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August 15, 2024

VIA eCOURTS

Honorable Justices of the Supreme Court of New Jersey
c/o Heather Joy Baker, Clerk, Supreme Court of New Jersey
Richard J. Hughes Justice Complex
25 Market Street
P.O. Box 970
Trenton, New Jersey 08625-0970

**Re: 257-261 20th Ave. Realty, LLC vs. Alessandro Roberto, et al.
Case No.: 088959**

Dear Justices of the Supreme Court:

My firm represents the defendant/respondent Alessandro Roberto (“Mr. Roberto”). Please accept this omnibus letter brief in reply to the *amici curiae* briefs filed by Invest Newark, New Jersey Land Title Association (“NJLTA”), and the Attorney General of New Jersey.

As a preliminary matter, the New Jersey Legislature’s recent amendments to the Tax Sale Law (“TSL”), N.J.S.A. 54:5-1 to -137, resolve the constitutional

arguments advanced by these *amici curiae*, particularly regarding abandoned properties and concerns about title insurance and potential liability to municipalities and tax sale investors pertaining to future claims from property owners over the loss of equity. Mr. Roberto's August 5, 2024 Supplemental Brief addresses the Legislature's recent amendments to the TSL and its impact on the constitutional issues raised by the Petitioner and *amici curiae*, and thus need not be repeated again.

In several instances, Mr. Roberto supports some of the positions advocated by these *amici curiae*, such as: (1) the Appellate Division's limited pipeline retroactivity of Tyler v. Hennepin County, 598 U.S. 631 (2023) (Tyler) is appropriate and applies in the present case and to all foreclosure proceedings in which no final judgment existed pre-Tyler; and (2) requiring mandatory judicial sales for all *in rem* tax foreclosure cases would meet the constitutional requirements mandated by Tyler.

With that said, Mr. Roberto is compelled to respond to several faulty arguments advanced by these *amici curiae* attacking the lower courts' rulings regarding vacatur of the Petitioner's final judgment under Rule 4:50-1(f), including the Appellate Division's finding that Tyler constituted independent grounds supporting vacatur of Petitioner's judgment under Rule 4:50-1(f). In

addition, Mr. Roberto takes issue with the NJLTA's attempt to establish a bright line standard that would prevent any future property owner from ever raising substantial equity as a basis to overturn a final judgment of tax foreclosure under Rule 4:50-1(f).

LEGAL ARGUMENT

A. LIMITED PIPELINE RETROACTIVITY OF TYLER IS NECESSARY AND APPROPRIATE FOR *IN REM* TAX FORECLOSURE CASES SUCH AS THE PRESENT CASE

The Appellate Division correctly held that Tyler establishes a new principle of law. “The retroactive pipeline application of the holding in Tyler to the TSL is mandated because the Court constitutionally recognized a property owner's interest in surplus equity.” 257-261 20th Ave. Realty v. Roberto, 477 N.J. Super. 339, 363 (App. Div. 2023), certif. granted, 256 N.J. 535 (2024). In direct response to Tyler, this Court in its July 12, 2023 Notice to Bar declared:

In response to the United States Supreme Court's decision in Tyler v. Hennepin County, 598 U.S. ___, 143 S. Ct. 1369 (2023), the New Jersey Supreme Court temporarily has suspended Office of Foreclosure recommendations of final judgment in tax sale certificate cases filed after May 25, 2023. The Court in the attached July 10, 2023 Order also has relaxed certain Court Rules governing in rem and in personam tax foreclosures.

Notice to Bar, July 12, 2023.¹

Among the rule changes implemented by this Court in direct response to Tyler include amending the definition of “uncontested action” recited in Rule 4:64-1(c) by permitting a property owner to allege in a responsive pleading that there is equity in the property; in such instance, that allegation alone “shall be treated as a contesting answer to the tax foreclosure complaint.” Notice to Bar, July 12, 2023, at pp. 1-2. In addition, the Court temporarily suspended the Office of Foreclosure making recommendations for final judgment in tax sale certificate cases filed after May 25, 2023, instead requiring tax sale certificate holders to apply to a Superior Court judge for entry of final judgment. Id. at p. 1. This Court implemented these changes prior to the Appellate Division issuing its published decision in Roberto. Indeed, the Appellate Division expressly commented about the Court’s July 12, 2013 Notice to Bar. Robeto, 477 N.J. Super. at 354, n 5. Thus, in view of this Court’s exercise of its rule-making powers post-Tyler and pre-Roberto, the *amici curiae* are hard-pressed to sustain their challenge to the Appellate Division’s ruling granting Tyler pipeline retroactivity.

¹www.njcourts.gov/sites/default/files/notices/2023/07/n230713d.pdf?cb=22982a42

Further, the Legislature’s recent amendments to the TSL, Bill A.3772, approved P.L. 2024, c.39 (the “Act”), further support the Appellate Division’s limited pipeline retroactivity of Tyler while eliminating the parade of horrors postulated by these *amici curiae*. For instance, despite the Attorney General’s concerns raised in the present case, Petitioner faces no exposure to “massive liability” by having to pay “just compensation” to Mr. Roberto under a “takings claim.” This is because the trial court granted Mr. Roberto’s motion to vacate the final judgment and re-vested title of the property to him conditioned on his payment of the full redemption fee plus interest and Petitioner’s legal fees. But for Mr. Roberto’s substantial equity, Petitioner received all of which it was entitled to receive under the TSL, i.e., the full amount of its investment plus statutory interest and reimbursement of attorney’s fees. Consequently, Petitioner suffered no prejudice and faces no further exposure from Mr. Roberto because Mr. Roberto has preserved his equity in the property. Though Petitioner continues clouding title to Mr. Roberto’s property by its filing of an appellate *lis pendens*.²

² Notwithstanding the Appellate Division’s ruling granting pipeline retroactivity to Tyler, Petitioner continues encumbering Mr. Roberto’s property. Unbeknownst to Mr. Roberto until several months ago, and thus unbeknownst to the Appellate Division when it rendered its decision, after Petitioner

Further, the new Legislation removes the alleged uncertainty confronting Petitioner or any other tax sale certificate holder from owners' claims of surplus equity by declaring the Act has prospective application only to those cases in which a final judgment has not been entered, implementing an "opt-in" foreclosure sale process for *in rem* foreclosures conditioned on an owner's timely motion made prior to entry of final judgment, and eliminating any judicial sale requirement for abandoned properties. While the Act falls short of ameliorating Tyler's due process mandate prohibiting the taking of an owner's surplus equity without just compensation, the Act at least recognizes that property owners have a protected right to surplus equity in tax foreclosure cases. One could say that the Legislature attempted to level the playing field but only reached third base.

Likewise, the Act's prospective application addresses and resolves the Attorney General's concerns about municipalities facing substantial liabilities for exposure to claims of property owners seeking refunds for surplus equity

discharged its foreclosure Notice of *Lis Pendens* following the trial court's vacatur of the final judgment, on July 7, 2022 Petitioner recorded an appellate Notice of *Lis Pendens* against Mr. Roberto's property with the Passaic County Register pursuant to N.J.S.A. 2A:15-14. The appellate Notice of *Lis Pendens* contains the Appellate Division case caption and appears in the chain of title as Instrument Number 2022034348.

that accrued to third-party investors. Attorney General Amicus Brief, at pp. 20-29.

The Attorney General cites a putative class action lawsuit³ filed on the heels of the Appellate Division’s decision in Roberto as grounds for this Court to “clear up any confusion and explain that municipal entities that neither foreclose nor retain surplus equity should not be liable” Attorney General Amicus Brief, at pp. 22-23. Mr. Roberto questions the validity of the claims asserted by the putative class action plaintiffs which bear no relation to this case and should not impact this Court’s review of the Appellate Division’s pipeline retroactive application of Tyler. For instance, unlike Mr. Roberto, none of the putative class action plaintiffs posted the full redemption amount with their counsel and timely moved to vacate the final tax foreclosure judgment. Nor do any of these plaintiffs present similar equitable circumstances as those of Mr. Roberto, such as Covid impairing their ability to redeem their tax sale certificates, unfamiliarity with the TSL’s draconian consequence of stripping title to their property, being elderly individuals, and relying on the equity as part

³ Thompson v. Ludden, United States District Court, District of New Jersey, Case No. 24-cv-6295 (D.N.J. May 21, 2024), attached to the Appendix of the Attorney General’s Brief.

of their retirement savings. Quite the opposite, these opportunistic plaintiffs merely piggy-backed on Mr. Roberto's favorable Appellate Division ruling and state blanket claims of being robbed of their equity. Indeed, the putative class action complaint does not even identify the dates when final judgments were issued. Suffice to say, these putative class action plaintiffs share nothing in common with Mr. Roberto, who timely acted to protect the substantial surplus equity in his property by posting the redemption funds with his counsel and seeking vacatur of the final judgment within two months from the date of its entry.

The Appellate Division correctly “accorded pipeline retroactivity to pending tax sale foreclosures involving a property owner's surplus equity, thus cause to vacate defendant's judgment is clear here.” Roberto, 477 N.J. at 366. “In sum, we conclude the retroactive application of Tyler separately mandates grounds to vacate final judgment and the motion judge did not abuse his discretion in vacating final judgment under Rule 4:50-1(f) based on the substantial credible evidence presented.” Id. at 370.

By limiting pipeline retroactivity to Tyler's new principle of law “to pending tax foreclosures involving a property owner's surplus equity,” and holding that that Tyler justified granting Mr. Roberto relief from the final

judgment, the Appellate Division appropriately balanced the competing interests of property owners and tax sale investors, and for that matter municipalities. The Legislature’s new amendments to the Act, which “shall have no effect on any foreclosure action in which a final judgment has been entered prior to the “Act’s effective date,” bolster the Appellate Division’s rationale in granting limited pipeline retroactivity to Tyler and concluding that Tyler supports granting Mr. Roberto relief from the final judgment. As does this Court’s July 12, 2013 Notice to Bar.

B. THE COURT SHOULD REJECT ANY BRIGHT LINE TEST PROHIBITING PROPERTY OWNERS FROM EVER CHALLENGING A FINAL TAX FORECLOSURE JUDGMENT UNDER RULE 4:50-1 DUE TO SURPLUS EQUITY

Irrespective of the constitutional issues addressed by the Appellate Division’s decision, to prevail on this appeal, Petitioner must establish that the trial court abused its discretion in vacating the final judgment conditioned on Mr. Roberto’s redemption of the full amount of the tax sale certificates with interest plus reimbursement of its legal fees, which he satisfied in full. Given the shift of the pendulum away from the pre-Tyler draconian practices of the TSL that allowed tax sale investors to engage in an unconstitutional taking of property owners’ equity, and in light of the undisputed “exceptional

circumstances” existing in this case, it is unfathomable that Petitioner could meet its heavy appellate burden and secure the “taking” of Mr. Roberto’s property and his substantial equity a second time, let alone several years later.

Like the Petitioner, the NJLTA avers “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).” NJLTA Amicus Brief, at p. 3. Specifically, the NJLTA questions whether “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?” Id. (emphasis in original).

The NJLTA completely misses the mark with its myopic view of Rule 4:50-1 and the broad range of discretion entrusted to trial judges in evaluating motions to vacate a final judgment on a case-by-case basis, a point conceded by the NJLTA. NJLTA Amicus Brief, at p. 5 (quoting IMO Guardianship of J.N.H., 172 N.J. 440, 474 (2002)). First, the preamble of Rule 4:50-1 indicates that relief is to be “upon such terms as are just.” Second, Rule 4:50-2 requires that motions “shall be made within a reasonable time,” while imposing a one-year requirement if the motion is based on subsections (a), (b), and (c). R. 4:50-2.

Third, as this Court has remarked, "[n]o categorization can be made of the situations which would warrant redress under subsection (f). . . . [T]he very essence of [subsection] (f) is its capacity for relief in exceptional situations. And in such exceptional cases its boundaries are as expansive as the need to achieve equity and justice." DEG, LLC v. Twp. of Fairfield, 198 N.J. 242, 269–270 (2009) (first and second alterations in original) (emphasis added) (quoting Ct. Inv. Co. v. Perillo, 48 N.J. 334, 341 (1966)). "Whether exceptional circumstances exist is determined on a case by case basis according to the specific facts presented." J.N.H., 172 N.J. at 474. "Thus, strict bounds should never confine its [subsection (f)] scope." Baumann v. Marino, 95 N.J. 380, 395 (1984) (internal quotation marks and citation omitted).

Indeed, the NJLTA cites this Court's prior precedent, recognizing that relief under Rule 4:50-1(f) is appropriate when the moving party establishes "that enforcement of the judgment would be unjust, oppressive, or inequitable, or otherwise that a 'grave injustice would occur.'" NJLTA Amicus Brief, at p. 5 (citing U.S. Bank National Ass'n v. Guillaume, 209 N.J. 449, 484 (2012) (other internal citations omitted)).

At the trial court and intermediary appellate level, Petitioner unsuccessfully argued for a bright line rule stripping a chancellor's discretion to

vacate a final judgment of tax foreclosure for any equitable reason whatsoever. See Del Vecchio v. Hemberger, 388 N.J. Super. 179, 188 (2006) (“We similarly find no equitable ground for vacating the judgment of foreclosure.”). See also Joseph Harris & Sons, Inc. v. Van Loan, 23 N.J. 466 (1957) (recognizing the fundamental right of a trial court to control the enforcement of its own judgments). The lower courts aptly rejected Petitioner’s draconian interpretation of Hemberger and its application to the instant case, appropriately finding Hemberger’s facts inapposite with those presented by Mr. Roberto.

We disagree with plaintiff’s contention that the judge erred in failing to apply precedent established in *Hemberger*. While in *Hemberger* we found no equitable ground for vacating the foreclosure judgment, . . . , the facts are distinguishable here. There, “the certification of [the defendant] provide[d] evidence of the fact that [defendants] actively sought redemption funds, 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. . . Pertinent to *Hemberger*, as noted by the judge, was that the third-party intervenor acquired an interest in the property for a price less than the property’s value, and therefore the intervenor would benefit over both the property owner and the tax sale certificate holder. . . Thus, the judge correctly distinguished the present facts from *Hemberger*.

Roberto, 347 N.J. Super. at 369. In other words, the lower courts viewed Mr. Roberto’s Rule 4:50-1(f) motion based on the undisputed facts presented in the motion record, and considered and correctly interpreted controlling case law.

Unlike the argument advanced by the NJLTA, the lower courts did not vacate Petitioner's final judgment merely because Mr. Roberto had substantial equity in his property. While that was a substantial factor in the lower courts' analysis, other reasons supported vacatur of the judgment. As the Appellate Division found:

In his decision, the judge balanced the equities and weighed "the necessity of allowing the transfer of a clear title and the need to compel the payment of property taxes" against "the onerous impact of the procedure in circumstances where the party has remained in possession of the property and has substantial equity in it." Further, he balanced defendant's interest in saving the property against plaintiff's remuneration of monies owed on the tax sale certificates, including interest, counsel fees and costs incurred, as well as the additional receipt of collected rental income. It was within the judge's sound discretion, based on the totality of facts, to permit redemption predicated on payment. The judge determined that plaintiff's "rights . . . under the law" were to yield to defendant's exceptional circumstances of receipt of substantial equity. In granting defendant's motion to vacate final judgment, which was obtained by default, the judge thoroughly balanced the facts presented, TSL statutory provisions, and equitable principles. The judge's decision to vacate final judgment was within the bounds of judicial discretion.

Roberto, 477 N.J. Super. at 369-370.

The Appellate Court also recognized that Mr. Roberto had escrowed the redemption funds with his counsel and certified to encountering financial hardship "from tenants' COVID-19-related rental arrears," and that he is an

elderly man. Id. at 369. Also, Mr. Roberto certified that he was not familiar with tax laws, his “command of the English language is not very strong,” and that he did “not comprehend that this tax foreclosure process could result in stripping [his] ownership of this valuable Property.” Pa24, ¶10.

Moreover, it is undisputed that Mr. Roberto filed his motion to vacate within a reasonable time – approximately two months from the date it was entered – as required by Rule 4:50-2. The NJLTA’s contention that the Appellate Division’s ruling creates an “indefinite time period” for any aggrieved property owner to file a motion to vacate a final tax foreclosure judgment is unrealistic and contradicts its own admission that Rule 4:50-1 motions are decided on a case-by-case basis. Trial court judges must always retain the discretion to determine what amount of time constitutes a “reasonable time” under Rule 4:50-2. There is no compelling reason for this Court to address our trial judges’ discretionary powers under Rule 4:50-2 in a vacuum.

Lastly, the trial court appropriately conditioned vacatur of the final judgment on Mr. Roberto tendering the full redemption amount with interest and Petitioner’s legal fees. Simply put, the trial court vacated the final judgment on “such terms as are just.” which is what Rule 4:50-1 mandates. The Appellate

Division correctly considered the totality of these circumstances in affirming the trial court's well-reasoned exercise of discretion.

We thank the Court for its consideration of this matter.

Respectfully submitted,

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