Plaintiff-Respondent, Stone Wool 22, L.L.C., vs. Defendant-Respondent, Block 87, Lot 10 57 Washington Avenue, Irvington, NJ; and Intervenor-Appellant Peake Point, L.L.C.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket A-394-23 CIVIL ACTION On appeal from the Superior Court of New Jersey, Chancery Division, Essex County, Docket- ESX-F-8595-22 Sat below: Hon. Jodi Lee Alper, P.J.Ch.

APPELLANTS' BRIEF

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PRELIMINARY STATEMENT

Abandoned properties hurt communities. They harbor vermin, invite drug addicts as a haven for shelter, bring down property values, are an eyesore to neighbors, and strike fear in the families that live nearby and have to walk past them to school, church, or work. Despite using the Tax Sale Law to its advantage in acquiring an abandoned property in Irvington, Matthews Enterprises abused the law by intentionally not paying its taxes and leaving the property to rot. It then ignored foreclosure notices and chose to spend money on investments in two nicer towns, Westfield and Rahway. Matthews received all notices but ignored the deadline, "assuming" he had more time based on his past experience as a tax foreclosure plaintiff. Matthews was wrong and the foreclosure ended January 23, 2023.

Matthews knew what it was getting into as a plaintiff – tax foreclosure - and knew what would happen as a defendant. It used monies that could ameliorate a scourge in Irvington elsewhere. It put the children and families of Irvington in danger. It was entitled to no relief. Peake Point bought the property on the morning of April 21, 2023 for $150,000.00. That afternoon, Matthews filed a motion to vacate the judgment.

Despite Peake Point being a bonafide purchase for value without notice, the trial court vacated the judgment leaving it as the biggest loser without any just basis for that to have occurred.

STANDARD OF REVIEW

A motion to vacate a foreclosure judgment is reviewed for abuse of discretion, found "when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" U.S. Bank, N.A. v. Guillaume, 209 N.J. 449, 467-468 (2012). Reconsideration is also reviewed for abuse of discretion. Cummings v. Bahr, 295 N.J. Super. 374, 389 (App. Div. 1996).

A court mistakenly exercises its discretion when it "fail[s] to give appropriate deference to the principles" governing the motion, relies "upon a consideration of irrelevant or inappropriate factors," or rests its decision "on an impermissible basis." BV001 REO Blocker, LLC v. 53 West Somerset Street Properties, LLC, 467 N.J. Super. 117, 123-124 (App.Div. 2021), multiple citations omitted. Guillaume, 209 N.J. at 467.

As to the legal issue of the Recording Act, equity follows the law and a trial judge's personal beliefs are insufficient to deprive a party of its statutory rights. IMO Estate of Shinn, 394 N.J.Super. 55, 67 (App.Div. 2007).

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

On August 26, 2020, Matthews Enterprises purchased a 2015 tax certificate by assignment, knowing the property was abandoned and that it could foreclose

[1] Combined for brevity.

immediately. Ia151-154. But after filing foreclosure on November 30, 2020, Ia236, averring that the property had been declared abandoned by the City, Ia237, it paid no more taxes and left the property abandoned and unsecured. Matthews completed its foreclosure 193 days later, June 10, 2021. Ia162.

Despite having purchased its lien in the third-quarter of 2020, Matthews didn't bother paying the 2020 open taxes, nor 2021-2023 either. As a result, another tax sale took place December 29, 2020. Ia17. The property was still abandoned more than a year later and Plaintiff filed this foreclosure August 17, 2022. Ia1. On October 14, 2022 Plaintiff served the pleadings by certified and regular mail (as well as by publication and posting as required) to Matthews at six different addresses, including that of its foreclosure counsel[2] and its registered office. Ia22-24. Matthews received all notices but "assumed Plaintiff's foreclosure would near conclusion between six months to a year from filing." Ia144, ¶13. This was despite the Notice that clearly stated "45 days following publication, we will move for the entry of final judgment..." Ia22.

On November 9, 2022, Plaintiff filed a motion to declare the property as abandoned, mailing it by certified and regular mail to all six addresses. Ia39-41. The motion was granted unopposed December 29, 2022. Ia42. On January 6, 2023,

[2] We presume that Matthews' foreclosure counsel provided a copy to him as well.

Plaintiff filed a motion to substitute the Plaintiff, again mailing by certified and regular mail. Ia54-56. The order was entered January 20, 2023. Ia57.

Final judgment entered January 23, 2023, Pa131, and was mailed certified and regular mail that same date. Ia135. Plaintiff's foreclosure took 159 days, not much less than the 193 days that Matthews' foreclosure did. Matthews hired an attorney who filed an appearance post-judgment, February 12, 2023, but took no action thereafter. Ia138. The property was sold to Peake Point for $150,000.00 on the morning of Friday, April 21, 2023. Ia211, Ia217. A motion to vacate was filed that afternoon, hours after closing. Ia139.

Matthews' principal conceded he had other projects, Rahway and Westfield, more deserving of his money, Ia143 ¶7, as his "financial resources and time and attention" and almost all of his capital was tied up elsewhere. Ia144, ¶14. He filed no answer. He contested no motion. He did not dispute the condition of the property – pictures don't lie – and received all notices. He just did not act. Although he claimed difficulty in getting the figures to redeem, Plaintiff showed this untrue. Matthews just didn't pay.

A consent order permitting Peake Point's intervention was entered May 25, 2023, Ia209, and both Plaintiff and Peake Point opposed on May 11 and May 18. Ia211, Ia250. Defendant submitted a reply certification May 22, 2023. Ia309. Despite having already responded, Defendant filed another certification May 31,

2023, Ia320, another June 2, 2023. Ia344, yet another on June 21, 2023, Ia361, and still another June 22, 2023. Ia363. Plaintiff responded with one on June 23, 2023. Ia372.

After argument, the judgment was vacated and a seven-page opinion issued August 14, 2023. Ia377. While restating the arguments of each party, there were no facts to suggest that Peake Point had any actual knowledge nor reason to question title and the court's analysis spanned just three paragraphs with few factual findings or legal conclusions. Ia384-385.The only finding seemingly made was when the court stated that both Plaintiff and Intervenor "were aware" that Defendant had wanted to redeem, a statement finding no support in the record. Ia384.

Peake Point timely moved for reconsideration, Ia386, noting that there were no facts showing that it had any notice, nor even reason to be concerned, of any defect in the foreclosure. Even now there was no defect in the foreclosure as Matthews received every single notice at every single stage of the foreclosure but failed to respond. Defendant opposed. Ia388. Plaintiff also sought equitable relief. Ia401.

The trial court denied reconsideration October 6, 2023 though it again did not point to any defect in the foreclosure nor specify what section of the Rule was relied upon. Ia411. Peake Point appealed October 9, 2023. Ia415. Meanwhile, code

violations were issued against Peake Point that remain pending in municipal court. Ia420-427.

LEGAL ARGUMENT

I. WHAT WE'RE NOT HERE ABOUT.

We are not here arguing the issues raised by Tyler v. Hennepin Co., 598 U.S. 631, 143 S.Ct. 1369 (2023) or 257-261 20th Avenue Realty, Inc. v. Roberto, ___ N.J.Super. ____ (App.Div. 2023) because this case is not a pipeline case, and the trial court expressly stated this. Ia385. Such an analysis would also be improper considering that Matthews acquired title by way of a tax foreclosure in the first place.

II. BACKGROUND ON THE TAX SALE LAW IN NEW JERSEY. (Raised below, *passim*).

Our Legislature has long recognized the burden caused by delinquent taxpayers. "[Q]ualified municipalities are owed millions of dollars annually in unpaid property taxes, and that such uncollected taxes adversely impact qualified municipalities' ability to timely collect the moneys necessary to meet their operating expenditures and provide for the delivery of necessary government services, amplifying the risk of future real property tax increases and negatively impacting those taxpayers who timely remit payment. N.J.S. 52:27BBB-67, emphasis added.

> The Tax Sale Law serves as a framework to facilitate the collection of property taxes. It 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).]

Created to assist municipalities in collecting revenue for real estate taxes and expenses, the Legislature directed

> This chapter shall be 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. 54:5-3].
>
> This provisions of this article shall be liberally construed to encourage the barring of the right of redemption by actions in the Superior Court to the end that marketable titles may thereby be secured.
>
> [N.J.S. 54:5-85].

A first priority lien is created for unpaid taxes, interest, and costs. N.J.S. 54:5-6, 54:5-7, 54:5-8, 54:5-9. The tax collector is required to "enforce the lien by selling the property in the manner set forth." N.J.S. 54:5-19. The sale is made in fee simple, subject to redemption at the lowest rate of interest bid at sale. N.J.S. 54:5-32. The lands may be sold to the public, the municipality, or even the State. N.J.S. 54:5-30.1, 54:5-34, 54:5-34.1. Although the property is "sold", it is subject to redemption at the statutory rate of interest and evidenced by a tax certificate. N.J.S. 54:5-32, 54:5-46,

54:5-47. The purchaser may also remit payment for subsequent taxes due and earn interest on them. N.J.S. 54:5-60.

The Tax Sale Law "is designedly such that it will not be worth the taxpayer's while to make the municipality his involuntary banker." East Orange v. Palmer, 52 N.J. 329, 334 (1968). The "legislative objective is to enable local governments to realize taxes by returning property to the paying tax rolls without first expending money to foreclose or bar the equity of redemption." Simon v. Deptford Township, 272 N.J.Super. 21, 26, (App.Div.) cert. den. 137 N.J. 310 (1994).

One with the right to redeem must do so by paying the delinquent taxes before the time to redeem has been cut off. N.J.S. 54:5-54. The right continues "until barred by the judgment of the Superior Court." N.J.S. 54:5-86(a), N.J.S. 54:5-104.64. "[T]he express policy of the [Tax Sale Law] is that it be liberally construed so as to bar the right of redemption, not preserve it, the goal being that marketable titles to property be secured." Malone v. Midlantic Bank, N.A., 334 N.J.Super. 238, 250 (Ch. Div. 1999) (citing N.J.S. 54:5-85), aff'd o.b., 334 N.J.Super. 236 (App. Div. 2000). The judgment entered is final, "and 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. 54:5-87; N.J.S. 54:5-104.67. The judgment vests in the plaintiff "an absolute and indefeasible estate of inheritance in fee simple in the land[.]" N.J.S. 54:5-104.64(a). Once a judgment is

entered, thereafter the plaintiff's right to the property becomes paramount. Landa v. Adams, 162 N.J.Super. 318, 323 (App.Div. 1978).

"Recognition cannot be afforded any policy enabling citizens to escape paying taxes." City of Philadelphia v. Bauer, 97 N.J. 372, 383 (1984). That same Court quoted Justice Oliver Wendell Holmes, as well as a prior case that "taxes are the lifeblood of government, the vital force needed to sustain the public interest. "Taxes are what we pay for a civilized society." Id. at 384, quoting City of Philadelphia v. Austin, 86 N.J. 55, 65-66 (1981), quoting, in turn, Compania General de Tabacos v. Collector, 275 U.S. 87, 100, 48 S.Ct. 100, 105 (1927).

Justice Albin, dissenting in a case involving state pension contributions, aptly described what tax revenue is used for and why it is so vital:

> The public workers … are not strangers to us. They are the police officers who protect our citizens and neighborhoods from violent crime; the firefighters who enter burning homes to save lives and salvage property; the teachers who educate our children; the prosecutors, public defenders, and judges, and their staffs, who operate our system of justice; the crews who pave our roads and recycle our waste; and the myriad other workers who, in their unheralded ways, improve the quality of life for almost nine million people in New Jersey and allow State and local governments to operate.
>
> [Burgos v. State of New Jersey, 222 N.J. 175, 225 (2015) (Albin. J., dissenting).]

III. DEFENDANT FAILED TO ALLEGE ANY EXCUSABLE NEGLECT NOR WAS A MERITORIOUS DEFENSE PRESENTED, LET ALONE EXCEPTIONAL CAUSE. DEFENDANT WAS NOT ENTITLED TO ANY RELIEF UNDER R.4:50-1. (Raised below 1T38:3 to 41:13)

Our Rules of Court provide a means for relief from a judgment. R.4:50-1. Relevant here are (a) and (f) - (a) mistake, inadvertence, surprise, or excusable neglect or (f) any other reason justifying relief. Neither prevails.

There was certainly no basis for relief under R.4:50-1(a) as Matthews was properly served and had full knowledge of all notices and deadlines. The only mistake, if it can be called a mistake, is Mr. Matthews *assuming* that he had more time in which to redeem – something he ostensibly learned as a tax foreclosure plaintiff of his own. That unilateral belief did not implicate Plaintiff, Intervenor, or the Courts in causing it.

A. There was no mistake, surprise, excusable neglect, nor any defense.

Under (a), a litigant must meet a two-prong test, first, excusable neglect, followed by a meritorious defense, neither of which were met. While motions to vacate judgments are treated indulgently, the moving party must nevertheless show "that the neglect to answer was excusable under the circumstances and that the [movant] has a meritorious defense." Marder v. Realty Construction Co., 84 N.J.Super. 313, 318 (App.Div.), affirmed 43 N.J. 508 (1964). Defendant did not do so.

'Excusable neglect' is that "which might have been the act of a reasonably prudent person under the same circumstances." Tradesman National Bank & Trust Co. v. Cummings, 38 N.J.Super. 1, 5 (App.Div. 1955). "Carelessness may be excusable when attributable to an honest mistake that is compatible with due diligence or reasonable prudence." Mancini v. EDS, 132 N.J. 330, 335 (1993), Deutsche Bank Nat'l Tr. Co. v. Russo, 429 N.J. Super. 91, 98 (App. Div. 2012). But the type of mistake entitled to relief under the rule is *one the party could not have protected itself against*. DEG, LLC v. Twp. of Fairfield, 198 N.J. 242, 263 (2009). A business' failure to read or respond to a lawsuit is not excusable neglect.

Matthews knew taxes were due on the property because it acquired the certificate in the third-quarter of 2020 and didn't even pay the fourth-quarter taxes which formed Plaintiff's certificate. He received and read all of the notices but "assumed" it would take 6-12 months - despite the notices that said forty-five days and despite the fact that his own foreclosure took only six months.

"A property owner knows that he must pay taxes on his property, and that if he fails to do so the municipality will sell the property (or the tax sale certificate) for the price of taxes due and owing." Long Beach v. Lot 3, Block 9, 189 N.J.Super. 116, 125 (Ch. Div. 1983). "[T]hey cannot have been unmindful that their interest in the property would not continue forever if they failed to pay taxes." Id. at 126.

Considering that Matthews had just prosecuted its own tax foreclosure, it obviously knew what it faced when a tax foreclosure was filed against it.

A corporate defendant bears "an obligation to institute procedures for receiving and responding to lawsuits." Davis v. DND/Fidoreo, Inc., 317 N.J.Super. 92 (App.Div.1999). Defendant received all notices, read them, but failed to act. He simply tried to juggle funds between multiple properties and failed. “Suffering the downside of a financially risky undertaking is not a forfeiture in law or equity.” Phillipsburg v. Block 1508, Lot 12, 380 N.J.Super. 159, 174 (App.Div. 2005). Lack of funds “constitutes the customary basis for foreclosure.” Del Vecchio v. Hemberger, 388 N.J.Super. 179, 188 (App. Div. 2006).

Motions to vacate final judgments are not as liberally granted because the Rule is designed to reconcile the strong interests in finality and judicial efficiency with the equitable notion that courts should have the authority to avoid an unjust result. Bauman v. Marinaro, 95 N.J. 380, 392 (1984). In one case, where a motion was filed in December following a September judgment, the Appellate Division affirmed the denial of a motion to vacate based upon the absence of excusable neglect:

> Within the specific context of a default judgment, it has been noted that an application to vacate such a judgment is to be "viewed with great liberality, and every reasonable ground for indulgence is [to be] tolerated to the end that a just result is reached." However, even under this rather accommodating standard, it is well settled that a default judgment is not to be set aside unless the defendant seeking such relief can demonstrate that his failure to answer or otherwise appear and defend was somehow excusable, and further, that he has a meritorious

> defense to either the cause of action or the quantum of damages assessed.
>
> [Resolution Trust Corp. v. Associated Gulf Contractors, 263 N.J.Super. 332, 340-341 (App.Div. 1993), emphasis added, multiple citations omitted].

In tax foreclosures, yet another public policy in favor of final judgments is put into play - the Legislature's determination that tax sale judgments should be final. N.J.S. 54:5-87 (stressing marketable title), Caput Mortuum v. S&S Crown, Ltd., 366 N.J.Super. 323, 336 (App.Div. 2004) (describing a lienholder's rights including "most importantly, the right to acquire title by foreclosing..."). "Quite obviously, the real incentive for participation in a tax sale is the potential to secure marketable title in a foreclosure action." Simon v. Rando, 374 N.J.Super. 147, 152-153 (App.Div. 2005), affirmed 189 N.J. 339 (2007), Landa, supra, 162 N.J.Super. at 323 (after judgment, plaintiff's title "becomes paramount").

The statutory command, N.J.S. 54:5-85, "to encourage the barring of the right of redemption" "evidences an intention to impose stricter limits upon the time and the grounds for vacating a judgment of foreclosure than would apply generally under Rule 4:50." Phillipsburg, supra, 380 N.J. Super. at 166; cf. Bron v. Weintraub, 42 N.J. 87, 91 (1964) (determining it "understandable that the Legislature found it fair to bar the right to redeem by a strict foreclosure").

B. Matthews did not show any exceptional circumstances.

There was no basis for relief under (f), which only applies when "truly exceptional circumstances are present." Hous. Auth. of Morristown v. Little, 135 N.J. 274, 283 (1994). "The movant must demonstrate the circumstances are exceptional and enforcement of the judgment or order would be unjust, oppressive or inequitable." Johnson v. Johnson, 320 N.J. Super. 371, 378 (App. Div. 1999). If the loss of a family home in Guillaume is not exceptional, the loss of a vacant, abandoned, investment property owned by a business is even less so.

There must be some showing of irregularity to set aside a foreclosure. East Jersey Savings & Loan Association v. Shatto, 226 N.J.Super. 473, 476 (Ch.Div. 1976), Doyle v. Chase Manhattan Bank, 80 N.J.Super. 105, 119 (App.Div.) cert. den. 40 N.J. 508 (1963) (absent showing of mistake or fraud the motion to vacate was properly denied), Sandford v. Wellborn, 85 N.J.Eq. 577, 587 (E&A 1916 (a final foreclosure decree, even by default, will not be vacated without a meritorious defense), Hallowell v. Daly, 56 A. 234, 235 (Ch. 1903) (no defense on merits shown, motion to vacate foreclosure denied). The Supreme Court has also stated:

> Whether exceptional circumstances exist is determined on a case by case basis according to the specific facts presented ... Among the factors to be taken into account on a Rule 4:50 motion are the 'extent of the delay in making the application for relief, the underlying reason or cause, fault or blamelessness of the litigant, and **any other prejudice that would accrue to the other party**.'

> [IMO Guardianship of J.N.H., 172 N.J. 440, 474 (2002), emphasis added].

Matthews Enterprises knew more about tax certificates and tax foreclosure than any other defendant in any published or unpublished case found because, after all, *it was a tax certificate investor and even acquired the property as a result of tax foreclosure*. Despite a knowledge curve far ahead of any other foreclosure defendant, Matthews intentionally chose to invest its funds in more tony communities than Irvington – Westfield and Rahway – and chose neither to pay its taxes to Irvington nor secure the property from entry by vagrants, squatters, and illicit drug and alcohol use. The pictures in the record demonstrate beyond any doubt the dangerous nature of the property. Ia268-288, and Defendant admitted as much. 1T16:3-5. Only the smell of human waste cannot be reproduced in the appendices. Ia258, ¶10.

Matthews' decision to not pay its Irvington taxes as a means of financing its Westfield and Rahway investments is not only inexcusable but an abuse of the tax sale process. Many will remember the new phrase of "zombie houses" after the 2009 foreclosure crisis where houses became vacant, abandoned, and dangerous to local communities. Our Legislature enacted specific laws to combat such blight, N.J.S. 55:19-78 et. seq., empowered municipalities to enforce code violations against foreclosure plaintiffs, N.J.S. 46:10B-51, and permitted immediate foreclosure of tax certificates. N.J.S. 54:5-86(d). Allowing Matthews to *intentionally* not pay its 2020-

2023 taxes runs against the concept that the Tax Sale Law is intended to prevent owners from using a municipality as its involuntary banker. East Orange v. Palmer, 52 N.J. at 334. Yet that is exactly what Matthews Enterprises did – it used its intentional non-payment of Irvington's taxes as a financing source for its Rahway and Westfield investments. That was grossly inexcusable.

Homeowners garner more sympathies for equitable relief than others, however, a corporate, absentee owner who knowingly and intentionally doesn't pay its taxes and allows the property to remain a blight on the community is entitled to no such sympathy. This is not a case where anyone would be made homeless. Simply, one real estate investor has to lose – Matthews Enterprises or Peake Point – and one was at fault while the other wholly blameless. Equity will impose a loss against the person whose conduct could first have avoided the loss, the party that should bear the loss is not only the one that could first have avoided it, but who actually caused it in the first place. Post at 27. Matthews put the entire process into motion and should not have been allowed to impose a loss on Peake Point. The "prejudice to the other party," here Peake Point, was not given sufficient weight below.

C. The Trial Court's findings were insufficient as well as factually and legally mistaken. (Raised below on reconsideration).

The trial court's analysis of the motion to vacate was confined to three paragraphs:

> While defendant's conduct in this matter was less than exemplary, the record reflects that he was arguably ready and able to redeem in December 2022 within the statutory time period. He was familiar with the foreclosure process for abandoned property as he availed himself to it in purchasing his own tax sale certificate which he foreclosed on June 10, 2021. Moreover, he failed to pay any taxes during the time he owned the property.
>
> As concerning as was Matthews inaction, the plaintiff and intervenor were aware of Matthews's efforts at redemption and did little acknowledge them. To the contrary, arguably within the three month statutory period for Matthews to redeem, and on the date of the filing of Matthews's motion to set aside Final Judgment, Peake Point purchased the property by way of quit claim deed for nearly $130,000.00 over the amount of the redemption amount including penalties and interest. Furthermore, defendant has established that it invested nearly $30,000 in commencing the rehabilitation process for the property.
>
> Without reaching the impact of the Tyler v. Hennepin case and/or its retroactivity, and considering that the defendant is merely seeking the right to be granted ten days during which to redeem its tax sale certificate, the court is GRANTING the relief as modified.
>
> [Ia477-478].

At no time did the trial court find any mistake, surprise, or *excusable neglect* by Defendant, nor did Her Honor indicate the existence of any defense, let alone a meritorious one. No reference to R.4:50-1(a) or (f) was even made in the analysis. R.1:7-4.

Two potential findings were also mistaken. The court stated that "plaintiff and intervenor were aware of Matthews's efforts at redemption and did little acknowledge them," yet there is nothing in the record to even suggest that Peake

Point was aware of anything at all. To the contrary, Mr. Phillips certified that he had no such knowledge whatsoever. Ia257. Hence, this finding of fact is "manifestly unsupported" by the record and cannot be upheld on appeal. Balducci v. Cige, 240 N.J. 574, 595 (2020). Nothing in the record showed Peake Point on notice of anything.

Next, the court's statement that Peake Point's closing was "arguably within the three-month statutory period for Matthews to redeem," is a legal error to which no deference is due. There is no post-judgment right of redemption; what exists is a deadline for filing a motion to vacate judgments after three months. N.J.S. 54:5-104.64, 54:5-105.

Simply, the right to redeem was barred by the judgment and remains barred unless a motion to vacate is timely filed *and granted on the merits*. It is not a get-out-of jail-free card for a defendant just to file a motion; that motion must be meritorious and it must prevail. Compare Resolution Trust, supra, 263 N.J.Super. at 340-341.

In denying reconsideration, the trial court stated

> The reasons for which the court granted the motion to vacate the final judgment were anchored in the timing of the motion to vacate (less than three months from the recording of the final judgment) as well as the fact that intervenor purchased the property by way of quitclaim deed on the same date defendant filed its motion to vacate. Moreover, the purchase was for nearly $130,000.00 in excess of the redemption amount and after defendant invested almost $30,000.00 in

> rehabilitation costs. Thus, the alleged "bona fides" of intervenor's purchase did not tip the scales in favor of Peake Point.
>
> [Ia511].

The court conflated the statutory time period to timely file a motion with the statutory right to redeem, which are wholly different. All motions to vacate under Rule 4:50-1 must be filed within a "reasonable time," regardless of the motion's grounds. Citibank, N.A. v. Russo, 334 N.J. Super. 346, 535 (App. Div. 2000), which can be less than one year. "We have explained that a reasonable time is determined based upon the totality of the circumstances." Romero v. Gold Star Distrib., LLC, 468 N.J. Super. 274, 296 (App. Div. 2021).

While the trial court referenced New Shrewsbury v. Block 115, Lot 4, 74 N.J. Super. 1 (App.Div. 1962) and the three-month period, that reference is misplaced. "The narrow issue before us on this appeal is whether the trial court properly denied Harvey's motion to reopen this tax foreclosure judgment on the ground that it was not made within time [under N.J.S. 54:5-104.67]." Id. at 8. On the other hand, then R.4:62-2 (now R.4:50-1) allowed for one-year to seek relief. Ibid.

Holding that "When a statutory provision and a rule of the court are in conflict in a matter of practice and procedure, the rule prevails," the panel stated that "in construing what is a "reasonable time" under the rule, judicial deference ought to be paid to the Legislature's expression of public policy, fixing a three months' time limitation for making such a motion in a tax foreclosure proceeding, except where

the ground is fraud or lack of jurisdiction." Id. at 8-9. New Shrewsbury did not establish a right to redeem post-judgment; *it merely confirmed a defendant's right to file a timely motion* seeking such relief. A motion is not meritorious simply because it is timely.

The Appellate Division remanded for a determination "for a plenary hearing and a determination as to whether under all the facts and circumstances of the case it would be inequitable to apply the three months' limitation as a bar to Harvey's motion to reopen the judgment. Such a factual determination and conclusion cannot be made by us on the basis of the present inadequate record before us." Id. at 10. It also directed the trial court to consider various disputed facts including the alteration of an affidavit of non-redemption, the conduct of plaintiff's counsel in possibly lulling defendant's delay, and the right to redeem. Id. at 10-11.

New Shrewsbury simply has no bearing here other than a discussion of what the three-month period entails. It made clear that the time limit is for filing a motion, not an extension of the right to redeem unless that motion is granted. Hence, the trial court's reliance on New Shrewsbury to deny reconsideration was legally mistaken.

Again the statement that Peake Point's purchase was "arguably within the three-month period for Matthews to redeem," 1T477, was mistaken because N.J.S. 54:5-104.67, *does not create a right to redeem nor even a time period in which to redeem*. Instead, it provides a deadline after which a motion to vacate a judgment

cannot (or at least should not) be granted. Once the judgment is entered, the right to redeem no longer exists, N.J.S. 54:5-87 and N.J.S. 54:5-104.64, meaning that there is no "three-month period for Matthews to redeem." While it is no doubt true that a defendant can seek relief from a final judgment within three-months, only an order vacating judgment revives a right to redeem.

This 90-day period is also wholly illusory given longstanding precedent where our courts have repeatedly held that the statute means nothing when weighed against the judiciary's right to decide cases. Bergen Eastern v. Koss, 178 N.J.Super. 42, 45 (App.Div. 1981), M&D Associates v. Mandara, 366 N.J.Super. 341, 351 (App.Div. 2004) ("[i]n foreclosure actions, where there is a conflict between a statute regarding practice and procedure, the court rules are generally paramount"), cert. denied 180 N.J. 151 (2004); BV001 REO Blocker, supra, 467 N.J.Super. 117; New Shrewsbury, supra, 74 N.J.Super. at 8-9, Phillipsburg, supra, 380 N.J.Super. 159; But see Navillus Group v. Accutherm Inc., 422 N.J.Super.. 169, 178-179 (App.Div. 2011). Each of these cases decided that, while comity demands respect and consideration of the Legislature's command, the time to seek relief from a judgment is governed by R.4:50-2 and not legislation.

IV. THE PROPERTY WAS TRANSFERRED FOR VALUE TO A BONAFIDE PURCHASER THAT SHOULD HAVE BEEN PROTECTED AS A MATTER OF LAW. (Raised below 1T36:20 to 37:19, 1T41:15-21)

"Absent any unusual equity, a court should decide a question of title such as this in the way that will best support and maintain the integrity of the recording system." Palamarg Realty Co. v. Rehac, 80 N.J. 446, 453 (1979). Matthews did not need merely to present a case, it needed to overcome the long-established presumption of a bona fide purchaser. This is because "the principal purpose of enactment of the New Jersey recording act... 'was to protect subsequent judgment creditors, bona fide purchasers, and bona fide mortgagees..." Cox v. RKA Corp., 164 N.J. 487, 508 (1999), citations omitted. This Court must consider the impact of such a decision on real estate titles as a whole.

> Where it is made to appear that one has acquired title to property and has paid a valuable consideration therefor, the purchaser is presumed to be a bona fide purchaser for value without notice until the contrary appears, and the burden of showing to the contrary rests upon the party alleging that title was acquired by the purchaser with notice of an outstanding equity or claim.
>
> [Venetsky v. West Essex Building Supply Co., Inc., 28 N.J.Super. 178, 187 (App.Div. 1953). Reaves v. Egg Harbor Township, 277 N.J.Super. 360 (Ch. 1994) (failure to overcome presumption)].

No one disputes that Peake Point paid $150,000.00, for the property. Ia478. The presumption thus arose and the burden of proof was on Matthews to show that

Peake had notice, yet Matthews presented no evidence to support any burden of proof and the trial court found none either.

There was no defect with the foreclosure as everything was in accordance with the statute and the rules. Defendant read and received all notices. Defendant agreed that the property was "an abandoned derelict of a property." 1T16:3-5. And nothing whatsoever even remotely suggested that Peake Point had any knowledge of any alleged defect nor reason for concern. Peake Point is the consummate bona fide purchaser for value without notice of a claim and it was mistakenly deprived of that protection.

A sale of property to a third-party purchaser should not be disturbed even if there was a defect in the underlying case – though here there was no defect. Sobel v. Long Island Entertainment Productions, Inc., 329 N.J.Super. 285 (App.Div. 2000), Sonderman v. Remington Construction Co., 127 N.J. 96 (1992), City of Newark v. Block 1852, 244 N.J.Super. 402 (App.Div. 1990), Last v. Audubon Park Associates, 227 N.J.Super. 602 (App.Div. 1998) cert. den. 114 N.J. 491 (1998), Heinzer v. Summit Federal Savings & Loan Association, 87 N.J.Super. 430 (App.Div. 1965), Rogan Equities v. Santini, 289 N.J.Super. 95 (App.Div. 1996), Woglemuth v. 560 Ocean Club, 302 N.J.Super. 306 (App.Div. 1997).

> Even substantial deviations from the prescribed procedures may be insufficient to require vacating a default judgment based upon flawed service if rights of an innocent third party have intervened . . . **even owners who have been deprived of property interests without**

> **notice can by their delay and reasonable reliance of others, lose the right to attack the judgment**.
>
> [Sobel, 329 N.J.Super. at 293, emphasis added].

Matthews received all notices and was neither deprived of notice nor due process. It remains unable to point to even one fact to show that Peake Point had any reason to question the foreclosure or the title it acquired. At best, Matthews argued that Peake should have waited 90 days from recording the judgment before closing, but this argument is a distinction without a difference as the 90-day period is illusory. Ante at 21.

Nor is the recording date dispositive. Pro Cap II, L.L.C. v. Block 682, Lot 49, 2018 N.J.Super. Unpub. LEXIS 1347 (App.Div. 2018[3]) ("That Pro Cap was required to perfect its estate in fee simple by recording that judgment pursuant to N.J.S.A. 54:5-104.65 does not alter the effect of the judgment as to Clearview."). Ia519. In ProCap II, the judgment was entered July 5, served August 17, and recorded August 26, 2016. Defendant attempted to redeem on August 22, 2016. Defendant moved to vacate, arguing that its request to redeem was timely because the judgment hadn't yet been recorded. Id. at *2.

Judge Del Buono Cleary denied that motion to vacate and a reconsideration motion, holding "N.J.S. 54:5-104.64(a) could not be clearer: it is the entry of final

[3] In accordance with R.1:36-3, a copy of this decision is attached at Ia428-430.

judgment, not the recording of that judgment, that gives "full and complete relief" barring "the right of redemption, and ... [vesting title in the plaintiff.]. Id. at 3-4, quoting Phillipsburg, 380 N.J.Super. at 165 (a defendant "has an absolute right of redemption **until that right of redemption is cut off by a judgment of foreclosure**), emphasis added. This Court agreed, again holding that it is the judgment that barred redemption, not the recording. Id. at 4.

Accepting the fact that the one-year period contained in R.4:50-2 controls – the three-month period relied upon by the trial court here was both illusory and mistaken. After all, Matthews would have 365 days in which to file a motion to vacate, not 90 days. R.4:50-2. If this is the case, would it have mattered if Matthews had filed its motion on day 364 instead or day 89? The answer is plainly no given longstanding precedent. It also would not matter if the motion had been filed on Monday, April 24, 2023 as opposed to Friday, April 21, 2023, 89 days instead of 92[4]. Just because a motion is timely filed does not mean that it is meritorious and must be granted.

Title to foreclosed real estate is not, and should not be, unmarketable for 90 days or 365 days, just because a motion *could be filed* within that time period. "The general welfare of society is involved in the security and registry of titles to real

[4] Yet Respondent argued that "had [plaintiff] waited until May 8th, May 9th, May 10th, you wouldn't be in the situation that you now face." 1T19:1-3.

estate ... and the power to ensure that security "inheres in the very nature of government." BFP v. Resolution Trust Corporation, 511 U.S. 531, 114 S.Ct. 1757, 1764-1765 (1994), quoting American Land Co. v. Zeiss, 219 U.S. 47, 60, 31 S.Ct. 200 (1911). Foreclosure titles should not be placed in limbo for extended periods of time just because someone could possibly file a motion in the future.

Our constitution provides for the right to acquire, possess, protect and dispose of property. N.J. Const. Art. I, s. 1. Stone Wool's attorney made it clear to the court that it did not want to own a dangerous, potentially uninsurable deathtrap in Irvington and wanted to sell it as soon as possible. 1T48:1-9, 16-24. Surely a property owner cannot be barred from selling its property on the off-chance that a motion to vacate might be filed at some time in the future. Otherwise, Stone Wool would be required to continue owing a dangerous, decrepit, abandoned and debris-ridden liability for an entire year. No law and no court rule stand as a bar to any foreclosure plaintiff from selling a property one day, one week, one month, or one year from taking title. The timing of the sale is completely irrelevant to whether Peake Point was a bonafide purchaser[5].

Again, if there was a reason within the foreclosure proceeding itself that might give a buyer notice of a defect, then that buyer might not be a bonafide purchaser or

[5] This is not a case where Plaintiff flipped the title for a pittance to a related entity immediately after foreclosure. The sale was a bonafide, arms-length transaction with no suggestion of impropriety.

without notice. But that is not what happened here; there was no defect in the foreclosure action and Matthews had notice at every step. It was not denied anything legally, procedurally, or constitutionally. Peake Point had no reason for concern and it justifiably relied on the public record. It was entitled to be protected.

Remembering that tax sale is intended so "it will not be worth the taxpayer's while to make the municipality his involuntary banker," East Orange v. Palmer, 52 N.J. at 334, Matthews' used Irvington as its involuntary banker to finance other projects and the result was foreclosure – fully predictable, expected, and justified. That outcome should not have been disturbed.

V. EQUITY SHOULD HAVE PLACED RESPONSIBILITY ON MATTHEWS BECAUSE ONLY IT HAD THE POWER TO PREVENT FORECLOSURE.
(Raised below 1T38:23 to 41:13)

"Where a loss must be borne by one or two innocent persons, equity will impose the loss on that party whose acts first could have prevented the loss." Dreier, Guidebook to Chancery Practice in New Jersey (Tenth Ed. 2018), Ch. I(A)(12) at 15. Plaintiff was blameless here, as was Peake Point. But Matthews chose not to pay its taxes, left the property to rot, and ignored foreclosure proceedings. If this court were to ask "whose acts first could have prevented the loss," that answer is clear.

Moreover, a third-party's rights are now jeopardized. Equity should not intervene to affect the rights of two innocent parties when Defendant caused the loss

by not paying taxes, leaving the property abandoned, and ignoring foreclosure pleadings. This is even more so when any relief to the Defendant can only result in untold subsequent litigation between Plaintiff and a subsequent purchaser[6].

"A judge sitting in a court of equity has a broad range of discretion to fashion the appropriate remedy in order to vindicate a wrong consistent with principles of fairness, justice, and the law." Graziano v. Grant, 326 N.J. Super. 328, 342 (App. Div. 1999). "[A] court's equitable jurisdiction provides as much flexibility as is warranted by the circumstances[.]" Matejek v. Watson, 449 N.J. Super. 179, 183 (App. Div. 2017). "[A] court of equity should not permit a rigid principle of law to smother the factual realities to which it is sought to be applied." Graziano, 326 N.J. Super. at 342 (citing Grieco v. Grieco, 38 N.J. Super. 593, 598 (App. Div. 1956)). "Equity will not permit a wrong to be suffered without affording the appropriate remedy." Ibid. Peake Point was left with a $150,000.00 loss through no fault of its own and is left with no remedy at all.

The trial court could have imposed a constructive trust or an equitable lien on the property by which Matthews bore the burden of protecting Peake Point. "A constructive trust is a remedial device through which the 'conscience of equity' is expressed; it will be imposed when a person has acquired possession of or title to property under circumstances which, in good conscience, will not allow the

[6] Plaintiff has refused to return any funds to Peake Point.

property's retention." Thompson v. City of Atl. City, 386 N.J. Super. 359, 375–76 (App. Div. 2006) (quoting Flanigan v. Munson, 175 N.J. 597, 608 (2003)). A two-prong test applies to determinations of whether a constructive trust is warranted: "a court must find that a 'wrongful act' caused the property to come into the hands of the recipient and that the recipient will be 'unjustly enriched' if it is not returned." Id. at 376 (quoting Flanigan, 175 N.J. at 608). The "wrongful act" necessary for imposition of a constructive trust need not be criminal; it includes, but it is not limited to, "fraud, mistake, undue influence, or breach of a confidential relationship, which has resulted in a transfer of property." D'Ippolito v. Castoro, 51 N.J. 584, 589 (1968). Second, the wrongful act must result in a transfer or diversion of property that unjustly enriches the recipient. Id. at 589. The circumstances in which a constructive trust may be imposed are as extensive as required to reach an equitable result. Thompson, 386 N.J. Super. at 376.

The trial court twice found Matthews' conduct "less than exemplary." Ia466, Ia477. Her Honor noted defendant "was familiar with the foreclosure process for abandoned property as he availed himself to it in purchasing his own tax sale certificate which he foreclosed on June 10, 2021." Ia477. Moreover, he failed to pay any taxes during the time he owned the property." Ibid. This alone is a sufficient mistake for a constructive trust or lien to be imposed.

But Matthews' conduct was far more egregious than merely not paying any taxes and knowing the tax foreclosure process. Matthews *intentionally did not pay its taxes because it chose to pursue other investments in Westfield and Rahway*, leaving 57 Washington Street to decay further. Even counsel admitted that we do not dispute the condition of the property.1T16:3-5. But for the grace of God, no one was hurt or killed by the dangerous condition of the property. On can be sure that Matthews would be happy to let Peake Point or Stone Wool take the blame for such a catastrophe, just as it has stood by as Peake Point is hauled into Irvington Municipal Court. Ia421.

VI. RECONSIDERATION SHOULD HAVE BEEN GRANTED (Raised below Ia386)

Reconsideration is reviewed to determine whether the trial court abused its discretion, Cummings, supra, 295 N.J. Super. at 389, but " cannot be used to expand the record and reargue a motion." Capital Fin. Co. of Delaware Valley, Inc. v. Asterbadi, 398 N.J. Super. 299, 310 (App. Div. 2008). It is meant to "seek review of an order based on the evidence before the court on the initial motion . . . not to serve as a vehicle to introduce new evidence in order to cure an inadequacy in the motion record." Ibid. Reconsideration is only granted in "those cases which fall into that narrow corridor in which either 1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent

evidence[.]" Cummings, 295 N.J. Super. at 384 (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401-02 (Ch. Div. 1990)). "[T]he magnitude of the error cited must be a gamechanger for reconsideration to be appropriate." Palombi v. Palombi, 414 N.J. Super. 274, 289 (App. Div. 2010).

Peake Point did not seek to expand the record or reargue the motion. It properly pointed out that the initial decision mistakenly found that there was a three-month right to redeem post-judgment and that Peake Point did not have knowledge of any claims by Matthews. The motion was entirely proper under the Rules and should have been granted for the reasons set forth above.

CONCLUSION

The decision to vacate the judgment should be reversed and title vested in Peake Point. Alternatively, Peake Point should be reimbursed by Matthews by way of a constructive trust or lien imposed against the property.

Most respectfully submitted,
HONIG & GREENBERG, L.L.C.

By: Adam D. Greenberg
Attorney for Plaintiffs-Appellants

Dated: January 18, 2024
Cherry Hill, New Jersey

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Plaintiff-Respondent Stone Wool 22, LLC, vs. Defendant- Respondent Block 87, Lot 10 57 Washington Avenue Irvington, New Jersey And Intervenor-Appellant Peake Point, L.L.C.	Docket No. A-394-23 Civil Action On Appeal from the Superior Court of New Jersey, Chancery Division Essex County Docket No. ESX-F -8595-22 Sat Below: Hon. Jodi Lee Alper, P.J. Ch

DEFENDANT'S BRIEF

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Defendant accepts and incorporates the Appellant, Peake Point LLC's appendices of Volume I, I, & III as if fully set forth and attached hereto, with the additional documents and exhibits referred to Defendant-Respondent's Appendix, Volume 1.

RESPONSE TO PRELIMINARY STATEMENT OF PEAKE POINT

Matthews Enterprises LLC, was assigned by the Township of Irvington, its municipal tax sale certificate No. 15-0754 on August 26, 2020. The property, designated as 57 Washington Avenue, Irvington, Essex County, New Jersey, known on the tax maps as Block 87, Lot 10, the "Premises" consists of an unoccupied two- family residential dwelling and adjacent vacant lot. The Defendant paid the Township of Irvington $85,900.0. Years prior to the assignment, the Premises was designated by the township as "abandoned" pursuant to N.J.S.A 55:19-78, *et al*. The property had been unoccupied and was in a dilapidated condition for several years.

The extreme and dire portrayal by counsel for Peake Point of the Premises condition seemingly attributed to a disregard by Matthews Enterprises LLC (herein "Matthews") fails to acknowledge the condition of the Premises when Defendant obtained its final judgment.

Defendant's final judgment was entered on June 10, 2021.

Contrary to Peake Point's attribution that the Defendant, "put the children and families of Irvington in danger," or the "scourge in Irvington" It was the devasting effect of COVID-19 upon its citizenry, while Defendant was rehabilitating distressed properties in Rahway,

and Westfield, New Jersey, and suffered a destructive fire in January, 2021, at the Hackensack residence of Rahameen Matthews, the sole member of Defendant Matthews Enterprises LLC, owner of the Premises.

As, any owner may exercise the right of redemption, at any time prior to entry of judgment. At each level of our courts, decisions are issued that grant redemption after a final judgment.

Though the Plaintiff and Peake Point, castigate the Defendant, in its failure to pay taxes, "abusing the law to its advantage. . . by intentionally not paying its taxes . .. " while intentionally failing to recognize that, the avoidance of taxes or periodic inability to pay, does not disqualify the right to redeem at any time prior to a final judgment and under certain circumstances after its entry,

Peake Point, if a bona fide purchaser for value, characterizes itself as the biggest loser as a consequence of the order that vacated the Plaintiff's final judgment. Though, it spent no funds toward rehabilitation of the property or spent no funds in payment of taxes from the date of its purchase. The acquisition funds it paid the Plaintiff is subject to return and if not voluntarily, then its right to file an action against the Plaintiff.

To the contrary, the Defendant, expended approximately $120,000.00, not including the redemption, for acquisition of the assignment and preliminary demolition, architect fees, clean up, title and survey and taxes for the fourth quarter 2022 through the full 2023 year and municipal sewer charge. (*Aa151) (Aa167-174) (Aa183*)

Within three months from entry of the final judgment, Defendant continued to press its desire, intention and financially ability to redeem.

The last attempt to redeem which Plaintiff rejected on April 4, 2023, the Plaintiff was informed will cause Defendant to file a motion to vacate. Plaintiff, then concluded its sale of the Premises to Peake Point, LLC. on April 21, 2023, the same day Defendant filed the motion to vacate the judgment.

The bona fide purchaser claimed status, nor the Plaintiff contention that the final judgment, statutorily, precluded a post judgment redemption, ignores the equities in favor of the Defendant.

In this appeal the same questions at the trial level are asked:

" Why would the Defendant on December 2, 2022 pay the 4th quarter taxes, sought to redeem, and on December 9, 2022 met with the tax assessor to seek a reduced assessment, and, inquired, the third time, of the tax office on February 8, 2023,to redeem and produce a bank check on April 4, 2023 for the redemption, if it were not ready, willing and prepared to redeem and preserve his interest in the Premises." (*Brief by Stuart B. Klepesch, Esq, in Opposition to Plaintiff's motion for reconsideration, September 18, 2023, at p.12*)

STANDARD OF REVIEW OF THE LOWER COURT ORDERS

The Appellate Division is asked to review the lower court orders by Judge Alper, that vacated a final judgment of a tax sale foreclosure denied a motion for reconsideration by Peake Point LLC.

The appeals court role in review of a trial court's decision to deny or vacate a motion under Rule 4:50-1, is whether the lower court decision is an abuse of discretion. Deutsche Bank Nat'l Tr. Co v. Russo, 429 N.J. Super. 91, 98 (App. Div. 2012).

Reversal of a trial court decision to vacate a default judgment has universally been denied, unless it is "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis. US Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012). The "trial court's determination under Rule 4:50-1 warrants substantial deference" and the abuse of discretion must be clear to warrant reversal. Guillaume, *surpa* at 467. Also see, Iliadis v. Wal-Mart Stores, Inc. 191N.J. 88,. 123 (2007).

Basically, the functional approach in the examination of evidence of an abuse of discretion requires an examination whether "there are good reasons for an appellate court to defer to the particular decision.'

In re Fernandez 468 N.J.Super.377, 391 (App. Div. 2021) and Flagg v. Essex County Prosecutor, 171 N.J. 561, 571 (2002).

To reverse Judge Alper's decisions, of the August 14, 2023 Order vacating the final judgment, and its affirmance in denying the appellants' motion for reconsideration, the appellate court must find the trial court's exercise of discretion was "manifestly unjust under the circumstances. Newark Morning Ledger Co v. N.J. Sports & Exposition Authority, 423 N.J.Super. 140, 174 (App. Div 2011) (quoting Union County Improvement Authority v. Artaki, LLC, 392 N.J.Super. 141, 149 (App. Div. 2007).

To disturb the October 6, 2023 Order, that denied the motion for reconsideration, this Court should look to Rule 4:49-2:

> Except as otherwise provided by R. 1:13-1 (Clerical errors) a motion for rehearing or reconsideration seeking to alter or amend a judgment or final order shall . . . state with specificity the basis on which it is made, including a statement of the matters or controlling decisions that counsel believes the court has overlooked or as to which it has erred, and shall have annexed thereto a copy of the judgment or final order sought to be reconsidered and a copy of the court's corresponding written opinion, if any.

Rule 4:49-2, fixes the grounds for the motion of reconsideration. They are (1) the court based its decision on a "palpably incorrect or irrational basis," (2) the court either failed to consider or "appreciate"

the significance of probative, competent evidence" or (3) the moving party is presenting "new or additional information . . . which it could not have provided on the first application." Cummings v. Bahr, 295 N.J.Super. 374, 384 (App. Div. 1996), quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401-02 (App. Div. 1990).

A motion for reconsideration is not a do-over, or allows for introducing new evidence. It is designed to review the prior order based upon evidence before the court on the initial motion.

The moving party must "initially demonstrate that the court acted in an arbitrary, capricious, or unreasonable manner, before the court will engage in the actual reconsideration process. D'Atria, 242 N.J.Super. at 401.

The trial court found that the motion for reconsideration lacked sufficient merit to warrant reversing the August 14, 2023 Order that vacated the final judgment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Respondent incorporates its Preliminary Responding Statement of Facts and offers its recitation of the statement of facts and procedural history.

The township of Irvington assigned its municipal tax sale certificate No. 15-0754 to Matthews (interchangeably referred herein as the "Defendant"). The township previously designated the Premises as abandoned.

Matthews engaged Keith A. Bonchi, Esq. as counsel, to foreclose the tax sale certificate. The foreclosure was processed by in personam foreclosure, pursuant to N.J.S.A. 54:5-869(a) (Aa236)

Though Peake Point continuously characterized the Defendant's foreclosure similar to the Plaintiff, as pursuant an abandoned property, under N. J.S.A. 55:19-78, it was not.

This misstated fact is intended to diminish Matthews's belief that the Plaintiff's action would have taken longer to reach a final judgment, and is factually contrary to manner that Mr. Bonchi conducted Defendant's tax sale foreclosure.

The attempt to discredit Matthews statement is meant to challenge any equitable consideration available to the Defendant-

contrary to the Intervenor's good faith purchaser status and the intractable nature of Plaintiff's final judgment.

Defendant's final judgment was entered on June 23, 2021 thereby vesting recorded title to the Defendant (Aa*162*).

The recorded judgment vested to Matthews Enterprises LLC, (herein "Matthews") title to 57 Washington Avenue, Township of Irvington, Essex County, New Jerey, Block 87, Lot 10, the "Premises."

During its ownership Defendant expended tens of thousand dollars on demolition, clean up, survey and architectural plan for the renovation and rehabilitation of the Premises.(*(IA168-to 183*).

The Plaintiff's interest in the Premises arose from its assignor, FIG Cust FIGNJ19LLC & SEC PTY, purchase at a December 29, 2020 tax sale by the Township of Irvington of tax sale certificate NO. 20-0423. (*Aa53*)

The foreclosure complaint by Plaintiff's predecessor, FIG Cust FIGNJ19LLC & SEC PTY was filed on August 17, 2022. (The same counsel for the original Plaintiff, represents its assignee, the Plaintiff, Stone Wool 22, LLC).

The foreclosure was processed by the In Rem Act, N.J.S.A. 54:5-104.29, et seq, and as an abandoned property pursuant to N.J.S.A. 54:5-86(b) (*Aa1*).

As of June 10, 2022, almost two months prior to filing the complaint, Plaintiff and its counsel possessed an Abandoned Property certification by Derek Leary, a licensed construction official.The certification, attached checklist of criteria that Derek Leary determined from his observation of the Premises met the definition of abandoned property. (*Aa131*).

AS an attachment to the complaint, the Plaintiff was required to confirm to pursuant to N.J.S.A. 54:5-104.32, by a certification either by the public officer or tax collector that the property is abandoned. Absent those municipal officials written statements in support of the condition of abandonment satisfies the statutory definition, then by a certification of a qualified or licensed, non-governmental, housing inspector, is an acceptable alternative.

On November 9, 2022, Plaintiff's counsel filed a Motion to Determine the Premises abandoned, N.J.S.A. 55:19-78, et seq. (Aa8)

In late November, prior to expiration of the 45 days from the Notice of In Rem, Rahameen Matthews contacted the office of

Plaintiff's counsel. He advised of his intention to redeem the tax sale certificate. (Aa143 to144).

Within a week of the call to Plaintiff's counsel, on the morning of December 2, 2022, Mr. Matthews attended the office of the tax collector to inquire of the amount to redeem with the intention to redeem. A staff member did not have an updated redemption statement and would not accept payment without first confirming from the Plaintiff the amount required to redeem. (*Aa144 to146*).

The staff member informed Defendant that the Plaintiff had not paid the 4th quarter 2022 taxes, and would accept payment from the Defendant. Prepared to redeem, Mr. Matthews, having the financial liquidity at the time, returned later in the morning and delivered a cashier's check for $2,190.33 written on Wells Fargo Bank, for the 4th quarter taxes. (*Aa176*).

Why would the Defendant pay the 4th quarter 2022 taxes were it not ready, willing, and able to redeem?

The Defendant, Matthews left the tax collector office to await the tax collector's call to advise when the updated redemption statement was received. The call never came.

On December 9, Defendant returned to the municipal complex. His purpose was to inquire if a redemption statement was received, l so he could make redemption, and to meet with the tax assessor, at the Premises to review its condition and address the assessment. The Defendant was not presented with a redemption statement or informed of the amount to redeem. Though the funds were readily available to redeem.

The tax assessor's observation confirms that demolition was done at the Premises in contemplation of its restoration. The certification of Silvia Forbes, represents her independent assessment of the Premises. (*Aa185*)

On December 22, 2022, the Plaintiff assigned its tax sale certificate to Stone Wool 22, LLC. (*Aa57*)

By Order of December 29, 2022, Hon. Jodi Lee Alpert, J.S.C. entered an Order Determining the Premises to be Abandoned, setting for the reason in support, and allowed Plaintiff to proceed under N.J.S.A 54:5-86 (b). (*1A142-146*).

Support for the December 29, 2022, Order, premised refers to N.J.S.A.2A:50-73, *et al* -which governs foreclosure of a mortgage, and excepted from the determination of abandonment not to include

"*vacant and abandoned such as unoccupied buildings undergoing construction . . .* "(*emphasis added*)

On January 23, 2022, approximately three weeks after the abandonment Order, Plaintiff's final judgment was entered. (*Aa131*)

The final judgment was recorded in the office of the Essex County Register on February 8,2023. (*Da1*)

The same day, Mr. Matthews, again, inquired of the tax collector's office, the status of the amount to redeem. He was informed by Albert Park, a staff member, that he would contact the lienholder of the tax sale certificate. Later than day, Mr. Park emailed Mr. Matthews that "The lien holder has responded and told us you are not allowed to redeemed(*sic*) the lien as it has been foreclosed." (*Aa179).*

Mr. Matthews was referred to Avram D. White, Esq. for assistance in his effort to redeem. On February 10, 2023, Mr. White, inquired of Plaintiff's counsel if its client would accept redemption of its tax lien. On February 14, 2023, Mr. White was notified by Plaintiff's counsel that Plaintiff would not vacate its judgment in consideration of redemption, nor assign the judgment. Defendant sought assistance by Mr. White for consultation, and he was not formally retained for future legal proceeding.

Mr. Matthews was then referred to Robert J. Bavagnoli, Esq, to assist him to redeem the Plaintiff's tax sale certificate. One April 2, 2021, Mr. Bavagnoli contacted the tax collector's office, spoke with and directed a letter to Beverly Baytops, Deputy Tax Collector. He formally requested a redemption statement for April 6, 2023. (*Aa312*)

Ms. Baytops, emailed a redemption statement, and advised that the figures may be subject to additional costs. She informed Mr. Bavagnoli that the tax sale certificate was foreclosed and had not received any documents to vacate the final judgment. (Aa317 to 318)

The Defendant produced a Wells Fargo, cashier's check, from in the amount of $19,003.92 to redeem the tax sale certificate. (*A194*).

Mr. Bavagnoli, admittedly not acquainted with tax sale law and process sought advice from an attorney and title office, how to effectuate redemption. Informed that a motion is required to vacate a final judgment, failing consent to accept by Plaintiff, on April 4, 2023 he contacted Plaintiff counsel.

He was informed by Amber J. Monroe, Esq. that redemption is subject to acceptance by the Plaintiff. Later in the afternoon Ms. Monroe phoned Mr. Bavagnoli, to advise that Plaintiff will not accept

post judgment redemption. Ms. Monroe was informed by Mr. Bavagnoli that a motion to vacate will be filed. (*Aa309*)

Notwithstanding notice of the post judgment attempts by the Defendant to redeem and its intention to file a motion to vacate the final judgment, the Plaintiff and Peak Point concluded the sale on April 21, 2023.

Plaintiff's counsel did not inform Mr. Bavagnoli, in during the conversation of the contemplated sale of the Premises, or that a potential buyer had made an offer of purchase or the existence of an executed contract for sale.

The Defendant filed its motion to vacate the final judgment on April 21, 2023. That same day, the Plaintiff sold the Premises to Peak Point, L.L.C. for $150,000.00. (*Aa217*) That consideration exceeds by $130,000.00 the amount to redeem. The deed was recorded on May 3, 2023 (*Da7*)

Though seemingly ignored by Peake Point and Plaintiff, foreclosure pursuant to the *In Rem Act*, (N.J.S.A. 54:5-104.29 et seq.) vests title in the holder of a final judgment upon recording in the county recording office. (N.J.S.A. 54:5-104.65). The In Rem equivalent to N. J.S.A. 54:5-87 is N.J.S.A. 54:5-104.67, a statutory right to seek redemption, post judgment, expires three months from a final judgment recorded, not when it is entered by the Clerk.

The motion to vacate and sale to Peake Point occurred almost three weeks prior to the expiration of the three- month statutory time period from recording the final judgment.

On May 11, 2023, Peake Point, filed a motion to allow its intervention, A consent order permitting Peak Point LLC's intervention was entered on May 25, 2023. (*Aa209*)

Certifications, exhibits and legal memoranda, are listed and indexed in Appellant Appendix Table of Contents, Volume II &III,

In response to the motion Judge Alpert held a remote hearing, on oral argument on July 31, 2023. (*See Transcript of Proceedings-Table of Transcript- Appellant Brief*)

On August 14 ,2023, Judge Alper granted the Defendant's motion to vacate the final judgment, subject to redemption within ten days from entry of the Order or receipt by the tax collector of a redemption statement. (*Aa377*) (*Aa379*)

On August 17, 2023, Peake Point, filed a motion for reconsideration. (*Aa386*)

On August 22, 2023, the Defendant redeemed the tax sale certificate in the amount of $20,025.97. When informed that neither the Plaintiff or Peake Point paid taxes for the year, the Defendant

remitted payment for the 1, 2nd and 3rd quarter 2023 taxes, interest and open sewer balance in the amount of $5,213.08 (*Aa394 to 397*).

A motion for reconsideration was filed by the Peake Point on August 17, 2023. Plaintiff followed with a similar motion.

On October 6, 2023, Judge Alper entered an Order Denying the Motion to Reconsider with a Statement of Reasons. (*Aa411 to 414*).

On October 9, 2023, Peake Point filed its appeal of the Orders of August 14, 2023 and October 6, 2023, to the Appellate Division.

The value or potential future worth of the Premises, based upon what Peake Point contracted to pay of $150,000.00 appears at odds with the characterization that Defendant caused or has perpetuated a "scourge in Irvington,". . "put children and families of Irvington in danger." That "the pictures in the record demonstrate .... the dangerous nature of the property" ..."only the smell of human waste cannot be reproduced in the appendices." (*Appellant Brief, Point.1 at p.15*).

Peake Point received a real bargain, and Plaintiff a quick $120,000.00 profit, less than three months from entry of its final judgment, Contrast to the redemption Defendant paid of $20,025.97 bespeaks to the harsh and punitive consequence if the Appellate Division reinstates the final judgment.

LEGAL ARGUMENT

POINT I

I. THE APPLICATION TO VACATE THE FINAL JUDGMENT SATISIFIES THE REASONABLE AND STATUTORY TIME PERIOD FOR THE RELIEF SOUGHT BY THE DEFENDANT-RESPONDENT

Plaintiff contends that Matthews was barred from vacating the final judgment of January 23, 2023, since redemption was not remitted prior to entry of the judgment. Landa v. Adams, 162 N.J.Super. 318, 320-321 (App. Div 1978.

Plaintiff's counsel refers to N.J.S.A. 54:5-87, "no application shall be entertained to reopen a judgment after three months from the date and then only upon the grounds of lack of jurisdiction or fraud in the conduct of the suit." (*Emphasis added*).

Were the literal interpretation applied and Plaintiff's statement accepted, why, would a counsel file a post-judgment application, or party offer to redeem any time after entry of a final judgment in a tax sale foreclosure. What a futile and costly exercise if, as the Plaintiff contends, redemption shall be made prior to entry of a final judgment.

Taken literally, an attempt to redeem, the day after entry of a final judgment bars relief, except upon a cause of lack of jurisdiction or fraud in the process.

It is evident, based upon the post judgment overtures to redeem, that if made minutes after midnight of the day final judgment was

entered. or the next business day, or any time within three (3) months from recording, the response by Plaintiff would be the same- rejected.

In Landa, supra at 320,321, a final judgment tax sale foreclosure was entered on February 23, 1978. The Defendants delivered an estimated amount to redeem, which was less than required to redeem. Though Defendants were willing and capable to pay the shortfall, the Plaintiff refused to accept. The trial court order allowed redemption and Plaintiff, appealed.

The Appellate Division decision refers to the time to redeem on the **same date the final judgment is entered** *(emphasis added*) and did not refer to today's application of R 4:50-1. The court at Landa, supra, at p. 322, 323 states; "We prefer to adopt the rule that landowners be given the whole of the last day allowed by law to redeem," and that ". further a rule permitting redemption until the close of the final day has the virtue of a certain moment of finality, which is not dependent on the vagaries of whether proof is available on the exact time the judgment was signed or filed." See, also Bron v Weintraub, 42 N.J. 87, 91-92 (1964)

The Landa decision did not refer to Rule: 4:50-1. It did not have to, since the decision affirmed a motion to allow redemption on the day

of judgment, and was not required to address a period days, months or year after entry of a final judgment, or a time period within N.J.S.A. 54:5-87 or N.J.S.A. 54:5-67.

Applying the Landa principles is akin to the timeliness by the Defendant's motion to vacate, which was filed within the "whole" of the same day Peake Point purchased the Premises. The sale occurred within three months of recording the final judgment.

Defendant's application to vacate the final judgment was filed less than expiration of the time in N.J.S.A. 54:5-87, or N. J. S.A. 54:5-104.67, as applied in the In Rem Act, which is applicable to the foreclosure. The degree of reasonableness is dependent upon the totality of the circumstances. See Moore v. Hafeeza, 212 *N..J.Super* 399 (Ch. Div. 1986). Time for moving to vacate requires a court to account for concepts of public policy and equity. M&D Associates. V. Mandara, 366 *N.J.Super* 341, 350 (App. Div. 2004).

Plaintiff relies upon Town of Phillipsburg v. Block 1608, 380 N.J. Super 159 (*App. Div*. 2005), for the proposition that the entry of a final judgment under the In Rem Act, N.J S.A.54:5-104-64(a), "bars the right of redemption." The fact specific in Phillipsburg questioned the right to redeem by a subsequent tax sale holder by assignment without first seeking to intervene.

The trial court's order denying the applicant's motion to vacant, aside from questioning its standing, noted the "absence of proof that Community is presently able to redeem all outstanding liens, thus casting doubt on the likelihood that the town's intention to secure a new owner to rehabilitate the property would be met." Township of Phillipsburg, supra at p. 170.

That observation is contrary to the Defendant's financial position to redeem prior to the final judgment; (*1A177to 178*), or as of recording the final judgment, or on April 4, 2023, when its motion to vacate was filed, and, finally upon redemption and payment of Plaintiff and Appellant's delinquent taxes. (*1A394 to 397*).

Plaintiff and Peake Point fail to acknowledge in Town of Phillipsburg, supra, p. 172, 173 the following; "Community's motion to vacate the judgment was made within three months of its entry, and therefore was not barred by the time limits set forth in N.J.S.A. 54:5-87 or N.J.S.A. 54:5-104-67. . . . The motion to vacate is governed by Rule 4:50-1. . . "The motion for vacation of the judgment. . . should be granted sparingly and is addressed to the sound discretion of the trial court, whose determination will be left undisturbed unless it results from a clear abuse of discretion." Community had an opportunity to

intervene to exercise its claimed right of redemption. It simply failed to do so. There is no unfairness in the result" Phillipsburg at p. 174.

Contrary to the public policy of the in Phillipsburg, supra, at166, to impose strict limits upon the time and grounds for vacating a judgment of foreclosure than would apply generally under Rule 4:50-1, "another important purpose is to give the property owner the opportunity to redeem the certificate and reclaim his land. Simon v. Cronecker, 189 N. J. 304, 319 (2007).

See also, Sonderman v. Remmington Construction Co. 127 N. J.96, 109 (1992), stating that "The primary purpose of the Tax Sale Law is not to divest owners of their property, but to provide a method of collecting taxes, citing Berkeley v. Berkeley Shore Water Co. 213 N.J.Super. 524, 553 (App. Div. 1986).

Iin Sourlis v, Borough of Red Bank, 220 N. J. Super. 434, 436-437 (*App Div.*1987). the trial court barred the Plaintiffs motion to vacate an In Rem foreclosure by the municipality because it was filed beyond the five-year limitation of N.J.S.A. 54:5-90. The issue revolved from the manner of service upon the defendant taxpayer.

The Appellate Division reversed the trial court and remanded for factual finding if laches applied to Plaintiff's failure to file its

motion within a reasonable time. However, the Sourlis decision acknowledged that; "The applicable statute of limitations is not N.J.S.A. 54:5-90 but N.J.S.A. 54:5-104.67 within the *In Rem Tax Foreclosure Act,* N.J.S.A. 54:5-104.29 *et seq.*

As interpreted in New Shrewsbury Borough v. Block 115, Lot 4, 74 N.J.Super. 1, 9 (1962), the three-month period of limitations in N.J.S.A 54:5-104-67, that no application shall be entertained to reopen such judgment after ***three months from the date of recording thereof in the office of the county recording officer*** and then only upon grounds of lack of jurisdiction or fraud in the conduct) applies to all grounds other than "lack of jurisdiction or fraud" [*emphasis added*].

In New Shrewsbury, supra at p. 8, 9; addressing the relationship between statute and Rules of Court, the court stated: "A motion to reopen a judgment is a matter of practice and procedure and subject therefore to the rule-making power of the Supreme Court. (*Citation omitted*). When a statutory provision and a rule of court are in conflict in a matter of practice and procedure the rule prevails. Winberry v. Salisbury 5 N.J. 240 (1950), cert den. 340 U.S. 877 (1950).

The mainstay and often cited decision that addresses the application of a Rule 4;50-1 motion, subject to N.J.S.A. 54;5-104.67, is New Shrewsbury Borough v. Block 115, Lot 4 at p. 8,9., as stated:

> We hold that R. R. 4:62-2 (now Rule 4:50-1) controls motions to reopen judgments, including one obtained under the In Rem Tax Foreclosure Act, yet in construing what is a "reasonable time" under the rule, judicial deference ought to be paid to the Legislature's expression of public policy, fixing a three months' time limitation for making such a motion in a tax foreclosure proceeding. . . .While N. J.S.A 54:5-104-67 is "not carefully drawn, we interpret it to means that the three months limitation applies to all grounds other than "lack of jurisdiction or fraud" by construing the word "then' as meaning "thereafter."

See also Peluso v. Township of Ocean, 85 N. J. Super 209 (*App. Div* 1964) which cites with approval New Shrewsbury v. Block 115, Lot 4, supra as to the application of N.J.S A. 54:5-104-67. In Peluso, supra, at P. 217-219, the Appellate Division affirmed the trial court denial of the motion to vacate a final judgment in a tax sale foreclosure finding: "There is no proof nor even an express allegation by plaintiff in any papers before us, that plaintiff was prepared in 1954 to pay any taxes or to discharge any liens or tax sale certificate . . . The plaintiff has never paid a dollar of taxes on the lots in question nor ever offered to do so at the time he ordered the tax search certificate or when he learned of the foreclosure. T

Reference is made to BV001 REO v. 53 West Somerset 467 N.J.Super. 117, 126-127 (App. Div. 2021) where the Appellate Division reversed the trial court's denial to vacate a final judgment. The applicant claimed it was not aware of the tax sale until judgment was entered and challenged the service of process.

Promptness to move to set aside a judgment is a critical factor in any action under Rule 4:50-1, particularly subsection (f) of the Rule. As stated BV001 REO, at p. 126-127, citing Regional Construction Corp. v. Ray ,364 N.J.Super.496, 504-505 (App. Div. 2003), in affirming relief from judgment courts must consider factors, "when examined against the short time between the entry of default judgment and the motion to vacate. See Jameson v. Great Atlantic & Pacific Tea Co., 363 N.J.Super.419, 428 (App. Div.2003).

The "competing goal of promoting finality does not loom so large when the ink has barely dried on the final judgment. At the early state a "plaintiff's expectations regarding the legitimacy of the judgment and the court's interest in finality of judgments are at their nadir" Regional Construction, 364 N.J.Super. supra, at 545

In its reversal of the trial court, the Appellate Division, in BV001 REO at P. 127, stated; "We are mindful of the countervailing policies

of the Tax Sale Law: to encourage investors to acquire tax-sale certificates and fill municipal coffers with taxes that property owners have not paid. (In re Princeton Office Park, L.P. v. Plymouth Park Tax Services, LLC, 218 *N.J.* 53, 62 (2014). In return, the investors obtain the right to receive interest on their investment if the property owner redeems . . . .and the right to acquire title by foreclosure if it does not Varsolona v. Breen Capital Services Corp., 189 N.J. 605, 618 (2004).

Based upon In Rem process that Plaintiff's prosecuted its foreclosure, Matthew's motion to vacate falls under N.J.S.A. 54;5-104.67, which is three (3) months from the date of recording the judgment; February 8, 2023.

The position by Peake Point is that as a bona fide purchaser, without notice, nothing else is required to deny the relief sought by the Defendant. That proposition disregards the timeliness of Defendant's motion, the merit to its argument and actions to redeem prior and after filing the final judgment. (*Aa141*)

Peake Point alleges that the Defendant's avoidance of payment of taxes denies it any good faith argument. All property owners whose failure to pay local property taxes, "because of inattention, willful disregard or impecuniousness, results in issuance of a tax sale

certificate, are permitted to redeem their property if they pay the tax sale holder what is due and is the lateness in paying, excusable or forgiven. Though "lack of diligence . . . should not deprive [it] of the opportunity to redeem, after securing relief from a judgment. BV001 REO Blocker. Id, at 129, 130.

The attack against Defendant's alleged failings to pay its taxes after it acquired title, is factually incorrect. These recriminations intentionally distract from and fail to recognize the failure during the combined ownership of the Plaintiff and Peake Point to pay taxes 4th quarter, 2022 and the 2023 taxes. Nonetheless, its approach is to deflect from the questionable process Plaintiff's used of the In Rem Act and Abandoned Property Act to accelerate its foreclosure,

Prior to its sale to Peake Point, LLC, the Plaintiff was aware of several attempts by Defendant to redeem, and its overture to the tax collector, and counsels' requests of Plaintiff's to accept redemption. Or the admonition by Robert J. Bavagnoli, Esq, on April 4, 2023 that Defendant had no choice but to file a motion to vacate the final judgment of January 23, 2023. (*Aa309*)

The Defendant does not contend that solely filing a motion within the time prescribed in N.J.S.A. 54:5-104.67, provides it the

right to redeem. It is an imperative and a significant factor in balancing the equity favorably to the Defendant's application.

The time of filing its motion is an important factor in support of its right to redeem. Nor is the absence of redemption prior to January 23, 2023 not fatal to its cause.

Judge Alpert balanced the equities of each party and weighed the loss each would realize if the final judgment was sustained or vacated, and the resulting equity overwhelmingly balanced the scale toward the Defendant-Respondent.

POINT II

THE TRIAL COURT CORRECTLY CONSIDERED ALL RELEVANT FACTS PRESENTED FINDING THAT DEFENDANT PRESENTED EXCEPTIONAL AND MERITORIOUS FACTS TO AVOID AN UNJUST RESULT AND THEREBY VACATED THE FINAL JUDGMENT OF FORECLOSURE
(Raised below T21-23 to 30-20)

Defendant filed its motion to vacate Plaintiff's final judgment pursuant to Rule 4:50-1(a) (f).

Under R. 4:50-1(a), the premise for relief is "mistake, inadvertence, surprise, or excusable neglect and, under section (f) for any other reason justifying relief from the operation or order. R.4:50-1. Though there is no specific enumerated circumstance or factual basis that engenders the scope and breadth of R .4:50-1(f), the "boundaries are as expansive as the need to achieve equity and justice. Court Invest. Co v. Perillo, 48 *N.J.* 334, 341 (1966). Generally, the applicant to prevail must come forth with facts, justifying that enforcement of a final judgment would be unjust, oppressive, or inequitable. U.S. Bank Nat. Ass'n v. Guillaume, 209 *N.J.* 449, 484 (2012).

A motion to vacate default judgments implicates two competing goals: resolving disputes on the merits and providing finality and stability to judgments. Thus, R. 4:50-1 "is designed to reconcile the strong interest in finality of judgments and judicial efficiency with the equitable notion that courts should have authority to avoid an unjust result in any given case; Nowosleska v. Steele, 400 *N.J. Super* 297, 306 (App. Div 2008).

The application to vacate a judgment, particularly, when a property owner faces the draconian forfeiture of a real property interest considers the principles enunciated in Mancini v. Eds ex rel N.J. Auto Full Ins. Underwriting Ass'n, 132 *N. J.* 330, 334 (1993) that in balance the two goals, "a court should view the opening of default judgments . . . with great liberality and should tolerate every reasonable ground for indulgence. . . to the end that a just result is reached. Further, to implement the principle recited in Mancini, at p. 334, that a court should resolve "all doubts. . . in favor of the part[y[seeking relief. Equitable principles "should . . . guide a court's decision to vacate a default judgment. Housing Authority of Morristown v. Little, 135 N. J. 274, 283 (1994).

The applicable Rules of Court and legal standard are well established. "Generally, a decision to vacate a default judgment lies within the sound discretion of the trial court guided by principles of equity" Coryell, L. L.C. v. Curry, 391 *N.J.Super.*72, 79 (App. Div. 2006). To grant or deny a motion to vacate judgment will be left undisturbed unless it represents a clear abuse of discretion. Housing Authority of the Town of Morristown, supra, at 298.

The decision to vacate and allow Defendant to redeem is an exercise within the delegated authority of a trial judge 's equitable powers. "Courts of equity have long been charged with responsibility to fashion equitable remedies that address the unique setting of each case . . .. U.S. Bank Nat'l Ass'n v.

Guillaume 209 *N.J.* at 467 and see Town of Kearny v. Discount City of Old Bridge, Inc. 205 *N. J.* 386 (2011).

Holding the Defendant worthy of consideration under Rule 4:50-1(f), Judge Alper's application of equitable principles recognized that exceptional circumstances are "as expansive as the need to achieve equity and justice" but granted sparingly, only to avoid a "grave injustice." Guillaume, 209 *N.J.* at 484. As stated in Johnson v. Johnson, 320 *N.J.Super.* 371, 378 (App. Div. 1999), each case "must be resolved on its particular facts." The burden is on the movant to "demonstrate the circumstances are exceptional and enforcement of the judgment or order would be unjust, oppressive, or inequitable.

The "Tax Sale Law framework provides the imperative not just for marketable title, but also that a property owner can redeem their property interest. Thus Rule 4:50-1(f), is available to a defendant demonstrating exceptional circumstances. 257 -261 20th Avenue Realty LLC v. Alessandro Roberto,477 N.J.Super. 339, 367-369 (App. Div. 2023). Under Rule 4:50-1(f) relief from a judgment or order may be obtained at any time where the "circumstances are exceptional . . . and enforcement of the order or judgment would be unjust or inequitable" Pressler & Verniero, Current N.J. Court Rules, *emt.* 5.61 on R 4:50-1(2023). Roberto, 477 N.J.Super. at 366-367.

The analysis in Roberto, supra at 367-369 addressing relief under Rule 4:50-1(f) is comprehensive and instructive in applying equitable factors that support Judge Alper's decision.

The exceptional circumstances favoring this Defendant are not solely the funds it has expended since its title to the Premises but the several frustrated attempts to redeem prior to entry of final judgment, despite the financial ability to do so. Notwithstanding its inquiries it appears that the tax collector did not produce the figure or redemption statements as had been requested and inquired if available. (*Aa344*) (*Aa347*) (*Aa356*)

In a Rule 4:50-1(f) application the applicant is not required to prove a meritorious defense in order to obtain relief.. See Guillaume, 209 *N.J.* at 469. The subsection (f) "boundaries "are as expansive as the need to achieve equity and justice, Ridge at Back Brook, LLC v. Klenert, 437 N.J.Super. 90, 98 (App. Div.2014), quoting Court Invest. Co v. Perillo, 48 N J. 334, 341 (1966).

The unpublished case of Carol L. Baron v. Lisa Youngbroker, et al,2021 N.J.Super Unpublished (App. Div. A-1203-2021, February 10, 2023,), at 7-9 the trial court's deference to the equitable principles displayed by the defendant property owners, who, were given time to obtain funds to redeem substantiated by bank statements was a pivotal in vacating the tax sale foreclosure judgment.

Defendant also has an issue with the manner Plaintiff used an accelerated process to foreclose its tax sale certificate, which gives support to a meritorious defense to the underlying action.

The Premises was not abandoned. The application of N.J.S.A. 54:5-86(b). is contrary to the Defendant's undertakings action to stabilize the Premises, expenditures, and exhibits. (*Aa156 to161*) (*Aa169 to174 (*Aa183). (Also refer to Legal Argument - Point IV)

The essence of the case and this appeal – is the following questions; why, at the times Defendant sought to make redemption knowing that it had funds sufficient funds to do so, redemption was not made!

Why, on the date the judgment was recorded was Defendant's attempt to redeem rejected, and subsequent overtures, likewise denied by the Plaintiff. All attempts within the statutory three (3) month time,

These were not wishful acts, such that if redemption was allowed, the applicant would have the time to obtain funds or explore a means to accumulate funds to redeem. On the contrary, the Defendant had the funds. (*Aa177,178*). The circumstances that Defendant presents are clearly distinguishable from the facts in Del Vecchio v. Hemberger, 388 N.J.Super.179 (App. Div 2006).

In Hemberger , 388 N.J.Super. at 187, the "certification of the defendant provided evidence of the fact the defendants actively sought redemption fund

but, were unable to obtain them. The property was encumbered by additional mortgages and the property owner contracted for sale with a third-party intervenor, known to the court as a tax raider – a third-party intervenor acquired an interest in the property at less than the property's value. ..Id at 184, 188.

Unlike in Hemberger, the Premises is unencumbered. Its potential worth compared is almost seven times to the amount Defendant paid to redeem, and has the potential of three times the value paid by Peake Point. (*Aa195*)

The Defendant is not engaging in trivial objections to the validity of Plaintiff's foreclosure process or its judgment. Nor did the Defendant obtain the redemption funds by attempting to orchestrate a sale to a third party, refinance or offer a contract for sale of the Premises to obtain funds to make redemption.

The Plaintiff and Peake Point realized, in their respective goal, the significant gain to each, a prize to the Plaintiff in lieu of $20,000.00 in redemption and potential value to Peake Point in the resale of the Premises. All this is at the significant loss to Defendant, but for, the trial court's evaluation of the equities which is paramount, in this setting to the claim of Peake Point's bona fide purchaser status.

It would be an exceptional loss to Defendant to have been denied redemption. However, it has established "exceptional" circumstances that prevail over the standing of the Plaintiff and Peake Point that requires upholding the lower court decision.

POINT III

A BALANCE OF A BONA FIDE GOOD FAITH PURCHASE STATUS CLAIMED BY PEAKE POINT LLC WITH EQUITABLE PRINCIPLES OF IN THE FACTUAL SETTING BEFORE THE COURT COMPELS UPHOLDING THE ORDER TO VACATE THE FINAL JUDGMENT OF FORECLOSURE .
(Raised below IT15-19 to 21-13)

The conveyance of title to the Premises by Plaintiff to the Peake Point occurred on April 21, 2023.

The transaction was basically a "flip" of the Premises. A sizable profit realized less than three months from judgment for tens of thousands of dollars more than the redemption the Defendant paid on August 22, 2023, less than ten days from Judge Alpert's order that vacated Plaintiff's final judgment.

The transfer of title to Peake Point, within and prior to three (3) months from recording the judgment, N.J.S.A. 54:5-104.67, begged the certainty of a motion to vacate the judgment. The action was on notice to Plaintiff, who had an ethical, and perhaps legal, obligation to alert the Intervenor.

Regardless of what was informed to Peake Point, prudence should have been the cautionary process to at least wait for the expiration of no less than the statutory time frame from recording the final judgment. The Defendant has a right to seek redemption, post-judgment, by statutory provision to reopen the judgment on or about May 8, 2023. The motion was filed on April 21,2023.

The Rules of Court at Rule: 1:3-1 states in part that ". . . *The last day of the period so computed is to be include, unless it is a Saturday or Sunday or legal holiday, in which event the period runs until the end of the next day which is neither a Saturday or Sunday nor legal holiday.*"

That the sale to Peake Point was a time earlier on the same day as the motion filed, is of no effect. The "day" of the event constitutes a full twenty-four hours. See Fiduccia v. Intercont. Restaurant, 310 N. J. Super 52 (*App. Div* 1998) and statutory construction as to the "next business day" application in Mercer County Park Commission v. DiTullio, 139 N. J Super 36 (*App Div.* 1976), cert den. 70 N.J. 276 (1976).

Neither party deserves a greater equitable claim than the Defendant. Nor acceptance urged by Peake Point it and Plaintiff's alleged losses are attributed to the Defendant, or entitlement to reimbursement of expense and legal fees.

The appellate decision in Last v. Audubon Park Associates, 227 N.J. Super 602 (App Div 1988), presents facts resulting in a decision often cited by practitioners challenging motions to vacate a final judgment in a tax sale foreclosure. The Plaintiff, who held a mortgage encumbering the subject property, filed a motion to set vacate the judgment, claiming it did not receive notice of the foreclosure.

On August 25, 1982, the Defendant, Audubon Park Assoc (herein "Audubon") acquired the property by a tax sale foreclosure intending to develop into low income rental units. The plaintiff, a year after the conveyance to Audubon, who had demolished and commenced renovation commenced the mortgage foreclosure action.

In denying the motion to set aside the tax foreclosure judgment, the trial court ruled that "setting aside the foreclosure judgment would place an inequitable and disproportionate hardship on defendant, Audubon for Last's failure to move against the foreclosure judgment in a timelier fashion or "within a reasonable time." The court found Audubon had placed substantial reliance on the foreclosure judgment, invested approximately nine million dollars in the housing project. Last v. Audubon Park Associates, supra, at p. 605.

The Appellate Division affirmed the trial court. Finding that Audubon placed good faith and vested time, effort, and money in its housing project. - adding value to the property through its rehabilitation. Last, *supra* at P. 608.

Contrast the reasonable and timely action by Defendant, challenging the final judgment, attempts to redeem and funds invested in the project, to Peake Point, who within the day or several concluding its purchase was aware of the Defendant's motion.

Royal Tax Lien Servs., LLC v. Morodan, 2015 N.J.Super. Unpub. LEXIS 1727 (App. Div, July 20, 2015), found the analysis "in I.E.'s clearly and convincingly outlines the equitable weight to be accorded to a defendant's concerns in this scenario, the consequences of which are draconian. Id at P. 6.

Other than the outlay of the proceeds paid to Plaintiff, Peake Point has not shown any affirmative expenditure to protect, preserve or maintain the Premises during the time of its ownership. Though that period may be short lived until the Order of August 14, 2023, as dire a situation it portrays of the Premises and the scourge upon the citizens of Irvington, what did it do to ameliorate the citizens of Irvington. During its ownership, it was the recipient of building and maintenance violations. (*1A420-425*).

Neither the Plaintiff or Peake Point expended any funds during its ownership to maintain the premises, clean the grounds or preserve the structure and safeguard the citizens of Irvington from what Peake Point describes in its brief as the 'scourge in Irvington" – all attributed to the Defendant.

The absence of any claim to file an action against the Plaintiff, which has elected not to take an active role in this appeal, seems to say more about the kindred relationship by and between these investors, than an adversarial approach. One would assume that upon notice of the Defendant's motion, within days or hours, Peake Point would have sought to mitigate any loss.

POINT IV

PLAINTIFF'S FORCLOSURE PURSUANT TO THE IN REM ACT DEVIATED FROM STATUTORY REQUIREMENT AND THE RULES OF COURT AND WAS DISQUALIFIED IN THE USE OF AN ACCELERATED PROCESS AND IS VOID AND NO EFFECT.
(Raised below T7-20 to 15-18)

The Defendant challenges the right of Plaintiff to have pursued the foreclosure under the Abandoned Property Rehabilitation Act, N.J.SA 55:19-78, 83 and accelerated its foreclosure under N.J. S. A. 54:5-86(b).

Uncontested facts disclose that the Defendant was actively in control of the Premises. It had not been abandoned. notwithstanding its appearance. Defendant was continuing to ready the site toward a multiple residential dwelling.

The issue is the **process** rather than the appearance of the Premises. The Plaintiff filed its complaint August 17, 2022. (*Aa1*). and mailed its published Notice of In Rem, October 14, 2022 (Aa22 to24).

The notice makes **no** reference to the underlying premise of the action- that the property satisfied the criteria of the Abandoned Property Rehabilitation Act. The imperative of the notice is to advise defendants of the nature of the cause of action, the amount required to redeem, the date when a final judgment may be entered, if there is no redemption and the findings in support of abandonment.

Then, in its motion of November 9, 2022, for the first time, Plaintiff seeks to declare the Premises abandoned N.J.S.A 55:19-83(d). (*Aa8*)

Attached to the motion is the Certification of Derek Leary, (Aa180), the affiant used by Plaintiff to establish that the Premises satisfied the conditions of the Act. His findings were available to the Plaintiff' two months prior to filing the complaint on August 17, 2022.

A determination if the Premises is abandoned is not the issue of this legal argument. It is the foreclosure process used by the Plaintiff. The benefit of a determination of abandonment is to accelerate a foreclosure rather than wait two years from the sale of the tax sale. N.J.S.A 54-5-86.

Application of N.J.S.A 54:5-86(b) requires that **at the time of filing** (emphasis added) "*an action with the Superior Court in the county, wherein the municipality is situate . . . pursuant to the tax sale law R.S. 54:5-1, et seq, or the In Rem Tax Foreclosure Act . . .. The filing shall include a certification by the public officer or the tax collector that the property is abandoned, provided pursuant to . . . N.J.S.A. 55:19-83.*

If neither the public officer or tax collector comply, the "*certificate holder may submit to the court, evidence that the property is abandoned, accompanied by a report, and sworn statement of an individual holding appropriate licensure or professional qualifications, and shall provide a copy of those documents submitted to the court to the public officer and tax collector. . .. on the basis of this submission. . . the court shall determine whether the property meets the definition of abandoned property.*"

Plaintiff's complaint of August 17, 2022, does **not** include the certification of either the public officer, tax collector or "accompanied by a report and sworn statement by an individual holding appropriate licensure or professional qualifications. . ." A court's aim is to "effectuate the Legislature's intent," ascribing to the statute's words, "their ordinary meaning and significance and reading them in the context with related provisions so as to give sense to the legislation as a whole. DiProspero v. Penn, 183 N.J. 477, 492 (2005).

The basis of a complaint is to apprise the defendant of the cause of action as of filing the complaint. Thus, a claimant's cause of action shall have accrued or ripen into a justiciable claim. Plaintiff's complaint did not provide a certification or sworn statement in support of abandonment, or that a court had found the Premises abandoned, either prior to as of filing the complaint.

The court Order of December 29, 2023 (Aa42), based upon the Leary certification that the property was abandoned, is an attempt to confirm the complaint filed four months earlier. The Order permitted the Plaintiff to accelerate foreclosure rather than wait a minimum of two years prior to commencing the foreclosure. N.J.S.A.54:5-86(a),

which would have been as of *December 29, 2022*, two years from the tax sale.

Plaintiff's procedure did not comport with the statutory requirement that the "filing shall include a "certification of the public officer or tax collector" or in the absence of those the sworn statement of a licensed person or who has professional qualifications.

For otherwise a plaintiff seeking to justify the "filing" after a complaint is filed would not know for months if a Court determines the property meets the definition of abandoned property.

The chronology of this juxtaposition process is that at the time of the Notice of Publication's service upon the Defendant, and others, there was no finding of abandonment.

The purpose of the Notice is to alert the parties of the basis of the cause of action, but to provide support for its cause of action in the complaint. It could not, since the order of abandonment was entered months after the complaint and notice was served. (*Aa21*) (*Aa22*)

Plaintiff's process is akin to a plaintiff filing a complaint to foreclosure a tax sale certificate, that had not been assigned, as of filing the cause of action or filing the complaint prior to the two years from the tax sale contrary to N.J.S.A 54:5-86(a).

The Order of December 29, 2022, was served upon the Defendant on December 30, 2022, a meaningless exercise, considering the Plaintiff's filed for its final judgment approximately a week thereafter.

During the almost 18 months Plaintiff held its tax sale certificate, prior and during its foreclosure, it could have sought the benefit of N.J.S.A 54:5-86(c)(d) - to secure, preserve and safeguard the property, and seek reimbursement for its expenses in the action. It did not.

Having the benefit of the Derek Leary findings of abandonment, two months prior to filing the Complaint, it was available, at the time of filing, as basis of a determination of abandonment. Thus, conforming to an imperative requirement of the statute.

Also, providing to all interest parties substantive support for the allegations of the Complaint, so that the published Notice acquainted all parties with the premise of the cause of action. Absent a determination of "abandonment" there is no basis to foreclose by In Rem. Thus, from filing to entry of judgment would not have been accelerated as was the Plaintiff's foreclosure.

The Plaintiff's process is statutorily flawed and lacked jurisdiction as filed and its final judgment has no legal affect.

POINT V

PRESERVATIOI OF PRIVATE PROPERTY RIGHTS IN THE TYLER V. HENNEPIN COUNTY DECSION ARE APPLICABLE TO THE CASE BEFORE THIS COURT.

Regardless if the decision in Tyler v. Hennepin County, 598 U.S. 631, which declared the county's appropriation of funds in a tax sale foreclosure beyond the amount due for the tax debt, is a form of confiscation of property and violation of a person's property rights, is applicable before this Court, the underpinning of the decision supports the rights of our Defendant, Matthews, to redeem Plaintiff's tax sale certificate.

We know that the "taking of excess tax debt, as determined in Tyler, was recently applied to third-party tax sale holders, in the recent appellate decision in Roberto, 477 N.J.Super. at 365-366 The decision on December 4, 2023, offers seismic change to the contour of municipal and private investment tax sale certificate foreclosure in New Jersey.

As stated in *Point II* in the Legal Argument, the Roberto decision articulates principles that support, in the Defendant's cause, the trial

court's decision to grant its motion to vacate the Plaintiff's final judgment.

The TSL, framework provides the imperative not just for marketable title, but also, that the property owner can redeem their property interest and Rule 4:50-1(f) is available to a defendant demonstrating exceptional circumstances, Roberto, supra at 368.

The trial judge, "correctly weighed that defendant escrowed the required funds . . . undisputably had significant equity in the property and certified he had compounded financial hardship from tenants' related COVID-19 related rental arrears. Roberto, Id at 369.

Beyond the premise for upholding the Rule 4:50-1 grant in vacating the final judgment, in Roberto, and in Tyler, decreeing that government indulging in a tax foreclosure cannot take retain more than is due from the taxpayer, are the underlying sacred value ascribed to individual property rights an ownership.

In sum a "TSL statutory framework that provides the forfeiture of a property owner's equity after final judgment violates the Fifth Amendment Takings Clause in accordance with the decision in Tyler. Roberto at 366, In addressing whether the Tyler decision applies to

third-party tax sale certificate holders, the Appellate Division, determined that state constitution provides "property owners with greater protections than afforded under the United States Constitution. . explicitly "prohibits private corporations from taking private property (citation omitted). Roberto, supra at 365.

In both the Tyler and Roberto decisions the guiding principle is the preservation of private property rights, from confiscation and forfeiture. Apply that concept to the Matthews circumstance of a private party seeking, multiple times, to redeem its property, before and after a final judgment.

Is a private property owner's rights subservient to any a bona fide purchaser for value, without notice? Are no circumstances, such as those displayed by the Defendant's attempts to redeem, and the value of its investment in the property, worthy of a higher calling than Peake Pointe?

Tax sale certificate holders, as the Plaintiff, and an investor, Peake Point, purchasing property derived from a tax sale foreclosure, should be aware at purchase, "that the right to equity cannot be relied upon because it is not perfected, but anticipate obtaining a high yield

interest rate, as most properties are redeemed, Cronecker at 189 N.J. 329.

Whether the recent decision in Roberto is or not "pipeline" retroactive, for purpose of the equitable argument of the Defendant, it is the pedestal that the United States Supreme Court and the New Jersey appellate court in Roberto, cloaked a private party facing an act of forfeiture sought to protect private property interests, that are just as meaningful and relevant to the case before this Court.

The Roberto decision, rightly or wrongly can be read to countenance under a Rule 4:50-1 motion, a basis to vacate a judgment of tax sale that affects property rights, if the defendant owner has equity in the property and ability to redeem. Courts have allowed pre-judgment and post-judgment motions with the condition to allow the property owner to sell the property (or another) to raise the redemption funds or refinance, each process extending the time to redeem.

In the facts presented to the trial court, the ability to redeem, when sought, prior to and timely after judgment, was never in question.

CONCLUSION

In analysis of the factual pattern applied to the legal principles and decisional law and the oral argument before the trial court, Defendant (Respondent) Matthews Enterprises LLC respectfully submits that this Court affirm the Order below and deny Appellants' motion to reinstate the final judgment, and sustain and affirm the Order of August 14, 2023 vacating the motion to vacate the final judgment and the motion for reconsideration of October 6, 2023, which confirmed the earlier order of the trial court. .

Respectfully submitted,

By:_____
Stuart B. Klepesch, Esq.

Dated: March 4, 2024

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March 14, 2024

Honorable Judges of the Appellate Division
Superior Court of New Jersey
Richard J. Hughes Justice Complex
PO Box 006
Trenton, NJ 08625-0006

APPELLANT'S LETTER SUR-REPLY BRIEF

Re: Stone Wool 22, L.L.C.;
Plaintiff-Respondent,
vs.
Block 87, Lot 10, 57 Washington Avenue,
Defendant-Respondent,
and
Peake Point, L.L.C.
Intervenor-Appellant

Appellate Docket No. A-394-23
Case type: Civil
County: Essex, Chancery
Trial Court ESX-F-8595-22
Sat below: Hon. Jodi Lee Alper, P.J.Ch.

My Dear Judges,

Kindly accept this letter in lieu of a more formal sur-reply brief, pursuant to R.2:6-2(b).

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LEGAL ARGUMENT

I. RESPONDENT CANNOT AND DOES NOT POINT TO EVEN ONE FACT SUPPORTING THE ORDER VACATING JUDGMENT OR THE TRIAL COURT'S DECISION TO DENY PEAKE POINT THE PROTECTIONS OF A BONA FIDE PURCHASER FOR VALUE WITHOUT NOTICE.

Respondent conflates timeliness and meritorious, but these concepts are not interchangeable. An untimely motion might otherwise be meritorious, while a timely motion might be frivolous.

Our argument is twofold. First, the motion was untimely because it was filed after the property was re-sold, even though filed within the time permitted by R.4:50–2 or N.J.S. 54:5-104.67. Compare U.S.D.A. v. Scurry, 193 N.J. 492, 503-504 (2007) (relief may be denied where "inexcusable and unexplained delay in exercising [a] right [and] prejudice [to] the other party" exists). Second, even if timely, the motion was not meritorious as defendant had no entitlement to relief

under R.4:50-1(a) or (f). Respondent, however, does not point to even one fact addressing either issue.

Respondent's R.4:50–1(a) argument only discusses the standard for relief but does not discuss any facts to support it. Rb28–30. Respondent points to no mistake, surprise, excusable, neglect, nor any defense at all. Instead, it only argues that (a) applies, but does not tell this Court why. Respondent states that "the trial court considered all relevant facts" but still cannot and does not point to even one fact on which the trial court allegedly relied. This is not sufficient, especially where our merits brief concentrated on the absence of any facts relied upon by the trial court to justify vacating the judgment.

Turning to (f), Respondent posits two arguments, first, that it was prevented from redeeming, and, second, that the property wasn't really abandoned. Plaintiff disproved the first argument, showing that figures were provided but payment still not made. Moreover, the trial court did not find this to have occurred and Respondent has not cross-appealed. This issue is not before this Court.

As to the second, the trial court declined to make such a finding and respondent did not cross-appeal this issue. This court should not, in the first instance, make a ruling not made below nor properly before this court. Any claim that the property was not abandoned is plainly fallacious, given the pictures and defendant's own repeated concessions below. Matthews let the property rot while it spent money

elsewhere. It then sat on its laurels doing nothing until Stone Wool had sold the property to Peake Point.

Respondent cites cases, such as IE's LLC v. Simmons, 392 N.J.Super. 520 (L. Div. 2007) and BV001 REO Blocker v. 53 West Somerset Street, LLC, 467 N.J.Super. 117 (App.Div. 2021), neither of which have any relation to this case. Each of those cases dealt with a complete lack of notice to owners, justifying vacating the foreclosure judgments on due process grounds. But this is not a situation where Matthews did not know of the foreclosure, proceeding or the final judgment; casting itself as an innocent waif is stunningly disingenuous.

In BV001, a contract purchaser of the property changed the registered agent of the owner, meaning the owner did not receive any notice of the foreclosure. 467 N.J.Super. at 122. Upon learning of the judgment, Defendant filed a motion to vacate that judgment just seven days post-judgment. Ibid. Notably, there was no bonafide purchaser there and the motion was filed within days, not three months later after the property was sold. Even though that event did not reflect upon the plaintiff or the foreclosure itself, the circumstances were so unusual and exceptional that relief was granted.

I.E.'s, a trial court decision, involved three heirs who did not get notice of the foreclosure, rendering the judgment void. 392 N.J.Super. at 530. It also involved a family that would lose its home and suffer "an extreme forfeiture." Id. at 533. Neither

issue applies here as Matthews here received every single notice and did not claim otherwise. It received the tax bills, the tax sale notices, the notice of intent, to foreclose, the complaint, the motion to declare the property abandoned, the motion to substitute the plaintiff and enter final judgment, and the entered final judgment.

Defendant, simply "assumed" that it would take longer despite the plain English notices that he was plastered with. Here no family suffers any loss and Matthews still has its Rahway and Westfield properties where it chose to invest its funds. Respondent's lengthy discussion of IE's also ignores that the property was still occupied by the foreclosed owner, placing everyone on inquiry notice that something might be amiss:

> Further, and most significantly, the bona fide purchaser for value took title to the property knowing that the defendant family in the tax sale foreclosure action was still in possession of the premises. New Jersey law has long recognized that a bona fide purchaser for value of real estate who purchases the property knowing others are in possession of the property has a duty to make reasonable and diligent inquiry of the rights to the property by those in possession.
>
> [Id. at 534-535].

It also warrants mention that the IE's decision addressed the purchaser's motion for reconsideration of a decision already made to vacate the judgment. Id. at 524. Thus, the arguments of being a bonafide purchaser were made after a decision had already been made, attempting to make a new argument on reconsideration that had not been made previously. That decision has no bearing nor relationship to this

case as this case is no comparison with cases addressing due process or a lack of notice.

Addressing whether or not Appellant is a bonafide purchaser, Respondent does not point to even one fact supporting its position – because none exists. Respondent argues, at best, that "prudence should have been the cautionary process to at least wait for the expiration of no less than the statutory time frame from recording the final judgment." Rb35. As argued in our merits brief, there is no law or rule that required Stone Wool to wait 90 days or even 365 days to sell a property. There is no law or rule that required Stone Wool to carry a dangerous liability on its books, praying that no one would be hurt or killed as each day passed. Stone Wool, in fact, had a constitutional right to sell its property even on the day after the final judgment was entered. Respondent's argument, unsupported by even one single fact, simply fails.

Respondent avers that "the action was on notice to Plaintiff, who had an ethical, and perhaps legal, obligation to alert the Intervenor." Rb35. Appellant does not understand this argument. First, it is not clear what "action" Respondent even refers to. Clearly "the action" cannot refer to the foreclosure itself because an argument that the Plaintiff was on notice of its own foreclosure makes no sense. So what does this refer to, the possibility that someday, somehow, somewhere a motion might be filed? A motion can always be filed, whether or not timely or meritorious,

but since none was filed before closing, neither Plaintiff nor Peake Point were "on notice" of anything.

Without an explanation of what action they speak of, what was Stone Wool obligated to disclose? And even if we assumed – without any basis, for that assumption – that Stone Wool knew something, still nothing is shown to question Peake Point's lack of notice, i.e. a bonafide purchaser without notice. Absolutely nothing is shown to have caused Peake Point any concern about purchasing this property three months' post-foreclosure.

II. RESPONDENT'S ARGUMENT ABOUT ABANDONMENT IS NOT BEFORE THIS COURT, IS DISPROVEN BY THE TRIAL COURT'S DECISION EXPRESSLY FINDING THE PROPERTY WAS ABANDONED, NOT TO MENTION RESPONDENT'S CONCESSIONS AND THE INDISPUTABLE EVIDENCE TO THE CONTRARY.

Respondent, again without the benefit of a cross-appeal, argues that the property was not abandoned, ignoring the fact that Judge Alper entered an order declaring the property to be abandoned. Ia42. Given that Respondent received, read, understood, and chose not to oppose, that motion, this issue is not properly before this Court. It is also patently untrue as evidenced by the extensive color photographs presented below by Plaintiff in its motion to declare it abandoned, Ia31-38, and by Peake Point in opposing Defendant's motion to vacate. Ia221-232.

Defendant even argues that it was not apprised of the nature of the complaint because the "Plaintiff's complaint did not provide a certification or sworn statement

in support of abandonment, or that a court had found the Premises abandoned either prior to [or] as of filing the complaint." Rb43. But a court cannot make a ruling before a case has even been filed since there is no case in which to file a motion until a complaint is filed. It would be akin to awarding child support before a child is even born[1]. Once filed, on notice to Respondent, Judge Alper expressly found the property to have been abandoned pursuant to law.

Review of the verified complaint also shows Respondent's argument to be mistaken because Plaintiff quite clearly alleged at the outset that the property was abandoned. The very first paragraph of the complaint states that "Plaintiff is an abandoned property certificate holder as defined in N.J.S.A. §54:5-104.30(h)." Ia1. The next paragraph states:

> 2. The Property is abandoned as set forth in N.J.S.A. §55:19-78 et seq. The certificate holder as unsuccessfully sought a certificate of abandonment from the public officer or tax collector. The certificate holder seeks the entry of a court order declaring the property as abandoned pursuant to N.J.S.A. §54:5-86(b).
>
> [Ibid.]

Matthews was not deprived of due process by way of any insufficiency of any particular notice. Respondent's argument thus fails.

III. WHETHER TAX FORECLOSURE IS AN UNCONSTITUTIONAL TAKING IS NOT BEFORE THIS COURT.

[1] This analogy would, at this time, hold true only in 49 states.

Despite the fact that the issue of an unconstitutional taking was not addressed by the trial court other than to say that it was not deciding the issue, Respondent once again argues an issue not before this Court. As decided by the panel in 257-261 20th Avenue Realty, Inc. v. Roberto[2], ___ N.J.Super. ____ (App.Div. 2023), the decision in Tyler v. Hennepin Co., 598 U.S. 631, 143 S.Ct. 1369 (2023) is prospective in nature, not retroactive. It is rather audacious for Matthews to argue that tax sale foreclosure is unconstitutional when it too acquired the very same property by the very same means. The term chutzpah[3] comes to mind.

Because this case is not a pipeline case, and the trial court expressly made no decision on this issue, it is not before this Court and should be disregarded.

CONCLUSION

Matthews Enterprises knew that its property in Irvington was vacant, abandoned, and obviously dangerous. Despite this, it didn't secure the property, didn't make the property safe for passers-by, and didn't even bother to pay its taxes. Instead, it spent its money in Westfield and Rahway, essentially saying 'Irvington be damned.'

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[2] A petition for certification is pending.

[3] The term is a Yiddish term often associated with someone having a lot of nerve. As an example, one who murders his parents and asks a court for mercy for, alas, he is an orphan, would be engaging in chutzpah.

Matthews received every single notice. Matthews read every single notice. Being experienced in tax foreclosure and having been represented by one of New Jersey's pre-eminent tax foreclosure experts in his own tax foreclosure, Matthews chose to ignore the notices because it assumed it had more time. It had no basis for relief based on mistake, surprise, or excusable neglect and it had no defense whatsoever. Respondent cannot point to even one fact supporting relief and the trial court found no such fact either.

Nor was it exceptional for this abandoned shell to have been lost to foreclosure for the second time in mere months. Here too, neither the trial court or the Respondent pointed to anything that rendered this tax foreclosure exceptional.

For the foregoing reasons, the decision should be reversed and the final judgment reinstated.

Most respectfully submitted,
HONIG & GREENBERG, L.L.C.

By: Adam D. Greenberg

ADG:st