment under Rule 4:50-1(f); and (ii) retroactive application of Tyler constitutes independent grounds to grant relief under Rule 4:50-1(f). Both questions should be resolved in the affirmative.

For the same reasons, this Court need not decide the issues briefed by the prospective amici applicant Invest Newark,[5] a non-profit community development organization that specifically deal[s] with . . . vacant, abandoned or deteriorating properties" ("VAD properties"). Brief of Invest Newark, at p. 1. Invest Newark primarily focuses on in rem tax foreclosures prosecuted by municipalities by arguing, among other points, that (i) VAD properties need protection from Tyler, and (ii) there needs to be a rebuttable presumption of no equity in VAD properties. The Bill addresses and resolves each of Invest Newark's respective points by affirmatively carving out abandoned properties from being subject to an equity claim and demand for judicial sale.

Also, the Bill addresses and resolves the concerns of the New Jersey Attorney General about abandoned properties, namely, that any holding by this

[5] Mr. Roberto has opposed Invest Newark's motion seeking approval as an amicus curiae. The Court has not ruled on the motion.

Court declaring the TSL unconstitutional "does not implicate the foreclosure of abandoned property under the TSL." Attorney General's Brief, at p. 19.

Lastly, with one exception, the Bill also nullifies the first two arguments presented by the New Jersey Land Title Association ("NJLTA").[6] Mr. Roberto agrees with the NJLTA's third argument - that mandatory judicial sales as in mortgage foreclosures would effectively resolve the constitutional issues at the crux of Tyler. Instead, however, the Bill makes judicial sales optional by requiring owners to file a motion requesting a sale before final judgment is entered or be deemed barred from asserting any claim to equity and surplus funds. The Bill's "conditional" judicial sale measure neither resolves the due process infirmities recited in Tyler nor cures the TSL statutory framework held unconstitutional by the Appellate Division because it still allows confiscation of a New Jersey property owner's equity in violation of the United States Constitution and New Jersey Constitution.

Respectfully submitted,
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Dated: August 5, 2024

[6] The NJLTA argues: (i) the existence of substantial equity does not constitute exceptional circumstances under R. 4:50-1(f); (ii) pipeline retroactivity must be defined and limited.