SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

LYNETTE JOHNSON,

Plaintiff-Appellant,

v.

CITY OF EAST ORANGE; ANNMARIE CORBITT, in her official capacity as Collector of Taxes, and TED R. GREEN, in his official capacity as Mayor of East Orange,

Defendants-Respondents.

DOCKET NO. A-002486-23T2

Civil Action

On Appeal From:
Superior Court of New Jersey
Chancery Division, Essex County
Docket No. ESX-C-16-23

Sat Below:
Hon. Lisa M. Adubato, J.S.C.

BRIEF OF PLAINTIFF-APPELLANT LYNETTE JOHNSON

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PRELIMINARY STATEMENT

The City of East Orange foreclosed on Lynette Johnson's property to recover a tax debt that was much lower than the property's value. It later sold the property to a third party for $101,000 and retained all proceeds. Even according to the City's most aggressive claim about the size of the debt (which conflicts with its own numbers elsewhere) this amounted to a $55,000 windfall at Ms. Johnson's expense. (Ja195, No. 36). Pursuant to the United States Supreme Court's unanimous holding in Tyler v. Hennepin County, 598 U.S. 631 (2023), that was a taking without just compensation.

The court below did not dispute that conclusion, but it held that *Tyler* does not apply retroactively to this case and that Ms. Johnson's claims are time-barred by laches. (Ja407, 415–16). These are errors. When the U.S. Supreme Court applies a rule of federal law to the parties before it, as it did in Tyler, that rule must be given full retroactive effect even with respect to all events that occurred prior to the Supreme Court's decision. Harper v. Va. Dep't of Tax'n, 509 U.S. 86, 97 (1993). Even were that not so, this Court decided in 257-261 20th Ave. Realty, LLC v. Roberto that Tyler should at least be given "pipeline" retroactivity, i.e., that it should apply to all cases filed and pending when Tyler was decided. 477 N.J. Super. 339, 366 (App. Div. 2023). This is such a case. Moreover, this case was brought well within the six-year statute of limitations

for takings claims and unjust enrichment claims in New Jersey and therefore is not time-barred. Klumpp v. Borough of Avalon, 202 N.J. 390, 409 (2010) (takings); Kopin v. Orange Prods., Inc., 297 N.J. Super. 353, 373–74 (App. Div. 1997) (unjust enrichment).

The opinion below was based in part on this Court's decision in 257-261 20th Ave. Realty, LLC v. Roberto, which is currently pending review at the New Jersey Supreme Court. Unlike Tyler and the present case, Roberto did not involve a takings claim but was instead an appeal from the vacatur of a foreclosure judgment under Rule 4:50-1(f). Tyler did not necessarily govern the outcome of that case because Tyler is not concerned with the appropriateness of foreclosure, but rather with the uncompensated takings that might result from a foreclosure. Because Roberto was a foreclosure case involving an equitable remedy—not a takings case involving just compensation—it was appropriate for this Court to hold that Tyler should only apply to set aside foreclosure judgments that were already in the pipeline. Regarding takings cases like the one at bar, however, full retroactive effect is mandatory.

Even so, the decision below was strange because this case *was* in the pipeline when Tyler was decided. The court concluded that, because this action was filed more than three years after the foreclosure judgment, "it was not in the pipeline, the way the Roberto court intended." (Ja413). Moreover, it reasoned

that this case was barred by "equitable principles, such as those embodied in the doctrine of laches[.]" (Ja416). Yet laches is an equitable doctrine which cannot bar an otherwise timely action governed by a statute of limitations. Fox v. Millman, 210 N.J. 401, 422 (2012). Because this legal action was filed within the statute of limitations, it is timely.

For these reasons, this Court should reverse the grant of summary judgment to Defendants and should remand the case with instructions to grant summary judgment to Ms. Johnson on the issue of the City's liability for an uncompensated taking. It should also instruct the lower court to proceed in determining the amount of just compensation owed.

PROCEDURAL HISTORY[1]

Ms. Johnson filed this action in the Superior Court of New Jersey, Essex County, Law Division, on December 1, 2021, alleging a taking without just compensation in violation of the New Jersey Constitution and unjust enrichment. (Ja8–11). In February 2021, Defendants filed a pre-Answer Motion to Transfer the matter to the Chancery Division, (Ja40), which Ms. Johnson opposed. The court granted the motion on December 8, 2022. (Ja72–73). In the Chancery

[1] Transcripts of the proceedings below include the following:
1T: Transcript of Hearing, Feb. 27, 2023;
2T: Transcript of Hearing, May 26, 2023;
3T: Transcript of Hearing, July 20, 2023;
4T: Transcript of Hearing, Dec. 7, 2023.

Division, the parties filed cross-motions for summary judgment: the City argued that it had not taken a property interest protected by the Constitution. (Ja74). Ms. Johnson moved for partial summary judgment, alleging that she was entitled to judgment as a matter of law that her property had been taken without just compensation.[2] (Ja. 308–10). After the parties had briefed the cross-motions, the United States Supreme Court issued its decision in Tyler v. Hennepin County. Multiple rounds of supplemental briefing followed. (Ja338–89). On March 19, 2024, the court granted summary judgment in favor of Defendants, holding that Tyler's retroactive effect does not reach this case, and that the case is barred by laches. (Ja405–17). This appeal was timely noticed on April 17, 2024. (Ja 419–24).

STATEMENT OF FACTS

In March, 2014, Lynette Johnson purchased commercially zoned property containing a vacant structure at 250 Tremont Avenue in East Orange, New Jersey (the Property) for $55,000. (Ja3, ¶6). Her plan was to renovate the Property and allow two of her adult children to operate their businesses on the premises. (Ja3, ¶9). Prior to closing on the purchase, Ms. Johnson signed a

[2] Ms. Johnson only sought partial summary judgment for the takings claim because the parties disputed how much money would be owed as just compensation. (Ja309). She did not seek summary judgment on her unjust enrichment claim, which requires further factual development. (Id.).

"Letter of Agreement" with the City providing that she would renovate the property and agreeing that she would not occupy the property until she obtained a certificate of conformity. (Ja3, ¶10; Ja210–11). On its first page, the Letter states in bold and italicized typeface that Ms. Johnson's mailing address is 68 S. Devine Street, Newark, N.J. 07106. (Id.). Despite being in possession of this Letter, the City never mailed any tax notices to that address. (Ja182, No. 5). Shortly thereafter, in 2015, Ms. Johnson's husband experienced deteriorating health conditions. (Ja4, ¶15; Ja159, No. 5). Distraught and distracted with her husband's health, and having not received any mailed notice of tax assessment or delinquency at her residential address, Ms. Johnson did not pay the 2015 taxes assessed on the Property.

On October 1, 2015, at an electronic auction of municipal property tax liens, Defendant Annmarie Corbitt sold a tax lien on the Property to the City for $4,787.76, which was the total amount of tax liability including interest, penalties, and costs, with interest at the legal maximum rate of 18%. (Ja4, ¶16; Ja21–22). No notice of the sale was sent to Ms. Johnson's residential mailing address. (Ja182, No. 5).

On October 15, 2015, Ms. Johnson obtained a Construction Permit issued by the City indicating the City's permission to proceed with roofing and siding work. (Ja5, ¶21; Ja26). She paid approximately $1,914.00 in fees to acquire the

permit. (Id.). At no point in the permitting process did the City or any of its officials inform Ms. Johnson of the Property's tax delinquency or the fact that a tax lien had been taken on it two weeks prior. (Ja202, No. 7). In September, 2017, the City instituted a foreclosure action against the Property by filing a complaint in the Chancery Division of Superior Court of New Jersey, Essex County, Docket No. F-020807-17. (Ja5, ¶23; Ja98–118). No notice relating to the action was ever sent to Ms. Johnson's residential mailing address. (Ja182, No. 5). The City instead sent notices to the Property itself, which were returned as undeliverable. (Ja6, ¶¶25–27; Ja31–32). On February 13, 2018, the Superior Court issued an Order for Final Judgment barring Ms. Johnson's right to redeem the Property. (Ja44–62). No notice of this judgment was mailed to Ms. Johnson's residential address. (Ja7, ¶34; Ja34–39).

Upon first receiving actual notice of the foreclosure, a relative of Ms. Johnson went directly and immediately to East Orange City Hall to offer to pay the outstanding taxes. (Ja7, ¶38; Ja169–70, No. 26). City officials refused to accept payment, saying that it was too late to redeem the Property and that the Property now belonged to the City. (Id.).

The City adopted Resolution No. I-91 on March 19, 2018, authorizing the sale of the Property at public auction. (Ja7, ¶39). The Resolution indicates that the Property is "surplus propert[y] and not needed for public use." (Ja7, ¶40).

The City ultimately sold the Property to private, third-party purchasers for $101,000. (Ja7, ¶41). Although this sale price exceeded the total tax liability by $55,000 to $75,000, the City retained the surplus proceeds and did not compensate Ms. Johnson for her lost equity. (Ja8, ¶43; Ja195, No. 36).

In 2021, Ms. Johnson filed this case alleging that the City violated her constitutional right to just compensation when it took more property than was necessary to satisfy its tax debt, and that the City was unjustly enriched by taking a windfall at her expense. (Ja1–13). The lower court dismissed the case, holding that she could not obtain the relief required by the Constitution because, although she was well within the relevant statutes of limitations, she waited "nearly four years" to file her lawsuit. (Ja416).

LEGAL ARGUMENT

POINT ONE

I. TYLER APPLIES RETROACTIVELY TO ALL TAKINGS CASES (Ja410–16)

This Court reviews a trial court's grant of a summary judgment de novo and must "consider whether the competent evidential materials presented" establish "that there is no genuine issue as to any material fact" and that "the moving party is entitled to a judgment or order as a matter of law." Alloco v. Ocean Beach & Bay Club, 456 N.J. Super. 124, 133–34 (App. Div. 2018).

In Tyler, the Supreme Court of the United States unanimously held that taking a home worth more than its tax debt, without compensation for the excess value, violates the Constitution. 598 U.S. at 639. Minnesota's statutes authorized the confiscation of Geraldine Tyler's Minneapolis property to collect $15,000 in taxes, penalties, interest, and fees. Id. at 635–36. Hennepin County sold it for $40,000 and, consistent with state law, kept it all—a $25,000 windfall. But the Supreme Court held that this violated the Takings Clause. Id. at 638. The government "had the power to sell Tyler's home to recover the unpaid property taxes. But it could not use the toehold of the tax debt to confiscate more property than was due." Id. at 639. Taking more was unconstitutional.

In Roberto, this Court held that Tyler applies to foreclosures conducted under the New Jersey Tax Sale Law (TSL). Roberto, 477 N.J. Super. at 362 ("The TSL has permitted foreclosure of a property owner's equity and is thus a prohibited taking under Tyler."). As to retroactivity, it recognized "[w]hen the United States Supreme Court 'applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review.'" Id. (quoting Harper, 509 U.S. at 97); see also id. at 23 (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."). The Tyler Court

unquestionably applied its ruling to the parties before it. Tyler, 598 U.S. at 647–48. Federal law therefore mandates that the same ruling apply to all pending takings cases. But Roberto was not a takings case; it was an appeal from the vacatur of a foreclosure judgment. Thus, this Court held Tyler "is accorded pipeline retroactivity to pending tax sale *foreclosures*[.]" Roberto, 477 N.J. Super. at 366 (emphasis added).

Roberto's pipeline retroactivity makes sense if limited to the foreclosure context. See Stone Wool 22, LLC v. Streater, No. A-2613-22, 2024 WL 3241363, at *6 (N.J. Super. App. Div. July 1, 2024) (Characterizing Roberto as holding "that relief under Rule 4:50-1(f) is appropriately granted where a property owner makes a timely application to vacate a final judgment of foreclosure . . . accompanied by a credible proffer to timely redeem the certificate[.]"). Tyler does not require foreclosures to be set aside, nor does the full retroactive effect of Tyler mean that completed foreclosures should be reopened. 598 U.S. at 639 ("The County had the power to sell Tyler's home to recover the unpaid property taxes.") Instead, Tyler stands for the simple proposition that where more is taken by foreclosure than was owed, just compensation must be paid. Id. ("But it could not use the toehold of the tax debt to confiscate more property than was due."). While courts have flexibility in how they apply Tyler's retroactive effect in foreclosure cases like Roberto, the

situation is different for takings claims that arise from foreclosure, like the case at bar. For these claims, just compensation is mandatory.

A. The ruling in Tyler must be given full retroactive effect regardless of whether cases pre-date or post-date the Supreme Court's decision

When the United States Supreme Court applies a rule of federal law to the parties before it, that rule must be given retroactive effect by all courts. Harper, 509 U.S. at 90. In Harper, the Supreme Court considered the retroactive effect of its previous ruling in Davis v. Mich. Dep't of Treasury, 489 U.S. 803 (1989), which had invalidated certain taxes on federal retirement benefits. Harper, 509 U.S. at 89. After Davis was decided, the Harper petitioners brought claims seeking a refund of pre-Davis taxes. *Id.* at 91; see Harper v. Va. Dep't of Tax'n, 18 Va. Cir. 463 (1990). The Court held that when it "applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review *and as to all events, regardless of whether such events predate or postdate*" the decision announcing the rule. Harper, 509 U.S. at 97 (emphasis added); see also Montgomery v. Louisiana, 577 U.S. 190, 198 (2016) (as revised Jan. 27, 2016) ("[C]ourts must give retroactive effect to new substantive rules of constitutional law."). Harper's reference to cases "still open on direct review" must not be read as an endorsement of pipeline retroactivity; rather, it is meant

to clarify that cases which have already reached a final judgment and exhausted all appeals are not to be reopened. In other words, full retroactivity does not overcome the doctrine of res judicata. The principle that retroactivity nevertheless applies to cases not yet filed is clear from the facts of Harper, as that case itself was not filed until after *Davis* was decided. See Harper, 18 Va. Cir. 463 (1990).

Consequently, because Tyler found a taking on the facts there alleged and applied its ruling to the parties in that case, its ruling must be given full retroactive effect. See Tyler, 598 U.S. at 647. This Court understood that principle in *Roberto*, observing that *Tyler* must be given "full retroactive effect" regardless of whether cases "predate or postdate the Supreme Court's decision." 477 N.J. Super. at 362. And the principle holds where, as here, the claim is under the New Jersey Constitution, since the state's Takings Clause provides protection "coextensive" with its federal counterpart. Klumpp, 202 N.J. at 405.

In foreclosure cases like Roberto which seek title to the property (not just compensation), Tyler's retroactive effect does not necessarily dictate the result. Thus it was appropriate for this Court to hold that only foreclosure cases in the pipeline should be reversed. For takings claims, however, just compensation is mandatory.

B. Just compensation is a mandatory remedy in takings claims and operates retroactively

This case is a paradigmatic Tyler case. Unlike Roberto, where foreclosure remained a live issue, the petitioner in Tyler did not seek to reopen or overturn that foreclosure. Tyler, 598 U.S. at 635. Rather, as here, she sought just compensation for the taking of equity interest which had already transpired. But while courts have discretion in providing equitable relief in foreclosure cases like Roberto, there is no such discretion in takings cases.

The Constitution itself requires just compensation for a taking. First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty., 482 U.S. 304, 315–16 (1987) (Supreme Court has "frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution."); Jacobs v. United States, 290 U.S. 13, 27 (1933) (the right to just compensation for property taken "rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the [Fifth] [A]mendment."). New Jersey law recognizes the same principle. Klumpp, 202 N.J. at 405 ("Regardless of the exact method employed, where a taking occurs, the Takings Clause requires the government to compensate the property owner.").

Unlike the defendant in Roberto, who obtained a reversal of the foreclosure judgment itself, takings claimants generally cannot get equitable relief. Knick v. Twp. of Scott, 588 U.S. 180, 199–200 (2019). The Takings Clause inherently contemplates retroactive monetary relief when property is taken without compensation. See id.; United States v. U.S. Coin & Currency, 401 U.S. 715, 722–24 (1971) ("No circumstances call more for the invocation of a rule of complete retroactivity" than where unconstitutional forfeitures are involved). State courts must order just compensation on a fully retroactive basis for Tyler-style takings. See Harper, 509 U.S. at 100 (state courts are bound by federal retroactivity doctrine when adjudicating issues of federal law).

This Court should clarify its holding in Roberto to explain that while foreclosures should only be overturned under Tyler for cases in the pipeline, the just compensation remedy is mandatory for all takings regardless of whether the case was filed before or after the Tyler decision.

C. New Jersey retroactivity doctrine also supports application of Tyler to this case

Even if Tyler's retroactive effect in this case were not mandated by Supreme Court precedent and the Constitution, New Jersey's retroactivity doctrine independently counsels that Tyler should control here. Where a new

principle of law[3] is concerned, retroactivity is the usual rule in New Jersey. Coons v. Am. Honda Motor Co., Inc., 96 N.J. 419, 425 (1984). In some circumstances, however, "sound policy reasons" may counsel for limited or no retroactivity. Id. Factors to be considered include: (1) the extent to which the parties and the public justifiably relied on prior decisions; (2) whether the purpose of the new rule would be advanced by retroactivity; and (3) the effect of retroactivity on the administration of justice. Id. Again, although this Court found pipeline retroactivity appropriate in Roberto, the posture and subject-matter of this case is different and therefore calls for a fresh analysis.

The first factor—reliance by the parties and the public—is inconclusive. While the City may have relied on longstanding statutory law in taking Ms. Johnson's equity, neither Ms. Johnson nor the public can be said to have relied on the rule that government can take everything over a small debt. On the contrary, most taxpayers and property owners like Ms. Johnson are shocked to

[3] Roberto incorrectly held that Tyler established a new principle of law. But as Tyler explained, "[t]he principle that a government may not take more from a taxpayer than she owes can trace its origins at least as far back as . . . 1215 . . . in the Magna Carta[.]" Tyler, 598 U.S. at 639. This postulate "became rooted in English law" and "made its way across the Atlantic." Id. It similarly "held true through the passage of the Fourteenth Amendment." Id. at 641. Moreover, prior Supreme Court "precedents have also recognized the principle that a taxpayer is entitled to the surplus in excess of the debt owed." Id. at 642 (citing United States v. Taylor, 104 U.S. 216 (1881); United States v. Lawton, 110 U.S. 146 (1884)).

learn that the government would take so much more than it is owed. See Horne v. Dep't of Agric., 576 U.S. 350, 361 (2015) ("[P]eople . . . do not expect their property . . . to be actually occupied or taken away."); see also, e.g., Noah Lanard, The Supreme Court Made Just About Everyone Happy for Once, Mother Jones (May 25, 2023)[4] (noting the wide range of support from progressives, liberals, conservatives, and libertarians for ending confiscatory tax foreclosure laws); Br. Amici Curiae of States of Utah, et al. at 9, Tyler v. Hennepin County, No. 22-166[5] (describing such laws as "shockingly unfair"); Br. Amici Curiae of AARP, et al. at 1, Tyler v. Hennepin County, No. 22-166[6] (noting "shocking result" under Minnesota's statute and "shock[]" that more states have similar laws).

The second factor, which considers the purpose of the rule in question, cuts plainly in favor of Ms. Johnson. The impetus for the rule is to uphold private property rights against government abuse. The guarantee of just compensation protects individual liberty because property rights are "indispensable to the

[4] https://www.motherjones.com/politics/2023/05/tyler-v-hennepin-supreme-court-roberts-jackson-gorsuch/.
[5] https://www.supremecourt.gov/DocketPDF/22/22-166/256332/20230306140902231_2023-03-06%20UT%20Brief%20of%20Amici%20Curiae%20in%20Supp%20of%20Pet%20Tyler%20v.%20Hennepin%2022-166%20FINAL.pdf.
[6] https://www.supremecourt.gov/DocketPDF/22/22-166/238523/20220922113207496_22-166%20Amici%20Brief%20AARP.pdf.

promotion of individual freedom." Cedar Point Nursery v. Hassid, 594 U.S. 139, 147 (2021). Withholding retroactive application of Tyler would only hinder this essential purpose, not further it.

The third factor relates to the administration of justice, and this too supports Ms. Johnson. The Takings Clause is designed to prevent the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960). Taxpayers like Ms. Johnson, who lost a valuable property to cover a relatively small tax debt, have "made a far greater contribution to the public fisc than [they] owed." Tyler, 598 U.S. at 647. Justice therefore requires that the government pay Ms. Johnson for the excess property that it took. See id.; Hall v. Meisner, 51 F.4th 185, 196 (2022), cert. denied, 143 S. Ct. 2639 (2023) (Mem.) (Explaining that "the equities" require just compensation where the government "forcibly took property worth vastly more than the debts these plaintiffs owed, and failed to refund any of the difference."). Moreover, confiscatory tax foreclosures primarily harm society's most vulnerable members—the elderly, the ill, the impoverished, and the bereaved. See Cherokee Equities, L.L.C. v. Garaventa, 382 N.J. Super. 201, 211 (Ch. Div. 2005) (tax foreclosure defendants are often "among society's most

unfortunate[.]"). These vulnerable individuals should be protected by the government, not exploited.

To be clear, none of the above considerations are necessary to resolve the question of retroactivity, since the rule from Harper and the constitutional mandate of just compensation are sufficient to command full retroactivity. But this Court need not be concerned, as it rightly was in the foreclosure context of Roberto, that retroactivity will create undue burdens on either government or bona fide purchasers of foreclosed property. The analysis is different here, where just compensation—not title—is concerned.

POINT TWO

II. THIS CASE IS NOT BARRED BY LACHES (Ja416)

This case was timely filed within New Jersey's statute of limitations for a takings claim. Yet the court below faulted Ms. Johnson for "wait[ing] nearly four years" to bring her claim, and held that "[a]t some point, equitable principles, such as those embodied in the doctrine of laches, apply" to bar the case. (Ja407, 416). That was error. A takings claim seeking just compensation is an action at law and is subject to a six-year statute of limitations. Klumpp, 202 N.J. at 407. An unjust enrichment claim seeking restitution is also subject to a six-year statute of limitations. Kopin, 297 N.J. Super. at 373–74. Where an action at law is governed by a statute of limitations, the equitable doctrine of

laches cannot apply to bar a suit commenced within the limitations period. Fox, 210 N.J. at 419–20. And where "a legal and an equitable remedy exist for the same cause of action, equity will generally follow the limitations statute." Id. at 421 (quoting Lavin v. Bd. of Educ. of City of Hackensack, 90 N.J. 145, 153 n.1 (1982)).

A. A claim filed within the statute of limitations is timely

In Fox, the New Jersey Supreme Court held that laches did not bar timely claims, including a claim for unjust enrichment. 210 N.J. at 408, 425. The Court observed that it had sometimes invoked equitable doctrines, including laches, to expand the rights of a plaintiff to commence or maintain an action governed by a statute of limitations, but had never invoked laches to limit those rights. Id. at 417. A suit based on a legal right to a monetary judgment and subject to an applicable statute of limitations is controlled by that statute. Id. at 419–20; see also, e.g., Lavin, 90 N.J. at 151 ("[L]aches [is] an equitable defense that may be interposed *in the absence of the statute of limitations*.") (emphasis added).

The New Jersey Supreme Court has never departed from this rule, although one Appellate Division case has. See Chance v. McCann, 405 N.J. Super. 547, 569 (App. Div. 2009). The Fox Court distinguished Chance on the basis of its "unique and compelling" circumstances, while being careful not to endorse the holding. Fox, 210 N.J. at 422 (noting that no party in Chance sought

review from the Supreme Court, and discussing the case in the context of a hypothetical argument: "[E]ven were we to agree in principle. . . ."). Chance concerned a breach of contract dispute between two partners brought by the heirs of one partner after his death. Fox, 210 N.J. at 422–23. Although the action was commenced within the statute of limitations for contract suits, three important witnesses had died such that the defendant "was largely precluded from raising defenses that otherwise would have been available." Id. at 423.

This case is not like Chance, where the passage of time had prejudiced the defendants by eroding evidence or rendering certain defenses impracticable to mount. Although a calculation of just compensation (or restitution, in the unjust enrichment claim) will have to look backward to determine how much money is owed, State v. Silver, 92 N.J. 507, 514 (1983), that is no different from any other takings case which courts routinely adjudicate. In this case, it is undisputed that the Property was worth more than the tax debt (Ja203, Nos. 8–9). That is enough to grant Ms. Johnson's Motion for Summary Judgment as to the City's liability for a taking.

The court below reasoned that it was unfair to order the City "to surrender $45,000 of equity, after retaining same for four years, without an inkling that the equity they legally received at the time was at risk." (Ja416). A similar—but stronger—line of argument was rejected by the Court in Fox. That case involved

an allegation that the defendant had improperly obtained and benefitted from a customer list belonging to the plaintiff. Fox, 210 N.J. at 409. The trial court reasoned that the delay in filing prejudiced defendants, who had "continued to reap the benefits of the customer list," and thereby unwittingly continued to accrue damages. Id. at 423–24. The New Jersey Supreme Court rejected that argument, finding that any failure to mitigate damages caused by the plaintiff's delay would go toward the size of the remedy, not to whether the claim was time-barred. Id. at 424. Here, the City's argument is even weaker: the City's continued retention of Ms. Johnson's equity does not increase its liability except for the amount of interest necessary to satisfy just compensation. See Borough of Rockaway v. Donofrio, 186 N.J. Super. 344, 353 (App. Div. 1982) ("[T]he allowance of interest on a condemnation award is a requirement of constitutional magnitude where the actual taking of the property is not contemporaneous with payment."). Again, this is no different from any other takings case which may be brought within six years from the date of a taking.

In short, the court below erred in applying the equitable doctrine of laches to bar timely claims that are governed by statutes of limitations. This action was filed less than four years after the taking and unjust enrichment claims accrued. As far as the law is concerned, Ms. Johnson would have been within her rights to wait another two years.

B. Even if this case were eligible for a laches analysis, the equities weigh in favor of Ms. Johnson

Laches is "an equitable doctrine, utilized to achieve fairness." Fox, 210 N.J. at 422. Even if laches were available here, the Court must consider "length of the delay; reasons for the delay; and 'changing conditions of either or both parties during the delay.'" Cnty. of Morris v. Fauver, 153 N.J. 80, 105 (1998) (quoting Lavin, 90 N.J. at 152).

Here, the "delay" was less than four years from when the City took title and sold Ms. Johnson's property, well within the applicable statutes of limitations. It is also readily explained. Ms. Johnson did not know of her tax delinquency until after the foreclosure judgment because the City never contacted her at her residential address, (Ja182, No. 5) despite having it on file in connection with her purchase of the property (Ja3, ¶10; Ja210–11), and despite the fact that mailings sent to the Property were returned undeliverable (Ja31–32). Neither did the City inform Ms. Johnson of her tax delinquency when it accepted nearly $2,000 from her in exchange for a construction permit on the Property. (Ja202, Nos. 6–7). During part of the relevant time, Ms. Johnson was caring for her terminally ill husband (Ja4; Ja159). Although she consulted with legal counsel, she was advised that there was a low likelihood of reversing the foreclosure. (Ja165–66, Nos. 17–18). She eventually found a nonprofit organization which had been successful in bringing takings claims in response

to foreclosures in other jurisdictions, and was willing to represent her pro bono. (Ja166, No. 18; Ja169, No. 25). She filed this action within three months of making contact with that organization. (Ja166, No. 18; Ja169, No. 25). And, as explained above, Defendants are not prejudiced by any change in conditions.

POINT III

III. THIS COURT SHOULD REVERSE AND REMAND WITH DIRECTIONS TO GRANT MS. JOHNSON'S CROSS-MOTION FOR SUMMARY JUDGMENT AND FURTHER FACT-FINDING TO DETERMINE THE AMOUNT OF JUST COMPENSATION OWED (Ja417)

Because the rule from Tyler applies retroactively to this case, as even Roberto held, and because the case cannot be barred by laches, Ms. Johnson is entitled to summary judgment on the question of the City's liability for a taking without just compensation. It is undisputed that the City foreclosed on Ms. Johnson's Property, that the Property was worth more than the tax debt owed, and that the City retained the surplus equity. Under Tyler, that is a taking. 598 U.S. at 647.

The parties dispute the exact amount of the total tax debt, although in any case this amount was less than the value of the Property and less than the $101,000 that the City kept after selling the Property. Defendants believe the tax debt owed on the Property, including the 18% interest, totaled approximately $44,300.08 (Ja288, ¶ 7). Ms. Johnson maintains that the total tax debt was closer

to $25,000 (Ja233) (listing the "amount" of the tax at $4,787.76 and the "Int[erest] to 8/31/17" at $19,860.83). This dispute will likely be resolved with further discovery on remand. But there is no question, and as a matter of law there can be no question, that the City is liable to pay just compensation of some amount. See Alloco, 456 N.J. Super. at 134 (standard of review for summary judgment).

CONCLUSION

For the reasons stated above, this Court should reverse the Order Granting Defendants' Motion for Summary Judgment and should remand the case with instructions to grant Ms. Johnson's Motion for Summary Judgment and to proceed in determining the amount of the just compensation award.

DATED: July 24, 2024.

Respectfully submitted,

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