SUPREME COURT OF NEW JERSEY
DOCKET NO. 088959

257-261 AVENUE REALTY, L.L.C.	:	**CIVIL ACTION**
Plaintiff-Petitioner	:	**On Petition from the Superior**
v.	:	**Court of New Jersey, Appellate**
	:	**Division, A-3315-21, and the**
ALESANDRO ROBERTO,	:	**Chancery Division, Passaic**
Defendant-Respondent,	:	**County, F-3349-21**
FANNY ROBERTO, wife of Alesandro Roberto; KELLER DEPKEN FUEL OIL COMPANY, INC. a/k/a HOP ENERGY, L.L.C.; MIDLAND FUNDING, L.L.C.		**Hon. Thomas Sumners, P.J.A.D.** **Hon. Morris Smith, J.A.D.** **Hon. Lisa Perez Friscia, J.A.D.** **Sat below: Hon. Randall C. Chiocca, P.J.Ch.**
Defendants,.		

AMICUS CURIAE BRIEF OF THE NATIONAL TAX LIEN ASSOCIATION, INC.

Law Offices
HONIG & GREENBERG, L.L.C.
By Adam D. Greenberg, Esq., #030931994
1949 Berlin Road
Suite 200
Cherry Hill, NJ 08003-3737
(856) 770-0990
AGREENBERG@HGLLCLAW.COM

GARY C. ZEITZ, L.L.C.
By: Robin London-Zeitz, Esq. #023011996
1101 Laurel Oak Road
Suite 170
Voorhees, NJ 08043
(856)857-1222
RZEITZ@zeitzlawfirm.com

Adam D. Greenberg and Robin London-Zeitz on the brief

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PRELIMINARY STATEMENT

This case presents an issue of vital constitutional importance never before decided. Compounding this, the panel omitted important findings that require action. We submit that Tyler v. Hennepin County, 598 U.S. 631, 143 S. Ct. 1369 (2023) does not apply to tax foreclosures by private entities. Our concern is the devastating effect of this decision on tax collection, particularly given the absence of any factual record and the incompleteness of the panel decision. Tyler dealt with Minnesota law and a governmental, *in rem*, foreclosure and subsequent sale. The case at bar is a foreclosure involving a private investor per N.J.S. 54:5-87.

LEGAL ARGUMENT

I. THIS COURT HAS LONG FOUND TAX FORECLOSURE CONSTITUTIONAL. ANY REMEDY SHOULD BE LEFT TO THE LEGISLATURE.

"It is therefore understandable that the Legislature found it fair to bar the right to redeem by strict foreclosure, i.e., by a judgment that payment be made by a fixed date in default of which the right of redemption shall end." Bron v. Weintraub, 42 N.J. 87, 91 (1964). "Our function is to effectuate the will of the Legislature, not to pass on the wisdom or efficiency of the Tax Sale Law. We have no separate tax policy." Simon v. Cronecker, 189 N.J. 304, 337 (2007). Even when adjustments were made, the law lived on. Montville v. Block 69, Lot 10, 74 N.J. 1 (1977) (determining mail required to meet minimum standards for due process).

II. THE PANEL FAILED TO FIND THE ELEMENTS OF A TAKINGS CLAIM.

The Tyler Court ruled the foreclosure stated a claim under the Takings Clause of the federal Constitution. This issue was not before the trial court, but was raised by the panel on its own without a factual record. Nevertheless, it weighed in, ruling New Jersey tax foreclosures constitute "a prohibited taking after Tyler." 257-261 20th Ave. v. Roberto, __- N.J.Super. ___ (App.Div. 2023). The opinion was, unfortunately, incomplete.

The Fifth Amendment requires a taking *by the government* for a *public purpose;* the panel found neither, which was surprising because the Court had ruled in 1969 that private foreclosure was not a violation of the Takings Clause. Balthazar v. Mari, Ltd., 396 U.S. 114 (1969) summarily affirming 301 F.Supp. 103 (N.D. Ill. 1969). Though raised and argued below, the opinion did not mention Balthazar even once.

Instead, the panel noted that the Court remanded a separate private tax foreclosure, Fair v. Nebraska, 143 S.Ct. 2580 (2023), for consideration in light of Tyler. Op at 24. But there was no decision reached in Fair, only a remand to develop a record. Somehow that lack of a decision led to a big decision here. Intriguingly, Pacific Legal argued to the appellate panel that "summary affirmance is a "slender reed on which to rest future decisions." PLFb3, n.1, citing Morse v. Republican Party

of Va., 517 U.S. 186, 203 n.21 (1996). If summary affirmance is a "slender reed," a summary remand with no decision is even thinner.

In Balthazar, the Supreme Court affirmed a three-judge District Court panel decision. Illinois tax statutes are more draconian than ours, with the issuance of a tax deed as opposed to a judicial foreclosure. In an Illinois tax sale, the real estate is offered to the public but bidding restricted to the amount of taxes and interest. The successful bidder bids the lowest rate of interest and obtains a certificate. The purchaser files a petition requesting a deed and serves notice by mail. If the owner fails to redeem within the two years, the buyer obtains a deed from the County vesting title. Id. at 104. "In the rare case when an owner fails to redeem ... the purchaser may obtain the property for a fraction of its market value, thus gaining as a windfall all "surplus value" which exceeds the land's tax and interest liabilities." Id. at 104-105.

Balthazar claimed that the tax sale deprived them of due process and that tax delinquent property cannot be sold by a state to a private purchaser unless there is a provision for a judicial sale. The panel rejected this, stating "[t]he purpose of a public sale, however, is to provide landowners with an opportunity to protect their real estate investment, even though their taxes may be in arrears. So long as owners have this opportunity, state legislation meets the due process requirements of the Fourteenth Amendment." Id. at 105. The Court noted that the two-year redemption

period affords ample opportunity to raise funds to redeem or sell for the highest possible price. In contrast, at a forced judicial sale, real estate is often sold for substantially less than its apparent market value. Id. at 106. Specifically noting New Jersey law, the Court noted a judicial sale would force owners "to raise as much money as the highest bid in order to redeem", whereas "the existing bidding system tends to depress the penalty-interest rate, thus protecting delinquent taxpayers from excessive charges." Id. at 106. While foreclosures can be harsh, this "must be tempered by the legislature, not the courts." Ibid., citing Nelson v. New York City, 352 U.S. 103, 110-111, 77 S. Ct. 195, 199 (1956). We believe that a solution lies with the state legislature which has several bills in consideration at this time.

To find a taking, courts engage in a two-step inquiry: (1) identify that the plaintiff has asserted a "legally cognizable property interest[1]" and (2) ask (a) "was there a taking?"; (b) "was the taking for public use?"; and (c) "did the claimant receive just compensation?" Nekrilov v. City of Jersey City, 528 F. Supp. 3d 252, 266 (D.N.J. 2021) (quoting Park Restoration, LLC v. Erie Ins. Exch., 855 F.3d 519, 526 (3d Cir. 2017)), aff'd, 45 F.4th 662 (3d Cir. 2022). A private entity may only be considered a state actor in limited circumstances, (i) when the private entity performs a traditional, exclusive, public function, (ii) when the government compels the

[1] As argued by Petitioner, New Jersey has not recognized a property right to surplus monies following tax foreclosure.

private entity to take a particular action, or (iii) when the government acts jointly with the private entity. Manhattan Comm. Access Corp. v. Halleck, 587 U.S. ___, 139 S.Ct. 1921, 1926 (2019).

Petitioner was not a state actor under this standard, nor did the opinion designate or provide any analysis for it to be one, though Pacific Legal raised two cases to argue this. Fuentes v. Shevin, 407 U.S. 67 (1972) and Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982). PLFb3. Neither was a Takings case. Each was, instead, a due process case where private plaintiffs were allowed to use *ex parte* proceedings to have a sheriff or constable seize defendant's property (in one case childrens' clothes and toys) without any notice or ability to be heard. Moreover, each case involved state action – law enforcement – taking action at a private plaintiff's behest. No such joint conduct exists in New Jersey tax foreclosures. Private tax foreclosure does not constitute state action. The panel mistakenly failed to address the 'state actor' standard before summarily determining that Tyler applies to private parties.

Private party tax foreclosure is also not taking the property "for a public purpose" as the property is acquired by a private entity, not a government. "[A] determination whether a taking is 'for a public use' is largely a legislative question beyond the reach of judicial review except in the most egregious circumstances," Twp. Of West Orange v. 769 Associates, L.L.C., 172 N.J. 567, 572 (2002). Likewise, a purely private benefit does not withstand the scrutiny of the "public use"

requirement for a constitutional taking. Kelo v. City of New London, 545 U.S. 469, 477 (2005).

Though the decision found that "[t]he New Jersey Constitution explicitly prohibits private corporations from taking private property," citing N.J. Const. art. 1, par. 20, this provision apes the federal constitution, stating "[p]rivate property shall not be taken for public use without just compensation. Individuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners." It thus restates the "public use" element – which was conspicuously not addressed here, despite being a requirement of a takings claim.

The decision noted that the government may not provide private plaintiffs with rights greater than the government might have, yet the language cited was dicta in a case involving a nuisance claim from a noisy airport. Hyde v. Somerset Air Svc., 1 N.J. Super. 346 (Ch. Div. 1949). No finding of "public use" renders the decision unsustainable. Consequently, this Court must undertake a review and reversal of the decision as failing to apply the Takings standard and State Actor test to this private tax foreclosure.

III. TYLER WON NOTHING. NEW JERSEY TAXPAYERS AND MUNICIPALITIES NOW LOSE.

The decision here extended Tyler too far, to the detriment of New Jersey taxpayers and municipalities. It is important to consider the facts in Tyler as they

relate to the Takings Clause and how her pyrrhic victory hurts everyone. See Brief of Hennepin County[2]. Geraldine Tyler, in her 90s, was placed into a nursing home. Her condominium was encumbered by a $48,000.00 mortgage and condominium liens. She failed to pay five years' worth of taxes resulting in a $15,000.00 lien. After those five years, Hennepin County foreclosed, taking clear title. The lender, despite notice and a right to redeem and foreclose its mortgage, declined, writing off its loan. The condominium association also chose not to redeem. As a result, title vested in the county which re-sold the property.

Tyler, represented by the Pacific Legal Foundation, alleged a Takings Clause violation. The federal district court dismissed the case for failure to state a claim, and the circuit court affirmed. The Supreme Court, however, vacated and remanded, noting that it stated a claim for relief. What did Tyler lose? She owned a condominium worth $40,000.00 encumbered by $15,000.00 tax lien, a $48,000.00 mortgage, and unknown condominium liens. Perhaps she could have sold the property and reduced her liabilities, but she had no reason nor ability to do so – she had no equity, would not receive one dime from a sale, and no excess existed even

[2] https://www.supremecourt.gov/DocketPDF/22/22-166/260178/20230329131415863_Hennepin%20Brief%203-29-23%20Final.pdf.

to pay a realtor unless everyone approved of a short sale. And she was in a nursing home. Tyler lost nothing[3].

On July 10, 2023, this Court entered an order barring the Foreclosure Unit from entering judgments but allowing judges to do so, directing that defendants in all post-Tyler cases would be required to have all notices – not just initial service - personally served upon them, and that any pleading that raised "surplus equity" would be deemed to be a contested answer.

Despite the Order affecting only post-Tyler cases, every single tax foreclosure regardless of filing date was immediately placed into limbo. Chancery judges statewide denied motions for judgment *en masse*, requiring plaintiffs to start all over by filing amended complaints that informed defendants of the possible defense of surplus equity – as if defenses are ever set forth in a complaint. Remembering that the feared harm of Tyler is a strict foreclosure without sale, the Order failed to address tax foreclosures where the United States was a defendant[4] requiring sheriff's sales that could result in "surplus equity." This distinction was overlooked in the Order but also led to chancery judges not entering judgments even in cases free of any Tyler concern.

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[3] Hennepin County argued that there was no Article III standing as a result but the Supreme Court did not reach this argument.

[4] A federal lien may not be divested without a sale. 28 U.S.C. 2410(c). Thus, N.J.S. 54:5-87 was amended to allow for sheriff's sales.

The order also required personal service of every single pleading in every single foreclosure though not one New Jersey law or Rule requires such service. While initial service in most cases is personal, R.4:4-3(a), there is no other case in New Jersey's jurisprudence that requires personal service at every single stage of the case after initial process. In nearly every case, once personal service is accomplished, nothing more than mailed service is required for default or motions. R.4:43-1, R.1:5-2. Parents lose their children for a $.67 stamp. Lawsuits after service only require mailed notice. Criminal and Municipal Court defendants who fail to appear face bench warrants simply mailed to them. If picked up on a Friday, they are held in jail until Monday or longer without personal service. But tax foreclosure defendants who have not paid their taxes for many years and received numerous bills, late notices, tax sale notices, and foreclosure notices, are entitled to personal service of everything at great expense to plaintiffs.

Despite N.J.S. 54:5-6's mandate that "all costs of collection" are added to a tax lien, courts have not protected this. The newly imposed personal service expenses have been massive as private process servers charge $80.00 for in-state service and $150.00 for out of state service. Yet the rules only allow reimbursement for initial service and cannot exceed the pittance that a sheriff would charge (and doesn't want to do anyway). N.J.S. 22A:4-8 ($16 to $22), R.4:42-8(c). Tax plaintiffs have spent tens of thousands of un-reimbursable expenses, and, despite exacting

compliance with the July 10 order, motions are denied for reasons not provided by the Order.

Compounding the injury, the Foreclosure Unit is dismissing cases for lack of prosecution because an amended complaint is not just grounds for avoiding dismissal. R.4:64-8(a). A dismissal requires a motion to reinstate and is improperly burdened by an $810.00 reinstatement fee, R.4:64-8(b) – despite the fact that this penalty, by law, only applies to residential mortgages. N.J.S. 2A:50-56.3. Tax plaintiffs are thus thrown out of court and wrongly forced to pay $810.00 to resume a case that cannot end. Not only did courts stop entering judgments, plaintiffs stopped trying. Delinquent taxes do not get paid, foreclosures do not reach final judgment, and properties remain on the delinquent tax rolls or in decay, or both. Meanwhile, attorney fees of just $500.00 are allowed, R.4:42-9(a)(5), while mortgage foreclosures can obtain up to $7,500.00, R.4:42-9(a)(4), and condominium foreclosures have no limits beyond "reasonable." R.P.C. 1.5, N.J.S. 46:8B-21(a).

The effect on tax sales quickly followed. Investments are made to make a profit. But when an investor can only recover $500.00 in attorney fees, not to mention thousands of dollars in unrecoverable service expenses, there is no profit. Instead of bidding liens down to 0% and below, investors have backed off or just left. Taxpayers who would have seen their interest rates bid down from 18% to below zero are not getting a reduction. Municipalities that rely on premiums to fund their

general treasuries find themselves short – meaning those who do pay have to subsidize the burden by paying higher taxes because taxes are the price we pay for a civilized society. City of Philadelphia v. Bauer, 97 N.J. 372, 384 (1984), citation omitted. The decision below, combined with the foregoing, frustrates the goal of tax sales to fund municipal budgets and creates an untenable burden for other taxpayers who must make up that shortfall.

IV. DUE PROCESS IN NEW JERSEY TAX FORECLOSURES IS NOT AN ISSUE AS DEFENDANTS RECEIVE MORE NOTICES THAN IN ANY OTHER TYPE OF PROCEEDING.

Remembering that Fuentes and Lugar, supra, were due process cases, not Takings Cases, it is important that no due process concerns are raised about our tax foreclosure system as defendants receive more notices than any other process anywhere.

We start with the premise that there is no personal nor criminal liability for non-payment of property taxes. Caput Mortuum, L.L.C. v. S&S Crown Services, Ltd., 366 N.J. Super. 323, 335 (App. Div. 2004). Tax assessment notices are mailed annually, N.J.S. 54:4-31, followed by two tax bills, N.J.S. 54:4-64, late notices, and a tax sale notice. N.J.S. 54:5-26. A tax sale may not take place until the eleventh day of the eleventh month of the fiscal year. N.J.S. 54:5-19. Private foreclosure cannot

start for two years[5], during which time four more tax bills and more late notices are sent. N.J.S. 54:5-86. Before foreclosure, a notice of intent is mailed. N.J.S. 54:5-97.1. Personal service, R.4:4-4(a) affords thirty-five days to answer, followed by a mailed copy of default, R.4:43-1, a motion for a redemption order, R.4:64-1(f), the redemption order (60 days to redeem), application for and entry of judgment. In any other case, following service, an application for judgment can be made just 36 days later. R.4:43-2, R.6:6-3. Even residential mortgage foreclosures move faster with a Notice of Intent (NOI) to foreclose, a summons and complaint, a 14-day notice to cure, motion for judgment, and then sheriff's sale. N.J.S. 2A:50-53 et. seq., R.4:64-1(d). But tax foreclosure judgments take nearly three-years from tax sale at the earliest with reams of notices. Due process is not an issue.

V. THE DECISION BELOW RAISES MANY QUESTIONS AND POSSIBLE RISKS WITH NO ANSWERS, LEAVING GRAVE UNCERTAINTY TO TAX COLLECTIONS.

One significant fear now is the effect of 257-261 20th. Has this created or will it create affirmative liability for damages to municipalities, the state, or private investors? There is no clear answer. The court afforded "pipeline retroactivity," meaning that the decision might only apply "to pending tax sale foreclosures." But does this mean that it cannot be an element in seeking relief from a judgment or is it

[5] A municipality need only wait 6 months and may use *in rem procedures*. R.4:64-7.

making a decision about whether damages can be sought – an issue not before that court?

For starters, Pacific Legal has a pending case against East Orange, New Jersey based on a governmental *in rem* foreclosure filing. Johnson v. City of East Orange, ESX-C-16-23. It is not known whether that will be deemed a pipeline case since the tax foreclosure was long over when Tyler came about. On the other hand, a damages verdict could appear. But this too does not address what happens where a private investor was the foreclosing plaintiff, unlike Tyler and unlike the East Orange case. Will someone file suit directly against municipalities or private lienholders as a result[6]? What might that outcome be? Liability should not rest on an issue never fully explored by any level of our courts.

At least three bills have been submitted to the state legislature with different proposals. One would require public auctions of real estate as part of foreclosure, one would enable property owners to opt into a sheriff's sale to protect equity but waive the right if not exercised, while another would allow the owner to apply for the premium paid by a plaintiff at tax sale. Whatever becomes enacted, Pacific Legal has already sent a letter to the Senate President threatening future litigation for

[6] A class action was filed against the Governor and the Director of the State Division of Taxation, however, that Plaintiff fails to realize that neither has any control over nor benefit from local property taxes. CPM-L-452-23.

Takings Clause violations, noting that the statute of limitations for such cases can be six years[7].

Unfortunately, the future for private tax lien investors in New Jersey is unknown. They have followed the law for 106 years, only to now face fear and uncertainty about possible liability over the past 6. There probably will be complaints filed with no predictability as to outcomes yet. The outcome of those cases should not be dictated by this decision, yet any trial court would be hard-pressed not to grant summary judgment as to liability, despite this decision made with no factual record developed below and without a full discussion of the "state actor" and "public purpose" elements.

If the chance of a profit on real estate evaporates, investors will not take the risks of interest rate reductions and premium bids that they did before. Municipal governments, especially in urban areas, have seen and will continue to see reduced tax sale revenue and competition, not to mention premiums, as lower-valued real estate does not have the potential profit that a suburban property might. If sheriff's sales are required, sheriff's deposits will add nearly $2,000.00 to every case, plus commissions, again making investor risk greater and driving investors away. And

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[7] Yet there is no constitutional violation "so long as an adequate post-deprivation remedy is available." Rivkin v. Dover Township Rent Leveling Bd., 143 N.J. 352, 358 (1996), cert. denied, 519 U.S. 911, 117 S.Ct. 275 (1996). We believe that the broad application of R.4:50-1, as here, provides a post-deprivation remedy that bars a constitutional violation.

the inability to be made whole for expenses or fees makes our tax liens unattractive. The decision should be set aside given the lack of any "state actor" or "public use" when a private foreclosure takes place. Anything less will worsen the disruption already caused.

Another possible disposition is vacatur in the event that the Legislature takes action as "courts of this state do not resolve issues that have become moot due to the passage of time or intervening events." City of Camden v. Whitman, 325 N.J.Super. 236, 243 (App.Div, 1999), Compare Old Bridge Owners Co-Op v. Old Bridge Twp., 246 F.3d 310, 313 (3d. Cir. 2001). In Old Bridge, the Third Circuit vacated a district court decision where an "overwhelming weight of authority" found to the contrary, starting with a 1998 decision of Judge Richard Williams in Casino Reinv. Dev. Auth. v. Cohen,321 N.J.Super. 297 (L. Div. 1998). Should the law change, the appellate decision should not stand given its incompleteness. We submit that this Court should grant certification and address the vital issues overlooked below.

VI. ANY EFFECT OF TYLER MUST BE PROSPECTIVE.

The TSL is liberally construed "to the end that marketable titles may thereby be secured." N.J.S. 54:5-85. "Contrary to early hostility to such titles, the policy today is to support them, thereby to aid municipalities in raising revenue." Bron, supra, 42 N.J. at 91. "The stability of [real estate] titles requires the judiciary to follow the course that "will best support and maintain the integrity of the recording

system … and by preventing others from successfully challenging [the] interest" [of the recording party]." Mezey v. United Jersey Bank/Central, N.A., 254 N.J.Super 19, 26 (App.Div. 1992), quoting Palamarg Realty Co. v. Rehac, 80 N.J. 446, 453 (1979).

Judicial decisions announcing a new rule of law will not apply retroactively, but prospectively including any case that has not reached final judgment. Henderson v. Camden County Mun. Util. Auth., 176 N.J. 554, 561-62 (2003), Coons v. Am. Honda Motor Co., 96 N.J. 419, 425-34 (1984), and Montells v. Haynes, 133 N.J. 282 (1993). A contrary decision places decades of titles derived from foreclosure in question, contrary to legislative mandates.

In Montville *in rem* foreclosures used only posting and publication for service, without even mailing. 74 N.J. at 5. While finding a violation of state and federal constitutional rights, "[i]n order to avoid upsetting settled titles based on foreclosure proceedings, we grant the requested relief to the landowner in this case, but hold that our decision should be applied prospectively only." Id. at 20. This same prophylactic step must be taken today.

CONCLUSION

The NTLA – made up of investors, government officials, tax collectors, attorneys, and lenders – recognize the importance of proper, ethical, collection of tax revenue. Foreclosure is, of course, the remedy of last resort and for that reason

due process is paramount. We are gratified that New Jersey's procedures provide substantial due process protections for defendants. Thus, we believe that Tyler does not apply here and that any changes should be made by the legislature and applied prospectively.

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

/s/ Adam D. Greenberg

By: Adam D. Greenberg, Esq.
Attorneys for amicus curiae
The National Tax Lien Association

Dated: January 29, 2024
Cherry Hill, New Jersey

Most respectfully submitted,
GARY C. ZEITZ, L.L.C.

/s/ Robin London-Zeitz

By: Robin London-Zeitz, Esq.
Attorneys for amicus curiae
The National Tax Lien Association

Dated: January 29, 2024
Voorhees, New Jersey