SUPREME COURT OF NEW JERSEY
DOCKET NO. 088959

257-261 20TH AVENUE REALTY, LLC,

Plaintiff/Petitioner,

v.

ALESSANDRO ROBERTO,

Defendant/Respondent.

and

FANNY ROBERTO, wife of ALESSANDRO ROBERTO, KELLER DEPKEN FUEL OIL COMPANY, INC., a/k/a HOP ENERGY LLC, and MIDLAND FUNDING LLC,

Defendants.

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO. A-3315-21

CIVIL ACTION

ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY, PASSAIC COUNTY, CH. DIV., DOCKET NO. F-3349-21

SAT BELOW: HON. THOMAS SUMNERS, PJAD HON. MORRIS SMITH, JAD HON. LISA PEREZ-FRISCIA JAD HON. RANDAL CHIOCCA, JSC

PETITIONER/PLAINTIFF 257-261 20TH AVENUE REALTY, LLC'S RESPONSE TO THE *AMICUS* BRIEFS OF PACIFIC LEGAL FOUNDATION AND LEGAL SERVICES OF NEW JERSEY

GOLDENBERG, MACKLER, SAYEGH, MINTZ, PFEFFER, BONCHI & GILL
660 New Road, Suite 1-A
Northfield, New Jersey 08225
(609) 646-0222/(609) 646-0887
Attorneys for Petitioner
Email: kbonchi@gmslaw.com, ealmanza@gmslaw.com

Keith A. Bonchi, Esq.
Of counsel and on the brief
NJ Attorney ID #032321983

Elliott J. Almanza, Esq.
Of counsel and on the brief
NJ Attorney ID #017542012

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PRELIMINARY STATEMENT

Petitioner 257-261 20th Avenue Realty, LLC does not oppose any of the motions to appear as amicus, file a brief, and participate in oral argument. But Petitioner wishes to respond to two amicus briefs in particular – those of the Pacific Legal Foundation (PLF) and Legal Services of New Jersey (LSNJ).

LEGAL ARGUMENT

I: THE QUESTIONS AS TO WHICH CERTIFICATION WAS GRANTED DO NOT INVOLVE RETROACTIVITY, AND THERE WAS NO CROSS-PETITION FILED AS TO THAT ASPECT OF THE APPELLATE DIVISION DECISION.

PLF argues that the Appellate Division erred by concluding Tyler should be given pipeline rather than full retroactivity. However, the question as to which this Court granted certification is:

> Is the Tax Sale Law . . . unconstitutional under the decision in Tyler v. Hennepin County, 598 U.S. 631 (2023); and if not, did exceptional circumstances otherwise exist in this matter that warranted vacating the final judgment under Rule 4:50-1(f)?

The Appellate Division's resolution of the retroactivity issue is beyond the scope of this limited question. There was no cross-petition seeking certification as to that separate issue. This Court generally does not address issues beyond the scope of the certified question. See, e.g., Hirl ex rel. Hirl v. Bank of Am., N.A., 198 N.J. 318, 319 (2009) ("Given the limited question on which certification was granted, we do not address or comment on the other issues considered by the Appellate

Division."); State v. J.R., 227 N.J. 393, 405 n.3 (2017) (holding that a particular issue was "outside the scope of our limited grant of certification, and we do not address it."). Accordingly, Petitioner respectfully suggests that the Court decline to entertain this issue.

If the Court determines that Tyler applies to New Jersey's Tax Sale Law (TSL) and intends to address the retroactivity issue, Petitioner agrees with the position of the New Jersey Attorney General: pipeline retroactivity is appropriate, particularly given the reliance interests at stake. Furthermore, in such circumstance, Petitioner asks that the Court grant direct certification, R. 2:12-1, on Lynette Johnson v. City of E. Orange, No. A-2486-23 (Johnson), which PLF refers to in its *amicus* brief.[1] The record in Johnson was well-developed, and the retroactivity issue was fully briefed and dispositive before the trial court.[2]

II: A FORFEITURE IS NOT A TAKING.

No party or *amicus* disputes that the Appellate Division did not undertake the first half of the takings inquiry: whether the property right exists in the first place. Nevertheless, PLF and LSNJ contend that the property right to equity exists in other contexts, and that Petitioner frames the right too narrowly as "equity following a tax foreclosure." But context certainly matters. There are several

[1] Petitioner's counsel and PLF also represent the parties in Johnson.

[2] Conversely, in this matter, retroactivity was raised by Petitioner only at the appellate level in response to the panel's request for supplemental briefing as to Tyler's application.

areas of the law in which complete forfeiture of equity occurs. If the Court agrees with PLF and LSNJ's expansive view, those areas of law would be similarly subject to constitutional infirmity.

Tax foreclosure in New Jersey is fundamentally a forfeiture[3] scheme. See Simon v. Cronecker, 189 N.J. 304, 310, 317, 330, 333, 334 (2007) (describing the Tax Sale Law as effecting a "forfeiture" of the property). And forfeitures are not viewed as takings. One example is adverse possession. Codified at N.J.S.A. 2A:14-30 to -34, adverse possession allows a party to fully divest an owner of real property without any compensation whatsoever, regardless of the amount of equity. Conceptually, both schemes function similarly and result in an identical outcome. Both involve a property owner's failure to discharge an obligation over a lengthy period of time,[4] followed by notice and judicial process, and ultimately culminating in the transfer of legal fee simple title through a judgment without any ability to recover whatever equity may exist in the property. Both require the claimant to satisfy particular elements of a duly-enacted statutory scheme. Yet there is no real dispute that adverse possession does not constitute a taking. See, e.g., City of Gainesville v. Morrison Fertilizer, Inc., 158 S.W.3d 872, 877 (Ct.

[3] A forfeiture is defined as "divestiture of property without compensation[;] loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty[.]" Black's Law Dictionary at 792 (11th ed. 2019).

[4] In the case of adverse possession, it is the owner's failure to assert any incident of ownership. Mannillo v. Gorski, 54 N.J. 378, 387 (1969). In the case of tax foreclosure, it is the owner's failure to pay taxes. N.J.S.A. 54:5-6 and -87.

App. Mo. 2005); State ex rel. A.A.A. Inv. v. Columbus, 478 N.E.2d 773, 775 (Ohio 1985); Weidner v. Dep't of Transp. & Pub. Facilities, 860 P.2d 1205, 1212 (Alaska 1993); Stickney v. City of Saco, 770 A.2d 592, 603 (Maine 2001); Dunnick v. Stockgrowers Bank of Marmouth, 215 N.W.2d 93, 96 (Nebraska 1974); Petersen v. Port of Seattle, 618 P.2d 67, 70 (Washington 1980).

Another example is administrative forfeiture. In U.S. v. Locke, 471 U.S. 84, 89 (1985), the defendant failed to timely comply with a federal statutory filing requirement, and consequently lost its mining rights without any compensation. The Supreme Court determined that this was not a taking:

> Even with respect to vested property rights, a legislature generally has the power to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties. As long as the constraint or duty imposed is a reasonable restriction designed to further legitimate legislative objectives, the legislature acts within its powers in imposing such new constraints or duties.
>
> [Id. at 104.]

The Court concluded that the defendants' "property loss was one appellees could have avoided with minimal burden; it was their failure to file on time – not the action of Congress – that caused the property right to be extinguished." Id. at 107.

Civil forfeiture provides another example. In Bennis v. Mich., 516 U.S. 442, 442 (1996), a husband solicited prostitution from a car he co-owned with his wife.

The state took the vehicle under its civil forfeiture laws, and the wife – who was completely unaware of her husband's conduct[5] – claimed this was a taking of her property without just compensation. Id. at 452. The Supreme Court disagreed: "The government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain." Ibid.

PLF and LSNJ's absolutist position is that just compensation is required any time property is taken. If that position were correct, the above-cited cases would not have turned out the way they did. Just because an owner loses their right to property does not mean a constitutional taking has occurred. That is how tax foreclosure in New Jersey has always been viewed. It bears repeating: the very same people who drafted New Jersey's Constitution of 1844 – which includes the *identical* Eminent Domain/Just Compensation Clause as our modern Constitution[6] – also drafted in that selfsame year what appears to have been New Jersey's first tax sale foreclosure law. See Hutchinson v. Johnson, 7 N.J. Eq. 40, *9-10 (Ch. 1847). And one year after the adoption of our modern constitution, the drafters passed the In Rem Act, N.J.S.A. 54:5-104.29 et seq. It strains credulity to believe that the framers of our governing documents passed, virtually contemporaneously,

[5] Since Bennis, Congress passed a law providing for an "innocent owner" defense. U.S. v. Ferro, 681 F.3d 1105, 1112 (9th Cir. 2012).

[6] Compare N.J. Const. of 1844, art. I ¶16 & art. IV, §7, ¶9 with N.J. Const. of 1947, art. I, ¶20.

laws that violate both Constitutions. The TSL is not constitutionally infirm. In New Jersey, tax foreclosure is a forfeiture scheme, like civil forfeiture or adverse possession, that is simply not amenable to the takings analysis.

III: MERELY FOLLOWING A LAW DOES NOT CONVERT A PRIVATE PARTY INTO A STATE ACTOR.

LSNJ believes that a state actor analysis "does not govern," and that the Appellate Division did not fashion or apply a state actor test. PLF, on the other hand – as well as the parties to this case, and other *amici* – appear to agree that the decision under review did employ a state actor test, with the conclusion that a private lienholder is a state actor. Regardless, both PLF and LSNJ believe that private lienholders qualify as state actors. They are incorrect for several reasons.

First, their positions boil down to the simple fact that private lienholders follow a law enacted by our Legislature. That is patently inadequate to qualify one as a state actor. See Lugar v. Edmonson Oil Co., 457 U.S. 922, 939 (1982) ("Action by a private party pursuant to . . . statute, without something more, [is] not sufficient to justify a characterization of that party as a 'state actor.'"). There must be "something more," which "might vary with the circumstances of the case." Ibid. That "something more" means the party charged with the deprivation "must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State."

Id. at 937. This is where PLF and LSNJ's argument falls apart. No matter how they may distort the roles of the parties, tax lienholders cannot be considered governmental actors because they do not act together with state officials nor receive aid from them. PLF claims that "[u]nder the Tax Sale Law, government officials are involved not only in the foreclosure of property and transfer of title, but also in the creation and sale of the underlying tax lien." The first half of this assertion is false. Government officials are *not* involved in the foreclosure of property and transfer of title, and PLF does not point to any statute or rule to the contrary. Foreclosure and transfer of title happens without governmental assistance, encouragement, or intervention. A private lienholder purchases a tax lien at an auction conducted by the taxing authority, and that is where the governmental involvement primarily ends. N.J.S.A. 54:5-31 and -32. From that point forward, the private lienholder proceeds (or does not) of its own accord. The lienholder may pay subsequent taxes, and, after waiting the requisite statutory period, N.J.S.A. 54:5-86, prosecute a foreclosure complaint in Superior Court, ultimately culminating in a final judgment that vests fee simple title, N.J.S.A. 54:5-87. At no point in this process does the lienholder act at the behest or direction of the municipality, or in concert with it. The municipality does not provide guidance or assistance throughout this process. As thoroughly detailed in Petitioner's previous briefs, the municipal collector acts as a neutral intermediary between the

lienholder and parties with redeemable interests. Petitioner will not re-cite the same statutes, but simply notes that neither PLF nor LSNJ points to any statute that supports their claim that private lienholders act jointly with the government. That is because private lienholders do not do so.

PLF believes the circumstances here mirror those in Lugar, in which a private party was considered a state actor. PLF is nowhere near the mark. Lugar was a Due Process case – not a Takings case – in which a creditor sought *ex parte* prejudgment attachment of the debtor's property in accordance with a statutory scheme. 457 U.S. at 924. As part of that scheme, and in response to the creditor's *ex parte* petition, the clerk of the state court issued a writ of attachment, which the county sheriff then executed on the debtor's property. Ibid. For that reason, the creditor "invoke[ed] the aid of state officials to take advantage of state-created attachment procedures," and this was enough to satisfy the "joint participation" requirement to convert the creditor into a state actor. Ibid. The glaring difference here is that the TSL does not contain a mechanism, like that at issue in Lugar, that directs a government official to aid or assist the lienholder in prosecuting its foreclosure. From beginning to end, a private lienholder foreclosure is conducted by the private lienholder and without governmental assistance or intervention.

With respect to the state action inquiry, this case is far more akin to Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978). In Flagg, the claimant's personal

property was stored at a warehouse company following her eviction, in accordance with a state statute. Id. at 153. When the claimant refused to pay the storage fee, the warehouse company threatened to sell the goods, also pursuant to that selfsame statute. Id. at 153, 156. The question was whether there was sufficient "state action" for the warehouse company to be considered a public entity. The claimant asserted that the private warehouse company should be treated as a state actor because it acted pursuant to a state statute which "authorized and encouraged" it to do what it did. Id. at 164. But the statute was permissive, not mandatory, so there was no "compelled" action which could have rendered the warehouse company a state actor. Id. at 165-66.

Here, as in Flagg, the statutory scheme is permissive, not mandatory, so there is no compelled action. N.J.S.A. 54:5-86(a). Here, as in Flagg, the "state action" argument by PLF and LSNJ devolves to the fact that private lienholders follow laws enacted by the legislature. But that is not enough. The TSL does not provide for any joint action, and as a matter of fact, there is no joint action. Private lienholders are not state actors under any reasonable conception of the term.

Lastly, PLF believes the Supreme Court "has already indicated" that private lienholders constitute governmental entities. PLF relies on two cases involving private-lienholder tax foreclosures, Fair v. Cont'l Res., 143 S. Ct. 2580 (2023) and Nieveen v. Tax 106, 143 S. Ct. 2580 (2023). But the extent of the Supreme

Court's action in those cases was to grant, vacate, and remand (GVR) "for further consideration in light of Tyler[.]" A GVR does "not amount to a final determination on the merits," but instead is a mechanism the Supreme Court uses when it is "not certain that the case [is] free from all obstacles to reversal on an intervening precedent[.]" Henry v. City of Rock Hill, 376 U.S. 776, 776 (1964). It is ironic, then, that PLF criticizes Petitioner for relying on the "slender reed" of summary affirmance in Balthazar v. Mari, Ltd., 301 F. Supp. 103 (N.D. Ill. 1969), aff'd, 396 U.S. 114 (1960). If summary affirmance is a slender reed, then GVR is a whisp-thin strand. At least summary affirmance endorses the judgment. Mandel v. Bradley, 432 U.S. 173, 176 (1977). And the judgment in Balthazar included, among other things, the dismissal with prejudice of a Takings claim based on a private-lienholder tax foreclosure. 301 F. Supp. at 105 n.6, 106.

Respectfully submitted,

GOLDENBERG, MACKLER, SAYEGH, MINTZ, PFEFFER, BONCHI & GILL,
Attorneys for Petitioner 257-261 20th Ave. Realty

BY: _____
KEITH A. BONCHI, ESQ.

_____
ELLIOTT J. ALMANZA, ESQ.

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