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U.S. BANK TRUST NATIONAL
ASSOCIATION, NOT IN ITS INDIVIDUAL
CAPACITY BUT SOLELY AS OWNER
TRUSTEE FOR RCF 2 ACQUISITION
TRUST

Plaintiff

vs.

Louis Tenore, et al

Defendant(s)

SUPERIOR COURT OF NEW
JERSEY
Essex COUNTY

CHANCERY DIVISION
GENERAL EQUITY

Docket No. F-000999-24

CIVIL ACTION

MEMORANDUM OF LAW IN
SUPPORT OF MOTION
OBJECTING TO SHERIFF'S SALE
PURSUANT TO R. 4:65-5

**LEGAL MEMORANDUM IN SUPPORT OF
DEFENDANT'S OBJECTION TO THE JULY 7, 2024 SHERIFF'S SALE
PURSUANT TO R. 4:65-5**

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On the Brief

Defendant, PNC Bank, NA, by and through its attorneys, KML Law Group PC, submits the instant Memorandum of Law in support of Defendant's Objection to the July 7, 2024 Sheriff's Sale Pursuant to R. 4:65-5.

I. PRELIMINARY STATEMENT

This is a case involving the judicial sale of a property in which the "Community Wealth Preservation Program" (hereinafter the "CWPP") procedures implemented at sale resulted in illegal lien-stripping and deprivation of several hundred thousand dollars in equity without just compensation and without due process of law. N.J.S.A. 2A:50-64, as recently amended, grants third-party nonprofit entities a right of second refusal to purchase a property at sale (subordinate only to the right of first refusal that the newly amended statute vests in the foreclosed upon defendant and related parties). This right of refusal, when exercised, permits the third-party entity to circumvent the bidding process and purchase the property at the plaintiff's "upset price" without any public bidding.

Here, a third-party, allegedly non-profit entity, Best Neighborhood Investment, exercised this right of second refusal on the day of sheriff's sale to acquire the subject property for the upset price of approximately 308,900.00. Defendant was prepared to enter a bid up to \$401,000. The fair market value of the property is between \$680,000.00-705,000.00.

As a result of this procedure, junior encumbrancer PNC Bank, NA was divested of its property interest, both in the property itself and the surplus funds to which its interest would have attached, without just compensation and without due process of law. Because N.J.S.A. 2A:50-64, as amended, mandates an unconstitutional taking and

violates the junior mortgagees' rights to due process, it must be declared void, the sheriff's sale vacated, and the property relisted for sale at which bidding shall occur.

II. STATEMENT OF MATERIAL FACTS AND PROCEDURAL HISTORY

Plaintiff herein sought foreclosure of its first mortgage against the real property known as 222 Eagle Rock Avenue, Roseland, NJ 07068 (the "Property"). The judgment entered in favor of the Plaintiff was \$278,590.58 on April 26, 2024, which was increased by an Order for Additional Sums on June 27, 2024, in the amount of \$2,284.52. See Donnelly Certification, Ex. "B" and "C", respectively. The property went to sheriff's sale on July 9, 2024 and sold to a third party, Best Neighborhood Investment, for the amount of \$308,900.00, the Plaintiff's upset price. Best Neighborhood Investment was able to purchase the property for that price by claiming to be a non-profit and exercising a right of second refusal under the recently enacted amendments to the Fair Foreclosure Act, known as the Community Wealth Preservation Program. N.J.S.A. 2A:50-64.

Defendant, PNC Bank, NA, is a junior encumbrancer, that appeared at the sale and attempted to bid up to \$401,000. The property is estimated to be worth between \$680,000.00-705,000.00. The sheriff's sale invalidly eliminated all equity in the property and any surplus funds that would have been available to Defendant. As such, Defendant is objecting to the validity of the sale, as the deed has not yet been delivered.

Furthermore, Best Neighborhood Investment does not appear in the IRS database as a tax exempt organization, and is not listed as a charity with the New Jersey Department of Community Affairs. It was organized shortly before the sheriff sale, and Defendant believes this for the sole intent of availing itself of the statutory right of second refusal in order to unfairly gain advantage over other competitive bidders.

III. LEGAL ARGUMENT

a. **As a junior lienholder, PNC Bank, NA has a constitutionally protected property interest.**

As holders of a mortgage encumbering the Property, PNC Bank, NA, has a property interest of a constitutional dimension. See, e.g., Mennonite Bd. Of Missions v. Adams, 462 U.S. 791, 798 (1983) (“[A] mortgagee clearly has a legally protected property interest.”). It is a deeply held principle of our law that, where a property interest is found, its holder, before being deprived of this interest, is entitled to due process of law.

It can hardly be doubted that interests in real estate are protected by the Due Process Clause. The Fourteenth Amendment to the Federal Constitution provides: ‘No State shall make or enforce any law which shall . . . deprive any person of life, liberty or property, without due process of law.’ This is consistent with Article I, par. 1 of our State Constitution, which also protects a person's right to acquire, possess, and protect property. That the property interests mentioned in both Constitutions refer to interests in real estate have been settled by innumerable decisions by both this Court and the United States Supreme Court.

[Montville Tp. v. Block 69, Lot 10, 74 N.J. 1, 7 (1977) (citations omitted).]

So, too, is the holder of a property interest protected from that interest being taken without “just compensation.” See U.S. Const., Amdt. 5 (“[N]or shall private property be taken for public use, without just compensation”); N.J. Const., Art. 1, Para. 20 (“Private 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.”).¹

¹ The Takings Clause of the Fifth Amendment to the United States Constitution has been incorporated against the states through the Fourteenth Amendment. See Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226 (1897).

Traditionally recognized property interests are shielded by the Takings Clause irrespective of apparent legislative intent to dissolve them. See, e.g., Phillips v. Washington Legal Foundation, 524 U.S. 156, 167 (1998) (“[A] State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law.”). Indeed, “the Takings Clause would be a dead letter if a state could simply exclude from its definition of property any interest that the state wished to take.” Hall v. Meisner, 51 F.4th 185, 190 (6th Cir. 2022); accord Tyler v. Hennepin County, Minnesota, 598 U.S. 631, 638 (2023).

b. A junior lienholder’s property interest in foreclosed-upon property attaches to surplus funds following the judicial sale.

N.J.S.A. 2A:50-37 vests in the Court the power to distribute to “the person or persons entitled thereto” any sale proceeds in surplus of the “moneys ordered to be paid.” Our courts have long recognized the vital importance of administration of surplus funds.

The court has not only the power, but it is its duty in that action to provide for the equitable disposition of the surplus money. The judgment of foreclosure and sale does not terminate the suit or deprive the court of the power to make other orders in it. The equities of lienors subsequent to the mortgage foreclosed are just as much before the Court, and as much the objects of its care as those of the mortgage primarily foreclosed.

[Morris v. Glaser, 106 N.J. Eq. 585, 590 (1930) (quoting Thomas on Mortgages at 379) (emphasis added).]

This element of the mortgage-foreclosure paradigm is vital to the equity of the system as a whole. Our courts have long recognized the “‘salutary purpose’ of securing the highest and best price in cash” via competitive bidding at sale. Fidelity Union Bank v. Trim, 210 N.J. Super. 476, 480 (App. Div. 1986). That purpose is not only to make it “more likely that the

judgment being executed will be satisfied,” but to maximize the chance that “there will be sufficient surplus moneys to satisfy the judgments of other lienholders.” New Brunswick Sav. Bank v. Markouski, 123 N.J. 402, 413 (App. Div. 1991).

To promote this equitable result, junior lienholders’ property interests are deemed to attach to any surplus funds realized at a foreclosure sale. “It is generally acknowledged that surplus funds take on the character of the land, at least with respect to junior encumbrancers whose liens existed at the time of the foreclosure.” Morsemere Federal Sav. & Loan Ass'n v. Nicolaou, 206 N.J. Super. 637, 643 (App. Div. 1968). This rule prevents junior encumbrancers from “los[ing] their liens completely” upon judicial sale. Western Sav. Fund Soc. of Philadelphia v. Goodman, 103 N.J. Super. 307, 314 (Ch. Div. 1968).

Thus, where a junior lien encumbers a property, and the value of that property exceeds the foreclosed lien, the junior lienholder retains a property interest in the surplus generated from a properly administered judicial sale of the property. Eliminating the generation of surplus funds in such circumstances therefore also eliminates the junior lienholder’s property interest that should have attached to those funds.

- c. The CWPP, as applied by the Sheriff’s Department at the July 7, 2024 Sheriff’s Sale, resulted in a taking of PNC’s property interest without just compensation and without due process of law.**

i. Takings Clause

The Fifth Amendment to the United States Constitution provides that “private property [shall not] be taken for public use, without just compensation.” In its essence, the Takings Clause “expresses a principle of fairness,” such that a taking has been effected not only when property is formally seized, but when sufficient “inroads are made upon an owner’s use of it.” U.S. v. Dickinson, 331 U.S. 745, 748 (1948).

Where a taking is effected for public use, the Takings Clause requires that the government provide “just compensation” to the owner, such that he is “in as good position pecuniarily as he would have occupied if his property had not been taken.” U.S. v. Miller, 317 U.S. 369, 379-80 (1943). However, “the Constitution forbids even a compensated taking of property when executed for no reason other than to confer a private benefit on a particular private party.” Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 245 (1984); see also Kelo v. City of New London, 545 U.S. 469, 477 (2005) (“[I]t has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation.”).

The United States Supreme Court has recently held that the deprivation of surplus funds in a tax foreclosure may constitute an unconstitutional taking. In Tyler v. Hennepin County, 598 U.S. 631, 635 (2023) (hereinafter “Tyler”), Hennepin County, Minnesota seized a condominium unit owned by Geraldine Tyler to satisfy a \$15,000 tax debt. The county subsequently sold the property for \$40,000, retaining the \$25,000 surplus. Id. In holding that Tyler “plausibly alleged a taking under the Fifth Amendment,” id. at 1381, the Court outlined the principle that delinquent taxpayers are “entitled to the surplus in excess of the debt owed” generated by a foreclosure proceeding. Id. at 1378.

Article 1, Paragraph 20 of the New Jersey Constitution provides a right that is analogous to, but broader than, that imparted by the Takings Clause of the United States Constitution: “Private 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.” Thus, “the

legislature or governmental agencies cannot constitutionally confer upon individuals or private corporations, acting primarily for their own profit, although for public benefit as well, any right to deprive persons of the lawful enjoyment of their property.” Hyde v. Somerset Air Service, 1 N.J. Super. 346, 350 (Ch. Div. 1948).

In light of the relative expansiveness of the rights conferred by the New Jersey Constitution’s Takings Clause, our Appellate Division recently applied the holding in Tyler to a tax foreclosure prosecuted by a private entity. In 257-261 20th Avenue Realty, LLC v. Roberto, 477 N.J. Super. 339, 351 (App. Div. 2023), the plaintiff, a private entity, foreclosed upon tax sale certificates totaling approximately \$30,000 and obtained final judgment by default. The foreclosed-upon property was valued between \$475,000 and \$535,000. Id. The trial court vacated the judgment pursuant to R. 4:50-1(f), and the Appellate Division affirmed. Id. at 350. In its decision, the Appellate Division found that, in addition to the reasons set forth by the trial court, the holding in Tyler applied to the case. Id. at 363. The court held that, while the tax foreclosure statute “promotes the worthy public interest goal of facilitating marketable titles to return properties to the paying tax rolls, there also exists the well-recognized public policy goal of protecting property owners’ interests.” Id. The court went on to explain that Tyler was applicable regardless of the nature of the entity taking the property:

Tyler provides the Fifth Amendment Takings Clause protects property owners from a taking of their property’s equity without just compensation. See 598 U.S. at 643-45, 143 S.Ct. 1369. That constitutional application stands whether the tax sale certificate holder is the taxing authority, or a third-party purchaser proceeding with an interest conveyed by the taxing authority. Additionally, the New Jersey Constitution provides property owners with greater protections than afforded under the United States

Constitution. The New Jersey Constitution explicitly prohibits private corporations from taking private property. N.J. Const. art. I, ¶ 20.

[Id. at 365 (emphasis added).]

While the instant matter is a mortgage foreclosure, not a tax foreclosure, the same principles apply. At the Sale, the Property was sold to Best Neighborhood Investment, for the upset price of \$308,900.00, without bidding. This sale price is significantly below the fair market value of the Property, which a BPO estimated to be between \$680,000.00-705,000.00. See Exhibit “A” to Donnelly Cert. Whatever the fair market value of the Property, there certainly would have been a substantial surplus, had the Sheriff’s Department permitted bidding. Counsel for PNC Bank, NA was prepared to enter a voice bid up to \$401,000.00. Despite this, the Sheriff’s Department compelled the Property to be sold for the approximate in accordance with the Act, effecting a taking of PNC Bank, NA’s interest in the Property that would have attached to the surplus funds that would have been realized had regular bidding been allowed.

ii. Due Process Clause

The Fourteenth Amendment to the United States Constitution provides that no “state [shall] deprive any person of life, liberty, or property, without due process of law.” This right is mirrored in the New Jersey Constitution, Article 1, Paragraph 1, which provides that “[a]ll persons . . . have certain natural and unalienable rights, among which are those of . . . acquiring, possessing, and protecting property.” “It can hardly be doubted that interests in real estate are protected by the Due Process Clause.” Montville Tp., 74 N.J. at 7. It is similarly “beyond question that any procedure which deprives an individual of a property interest must conform to the dictates of the Due Process Clause.” Id. at 8.

Our courts have employed the framework set forth in Mathews v. Eldridge, 424 U.S. 319 (1976), to evaluate whether property has been deprived without due process:

[T]he specific dictates of due process generally require [] consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

[Mathews, 424 U.S. at 335; accord New Brunswick Sav. Bank, 123 N.J. at 416.]

The ability of an interested party to participate in a sheriff's sale is entitled to due process. For example, our courts have held that a judgment creditor's actual, rather than constructive, notice of the sale is required to satisfy due process requirements. See New Brunswick Sav. Bank, 123 N.J. at 424.

Here, though PNC Bank, NA received notice of the sale, the procedures used by the Essex County Sheriff's Department barred them from participating in it.² The result was as if it did not receive notice: It was deprived of its property interest without an opportunity to participate in appropriate proceedings. The "erroneous deprivation of such interest" through the amended N.J.S.A. 2A:50-64 procedures, as occurred here, is not a

² To the extent that a statutory right to object to the sale procedure on constitutional grounds is required, 42 U.S.C. 1983 and N.J.S.A. 10:6-2(c) provide that right for the Federal and State Constitutions, respectively. See Gormley v. Wood-El, 218 N.J. 72, 97 (2014) ("Section 1983 applies only to deprivations of federal rights, whereas N.J.S.A. 10:6-1 to -2 applies not only to federal rights but also to substantive rights guaranteed by New Jersey's Constitution and laws."). There can be no doubt that the actions of the Sheriff's Department constitute action taken "under color of law," as our courts have construed that term in both 42 U.S.C. 1983 and N.J.S.A. 10:6-2(c). See, e.g., Davidson v. O'Lone, 752 F.2d 817, 827 (3d Cir. 1984) (explaining that action under color of state law is involves a use of power "possessed by virtue of state law"); see also Monell v. Department of Social Services, 436 U.S. 658 (1978) (holding that Section 1983 claims may be brought against municipalities where, in relevant part, the action is one of official policy). PNC Bank, NA reserves all rights it may have to bring a separate action if necessary.

risk but a certainty. Junior lienholders are deprived of their property interests when the rights of refusal permitted under the amended statute are exercised. Finally, the burden on the government of reverting to pre-Act procedures, namely public bidding at foreclosure sales, would be virtually nonexistent, as the county sheriff's departments have conducted public bidding since the inception of the foreclosure sale paradigm.

d. Even if the CWPP were deemed constitutional, Best Neighborhood Investment is not a non-profit as contemplated by the CWPP.

The amended procedures outlined by N.J.S.A. 2A:50-64 allow a nonprofit community development corporation with a mission to revitalize the community or create and preserve affordable housing through the restoration of vacant and abandoned property an opportunity to have a second right of refusal if a foreclosed upon defendant, next of kin, or tenant (or a nonprofit bidding on behalf of one of those parties) do not exercise their rights of first refusal. N.J.S.A. 2A:50-64(g).

Best Neighborhood Investment was only created according to the New Jersey Business Entity Search shortly before the applicable sale and has no history of revitalization or restoration. They are not a charity or non-profit registered with the State of New Jersey, nor with the IRS. As such, the sale to Best Neighborhood Investment should be deemed void for lack of compliance with the amended statute, and the sale must be relisted.

IV. CONCLUSION

On July 7, 2024, acting pursuant to N.J.S.A. 2A:50-64(d) and N.J.S.A. 2A:50-64(g), as amended, the Essex County Sheriff's Department permitted Best Neighborhood Investment to purchase the Property for the upset price of approximately \$308,900.00. PNC Bank, NA and all other attendees were barred from bidding. PNC Bank, NA was

there and prepared to bid up to \$401,000.00 but was not allowed to participate, and it believes other bidders would have exceeded that bid, as the property is worth upwards of \$680,000.00-705,000.00. The refusal to recognize other bids results in illegal lien-stripping and the illegal taking of substantial surplus that would have been realized, and the deprivation of PNC Bank, NA's property interest that would have attached to that surplus.

Because PNC Bank, NA's property interest was taken without just compensation and without due process of law, and such a result was mandated by the statute, N.J.S.A. 2A:50-64(d) and N.J.S.A. 2A:50-64(g) must be declared void as unconstitutional, the sheriff's sale must be vacated, and the Property must be relisted for sale at which competitive bidding may occur.

Respectfully submitted,

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Attorney for Defendant, PNC Bank, NA

Dated:

BY:


Caitlin M. Donnelly, Esq.

8/8/2024