SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3687-20

INDIAN FIELD HOMEOWNERS ASSOCIATION, INC.,

Plaintiff-Appellant,

v.

MR. FRANK CICERALE, JR., FRANK CICERALE, SR., INDIAN FIELD, LLC, SCOTT HOLZHAUER, TERRY BESHADA, HARDYSTON TOWNSHIP, HARDYSTON TOWNSHIP MUNICIPAL UTILITIES AUTHORITY, HARDYSTON TOWNSHIP PLANNING BOARD, and HARDYSTON ZONING BOARD,

Defendants-Respondents.

FRANK CICERALE, JR., FRANK CICERALE, SR., and INDIAN FIELD, LLC,

Defendants/Third-Party Plaintiffs-Respondents,

v.

TITLE RESOURCES GUARANTY COMPANY,

Third-Party Defendant.

Argued January 11, 2023 – Decided February 9, 2023

Before Judges Gooden Brown and Mitterhoff.

On appeal from the Superior Court of New Jersey, Chancery Division, Sussex County, Docket No. C-000034-16.

David J. Byrne argued the cause for appellant (Ansell, Grimm & Aaron, PC, attorney; David J. Byrne, on the briefs).

William B. Jones argued the cause for respondent Frank Cicerale, Jr. (Law Offices of Clark L. Cornwell, III, and Simio & Jones, LLP, attorneys; Clark L. Cornwell, III, on the brief).

Cara A. Parmigiani argued the cause for respondents Frank Cicerale, Sr., Frank Cicerale, Jr., and Indian Field, LLC.

Noel Lesica argued the cause for respondents Schott Holzhauer, Hardyston Township, Hardyston Planning Board, and Hardyston Zoning Board (Gebhardt & Kiefer, PC, attorneys; Richard P. Cushing, Sharon Flynn, and Noel Lesica, on the brief).

PER CURIAM

Plaintiff, Indian Field Homeowner's Association (the "Association"), appeals from a September 4, 2019 order granting summary judgment in favor of defendants Frank Cicerale, Jr., Frank Cicerale, Sr., and Indian Fields, LLC (the "Cicerale defendants"), as well as defendants Scott Holzhauer, Hardyston Township, Hardyston Planning Board, and Hardyston Zoning Board (the "Township defendants"), with regard to count one, count two, count three, count six, count seven, and count eight of plaintiff's third amended complaint; a January 4, 2021 order granting the Cicerale defendants' motion in limine to bar plaintiff's expert, Mark Sussman, from testifying at trial; and a March 19, 2021 order denying plaintiff's partial summary judgment motion on count five of plaintiff's third amended complaint and granting the Cicerale defendants' cross-motion regarding the same. We affirm, substantially for the reasons set forth in Judge Maritza Berdote Byrne's well-reasoned opinions.

We discern the following facts from the record. Plaintiff is a duly organized Homeowner's Association ("HOA") in the Township of Hardyston. Hardyston Development Corp. ("HDC") created the Association pursuant to a "Declaration of Covenants, Easements and Restrictions for Forest Hill Village at Hardyston" (the Declaration), which was recorded with the Sussex County Clerk on February 27, 1989. Thereafter, HDC transferred title of the

development's unsold and unconveyed lots, along with other lands, premises, and improvements therein, to HFH Development Corp. (the "Developer") by deed dated September 28, 1993, which was recorded with the county clerk on December 31, 1993.

The Declaration required the Developer to convey all common property[1] to the Association "on or before the conveyance in the regular course of business of the last [l]ot incorporated as part of the development to an individual purchaser or the expiration of the Developer's reserved right to incorporate portions of the [a]dditional [l]ands as part of the property, whichever shall occur first." The Declaration further states that "the Developer shall hold title to so much of the [c]ommon [p]roperty that is comprised of those portions of the [p]roperty not contained within an individual lot and the improvements constructed therein that are deemed to be realty." The Declaration provides that the Association has the right to transfer common property "[o]nce title to the

[1] The Declaration defined "common property" as "all undedicated portions of the [p]roperty other than the residential building lots as shown on any recorded final subdivision map for any portion of the [p]roperty, together with all other improvements thereto or facilities thereon, and any other real or personal property owned by the [HOA]." The Declaration further identifies "common property" as subject to the Declaration "which are not within, part of or appurtenant to the [l]ots subjected to this Declaration and which have been incorporated as part [of] the property."

[c]ommon [p]roperty has been conveyed by the Developer to the [HOA]." While the common property was to be owned by the Association, other property within the development was to be owned by the individuals who purchased the individual residential building lots.

By the terms of the Declaration, the Developer was permitted to incorporate additional lands and alter its rights and obligations through amendments or supplements to the Declaration. Over time, the Declaration was amended four times. Relevant to this appeal is the fourth amendment to the Declaration, which was executed on September 14, 1998 and recorded with the county clerk on October 20, 1998.

The fourth amendment expanded the bounds of the land governed by the Declaration to include all of the disputed property, which are: (i) Block 67, Lot 16.03; (ii) Block 67, Lot 16.04; (iii) Block 67.29, Lot 1; (iv) Block 67.05, Lot 1; and (v) Block 67.30, Lot 1 (collectively, the "Disputed Properties"). Importantly, the Disputed Properties do not have any residential building lots located on them and are on the outskirts of the development.

On October 22, 2004, the Developer prepared and distributed an unrecorded fourth amendment to the Public Offering Statement (Fourth POS Amendment), which explained that the Disputed Properties "would be conveyed

[to the Association] after the completion thereof by the . . . Developer . . . has occurred." The Fourth POS Amendment further stated that "the Declaration established various easements in favor of the Developer . . . [and] the Association . . . but not the public in general."

The Fourth POS Amendment also provided, in pertinent part, that "the [c]ommon [p]roperty, title to which will be held by the Association, will be taxed separately for real estate purposes." Township Tax Assessor, Scott Holzhauer, testified that Hardyston annually assessed and taxed the Disputed Properties because the Township's tax records reflected that the Developer, not the Association, was the record owner in the chain of title.

Although the Developer initially paid the taxes, it became delinquent in 2008. The Township attempted to collect the debt through imposing liens on the Disputed Properties and issued tax sale certificates. Notice of such sales were placed in the New Jersey Herald. In fact, during his deposition, Roger O'Brien—president of the HOA—testified that, while he was vice-president, he discovered that the Disputed Properties had been the subject of a tax certificate in the first quarter of 2012. O'Brien further testified that, after seeing the notice, he brought the matter to the attention of the Board who told him to look into it further. O'Brien then went to Hardyston and spoke with tax assessor Terry

Beshada who advised him of the procedure to submit a bid on the Disputed Properties. Finally, O'Brien testified that the Association never made a bid on the tax certificates because Beshada informed O'Brien that the taxes had already been paid on the Disputed Properties.

Although the Association believed that the Developer had paid the taxes, the tax certificates for each of the Disputed properties publicly advertised were obtained by Frank Cicerale. Beshada recorded the certificates as follows: Tax Sale Certificate #09-13 for Block 67, Lot 16.04, dated October 16, 2009, recorded on November 23, 2009; Tax Sale Certificate #09-18 for Block 67.05, Lot 1, dated October 16, 2009, recorded on November 23, 2009; Tax Sale Certificate #09-22 Block 67.30, Lot 1, dated October 16, 2009, recorded on November 23, 2009; and Tax Sale Certificate #2012-012 Block 67, Lot 16.03, dated October 12, 2012, recorded on October 22, 2012. On October 5, 2010, by way of Resolution #71-10, tax sale certificate No. 09-21 was assigned to the Cicerale defendants and purchased at an Assignment Sale for $27,856.57. Thereafter, Beshada recorded Tax Sale Certificate #09-21 for Block 67.29, Lot 1, dated October 15, 2010, recorded on October 19, 2010. [2]

[2] The Tax Sale Certificates all indicate that "Frank Cicerale" purchased the property, without specific designation. It is believed that the current record

On July 9, 2014, the Cicerale defendants obtained final judgment on four of the five lots comprising the Disputed Properties: Block 67.29, Lot 1 ($116,940.21 in taxes due); Block 67.30, Lot 1 ($115,559.81 in taxes due); Block 67.05, Lot 1 ($85,558.82 in taxes due); and Block 67, Lot 16.04 ($14,533.31 in taxes due). On August 12, 2015, the Cicerale defendants obtained final judgment on the fifth lot, Block 67, Lot 16.03 ($35,722.38 in taxes due). These final judgments ordered and adjudged that the Cicerales were "vested with an absolute and indefeasible estate of inheritance in fee simple on the premises above described." The Cicerale defendants paid the taxes on the Disputed Properties and continue to do so. After obtaining final judgment, the Cicerale defendants posted "No Trespassing" signs at locations near various disputed property lines and erected orange fencing along certain sidewalks situated on the Disputed Properties to block the Association's residents from walking on and enjoying them.

On October 27, 2015, plaintiff filed a civil complaint against the Cicerale defendants and the Township defendants disputing ownership of the five parcels of Disputed Properties in Hardyston Township. After three amendments,

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ownership is as follows: (i) Block 67, Lot 16.03 – Cicerale, Sr.; (ii) Block 67, Lot 16.04 – Indian Field LLC; (iii) Block 67.30, Lot 1 – Cicerale, Jr.; (iv) Block 67.29, Lot 1 – Cicerale, Sr.; and (v) Block 67.05, Lot 1 – Cicerale, Jr.

plaintiff's complaint contained the following counts: quiet title, injunctive relief, and declaratory judgment regarding the Disputed Properties (count one); statutory trespass and injunctive relief (count two); common law trespass and injunctive relief (count three); service mark infringement (count four);[3] quiet title, injunctive relief, and declaratory judgment acknowledging easements and covenants running with the Disputed Properties (count five);[4] the Township's improper allowance of obstructions to the safe travel of disabled and other persons (count six); violation of the Americans with Disabilities Act (ADA) (count seven); and violation of New Jersey's Law Against Discrimination (NJLAD) (count eight).

On July 6, 2018, plaintiff's expert, Mark Sussman, MAI, CRE, SCGREA, prepared an expert report addressing whether the Township defendants "improperly handled property taxes and related issues which result[ed] in erroneous tax liens and subsequent foreclosures." Sussman concluded that

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[3] This claim relates to the Cicerale defendants' use of the term "Indian Field" for their LLC.

[4] Plaintiff alleges that the Disputed Properties are crucial to its existence and to the health and safety of its residents, namely the two lots that contain stormwater basins. In addition, plaintiff alleges that, without the Disputed Properties, it would be in violation of the 1986 Township Resolution, by which plaintiff agreed to use twenty-five percent of its land as open space, ten percent as recreational facilities, and ten percent to be left as wooded and natural.

Holzhauer "should have assessed each of the [Disputed Properties] at $0." On July 27, 2018, the Cicerale defendants' expert, Adam Greenburg, Esq., prepared a report which confirmed that the tax foreclosure proceedings were done legally.

In response to Greenberg's report, on October 1, 2018, Sussman provided four comments supplementing his July 6th expert report. Specifically, Sussman stated that Holzhauer "should have identified and considered the [e]asements, [r]estrictions & [c]ovenants when setting the assessments for the [Disputed Properties,]" because the Declaration and its amendments "are recorded documents that were on file with the Township." Sussman's report also stated that "Holzhauer should have identified and considered all applicable site plans, zoning ordinances, municipal controls, Township resolutions and developer's agreements when setting the assessments for the [Disputed Properties]." Sussman further opined that the Disputed Properties "were never marketable and could not be sold, they could only be transferred or dedicated to a public entity and/or agency." Finally, Sussman's report stated that "it is unlawful double taxation when the assessment of a [HOA]'s individual lot contemplates those lots' access to and/or use of certain property (whether common property, lots or otherwise) when that certain property is also assessed and taxed."

On May 23, 2019, after discovery had concluded, the Township defendants filed a motion for summary judgment. The following day, the Cicerale defendants also moved for summary judgment.

The parties appeared before the judge on August 29, 2019 for a summary judgment hearing, where plaintiff argued that the Association did not need a deed because, by virtue of the Declaration, the Disputed Property was "common property." Plaintiff pointed out that the Township identified other property within the development as being owned by the Association for which it has no deed, was considered common property, and was taxed at a rate of zero. Plaintiff further asserted that the Association had no knowledge of the sale because, even if O'Brien's testimony was true, 2012 was years after the tax certificates were already issued.

The Cicerale defendants argued that, in New Jersey, you cannot transfer property without a deed. They also argued that the Association had proper notice through O'Brien, but ultimately failed to act. Counsel for Cicerale Jr. specifically indicated that a title search was done and that all people who were joined were people who held interest or record. The Township defendants further pointed out that plaintiff admitted to not having ownership over the

Disputed Properties and that some of the properties could not be considered common property because they were zoned for commercial use.

In a September 4, 2019 order, the judge granted summary judgment in favor of defendants on counts one, two, three, six, seven, and eight. In a written opinion, the judge first addressed plaintiff's quiet title claim regarding the Disputed Properties (count one) and the easements and covenants claims (count five). Regarding count one, the judge determined that there was "no genuine issues of material fact sufficient to determine any party other than [the Cicerale] defendants own the property." The judge noted that "[i]t was undisputed plaintiff is not in the chain of title to the property" and that "[a]t no time did plaintiff hold title or otherwise appear in the relevant deeds or recorded transfers of the property." Thus, the judge granted defendants' request for summary judgment on count one because

> plaintiff [did] not present any recorded instrument which grant[ed] it an interest in the property. Plaintiff therefore lacked a recorded interest in the property and did not seek to assert any relevant interest in the tax foreclosure sale through the available remedies. Plaintiff lacks standing to bring a claim seeking to quiet defendants' title to the property or to challenge the Township's taxation of the property.

The judge, however, refused to grant summary judgment on count five because there were material issues of fact as to plaintiff's rights in that regard.

Next, the judge discussed plaintiff's trespass claims (counts two and three). There, the judge identified that "to succeed on these claims, plaintiff[] must . . . show the Cicerale defendants['] intentional, reckless[,] or negligent conduct." In finding that plaintiff failed to meet that requirement, the judge reasoned

> [t]he Cicerales rationally believed they held the property in fee simple based on their purchase at the tax sale foreclosure. As the court has determined the Cicerale defendants were and continue to be the proper owners of the land pursuant to such purchase, their use, entry and other conduct on the land cannot be deemed to be intentional trespass.

Therefore, the judge granted defendants' motion for summary judgment on counts two and three of plaintiff's complaint.[5]

Moreover, the judge refused to grant summary judgment on plaintiff's service mark infringement claim (count four), finding that "there [were] material disputes of fact with respect to both the validity of the mark and the likelihood of confusion of the mark." The judge did, however, grant defendants' motion for summary judgment on the Township's alleged improper allowance of obstructions (count six), violation of the ADA (count seven), and violation of

[5] On February 12, 2020, the judge further denied plaintiff's motion for reconsideration of her September 4, 2020 order regarding the dismissal of plaintiff's count three.

the NJLAD (count eight), finding that plaintiff's claims fail as a matter of law because "defendants[] are the proper owners of the property, and plaintiff does not have [a] possessory interest."

On March 26, 2020, the Cicerale defendants filed a motion in limine to prevent plaintiff from offering testimony from Mark Sussman, a real estate appraiser and consultant, regarding the remaining counts four and five. During the December 3, 2020 hearing on the matter, the Cicerale defendants argued that Sussman was not qualified to testify as to the remaining counts. Although plaintiff explained what Sussman would testify about and how it would help the jury, plaintiff repeatedly admitted that Sussman's report did not address whether the Declaration runs with the land because it is "a question of law." Plaintiff further admitted that Sussman was not "qualified to testify about the legal questions concerning how Declarations survive foreclosures."

In a January 4, 2021 order, the judge granted defendants' motion to bar Sussman's testimony, reasoning that, "both of . . . Sussman's expert reports are devoid of factually–or legally–supported opinion on whether the purported easements survived the tax foreclosure sale." In the judge's opinion, "[w]ithout any analysis on the survivability of these easements, covenants, or restrictions, . . . Sussman's expert reports and related testimony cannot assist the trier of fact."

On December 30, 2020, plaintiff filed a motion for partial summary judgment regarding its easement and covenants claim (count five). On January 26, 2021, the Cicerale defendants filed a cross-motion for summary judgment on the same issue.

During the February 16, 2021 summary judgment hearing, the Cicerale defendants argued that there was no link between the Association and any easement that was reported or otherwise which would survive the tax foreclosure sale. Conversely, plaintiff argued that the easements survived the tax foreclosure sale because the lots were subject to the recorded Declaration and that easements are not extinguished by such a foreclosure.

In a March 19, 2021 order, the judge denied plaintiff's motion and granted defendants' motion, thereby dismissing count five of the complaint. In a written opinion, the judge reasoned that, while the

> Hardyston's 1986 resolution, [the Developer's] public offering statement, and the fourth amendment to its declaration . . . . may contemplate plaintiff's governance and use of the five parcels and may identify them by their legal descriptions[,] . . . . plaintiff chose not to record those documents in the chain of title as to the five parcels and never obtained any deeds to those parcels.

Thus, the judge dismissed plaintiff's easements and covenants claim (count five) because, "while plaintiff's declaration proclaims to govern those

parcels, plaintiff has no right to declare its covenants run with those parcels because plaintiff has never owned those parcels." The judge explained that "[f]or plaintiff to have obtained an interest in the five parcels, it must have either recorded an easement in the chain of title as to those five parcels or recorded a deed as to those five parcels along with its declarations and subsequent amendments[,]" but plaintiff failed to do either. The judge reasoned plaintiff's claim failed because "plaintiff [was] claiming an interest or encumbrance upon the five parcels, which could have been recorded but was not, and is therefore bound by the Cicerale defendants' purchase of the five parcels." This appeal followed.

On appeal, plaintiff raises the following arguments:

> POINT I
>
> THE DECLARATION & THE 4TH AMENDMENT PLACED THE ASSOCIATION IN THE LOTS' CHAIN OF TITLE & SERVE[S], & SERVED, AS THE ASSOCIATION'S INTEREST IN THE LOTS
>
> > A. The Declaration Constitutes, & Constituted, a Recorded Instrument By Virtue of Which the Association Enjoys, & Enjoyed, an Interest in the Lots Such That the Absence of Some Recorded "Deed" Vis a Vis the Lots is Meaningless
> >
> > B. By Virtue of the Declaration, Which Binds the Lots, & the Easements,

Covenants & Restrictions Created by the Declaration, the Association Has, & Had, Standing to Challenge the Actions of Anyone or Anything Purporting to Own, Possess, Have Access to and/or Tax the Lots

C. The Association Had Neither the Right, Nor Chance, to Assert an Interest in the Liens &/or Foreclosures

i. The Association Had No Right to Redeem the Liens

ii. The Association Had No Right to Intervene in, or Otherwise Contest, the Foreclosures & Any Attempt to Do So Would Have Been Denied

iii. A HOA Abused & Constitutionally Harmed By a Tax Sale Certificate That is Void ab initio Has No Obligation to Seek Redress By Assertion of Rights in a "Tax Foreclosure Sale"

iv. The Association Was Improperly Denied the Ability to Prove That the Improper and Unconstitutional Taxation of the Lots Was Caused By the Township's and/or Holzhauer's Misconduct &/or Negligence By Failing to Consult &/or Cross-Reference the

Declaration and Other Documents on File With the Planning Board in the Township Defendants' Possession

POINT II

THE TRIAL COURT SHOULD HAVE DENIED BOTH THE 5/19 TOWNSHIP DEFENDANTS' SJ MOTION, & THE CICERALE DEFENDANTS' SJ MOTION & CICERALE JR'S MOTION FOR SUMMARY JUDGMENT BECAUSE GENUINE ISSUES OF MATERIAL FACT EXISTED

A. Disputed Material Facts Continue to Exist Concerning Whether the Association Had "Notice" of Anything at All & If it Did, Exactly What it Knew & When it Knew It

i. Even If Somehow O'Brien's Deposition Testimony Can be Interpreted In Such A Way As To Believe That He Saw Something Relevant to the Liens, the Foreclosures, Etc., None of It Binds the Association and its Families and Residents

ii. Even If Somehow the Deposition Testimony of One . . . Member of the Board Can be Imputed to the Entire Corporation, & In Turn Have a Preclusionary Effect on the Property Rights of Hundreds

ADJUDGED TO BE INCLUDED WITHIN THE BOUNDS OF THE LAND GOVERNED BY THE DECLARATION

A. A Tax Lien Foreclosure Judgment Does Not Result in Ownership of the Land in Question Free of the Prior Recorded Nonpossessory Interests With Respect to Which Said Land Had Already Been Burdened

i. Relevant Case & Statutory Law Holds that the Subject Land of a Tax Lien Foreclosure Judgment is Not Freed From Nonpossessory Interests

ii. Though it Could Have, the Declaration Does Not Include Any Provision By Which a Lot Owner is Able to Remove His Lot From the Declaration &/or By Which the Declaration Automatically Terminates

iii. The Act Provides that A Unit is Not Freed From the Relevant Master Deed or Bylaws & the Nonpossessory Interests Therein

iv. The Declaration Does Not Include Any Provision By Which It Will Automatically Expire

v. The Restatement Third, Property (Servitudes) Validates & Supports the Longstanding View That Easements and Conditions, Such as those Created Via the Declaration, Survive Tax Lien Foreclosures

B. The Declaration Is and Always Was a Recorded Instrument Affecting Title to the Lots and the Trial Court's View Otherwise is Reversible Error

i. The Declaration and the 4th Amendment Are Each "A Recorded Document" Contemplated by N.J.S.A. 46:26A-12

ii. The Trial Court Already Ruled, using Logic & Elementary Deduction, & it is the Law of the Case, that the Declaration and the 4th Amendment Are Recorded Documents Affecting Title to the Lots

C. Even if the Declaration is Somehow Missing From the Lots' Chain of Title, For Equitable & Practical Reasons, Such as the Health, Safety & Welfare of the Owners & Residents, the Declaration's Nonpossessory Interests Connected With the Lots Must Be Deemed to Have Survived the Relevant tax Foreclosure Sales

i. Owners and Residents Have Been Told That They Had Easement, Use and Access Rights Vis a Vis the Lots and Many Have Experienced and Enjoyed Same For 20+ Years

ii. The Association's Overall Practical and Existing Particulars Allow For Only One . . . Conclusion: the Owners' and Residents' Nonpossessory Interests in the Lots Have to Have Survived the Tax Foreclosure Sales and all That Was Imprisoned by the Cicerale Defendants Just Cannot be Lost

POINT V

THE TRIAL COURT MISUNDERSTOOD RELEVANT FACTS, ISSUES AND CONCEPTS UPON WHICH IT BASED BOTH THE 2019 DECISION AND THE 2021 DECISION SUCH THAT QUESTIONS EXIST AS TO ITS GRASP OF THE LAW CONCERNING REAL ESTATE TAXES, PLANNED UNIT DEVELOPMENTS, TAX LIEN FORECLOSURES AND EASEMENTS

A. Even Though Not One . . . Aspect of this Litigation Involves or Connects to Lots 18.01 & 19, Block 67, Lot 19, the 2021 Decision and the 2019 Decision Held That These Lots & Blocks are Owned by the Cicerale Defendants "in Fee Simple, Free of Any Nonpossessory Interest"

B. Both the 2019 Decision and the 2021 Decision are Inconsistent, Illogical and Confused When Considered Together

POINT VI

THE ASSOCIATION IS ENTITLED TO PRESENT THE EXPERT TESTIMONY OF MARK W. SUSSMAN AT TRIAL

A. By Virtue of the Precise Holding of the in Limine Motion Order, any Reversal of the 2019 Decision that Results in a Remand Should Carry with it an Automatic Extinguishment of the in Limine Motion Order

B. Separate From a Review of the 2019 Decision, if the 2021 Decision is Reversed and Remanded the Appellate Court Must Revisit the in Limine Motion Order and Vacate it

i. Open Space Requirements

ii. Taxes & Assessments of Individual Homes Include, and Have Included, the Value of Each Home's Right to Use, Enjoy and/or Access the [Five] Parcels

iii. Sussman Will Interpret & Explain the Tax Maps, Site Plans, Resolutions, Developer Agreements & Recreation Master Plan

iv. Sussman Will Provide & Explain the Development's History, Chronology of Entire Tract's Subdivision & Creation, & Deletion, of Relevant Blocks & Lots

C. The Trial Court Held That . . . Sussman is Qualified to Testify About Easements, Restrictions & Real Property & Neither the Sussman Report #1 Nor Sussman Report #2 are Net Opinions

We review a trial court's grant of summary judgment de novo, applying the same standard as the trial court. Conley v. Guerrero, 228 N.J. 339, 346 (2017). Summary judgment must be granted "'if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.'" Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016) (quoting Rule 4:46-2(c)).

Turning to plaintiff's quiet title claim, we agree with the judge's finding that there was "no genuine issues of material fact sufficient to determine any party other than [the Cicerale] defendants own the property."

New Jersey's Tax Sale Law:

> confers on a municipality that is owed real estate taxes a continuous lien on the land for the delinquent amount as well as for all subsequent taxes, interest, penalties and costs of collection. The Tax Sale Law converts that lien into a stream of revenue by encouraging the purchase of tax certificates on tax-dormant properties. By authorizing the sale of liens in a commercial market, the Tax Sale Law gives rise to a municipal financing option that provides a mechanism to transform a non-performing asset into cash without raising taxes.
>
> [In re Princeton Office Park L.P. v. Plymouth Park Tax Servs., LLC, 218 N.J. 52, 61-62 (2014) (internal citations omitted).]

As codified by the Legislature, the Tax Sale Law is "deemed to be a remedial statute and to operate both prospectively and retrospectively and be liberally construed to effectuate the remedial objects thereof." N.J.S.A. 54:5-3. The underlying purposes of tax sale certificates are to secure marketable titles to land, thereby maximizing "the recovery of unpaid municipal taxes and other municipal charges and [] to quickly return to the tax rolls the property on which such charges have remained in default." Town of Phillipsburg v. Block 1508, Lot 12, 380 N.J. Super. 159, 162 (App. Div. 2005).

The purchaser of a certificate for unpaid taxes does not have title to the land but has a lien interest derived from the taxing district. Jefferson Twp. v. Block 447A, Lot 10, 228 N.J. Super. 1, 4 (App. Div. 1988). "The holder has the right to receive the sum paid for the certificate with interest at the redemption

rate for which the property was sold." Ibid. In addition, the holder has the right to acquire title by foreclosing if the delinquent owner does not redeem the certificate within two years from the date of the sale. Id. at 4-5. However, the property owner has the right to redeem at any time up to the entry of final judgment. Simon v. Cronecker, 189 N.J. 304, 319 (2007). "For tax liens, '[a] subsequent tax sale certificate . . . has priority over an earlier certificate, and the foreclosure of the later certificate can extinguish the earlier certificate.'" Cherokee LCP Land, LLC v. City of Linden Plan. Bd., 234 N.J. 403, 425 (2018) (quoting Lato v. Rockaway Twp., 16 N.J. Tax 355, 363 (Tax 1997)) (alterations in original). After a judgment of foreclosure is entered, "no application shall be entertained to reopen the judgment after three months from the date thereof, and then only upon the grounds of lack of jurisdiction or fraud in the conduct of the suit." N.J.S.A. 54:5-87.

Additionally, N.J.S.A. 54:5-26 specifies that, in the event of a tax sale, notice must be placed:

> in five of the most public places in the municipality, and a copy of the notice shall be published in a newspaper circulating in the municipality, once in each of the four calendar weeks preceding the calendar week containing the day appointed for the sale. In lieu of any two publications, notice to the property owner and to any person or entity entitled to notice of foreclosure. . . may be given by regular or certified mail . . . .

. . . .

> Failure of the property owner to receive a notice of a tax sale properly mailed by the tax collector shall not constitute grounds to void the subsequent tax sale.

Further, "New Jersey is considered a 'race-notice' jurisdiction, which means that as between two competing parties the interest of the party who first records the instrument will prevail so long as that party had no actual knowledge of the other party's previously-acquired interest." Cox v. RKA Corp., 164 N.J. 487, 496 (2000). Under the statutory race-notice scheme, "any recorded document affecting the title to real property is, from the time of recording, notice to all subsequent purchasers, mortgagees and judgment creditors of the execution of the document recorded and its contents." N.J.S.A. 46:26A-12(a). "A claim under a recorded document affecting the title to real property shall not be subject to the effect of a document that was later recorded or was not recorded unless the claimant was on notice of the later recorded or unrecorded document." N.J.S.A. 46:26A-12(b).

As a threshold matter, it is undisputed that plaintiff does not have a deed to any of the Disputed Properties. New Jersey law makes clear that "[o]wnership of real property is transferred by deed." H.K. v. State, 184 N.J. 367, 382 (2005) (citing N.J.S.A. 46:3-13). Thus, plaintiff's argument that the Declaration and

the fourth amendment placed the Association's interest in the Disputed Properties' chain of title is meritless as both documents clearly indicate that the Developer held title to the property and that, although the Developer intended to transfer title to the Association, such transfer was never effectuated.

Having established that plaintiff does not own the property, the judge correctly found that plaintiff lacked standing to bring a claim seeking to quiet defendants' title to the property or to challenge the Township's taxation of the property, as only the owners of the property are entitled to do so. See N.J.S.A. 2A:62-1; N.J.S.A. 54:3-21. Furthermore, any discussion of notice is irrelevant as notice specifically relates to the property owner; however, even failure to provide notice does not void the subsequent tax sale. See N.J.S.A. 54:5-26. Therefore, the Developer, as owner of the Disputed Properties, was the only entity entitled to notice and also the only entity that could challenge the tax sale certificates and subsequent foreclosures. Because the Developer failed to redeem the tax sale certificates or challenge the foreclosures, and because the Cicerale defendants properly recorded their interest, we find that the Cicerale defendants successfully obtained title to the Disputed Properties.

The next issue to resolve is whether the Disputed Properties were properly taxed. Although plaintiff does not have standing to challenge the Township's

taxation of the property, if the Disputed Properties were improperly taxed, then the tax sale certificates, and subsequent foreclosures, would be void. See Hudson Cnty. Park Comm'n v. Jacobson, 132 N.J.L. 287, 289 (Sup. Ct. 1944).

Contrary to plaintiff's argument, plaintiff's common property could have been taxed. For HOAs, "the common facilities which are legally owned by the [HOA] will often be taxed as association property. All members will, as a practical matter, be liable for that debt since it will constitute one of the common expenses for which they are all assessed." Smith, Estis & Li, New Jersey Condominium & Community Association Law 7 (2023). "Because of the separate tax assessment of unit and association-owned lots, HOA[]s face a greater risk of double taxation[,]" which, while frowned upon, is "not in itself illegal." Ibid. Indeed, section 8.01 of the Declaration even contemplated as much by stating that the Association would be responsible for "payment of all real estate taxes assessed against the [c]ommon [p]roperty." Therefore, we reject plaintiff's argument that the Disputed Properties were improperly taxed.

Turning to plaintiff's easement claim, we agree with the trial judge's finding that, "[f]or plaintiff to have obtained an interest in the five parcels, it must have either recorded an easement in the chain of title . . . or recorded a deed," which plaintiff failed to do.

"[HOAs] are created in New Jersey by the filing of a declaration of covenants, conditions, and restrictions contained in deeds and association bylaws." Highland Lakes Country Club & Cmty. Ass'n v. Franzino, 186 N.J. 99, 110 (2006). "The covenants include restrictions and conditions that run with the land and bind all current and future property owners." Ibid. "The bylaws set forth the rules and regulations that govern an association's members." Id. at 111. "Because such documents are instruments affecting title to real estate, homeowners' associations may record their governing documents."[6] Ibid. "Once recorded, the recordation can serve as notice to subsequent judgment creditors and purchasers." Ibid. (citing N.J.S.A. 46:16-1).

"Whether or not an easement appurtenant to the dominant estate will be cut off by foreclosure of a tax sale certificate covering the servient estate depends upon the effect given to and the method of assessment itself." Lipman v. Shriver, 51 N.J. Super. 356, 359 (Law Div. 1958). "When an easement is carved out of one property for the benefit of another, the market value of the servient estate is thereby lessened, and that of the dominant increased, practically by just the value of the easement; the respective tenements should

[6] The case does not specifically indicate where the declaration needs to be recorded.

therefore be assessed accordingly." Ehren Realty Co. v. Magna Charta Bldg. & Loan Ass'n, 120 N.J. Eq. 136, 138 (Ch. 1936) (quoting Tax Lien Co. v. Schultze, 213 N.Y. 9, 11 (1914)). Thus, if the tax sale is subject to the easement, "the right of way cannot be extinguished by foreclosure of the lien." Ibid. Conversely, if the easement is subject to the tax lien, it would be destroyed by the foreclosure. Niestat v. Equitable Sec. Co., 138 N.J. Eq. 480, 482 (Ch. 1946).

Although easements may survive a tax sale foreclosure, such easements must be recorded in the chain of title. "A purchaser is not bound to take notice of restrictions when they are absent from his chain of title—he is only bound to look to his own deed and chain of title, unless chargeable with direct notice." Hammett v. Rosensohn, 46 N.J. Super. 527, 535 (App. Div. 1957); see also Pochinski Realty Assocs. v. Puzio, 251 N.J. Super. 388, 393 (App. Div. 1991) (noting that "the easement was fully disclosed in plaintiff's chain of title"); Nuzzi v. Corcione, 139 N.J. Eq. 339, 344 (Ch. 1947) ("[E]very purchaser of land takes title subject to any existing easements therein, referred to in the deed by which he acquires title . . . ."); Camp Clearwater, Inc. v. Plock, 52 N.J. Super. 583, 598 (Ch. Div. 1958) ("A purchaser is chargeable with notice of every matter affecting the estate, which appears on the face of any deed forming an essential

link in the chain of instruments through which he derived his title . . . .") (internal quotation marks omitted).

Additionally, pursuant to N.J.S.A. 54:5-89.1:

> [i]n any action to foreclose the right of redemption in any property sold for unpaid taxes or other municipal liens, all persons claiming an interest in or an encumbrance or lien upon such property, by or through any conveyance, mortgage, assignment, lien or any instrument which, by any provision of law, could be recorded, registered, entered or filed in any public office in this State, and which shall not be so recorded, registered, entered or filed at the time of the filing of the complaint in such action shall be bound by the proceedings in the action so far as such property is concerned, in the same manner as if the person had been made a party to and appeared in such action, and the judgment therein had been made against the person as one of the defendants therein.

Furthermore, pursuant to N.J.S.A. 54:5-104.65, "[u]pon the recording of a certified copy of [a] judgment . . . , the plaintiff shall be seized of an estate in fee simple, in the lands described therein, absolute and free and clear of all liens and encumbrances, in accordance with the terms of said judgment."

Here, while the Declaration and fourth amendment were recorded, there is no evidence in the record to suggest that those documents were recorded in the Disputed Properties' chain of title. Further, the Declaration was not contained in a deed, as dictated by Highland Lakes. Because those documents

were never properly recorded in the Disputed Properties' chain of title and, therefore, the Cicerale defendants had no notice of the encumbrances, the encumbrances were effectively extinguished by the foreclosure judgments pursuant to N.J.S.A. 54:5-89.1 and N.J.S.A. 54:5-104.65.

Turning to plaintiff's challenge to the January 14, 2021 order, the exclusion or admission of an expert's testimony or report is "committed to the sound discretion of the trial court." Townsend v. Pierre, 221 N.J. 36, 52 (2015). Therefore, on review, a trial court's grant or denial of a motion to bar expert testimony is entitled to deference. Ibid.; see Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011) ("[W]e apply [a] deferential approach to a trial court's decision to admit expert testimony, reviewing it against an abuse of discretion standard.").

We find that the judge properly granted the Cicerale defendants' motion to exclude Sussman's expert testimony because his testimony would not be helpful to the jury on the remaining issue of whether any easements survive the foreclosure judgments. See N.J.R.E. 702.

As for plaintiff's remaining contentions, we find insufficient merit to warrant extended discussion in a written opinion. Rule 2:11-3(e)(1)(E).

Affirmed.