

<p>ROYAL TAX LIEN SERVICES, LLC d/b/a CRUSADER LIEN SERVICES, LLC,</p> <p style="text-align: center;">Plaintiff,</p> <p>vs.</p> <p>SAMI ARIK a/k/a SAMMY ERIK, IBRAHIM ARIK, LIZA ARIK, spouse of Sami Arik a/k/a Sammy Erik; TURKAN ARIK, spouse of Ibrahim Arik; and FIA CARD SERVICES, N.C.</p> <p style="text-align: center;">Defendants.</p>	<p>SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: BERGEN COUNTY</p> <p>DOCKET NO.: F-7409-11</p> <p>Civil Action</p>
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**BRIEF IN SUPPORT OF DEFENDANTS' APPLICATION FOR TEMPORARY RESTRAINTS, TO
DECLARE FINAL JUDGMENT OF TAX FORECLOSURE VOID, AND TO PERMIT REDEMPTION**

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PRELIMINARY STATEMENT

This is a real estate tax foreclosure case. The defendants Sami Arik a/k/a Sammy Erik ("Sammy"), Ibrahim Arik ("Ibrahim"), Liza Arik (Liza"), and Turkan Arik ("Turkan") submit this Brief in support of their Order to Show Cause seeking temporary restraints ("TRO") staying execution of the Writ of Possession, and prohibiting plaintiff from selling, transferring and/or assigning ownership of the single family residence that is the subject of this foreclosure action pending the outcome of their application to vacate the Final Judgment of Tax Sale Certificate Foreclosure ("Final Judgment"), and to redeem the outstanding tax sale certificate. In fact, today defendants wired \$200,000 into the attorney trust account of LoFaro & Reiser, LLP which is more than sufficient to satisfy the tax lien in full.

In further support of their Order to Show Cause, defendants submit the Certification of Sammy Erik ("Sammy Cert."), Certification of Ibrahim Arik ("Ibrahim Cert."), and Certification of Benjamin B. Isik ("Isik Cert.").

The Court entered Final Judgment by Order of May 28, 2013. See Exhibit 1 to Sammy Cert. The property is commonly known as 680 Bliss Drive, New Milford, New Jersey (the "Property), and is co-owned by Ibrahim and his son Sammy. Ibrahim and his wife Turkan presently reside at the Property with their son John Arik ("John"), his wife and two daughters ages 3 and 10 months. Ibrahim's and Turkan's native language is Turkish. Neither of them read English, and both are only capable of engaging in minimal conversational English. Thus, Ibrahim's Certification was drafted with the aid of a Turkish translator; the English version of Ibrahim's Certification is also provided and is certified by the same translator.

The defendants, who are all immediate family, did not learn of this foreclosure action until Wednesday, November 6, 2013, when two Bergen County Sheriff's officers appeared at

the Property with moving trucks and informed them they had to vacate the Property. The Bergen County Sheriff agreed to postpone the eviction for two (2) weeks.

The Property has a fair market value of \$624,500. See Comparative Market Analysis annexed as Exhibit 8 to Sammy Cert. As of November 8, 2013 the amount due for redemption of plaintiff's tax lien is \$159,855.73.¹ See Exhibit 7 to Sammy Cert. The Property is unencumbered by a mortgage. Thus, in the absence of this relief the defendants will lose approximately \$464,000 of equity compared to plaintiff who will gain an approximate \$464,000 windfall from a tax sale certificate in the original amount of \$10,557.61.

As defendants will demonstrate herein, service of process on Sammy and his wife Liza is defective. Because their due process rights have been violated by the lack of notice of this proceeding, the Final Judgment entered on May 28, 2013 must be deemed void. Neither Sammy nor Liza were served with the Complaint or the subsequent orders issued by the Court and notices sent plaintiff, including the Order Fixing Amount, Time and Place for Redemption entered on December 7, 2012 (the "Redemption Order"),² and the Final Judgment. These defendants did not reside at the Property at the time this foreclosure action was commenced, having moved out several years earlier. The Property was not Sammy or Liza's usual place of abode at the time the Complaint was served on Sammy's brother John. **However, service on Sammy's brother John does not constitute valid service on Sammy and Liza under R. 4:4-4(a), and therefore the Final Judgment should be declared void as to Sammy and Liza pursuant to**

¹ The redemption amount of \$159,855.73 is based on information provided by the Borough of New Milford Tax Collector, and is subject to plaintiff's verification.

² The Isik Certification includes a copy of the foreclosure file that he obtained from a real estate abstract company. The Redemption Order is incorporated in Exhibit A to the Isik Certification and is identified as bates stamp 044.

R. 4:50-1(d). The same holds true for all subsequent orders entered on plaintiff's applications because same were not mailed to Sammy and Liza's actual residence, but rather were sent to the Property where they do not reside. Thus, Sammy and Liza had no notice that this action was pending until being informed about the Bergen County Sheriff appearing at the Property on November 6th.

The parents, Ibrahim and Turkan, also seek a declaration that the Final Judgment is void. Alternatively, the parents seek to vacate the Final Judgment based on excusable neglect under R. 4:50-1(a), as well as for extraordinary circumstances pursuant to R. 4:50-1(f). As confirmed in the various Certifications submitted, neither parent reads English and each is limited to speaking only minimal conversational English. The parents were served with process through service on John who, although an adult residing at the Property, has a gambling addiction. John never informed his parents or his brother about the Complaint, and deliberately buried all mail and notices issued in the case. Consequently, neither the parents nor his brother Sammy had any knowledge that a tax foreclosure suit had been filed.

PROCEDURAL HISTORY

Plaintiff commenced this tax foreclosure action by filing a Complaint on August 30, 2011. Default was entered as to Sammy, Ibrahim, Liza, and Turkan on December 12, 2011.

On August 21, 2012, plaintiff filed a motion to enter default out of time as to the defendant FIA Card Services, and for the entry of an order fixing the amount, time and place for redemption. On December 7, 2012, the Honorable Paul Innes, P.J. Ch., entered an Order Fixing Amount, Time and Place for Redemption (the "Redemption Order") which established January

22, 2013 as the redemption date. On May 28, 2013, the Court entered Final Judgment. A Writ of Possession followed on July 23, 2013.

BRIEF FACTUAL STATEMENT

Ibrahim, who is 63 years old, and Turkan who is 58 years old, do not read English and are limited to engaging in only minimal conversational English. Ibrahim Cert. at ¶14. On July 31, 2003, Sammy and his father Ibrahim purchased the Property for \$800,000 without requiring a mortgage. Title to the Property was vested jointly in Sammy, who was single at the time, and Ibrahim as a married man. See Deed attached as Exhibit 2 to Sammy Cert. Ibrahim, his wife, their son John, John's wife and two daughters ages 3 and 10 months all currently reside at the Property. Ibrahim Cert. at ¶13.

Sammy resided at the Property from 2003 to mid November 2008, at which time Sammy and his wife Liza moved into another home commonly known as 448 Luhmann Drive, New Milford, New Jersey that they purchased as new construction. Sammy Cert. at ¶¶13, 6-7; Isik Cert. at ¶15. Proof of ownership of Sammy's new residence is reflected in the Deed annexed as Exhibit 3 to the Sammy Cert. In addition, Sammy's New Jersey driver's license and several prior utility bills confirm that he maintains his residence at 448 Luhmann Drive, New Milford, New Jersey. See Exhibit 4 and Exhibit 5 to Sammy Cert.

When Sammy lived at the Property he was primarily responsible for helping his parents pay their bills; after all, the parents do not read English and are limited to speaking in minimal conversational English. Isik Cert. at ¶14; Sammy Cert. at ¶15. Thus, Sammy would write all checks from his parents' bank account to pay the house bills, including the real estate taxes. Id. Shortly before Sammy moved out of the house in mid November 2008, the bill paying and

check writing obligations were entrusted to Sammy's brother John. Id. Unbeknownst to any of the defendants, John had a gambling problem and was misappropriating his parents' trust by using their money to fund his gambling habit. Id. Hence, John's taking over his parents' bill paying coincided with the beginning of the non-payment of the real estates.

Unbeknownst to any of the defendants, on December 4, 2008, the Borough of New Milford sold a tax sale certificate to plaintiff in the amount of \$10,557.61. Thereafter, plaintiff continued paying the taxes for the next two years, while none of the defendants were aware of the same.

Also unbeknownst to any of the defendants at the time, plaintiff's process server served the Complaint on John. See Affidavits of Service annexed as Exhibit 6 to Sammy Cert. Although John is an adult who resides at the Property with his wife and two young daughters, Sammy and Liza were not living there when the Complaint was dumped on John. Sammy Cert. at ¶¶7, 10. Further, John deliberately concealed the lawsuit from his family. Id. at ¶11; Ibrahim Cert. at ¶9. In fact, John never informed defendants about any of the subsequent mailings concerning this case that plaintiff's counsel sent to the house. Ibid. Thus, none of the defendants had actual knowledge of the pendency of this action.

The defendants did not learn of this foreclosure action until Wednesday, November 6, 2013, when two Bergen County Sheriff's officers appeared at the Property with moving trucks and informed them they had to vacate the Property. Sammy Cert. at ¶4.; Ibrahim Cert. at ¶7. Defendants immediately contacted their family attorney Benjamin B. Isik, and he went to the Property on November 6, 2013 and witnessed the Sheriff's officers attempting to enforce the

Writ of Possession. Isik Cert. at ¶16. The Sheriff's officers informed Mr. Isik that they would postpone enforcement of the Writ of Possession for 14 days. Id.

The Property has a present fair market value of \$624,500 as confirmed by the Comparative Market Analysis attached as Exhibit 8 to the Sammy Cert. As previously mentioned, the Property is not encumbered by a mortgage. As of November 8, 2013, the amount due to redeem plaintiff's outstanding tax lien is \$159,855.73.³ Id., Exhibit 7.

The Property represents Ibrahim's and Turkan's life savings, as well as representing a substantial investment by Sammy. In the absence of issuing the necessary TRO and granting the defendants relief from the Final Judgment and all preceding orders, their due process rights will be abrogated and they will suffer irreparable harm if not given an opportunity to redeem the outstanding tax lien.

POINT I

THE COURT SHOULD IMPOSE TEMPORARY RESTRAINTS PROHIBITING PLAINTIFF FROM TRANSFERRING, SELLING AND/OR ASSIGNING THE SUBJECT REAL ESTATE PENDING THE RETURN DATE OF THE ORDER TO SHOW CAUSE

Defendants ask the Court to issue temporary restraints prohibiting plaintiff from transferring, selling and/or assigning the Property to any third party pending the return date of their Order to Show Cause. As even our Model Civil Jury Charges recognize, "[E]very parcel of real estate is unique." New Jersey Model Civil Jury Charge 9.10. Article 5 of the United States Constitution states in pertinent part, "No person shall be...deprived of life, liberty, or property, without due process of law;...."

³ The redemption amount is based on the information made available by the Borough of New Milford Tax Collector, and is subject to plaintiff's verification.

In Evening Times Printing and Publishing Co. v. The American Newspaper Guild, 124 N.J.

Eq. 71, 74 (E. & A. 1938), the court succinctly explained the purpose of a TRO:

The object of a preliminary injunction is to prevent some threatening, irreparable mischief which should be averted until opportunity is offered for a full and deliberate investigation of the case. (citations omitted). Acts destroying a complainant's business, custom and profits do an irreparable injury and authorize the issue of a preliminary injunction.

See also Crowe v. De Gioia, 90 N.J. 126, 134 (1982)(the object of temporary relief is to "maintain the parties in substantially the same condition 'when the final decree is entered as they were when the litigation began.'").

The following elements must be established to award a litigant *pendente lite* relief pending adjudication of the merits of the underlying claim at trial: (i) irreparable harm; (ii) the legal right underlying the claim is settled; (iii) all material facts are uncontroverted, and thus there exists a reasonable probability that movant will succeed on the merits of the underlying claim; and (iv) the balance of hardships between the relative parties in granting or denying the relief weighs in favor of the movant. Crowe, supra, 90 N.J. at 132-133. The Court should be circumspect in granting *pendente lite* relief where to do so would be tantamount to giving the moving party the full measure of relief to which they may be entitled at a final hearing. Aldrich v. Union Bag & Paper Co., 81 N.J. Eq. 244 (Ch. 1913).

The first element of "substantial harm" is met if a litigant is threatened with substantial, immediate, and irreparable harm if the injunction does not issue. Citizens Coach Co. v. Camden Horse R.R. Co., 29 N.J. Eq. 299, 303-304 (E. & A. 1878). It has been held that destruction or significant impairment of the subject matter of the litigation constitutes irreparable harm. See Coleman v. Wilson, 123 N.J. Super. 310 (Ch. Div. 1973). It is axiomatic that harm is considered

irreparable only if it cannot be adequately addressed by monetary damages. Crowe v. De Gioia, 90 N.J. 126, 131 (1982). “[T]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.” Judice’s Sunshine Pontiac, Inc. v. General Motors Corp., 418 F. Supp. 1212, 1222 (D.N.J.1976).

Defendants maintain that they satisfy the criteria for the Court to impose a TRO staying execution of the Writ of Possession and prohibiting the sale, transfer or assignment of the Property pending the return date of their Order to Show Cause.

A. Irreparable Harm

“[E]very parcel of real estate is unique.” New Jersey Model Civil Jury Charge 9.10. That defendants will suffer irreparable harm absent the issuance of a TRO is undisputed. “[J]ustice is not served if the subject matter of the litigation is destroyed or substantially impaired during the pendency of the suit.” Haines v. Burlington County Bridge Commission, 1 N.J. Super. 163, 174 (App. Div. 1949)(internal citations omitted).

No amount of monetary damages would serve to return defendants to the status quo – occupancy and ownership of a single-family home unencumbered by a mortgage and with equity in excess of \$464,000 over and above the amount necessary to redeem plaintiff’s tax lien. The defendants, in particular Sammy and Liza, are presently stripped of their property rights without even receiving proper service of process – a violation of the due process clause of the United States Constitution. Accordingly, the Court should issue a TRO prohibiting plaintiff from: (i) enforcing the Writ of Possession, and (ii) selling, transferring and/or assigning the Property pending further order of the Court.

B. Legal Right Underlying The Claim Is Settled

Defendants, in particular Sammy and Liza, maintain that their right to redemption has not expired because they were not properly served with the initial judicial process or any subsequent orders issued by the Court, including the Redemption Order that established January 22, 2013 as the redemption deadline.

Foreclosure is a harsh remedy and equity abhors a forfeiture. A court of equity may invoke its inherent equitable powers to avoid a forfeiture and deny the remedy of foreclosure. Sanguigni v. Sanguigni, 197 N.J. Super. 505, 507 (Ch. Div. 1984) (a determination as to whether an action "... warrants the remedy of foreclosure involves the operation of equitable principles [and] . . is subject to the exercise of discretion by the court"). See also Kaminski v. London Pub., 123 N.J. Super. 112, 117 (App. Div. 1973).

New Jersey courts recognize that the interest of the tax sale certificate holder is entirely subordinate to the property owner's statutory right of redemption. In order to redeem a tax sale certificate while a foreclosure action is pending, the redeeming person or entity must be a party to the action. Phoenix Funding, Inc. v. Krute, 403 N.J. Super. 261, 266-67 (App. Div. 2008). Defendants are indeed parties to the case, and thus have the right to redeem. This right of redemption can be exercised up to the date fixed by the court barring the right of redemption. Manning v. Kasdin, 97 N.J. Super. 406, 417 (App. Div. 1967), certif. denied, 51 N.J. 182 (1967). Critical to the homeowner's ability to exercise the right of redemption is receiving proper service of the Complaint initiating the tax foreclosure and being on actual notice of the redemption date. Service of process upon Sammy and Liza is defective under R. 4:4(a) because the Complaint was served via John at the Property which is not Sammy's or Liza's usual place of

abode. See Point II, infra. Ergo, it must follow that their right of redemption has not expired regardless of the Redemption Order which they also were not served with.

C. The Material Facts Are Not Controverted

It is undisputed that service of process attempted on Sammy and Liza is defective under R. 4:4-4(a). See Point II, infra. Neither of these defendants was residing at the Property at the time the foreclosure Complaint was filed and service attempted through John. All subsequent orders and notices were sent to these defendants at the Property even though they don't reside there.

It is further undisputed that the Property has substantial equity over and above the amount due to plaintiff on its tax sale certificate. Further, defendants are immediately able to redeem the entire tax sale certificate as evidenced by their depositing the sum of \$200,000 into their attorney's trust account.

D. Balance Of Hardships Tips in Defendants' Favor

At the present time, plaintiff has obtained ownership of real estate valued at \$624,500 for in investment of approximately \$159,000. To say that plaintiff hit the lottery would be an understatement. This case represents a convergence of the perfect storm for the plaintiff tax investor: (i) Homeowners who don't comprehend English; (ii) a son who is home when the process server arrives and is served with the Complaint on behalf of all defendants, and then abuses his parents' trust by deliberately concealing the foreclosure lawsuit; and (iii) a home unencumbered by a mortgage thus removing the last safety mechanism typically available to the average homeowner whose lender is served with the foreclosure complaint.

In the absence of the Court granting a TRO, plaintiff could reap a windfall of approximately \$464,000 from the sale of the Property to a third party. If the Court permits defendants to redeem, then plaintiff will receive every dime to which it is entitled. By contrast, absent redemption the parents will have no place to live and all defendants will lose their equity in the Property.

POINT II

**THE TAX FORECLOSURE JUDGMENT AND ALL PRECEDING ORDERS
SHOULD BE DECLARED VOID AS TO DEFENDANTS SAMMY ERIK
AND LIZA ARIK BECAUSE OF DEFECTIVE SERVICE OF PROCESS**

The Court should declare the Final Judgment and all preceding orders void as to Sammy and Liza due to improper service of process of the initial Complaint and subsequent orders and notices.

Defendants recognize that a final judgment of foreclosure entered pursuant to the Tax Sale Law, N.J.S.A. 54:5-1 to -104.75, gives "full and complete relief . . . to bar the right of redemption, and to foreclose all prior or subsequent encumbrances," granting the successful party an estate in fee simple upon the recording of the judgment. N.J.S.A. 54:5-104.64. Because its chief purpose is to aid municipalities in the raising of revenues, Bron v. Weintraub, 42 N.J. 87, 91 (1964), the New Jersey Legislature has declared that the Tax Sale Law "shall be liberally construed as remedial legislation to encourage the barring of the right of redemption by actions in the Superior Court to the end that marketable titles may thereby be secured," N.J.S.A. 54:5-85.

N.J.S.A. 54:5-87 declares that judgments entered pursuant to the Tax Sale Law "shall be final . . . and no application shall be entertained to reopen the judgment after three months

from the date thereof, and then only upon the grounds of lack of jurisdiction or fraud in the conduct of the suit." N.J.S.A. 54:5-104.67 repeats this admonition.⁴ As one appeals court observed, "N.J.S.A. 54:5-87 and N.J.S.A. 54:5-104.67 are inconsistent in that the three month limitation period they refer to commences, in the former, from the *entry* of the judgment and, in the latter, from the *recording* of the judgment." Fresh Fish Holdings, L.L.C. v. 61 Main Street, Inc., 2006 N.J. Super. Unpub. LEXIS 113, *2 n. 2 (App. Div. March 30, 2006)(emphasis in original).

Although N.J.S.A. 54:5-87 indicates that no application to reopen a judgment can be made after three months from the date of judgment, R. 4:50-1 allows a period of one year to bring the motion, or if the judgment is void, then a reasonable period of time is allowed within which to bring the motion under R. 4:50-1(d). In foreclosure actions where there is a conflict between a statute regarding practice and procedure, the New Jersey Court Rules are generally paramount. M & D Associates v. Mandara, 366 N.J. Super. 341, 351 (App. Div. 2004)(citing Bergen-Eastern Corp. v. Koss, 178 N.J. Super. 42, 45 (App. Div. 1981), certif. granted, 87 N.J. 351, appeal dismissed, 88 N.J. 499 (1981); Borough of New Shrewsbury v. Block 115, Lot 4, Assessed to Hathaway, 74 N.J. Super. 1, 8 (App. Div. 1962)). Thus, in the instant case the time periods provided by R. 4:50-1 control, meaning that defendants are not time barred from pursuing relief from the Final Judgment merely because more than three months have elapsed since entry of the Final Judgment. Defendants have filed the within motion within a reasonable

⁴ N.J.S.A. 54:5-104.67 states in full:

No application shall be entertained to reopen such judgment after three months from the date of the recording thereof in the office of the county recording officer, and then only upon the grounds of lack of jurisdiction or fraud in the conduct of the action.

time – less than six months after entry of the Final Judgment, and within two weeks of discovering the existence of this tax foreclosure suit.

Notice is a basic procedural necessity to ensure that a party's due process rights are enforced. Mettinger v. Globe Slicing Mach. Co., 153 N.J. 371, 389 (1998) (citing Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S. Ct. 652, 656-57, 94 L. Ed. 865, 873 (1950)). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." O'Connor v. Altus, 67 N.J. 106, 126 (1975) (quoting Mullane, *supra*, 339 U.S. at 314, 70 S. Ct. at 657, 94 L. Ed. at 873); Jameson v. Great Atl. & Pac. Tea Co., 363 N.J. Super. 419, 425 (App. Div. 2003) (quoting Davis v. DND/Fidoreo, Inc., 317 N.J. Super. 92, 97 (App. Div. 1998), *certif. denied sub nom, Davis v. Surrey Downs/Fidoreo, Inc.*, 158 N.J. 686 (1999)).

A party may seek relief from a final judgment or order based on the criteria set forth in R. 4:50-1, including: * * * "(d) the judgment or order is void; * * * or (f) any other reason justifying relief from the operation of the judgment or order." R. 4:50-1(d), (f). Subparts (a), (b), or (c) of R. 4:50-1 allow a period of one year to bring the motion. R. 4:50-2. Otherwise, the motion to vacate must be brought within a reasonable time if the judgment is void under R. 4:50-1(d). R. 4:50-2; *see also* Citibank, N.A. v. Russo, 334 N.J. Super. 346, 353 (App. Div. 2000) (stating a motion to vacate judgment must be made within a reasonable time).

An application to vacate a judgment based on R. 4:50-1 is within the sound discretion of the trial court and "should be guided by equitable principles in determining whether relief should be granted or denied." Housing Auth. of the Town of Morristown v. Little, 135 N.J. 274,

283 (1994). The application is "viewed with great liberality, and every reasonable ground for indulgence is tolerated to the end that a just result is reached." Marder v. Realty Constr. Co., 84 N.J. Super. 313, 319 (App. Div. 1964), aff'd, 43 N.J. 508 (1964). A motion based on R. 4:50-1(f) must be supported by "truly exceptional circumstances" in the interests of finality of judgments. Housing Auth., supra, 135 N.J. at 286.

Because of the aforementioned due process requirements, when service of process is defective or non-existent and a default judgment results, the judgment is generally void. Jameson v. Great Atl. & Pac. Tea Co., 363 N.J. Super. 419, 425 (App. Div. 2003); Sobel v Long Island Entm't Prods., Inc., 329 N.J. Super. 285, 293 (App. Div. 2000); Rosa v. Araujo, 260 N.J. Super. 458, 462 (App. Div. 1992), certif. denied, 133 N.J. 434 (1993). "A default judgment will be considered void when a substantial deviation from service of process rules has occurred, casting reasonable doubt on proper notice Such a judgment will usually be set aside under R. 4:50-1(d)." Jameson, 363 N.J. Super. at 425 (citations omitted). "If a judgment is void in this fashion, a meritorious defense is not required to vacate under the rule." M & D Associates, supra, 366 N.J. Super. at 353 (citing Jameson, 363 N.J. Super. at 425).

R. 4:4-4 spells out the primary method of obtaining in personam jurisdiction in civil cases brought in the Superior Court of New Jersey. As to individuals, personal service must be made as follows:

Upon a competent individual of the age of 14 or over, by delivering a copy of the summons and complaint to the individual personally, or by leaving a copy thereof at the individual's dwelling place or usual place of abode with a competent member of the household of the age of 14 or over then residing therein, or by delivering a copy thereof to a person authorized by appointment or by law to receive service of process on the individual's behalf;

R. 4:4-4(a) (emphasis added). In the event a plaintiff cannot effect service in accordance with R. 4:4-4(a), a plaintiff may pursue alternative or substituted methods of personal service conditioned on providing the required affidavit of due diligence detailing the efforts undertaken to serve a party, as more specifically set forth in R. 4:4-5(b).⁵

"The requirements of the rules with respect to service of process go to the jurisdiction of the court and must be strictly complied with. Any defects . . . are fatal and leave the court without jurisdiction and its judgment void." Berger v. Paterson Veterans Taxi Serv., 244 N.J. Super. 200, 204 (App. Div. 1990) (quoting Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433, 493, cert. denied, 344 U.S. 838, 73 S. Ct. 25, 97 L. Ed. 652 (1952)). The court lacks jurisdiction over a defendant and the authority to enter judgment if the defendant was not properly served with process. City of Passaic v. Shennet, 390 N.J. Super. 475, 483 (App. Div. 2007). "Personal service is a prerequisite to achieving in personam jurisdiction[.]" Berger, supra, 244 N.J. Super. at 204-05; R. 4:4-4(a). "The primary method of obtaining in personam jurisdiction over a defendant in this State is by causing the summons and complaint to be personally served[.]" R. 4:4-4(a).

In cases where a defendant asserts defects in service of process, due process may be implicated, and further showings, such as that of a meritorious defense, may not be required. Pressler & Verniero, Current N.J. Court Rules, comment 5.4.2 on R. 4:50-1(d) (2012) (citing Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80, 108 S. Ct. 896, 99 L. Ed.2d 75 (1988)).

⁵ R. 4:4-4(b) authorizes personal service by the simultaneous mailing of certified and regular mail, and by court order, among other methods. In addition, R. 4:4-5 authorizes personal service by publication in a newspaper of general circulation in the county where the action is venued.

Here, plaintiff did not properly effect service on defendants Sammy and Liza in accordance with R. 4:4-4(a) because they were not residing at the Property when the process server left the Complaint with Sammy's brother John. In other words, the Property is not Sammy's or Liza's "usual place of abode," and therefore service was not properly made against them. Plaintiffs' violations of the New Jersey Court Rules regarding service of process were not mere technical defects. The improper and defective service of process in this case deprived the Court of in personam jurisdiction against Sammy and Liza. Because the Court never obtained in personam jurisdiction over Sammy and Liza, the Tax Foreclosure Judgment obtained against them is absolutely void and of no legal effect for any purpose. See Garza v. Paone, 44 N.J. Super. 553, 557 (App. Div. 1957); see also Berger, 244 N.J. Super. at 204. Thus, the Court should deem the Final Judgment void pursuant to R. 4:50-1(d).

Sammy's and Liza's due process rights to redeem the outstanding tax lien will be nullified absent the Court declaring the Final Judgment and all preceding orders void. As previously emphasized, Sammy and Liza are immediately prepared to redeem the outstanding tax lien in lump sum as evidenced by the \$200,000 deposit made today into their lawyer's trust account. Absent the opportunity to redeem the tax lien, Sammy and Liza will suffer irreparable harm and prejudice. By voiding the judgment and all preceding orders thereby enabling Sammy and Liza to immediately redeem plaintiff's outstanding tax lien in lump sum from the funds deposited in their lawyer's trust account, the Court can evenly dispense justice to all parties. In fact, there is precedent for requiring more careful scrutiny of the validity of service of process in a tax foreclosure case when, as here, there is there is "a tremendous disparity between the

amount due on the tax certificates and the value of the property subject to foreclosure.” M & D Associates, supra, 366 N.J. Super. at 366.

In contrast, vacating the Final Judgment will not result in any prejudice to plaintiff because defendants are immediately prepared to redeem the total outstanding amount necessary to satisfy plaintiff’s tax lien in full. See M & D Associates, 366 N.J. Super. at 357 (commenting that vacating the entire tax foreclosure judgment would not cause the tax holder plaintiff to suffer an injustice because plaintiff was entitled to receive the value of its tax certificates, including interest, costs and reimbursement of any taxes paid, and could file another complaint).

POINT III

THE DEFECTIVE SERVICE OF PROCESS ON DEFENDANTS SAMMY ERIK AND LIZA ARIK RENDERS THE TAX FORECLOSURE JUDGMENT VOID AS TO THE REMAINING DEFENDANTS

In M & D Associates, supra, the Appellate Division ruled that defective service of process as to one defendant rendered the judgment void as to both defendants even though service was valid on the other defendant. In that case, the plaintiff properly served one brother Philip Mander by serving his 17-year old stepdaughter at his residence. However, as to the second defendant Carmelo Mander who was Philip’s brother, plaintiff elected to serve process by publication. The appeals court took issue with plaintiff’s affidavit of diligent inquiry, remarking that Carmelo’s New Jersey address was readily obtainable from Division of Motor Vehicle records and the Passaic County Voter Registration Board. 336 N.J. Super. at 355. Inevitably, the appeals court rejected plaintiff’s affidavit of diligent inquiry resulting in the court declaring service by publication improper and rendering the judgment void.

But the appellate court in M & D Associates did not merely render the judgment void as to Carmelo only. Rather, the court declared the entire judgment void. “In view of our decision, the operation of the tax sale law requires that the entire judgment must be vacated as void based upon equitable considerations, despite the fact that only Carmelo suffered defective service.” Id. at 356. The Appellate Division explained:

The tax sale law is clear that any eligible individual is entitled to redeem, and upon such redemption the certificates are cancelled. The transfer of title is contingent upon the non-redemption of the certificates at the time of judgment. Therefore, Carmelo could have unilaterally prevented the entire transfer of title had he had notice of the action and timely redeemed. While Carmelo could have redeemed at any time, even prior to the action, M & D still purported to obtain title by a judgment that did not fully encompass the redemptive rights of all the defendants. Because M & D could have been prevented from obtaining any ownership interests by Carmelo's exercise of his redemption rights, we are satisfied that the entire judgment must be vacated.

Id. (emphasis added).

Likewise, Sammy and Liza could have unilaterally prevented the transfer of title to the Property if they had received notice of the action and timely redeemed. This Court should follow the Appellate Division’s decision in M & D Associates by declaring the Final Judgment void as to all defendants.

POINT IV

ALTERNATIVELY, THE TAX FORECLOSURE JUDGMENT SHOULD BE VACATED AGAINST DEFENDANTS IBRAHIM ARIK AND TURKAN ARIK DUE TO EXCUSABLE NEGLIGENCE AND EXTRAORDINARY CIRCUMSTANCES

Alternatively, the defendants Ibrahim and Turkan submit that they are entitled to relief from the judgment due to excusable neglect under R. 4:50-1(a), and extraordinary circumstances pursuant to R. 4:50-1(f). However, if the Court agrees to follow the holding in M

& D Associates, supra, by declaring at the entire judgment void as to all defendants, then the Court need not address these additional prongs of R. 4:50-1 raised by Ibrahim and Turkan. Further, if redemption is permitted through Sammy and Liza then the issue of vacating the judgment against Ibrahim and Turkan becomes a moot point.

The term “excusable neglect” has been defined as “[c]arelessness . . . attributable to an honest mistake that is compatible with due diligence or reasonable prudence.” Mancini v. EDS, 132 N.J. 330, 335 (1993; see also Tradesmens Nat’l Bank & Trust Co. v. Cummings, 38 N.J. Super. 1, 5 (App. Div. 1955)(excusable neglect means that “which might have been the act of a reasonably prudent person under the same circumstances”).

Ibrahim and Turkan do not read English, and are only capable of speaking minimal conversational English. Their neglect in failing to respond to the foreclosure Complaint and all subsequent orders and notices is excusable under these circumstances, where they trusted their son John to handle all of their mail and bill paying, the Complaint was served on John directly, and John deliberately concealed the foreclosure case from his family members.

Defendants have filed this motion within a reasonable time – less than 6 months of the entry of the Final Judgment, and within two weeks of learning of the foreclosure case. Accordingly, defendants have timely moved to vacate the Final Judgment as per the requirements of R. 4:50-2.

Further, extraordinary circumstances exist that merit vacating the Final Judgment pursuant to R. 4:50-1(f). The New Jersey Supreme Court has laid out the broad contours of R. 4:50-1(f):

[N]o categorization can be made of the situations which would warrant redress under subsection (f). . . . [T]he very essence of (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.

Hous. Auth., supra, 135 N.J. at 286 (quoting Court Inv. Co. v. Perillo, 48 N.J. 334, 341 (1966)). In applying subsection (f), courts must focus on equitable considerations to avoid an unjust result. Hous. Author., supra, 135 N.J. at 294.

The overwhelming disparity between the amount of the tax lien (\$159,855.73) versus the Property's value (\$624,500) would result in a complete windfall for the plaintiff who would stand to profit more than 3 times the amount of its total investment. To the contrary, Ibrahim and Turkan's life savings will be jeopardized in the absence of vacating the Final Judgment and allowing redemption. Since defendants are not asking the Court for a free ride, and instead are ready, willing and able to pay plaintiff every dime to which it is entitled, the principles of equity tip the scales of justice in favor of the defendants. Accordingly, the Court should vacate the Final Judgment against Ibrahim and Turkan.

POINT V

THE COURT SHOULD PERMIT DEFENDANTS TO REDEEM THE TAX SALE CERTIFICATE

In order to redeem a tax sale certificate while a foreclosure action is pending, the redeeming person or entity must be a party to the action. Phoenix Funding, supra, 403 N.J. Super. at 266-267. Since defendants are parties to the case their right to redeem cannot be questioned.

Assuming the Court voids and/or vacates the Final Judgment as to several or all defendants then the Court should allow the defendants, one or more of them, to redeem the tax sale certificate which, according to the most recent information provided by the Borough of

New Milford Tax Collector, is \$159,855.73 as of November 8, 2013. None of the defendants were aware of the redemption date, and thus cannot be bound by the prior Redemption Order fixing January 22, 2013 as the redemption deadline. As previously emphasized, defendants have deposited \$200,000 into their attorney's trust account and thus are in a position to immediately redeem.

CONCLUSION

For the foregoing reasons and authorities cited, the Court should grant defendants' request for a TRO staying execution of the Writ of Possession and prohibiting the sale, transfer or assignment of the Property pending the outcome of the balance of their Order to Show Cause. Ultimately, defendants maintain that the Court should declare the Final Judgment void as to all defendants, and allow them to redeem the tax sale certificate from the \$200,000 escrow proceeds deposited in their lawyer's trust account.

It is undisputed that service of process against Sammy and Liza, made through John, is defective, and that therefore the entire judgment is invalid because these defendants could have and would have redeemed the tax sale certificate had they been aware of the foreclosure case. It is further undisputed that Sammy and Liza were not properly served with subsequent orders issued by the Court, including the Order fixing the date of redemption. Therefore, the Court should permit Sammy and Liza to redeem the tax sale certificate. Otherwise, their due process rights will be eviscerated.

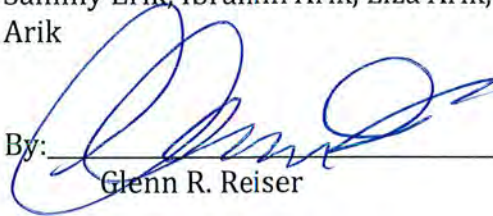
In addition, the parents' failure to respond to the foreclosure Complaint is due to excusable neglect and there exist extraordinary circumstances for vacating the Final Judgment against them and allowing redemption on their part as well. If the Court declares the Final

Judgment void as to all defendants, then the Court need not address the remaining prongs of relief sought by Ibrahim and Turkan under R. 4:50-1.

Respectfully Submitted,

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Arik

By: _____



Glenn R. Reiser

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