

**SUPREME COURT OF NEW JERSEY
DOCKET NO. 088959**

257-261 20TH AVENUE REALTY, LLC,	:	CIVIL ACTION
	:	
Plaintiff/Petitioner,	:	ON APPEAL FROM:
	:	SUPERIOR COURT OF NEW JERSEY
	:	APPELLATE DIVISION
v.	:	DOCKET NO. A-3315-21
	:	SAT BELOW:
ALESSANDRO ROBERTO,	:	THOMAS SUMNERS, P.J.A.D.
	:	MORRIS SMITH, J.A.D.
Defendant/Respondent.	:	LISA PEREZ-FRISCIA, J.A.D.
	:	
and	:	ON APPEAL FROM:
	:	SUPERIOR COURT OF NEW JERSEY
FANNY ROBERTO, wife of	:	PASSAIC COUNTY,
ALESSANDRO ROBERTO,	:	CHANCERY DIVISION
KELLER DEPKEN FUEL OIL	:	DOCKET NO. F-3349-21
COMPANY, INC., a/k/a HOP	:	SAT BELOW:
ENERGY LLC, and MIDLAND	:	RANDAL CHIOCCA, P.J. Ch.
FUNDING LLC,	:	
	:	
Defendants.	:	

**AMICUS CURIAE BRIEF OF
NEW JERSEY LAND TITLE ASSOCIATION**

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PRELIMINARY STATEMENT

The New Jersey Land Title Association (“NJLTA”) is moving in accordance with R. 1:13-9 for leave to file this brief and participate in oral argument as Amicus Curiae. The reason is that any remedy that this Court may impose to protect the surplus equity of an owner in foreclosure has serious implications for the stability of real estate titles derived through already completed tax foreclosures and to be derived through pending or future tax foreclosures. In particular, in order to insure titles on a prospective basis, titles cannot be subject to attack for an uncertain or indefinite time period.

The Appellate Division in this case noted specifically that “Our Supreme Court has long recognized ‘two competing public policy goals’ embodied in the [Tax Sale Law]: ‘one to enhance the tax-collecting ability of municipalities by encouraging tax sale foreclosures and the other to protect property owners from the devastating consequences of foreclosure.’” Simon v. Cronecker, 189 N.J. 304, 315 (2007). While the Appellate Division clearly considered the latter public policy goal in rendering its decision, it gave insufficient weight to the former and equally important public policy goal behind the Tax Sale Law. Encouraging tax sale foreclosures necessitates the protection of the titles derived through such foreclosures. Titles derived through tax foreclosures must be transferable to third

parties, free of any interests of the defendants, and insurable by title insurance underwriters.

As a consequence of both Tyler v. Hennepin County, Minnesota, 598 U.S. 631 (2023) and the Appellate Division's extension of the Tyler holding to *in personam* tax foreclosures without apparent time limitations, titles to properties purchased as a result of tax foreclosure actions have become uninsurable and unmarketable.¹ Since tax sale certificate holders know they must sometimes resort to tax foreclosure in order to recover the amounts they paid to a municipality for real estate taxes, their reliance upon the finality of judgments is a critical factor in their decision to purchase tax sale certificates. Perhaps more importantly, any subsequent purchaser or mortgagee of a property acquired in a tax sale foreclosure is reliant on that finality as well. The Appellate Division decision, if not modified, will adversely affect the ability of title insurance underwriters to insure title, and consequently the marketability of titles. If investors cannot ultimately depend on receiving insurable and marketable titles, the purchase of certificates becomes a much riskier proposition for the investment community. This, in turn, will

¹ A "marketable title" has been defined as "a title which is free from encumbrances and any reasonable doubt as to its validity. ... One which is free from reasonable doubt and will not expose the party who holds it to hazards of litigation." Black's Law Dictionary, 970 (6th Ed. 1990). An "insurable title" has been described as one which is "insurable by any reputable title insurer licensed to do business in New Jersey, subject only to standard exceptions, at regular rates, and without payment of additional premium". Brinn v. Mennen Co., 5 N.J. Super. 582 (Ch. Div. 1949), aff'd 4 N.J. 610 (1950).

seriously compromise municipalities' ability to sell tax sale certificates in order to generate needed revenue.

NJLTA wishes to address three issues:²

- (1) Does the existence of "substantial equity," without more, constitute an "exceptional circumstance" under R. 4:50-1(f), which would, in essence, permit an owner **an indefinite period** of time to move to redeem a tax sale certificate after a final judgment of foreclosure has been entered?
- (2) How should "pipeline retroactivity" be defined in the context of a completed tax sale foreclosure action?
- (3) What procedure is appropriate under Tyler to foreclose upon and protect a defendant-owner's right to surplus equity?

NJLTA's position is that the existence of substantial equity is actually a common circumstance in the context of tax foreclosures and not an exceptional circumstance that justifies relief under R. 4:50-1(f). Additionally, a motion filed pursuant to R. 4:50-1(f) based on substantial equity could be filed *at any time*, even

² While it will not separately brief the issue, NJLTA agrees with the position taken by both the Petitioner and the National Tax Lien Association, Inc. concerning the application of Tyler to foreclosures involving private investors per N.J.S.A. 54:5-87. However, in the event that the Court affirms the Appellate Division's application of Tyler to *in personam* tax sale foreclosures, NJLTA urges the Court to consider, in determining the mechanics of such application, the marketability, insurability and stability of land titles derived from tax foreclosures.

in a closed action, which could result in that action being given new life, because it is now “in the pipeline.” This would cause the status of title to a property that is owned as a result of a tax foreclosure action to remain uncertain - - and thus uninsurable and unmarketable - - for an indefinite time period. It is also the NJLTA’s position that pipeline retroactivity must be limited to actions pending or under appeal as of the effective date of the Appellate Division decision in the instant case, i.e., December 4, 2023. Otherwise, all titles derived from tax foreclosures will be at risk of attack.

LEGAL ARGUMENT

POINT I

THE EXISTENCE OF SUBSTANTIAL EQUITY DOES NOT CONSTITUTE “EXCEPTIONAL CIRCUMSTANCES” UNDER R. 4:50-1(f)

As noted by the Supreme Court in Court Invest. Co. v. Perillo, 48 N.J. 334, 341 (1966), R. 4:50-1(f) permits relief in exceptional situations. This subsection, which is referred to as the “catchall” category, permits courts to vacate judgments for “any other reason justifying relief from the operation of the judgment or order”. R. 4:50-1(f). Because of the importance attached by the courts to the finality of judgments, relief under R. 4:50-1(f) is available only when “truly exceptional circumstances are present”. Housing Authority of Morristown v. Little, 135 N.J.

274, 286 (1994); U.S. Bank National Ass'n v. Guillaume, 209 N.J. 449 (2012).³ In fact, the movant must show not only that the circumstances are exceptional, but that enforcement of the judgment would be unjust, oppressive, or inequitable, or otherwise that a “grave injustice would occur.” Guillaume at 484 quoting Little at 289; Lawson Mardon Wheaton, Inc. v. Smith, 160 N.J. 383, 404-407 (1999); Piscitelli v. Classic Residence, 408 N.J. Super. 83, 102-03 (App. Div. 2009); see Pressler & Verniero, Current N.J. Court Rules, Comment to 4:50-1 at Note 5.6.1 (Gann). Furthermore, the prejudice that may be visited upon the non-moving party must be considered. As stated by the Court in IMO Guardianship of J.N.H., 172 N.J. 440, 474 (2002):

[w]hether 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 prejudice that would accrue to the other party.” (citations omitted) (emphasis added)

³ Indeed, although a trial court's determination under R. 4:50-1(f) receives deference, it is reversed when it results in an abuse of discretion. See DEG, LLC v. Twp. of Fairfield, 198 N.J. 242, 261 (2009). Abuse of discretion is found when a decision is “made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis”. Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 123 (2007) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)).

Permitting substantial equity to be considered as an “exceptional circumstance” under R. 4:50-1(f), without more, would certainly prejudice the holder of a tax foreclosure judgment, as well as subsequent assignees and purchasers. Again, substantial equity, by itself, is not an exceptional circumstance. Moreover, the indefinite *timing* of the filing of a motion under R. 4:50-1(f) would create an added layer of uncertainty imperiling titles to real property that were the result of tax sale foreclosures.^{4,5}

Even where a tax foreclosure defendant-owner may have a “surplus equity” defense, other equitable doctrines must also be considered in determining whether a judgment should be set aside. Courts in New Jersey have, in the past, been protective of the rights of innocent third parties in real estate transactions. See Heinzer v. Summit Fed. Sav. & Loan Ass’n, 87 N.J. Super. 430, 439 (App. Div. 1965) (where the court found that the owner was barred by the doctrines of laches and equitable estoppel from attacking a judgment and affecting the interest of bona

⁴ Pursuant to R. 4:50-2, a motion made under R. 4:50-1(f) shall be made within “a reasonable time,” which is dependent on the *totality* of the circumstances. Certainly, an owner of property is deemed to know the value of his own property and, therefore, whether he has substantial equity in same as of the commencement of a tax foreclosure action.

⁵ Further, if the Appellate Division decision is affirmed, “substantial equity” will be a recognized, available defense. As such, its assertion post-judgment would appear to qualify as mistake, inadvertence or excusable neglect under R. 4:50-1(a) and thus be subject to the one-year time bar under R. 4:50-2.

fide purchasers for value, where she delayed in acting for more than 14 months); Rogan Equities, Inc. v. Santini, 289 N.J. Super. 95, 114 (App. Div.) certif. denied, 145 N.J. 375 (1996) (where the court held that the property owner was barred by laches, because of the intervening rights of an innocent purchaser and his delay of more than two years in attacking the foreclosure sale); Last v. Audubon Park Associates, 227 N.J. Super. 602 (App. Div. 1988) (where the court found that plaintiff was barred by the doctrines of laches and estoppel from attacking a foreclosure judgment, because the plaintiff delayed in attacking the judgment for 18 months, the court noting that the defendant had made a substantial investment in the property and the “plaintiff was aware that the tax foreclosure judgment formed an important link in the property’s public chain of title”). Accordingly, the surplus equity defense should not be permitted where a third-party purchaser would be prejudiced.

POINT II

“PIPELINE RETROACTIVITY” MUST BE DEFINED AND LIMITED.

The Appellate Division, in concluding that “pipeline retroactivity” should apply in the instant case, summarized the required analysis as follows: “In determining whether a decision is to be given retroactive effect, a court must consider whether: (1) a new principle of law has been established, (2) ‘the prior history of the rule in question’ including its purpose and effect to determine

whether retrospective application will further its operation, and (3) retroactive application of the rule would produce ‘substantial inequitable results’ such as injustice or hardship. Where full retroactivity ‘would impose an undue hardship on participants who justifiably relied on’ a previous rule, but pure prospectivity ‘would unnecessarily inhibit’ a constitutional right, pipeline retroactivity is appropriate.” (citations omitted) Roberto 477 N.J. Super. at 363.

“Pipeline retroactivity” has been defined as rendering a new rule of law applicable (a) in all future cases, (b) the case in which the rule is announced, and (c) any cases still on direct appeal. State v. Knight, 145 N.J. 233, 249 (1996). The Appellate Division in the instant case recognized that pure retroactivity “would be unworkable and create a substantial hardship for taxing authorities, as well as third-party purchasers,” but concluded that, in balancing the public policy goals and interests, it did “not discern the same hardship if *pipeline* retroactivity is applied.” (emphasis added) Roberto 477 N.J. Super. at 363. A conclusion that pipeline retroactivity applies, however, requires particular scrutiny in the context of a tax foreclosure action.

As a direct consequence of a tax foreclosure action, title to the subject property is acquired and a certified copy of the final judgment of foreclosure is recorded in the chain of title to that property, evidencing the transfer of record title to the plaintiff. Quite often, the property is thereafter sold to a third-party purchaser by the tax foreclosing plaintiff. The new purchaser often requires mortgage

financing to accomplish the purchase. In order for the purchaser to be assured that title is good and marketable, and for the new lender to be assured that it has a valid first mortgage lien, the third-party purchaser will seek to obtain title insurance to cover its fee ownership interest, as well as a loan policy insuring the validity of the mortgage. NJLTA emphasizes that insuring titles derived from tax foreclosures was difficult even before Tyler. Prudent underwriting standards have forced title insurers to include an exception in their policies for attacks on title derived through a tax sale foreclosure within 1 year of a final judgment, far exceeding the 3-month statutory redemption period contained in N.J.S.A. 54:5-87 (for *in personam* foreclosures) and N.J.S.A. 54:5-104.67 (for *in rem* foreclosures). Moreover, as a result of the holding in In re Varquez, 502 B.R. 186 (Bank. D.N.J. 2013) (tax sale foreclosure set aside as a constructively fraudulent transfer under 11 U.S.C. §548(a)(1)(B)), many title insurers are compelled to further except from coverage the “consequences of an attack on the estate or interest insured herein under the Federal Bankruptcy Law” for a full two years following final judgment. Some title insurers will simply offer no insurance to the prevailing plaintiff in a tax sale foreclosure, instead awaiting an initial sale to an arm’s-length and bona fide purchaser for value (though still subject to the exceptions above). Even these precautions sometimes prove insufficient, since trial courts are frequently unpredictable in their application of R. 4:50-1(f), sometimes vacating judgments years after entry.

The decision in Roberto creates *new* uncertainty. For example, should it be applied with respect to a *closed* case in which a motion is filed under R. 4:50-1(f)? NJLTA asserts that the answer must be “no.” If judgment was entered prior to the rendering of the decision in the instant case, a R. 4:50-1(f) motion based on substantial equity should not be permitted. Otherwise, third-party purchasers will have indefinite exposure to claims arising out of tax foreclosure actions that were concluded two or three years (or more) prior to the decision in Roberto. Further, title insurance companies will not be willing to insure title to properties where titles result from tax foreclosure actions, as their exposure to potential claims would be similarly indefinite. Again, the likely consequence of tax foreclosure titles being uninsurable will be to discourage purchasers from acquiring properties which were the subject of tax foreclosure actions. Difficulty in selling such properties will make investors less likely to purchase tax sale certificates. The negative impact upon the ability of municipalities to generate tax revenue is clear.

Contracts for the sale of New Jersey real estate frequently require the seller to convey a title which is both marketable and insurable. Furthermore, the forms of title insurance policies used in New Jersey generally insure against loss owing to unmarketability of title. Thus, the members of NJLTA must determine that title is marketable before agreeing to issue a policy which provides such coverage. See N.J. Title Practice, §77.01 (N.J. Land Title Inst., 5th Ed. 2021). For the reasons discussed at length above, the opinions of the Chancery and Appellate Divisions

in the case at bar will have the unfortunate effect of rendering many titles derived from tax foreclosure unmarketable or uninsurable or both. This will, in turn, have a significant impact on the ability of municipalities to recover revenue loss from the non-payment of real estate taxes.

POINT III

MANDATORY JUDICIAL SALES FAIRLY AND EFFECTIVELY RESOLVE THE CONSTITUTIONAL ISSUES RAISED BY TYLER.

To the extent this Court chooses to make recommendations to the Legislature as to how to protect surplus equity, NJLTA urges this Court to recommend judicial sales in all tax sale foreclosures, as a method to preserve a property owner's equity. In fact, Chancery Judges are already directing the tax foreclosure bar that they must alert defendant owners in tax foreclosures of their right to surplus equity and to demand a judicial sale.

While admittedly judicial sales may not yield "fair market value" as they constitute forced sales, it has been recognized that judicial sales do yield "reasonably equivalent value." As found by the U.S. Supreme Court in BFP v. Resolution Trust Corporation, 511 U.S. 531, 545 (1994), a decision construing section 548 of the United States Bankruptcy Code [11 U.S.C. §548]:

For the reasons described, we decline to read the phrase "reasonably equivalent value" in §548(a)(2) to mean, in its application to mortgage foreclosure sales, either "fair

market value” or “fair foreclosure price” (whether calculated as a percentage of fair market value or otherwise). We deem, as the law has always deemed, that a fair and proper price, or a “reasonably equivalent value,” for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State’s foreclosure law have been complied with.

With this procedure in place, motions to vacate final judgments would be much more limited, and titles will be marketable and thus more readily insurable, leading to greater stability of real estate titles derived from tax foreclosures. Therefore, it is NJLTA’s position that mandatory judicial sales are the best means of protecting the interest of the property owner’s equity, while assuring that titles derived through tax foreclosures will be both marketable and insurable.

CONCLUSION

For the reasons set forth above, NJLTA urges this Court to hold that (a) “substantial equity” is not an exceptional circumstance under R. 4:50-1(f); and (b) pipeline retroactivity should be limited to actions pending or under appeal as of the effective date of the Appellate Division decision in the instant case, i.e. December 4, 2023; and (c) the best solution to the problem is the adoption of a requirement for judicial sales in all tax foreclosure cases.

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