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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-6605-06T3

TOWNSHIP OF HADDON,

Plaintiff-Respondent,

v.

MORGAN BROTHERS, INC., a New Jersey Corporation, and CAMDEN COUNTY MUNICIPAL UTILITIES AUTHORITY,

Defendants,

and

M.D. SASS MUNICIPAL FINANCE PARTNERS II, L.P. and WACHOVIA BANK, N.A. COLLATERAL AGENT FOR SASS MUNI IV, L.L.C.,

Defendants-Appellants,

and

WACHOVIA BANK, N.A. COLLATERAL AGENT FOR SASS MUNI V, L.L.C.,

Defendant/Intervenor-Appellant.

Argued September 29, 2008 - Decided October 30, 2008

Before Judges Winkelstein, Gilroy and Chambers.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, L-5318-05.

Adam D. Greenberg argued the cause for appellants (Honig & Greenberg, L.L.C., attorneys; Mr. Greenberg, on the brief).

Timothy J. Higgins argued the cause for respondent (Law Office of Timothy J. Higgins, attorneys; Mr. Higgins, on the brief.

PER CURIAM

This appeal presents the question of whether the holders of tax sale certificates on condemned property are entitled to payment from condemnation proceeds being held for environmental remediation. Both sides agree that the case presents no disputed issues of fact, but presents a question of law. Hence our review is de novo. Paradise Enters. Ltd. v. Sapir, 356 N.J. Super. 96, 102 (App. Div. 2002), certif. denied, 175 N.J. 549 (2003).

Defendants M.D. Sass Municipal Finance Partners II, L.P. and Wachovia Bank, N.A. Collateral Agent for Sass Muni IV, L.L.C. and Intervenor, Wachovia Bank, N.A. Collateral Agent for Sass Muni V, L.L.C. (Sass defendants) are the holders of four tax certificates on property located at 202-212 Highland Avenue in the plaintiff Township of Haddon (Township). The Township, seeking to use the property in its redevelopment project, brought this condemnation proceeding pursuant to the Eminent

Domain Act, N.J.S.A. 20:3-1 to -50. When the Township filed its declaration of taking, it deposited with the court $280,000, representing its determination of the fair market value of the property as if remediated. The commissioners, appointed pursuant to N.J.S.A. 20:3-12(b), thereafter determined that the fair market value of the property was indeed $280,000, as if remediated.

The Sass defendants, as holders of tax sale certificates on the property, moved to intervene and sought $125,000 in disbursement from the deposited monies; the $125,000 represented the then current value of their tax sale certificates. The estimated cost of remediation, however, was determined to be between $1.3 and $2.8 million, thereby vastly exceeding the value of the property and the amount deposited with the court. While the trial court granted the application to intervene, it denied the application for disbursement of funds.

On appeal, the Sass defendants raise the following issues:

> POINT I
> A CONDEMNING AUTHORITY MAY NOT CONSTITUTIONALLY SEIZE OR RESTRAIN THE ASSETS OF AN INNOCENT LIENHOLDER TO SATISFY GOVERNMENTAL CLAIMS AGAINST A FEE SIMPLE OWNER.
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> POINT II
> ENVIRONMENTAL COSTS ARE NOT TRANSACTIONAL COSTS AND CANNOT BE SURCHARGED TO INNOCENT LIENHOLDERS SIMPLY FOR THE CONVENIENCE OF THE CONDEMNOR.

POINT III
A CONDEMNOR RETAINS A REMEDY AGAINST POTENTIALLY RESPONSIBLE PARTIES WHILE A TAX CERTIFICATE HOLDER LOSES ITS REMEDY FOREVER. THUS, TO THE EXTENT THAT CASINO REINVESTMENT DEVELOPMENT AUTHORITY V. TELLER PREVENTS M.D. SASS FROM BEING PAID, IT WAS DECIDED IN ERROR.

POINT IV
COMPARISONS TO OTHER AREAS OF LAW DEMONSTRATE THAT HOLDERS OF SENIOR LIENS CANNOT BE SUPPLANTED TO SATISFY JUNIOR CLAIMS.

POINT V
EVEN IN CRIMINAL FORFEITURE CASES, THE PROPERTY OF INNOCENT OWNERS AND PRIVATE LIENHOLDERS IS PROTECTED.

POINT VI
THE BURDEN OF UNSATISFIED REMEDIATION COSTS IS A PUBLIC BURDEN FOR ALL TAXPAYERS TO SHARE, NOT JUST ONE INNOCENT TAXPAYER WHO PURCHASED A TAX SALE CERTIFICATE.

POINT VII
THERE ARE POSSIBLE REMEDIES FOR THE LEGISLATURE TO PROVIDE BUT SINCE THEY HAVE NOT BEEN PROVIDED, THIS COURT IS BOUND TO ADHERE TO THE EXISTING LAW AND THE LIMITS OF THE CONSTITUTION UPON ITS APPLICATION.

POINT VIII
IN A TYPICAL MOTION TO DISBURSE FUNDS, LIENHOLDERS ARE ENTITLED TO BE PAID FROM THE PROCEEDS IN THE ORDER OF PRIORITY OF THEIR INTERESTS IN THE PROPERTY.

The starting point for this analysis is Housing Auth. of New Brunswick v. Suydam Investors, L.L.C., 177 N.J. 2 (2003), which addresses the procedure to follow in a situation where the condemned property needs remediation. The Supreme Court held

that the condemned property must be appraised "as if" remediated, and that sum should be deposited into a trust escrow account in court. Id. at 24. The portion of the award representing the cost of remediation should not be disbursed until the remediation is concluded. Id. at 25-26. Once the remediation is concluded, the condemnor is reimbursed for the cost of remediation from those monies being held in court. Ibid. The balance of the monies, if any, would then be paid to the condemnee. Ibid. Those monies being held in court pending remediation, at that point, do not belong to the condemnee. Ibid. Rather, they are viewed as a "transactional cost that will be incurred to give the condemnee the benefit of the as if remediated value." Id. at 26.

The procedure set forth in Suydam was followed in this case, and the value of the property as if remediated, that is $280,000, was deposited with the court. However, because the anticipated remediation costs exceed the value of the property, even when remediated, it is unlikely that any of these monies will go to the condemnee.

In Casino Reinv. Dev. Auth. v. Teller, 384 N.J. Super. 408 (App. Div. 2006), we addressed whether a municipal tax lien would attach to the funds being held in court for the purpose of paying the remediation costs of the condemnor pursuant to Suydam. We held that the condemnor must first be allowed to

recoup the costs of remediation from the funds. Id. at 416. Once that payment is made, the tax lien may be satisfied from any surplus funds. Ibid. In Teller, the expected costs of remediation exceeded the amount of the funds in court, so that it was unlikely any surplus funds would be left to satisfy the municipal tax liens. Id. at 417.

Because the holder of a tax sale certificate succeeds to the interest of the taxing authority, Twp. of Jefferson v. Block 447A, Lot 10, 228 N.J. Super. 1, 4 (App. Div. 1988), the rule in Teller applies to holders of tax sale certificates. As a result, defendants' lien may be satisfied from any surplus funds left after plaintiff has been reimbursed for the remediation costs. Under the facts of this case, it is unlikely that there will be any surplus funds due to the high costs of remediation.

In asserting that the tax sale certificate holders are entitled to payment from the funds in court, appellants invite us to overrule our decision in Casino Reinv. Dev. Auth. v. Teller, supra, 384 N.J. Super. 408. This we decline to do since the logic in Teller follows the Supreme Court's reasoning in Housing Auth. of New Brunswick v. Suydam Investors, L.L.C., supra, 177 N.J. 2.

The rule in Teller makes sense. A condemnor who remediates the property enhances the value of the property. The Suydam reimbursement mechanism not only prevents a condemnor from

receiving "a windfall,"[1] Suydam, supra, 177 N.J. at 23, but it also permits the condemnor to retain the property's enhanced value to the extent of the cost of remediation. Otherwise, if the condemnor were forced to pay in just compensation the value of the property as though it were remediated and also pay the cost of the remediation without reimbursement, that added value would gratuitously flow to lien holders at the expense of the condemnor. As a result, the proceeds being held for remediation may not be disbursed to the holder of the tax sale certificates until the remediation is completed and the condemnor is reimbursed for its remediation costs. If any excess funds are available after remediation costs are reimbursed, then the holder of the tax sale certificate may apply for payment from the balance being held.

We also reject the Sass defendants' argument that application of Teller violates their constitutional rights. They contend that application of the Teller holding to the owners of tax sale certificates violates the constitutional mandate that "[n]o person shall . . . be deprived of life,

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[1] The Court in Suydam rejected the "double take" approach. Under that approach, when fixing the amount of just compensation, the property is devalued due to the contamination, and yet the condemnee is also responsible for clean up costs. As a result, the condemnee receives less in just compensation due to the devaluation of the property and still must pay for (continued)

liberty, or property, without due process of law" "nor shall any State deprive any person of life, liberty, or property, without due process of law." See U.S. Const. amend. V, XIV. They contend that they have a property interest in the tax sale certificates and that the Teller analysis results in a taking without just compensation. In essence, the Sass defendants maintain that the Township is taking their tax sale certificates because the amount awarded in the condemnation process will go to remediating the environmental hazards rather than being available to compensate them. As a result, their tax sale certificates have been rendered valueless in this condemnation process.

Certainly, a tax sale certificate represents a property interest protected by the due process clause of the Fourteenth Amendment. Twp. of Jefferson v. Block 447A, Lot 10, supra, 228 N.J. Super. at 4-5. The holder of a tax sale certificate is entitled to notice of proceedings affecting the holder's rights. See ibid. (stating that a holder of a tax sale certificate is entitled to notice of the municipality's tax foreclosure proceeding against the property). The holder of a tax sale certificate succeeds to the lien interest of the taxing

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(continued)
the clean up. This approach results in a windfall to the condemnor.

authority. Id. at 4. Since real property taxes in New Jersey are an in rem obligation, the holder of a tax sale certificate may not obtain a personal judgment against the owner of the property for the amount due. City of East Orange v. Palmer, 47 N.J. 307, 318 (1966). The holder generally receives payment for his investment if the certificate is redeemed, that is, the owner pays him the amount due in order to remove the lien on the property, or if the holder forecloses on the property. Twp. of Jefferson v. Block 447A, Lot 10, supra, 228 N.J. Super. at 4-5. However, the value of the investment and any return on the investment will ordinarily depend on the value of the underlying property.

Here, due to the high remediation costs, this property is valueless or as the trial court put it, has a negative value. The loss of value in the tax sale certificates is due to the loss of value in the property, not due to the action of the condemning authority.

As the Suydam court makes clear, the funds being held for remediation do not belong to the condemnee. Housing Auth. of New Brunswick v. Suydam Investors, L.L.C., supra, 177 N.J. at 25-26. They are being held to meet transactional costs and are not subject to attachment. Ibid. The Suydam court explains the situation as follows:

> The underpinning of that procedure is the differential between the estimated value of the property as contaminated and the value as if remediated. The estimated value of the former is obviously less than the latter. Because the enhanced value is to be generated by the incurring of a transactional cost (the cost to transfer and develop the property), that cost, in turn, is folded into the estimate. Thus, unlike the run-of-the-mill condemnation case that does not involve remediation and in which money is viewed as a pure substitute for the res (the property), the estimated value in a contamination case has a component that is altogether outside the property itself--the transactional cost that will be incurred to give the condemnee the benefit of the as if remediated value. In light of the fact that attachment is the taking or encumbering of another's property, see Black's Law Dictionary 126 (6th ed. 1990) (defining attachment as "[t]he act or process of taking, apprehending, or seizing . . . property"), withholding only the estimated transactional costs, which, in reality, do not belong to the condemnee, is not an attachment at all. Accordingly, there is no unfairness to the condemnee in the set-aside.
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> [Ibid.]

Accordingly, the mechanism in Suydam and application of the Teller holding to the facts in this case did not violate any constitutional property rights of the Sass defendants. They are lienholders of property that, due the cost of necessary remediation, has no value. No property interest of theirs is being unconstitutionally seized.

After a careful review of the record and arguments of counsel, we conclude that the balance of the arguments raised by appellant are not of sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.