STATE OF MICHIGAN

COURT OF CLAIMS

LYNETTE HATHAN and AMY JO DENKINS, and all those similarly situated in the Counties of Keweenaw, Luce, Iosco, Mecosta, Clinton, Shiawaseee, Livingston, and Branch,

Plaintiffs,

v

Case No. 19-000023-MZ

STATE OF MICHIGAN and PATRICIA A. SIMON,

Hon. Christopher P. Yates

Defendants.
_____/

OPINION AND ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY DISPOSITION AND GRANTING PLAINTIFFS' MOTION FOR RECERTIFICATION

The State of Michigan violated the constitutional rights of hundreds of Michigan property owners by foreclosing on their property and then keeping the surplus proceeds resulting from the sale of the property. Our Supreme Court unanimously said so in *Rafaeli, LLC v Oakland Co,* 505 Mich 429, 437; 952 NW2d 434 (2020), ruling that retention of surplus proceeds from a foreclosure sale constitutes an "unconstitutional taking without just compensation under Article 10, § 2 of our 1963 Constitution." The United States Supreme Court unanimously said so in *Tyler v Hennepin Co*, 598 US 631, 639; 143 S Ct 1369; 215 L Ed 2d 564 (2023), concluding that retaining surplus proceeds "effect[s] a 'classic taking in which the government directly appropriates private property for its own use.'" To redress the myriad constitutional transgressions, our Legislature fashioned a statutory mechanism for property owners to obtain the "just compensation" due to them under the

United States and Michigan Constitutions for the takings committed by the State. Specifically, in MCL 211.78t, our Legislature prescribed a process for claimants to recover surplus proceeds that the State or any other governmental entity has unconstitutionally taken.

In MCL 211.78t(11), our Legislature mandated that the process prescribed by MCL 211.78t "is the exclusive mechanism for a claimant to claim and receive any applicable remaining proceeds under the laws of this state." Additionally, because our Supreme Court had not expressly deemed its ruling in *Rafaeli* retroactively applicable, our Legislature barred claims for "foreclosed property transferred or sold . . . before July 18, 2020," i.e., the date after the *Rafaeli* decision was rendered, unless "the Michigan supreme court orders that its decision in Rafaeli . . . applies retroactively." MCL 211.78t(1)(b)(*i*). That bar remained in place for approximately four years until, in 2024, our Supreme Court determined in *Schafer v Kent Co*, ___ Mich ___; ___ NW3d ___ (2024) (Docket Nos. 164975, 165219), that "*Rafaeli* has full retroactive effect." *Id.* at ___; slip op at 21. Although that decision opened the courthouse doors for claimants deprived of surplus proceeds arising from foreclosed property transferred or sold before July 18, 2020, see MCL 211.78t(1)(b)(*i*), it left open the question of class certification in the instant case. See *Schafer*, ___ Mich at ___; slip op at 42. In addition, *Schafer* did not expressly require claimants whose foreclosed property was transferred or sold before July 18, 2020, to comply with the process prescribed by MCL 211.78t. Accordingly, the Court must now decide whether those claimants must follow the process in MCL 211.78t and whether class certification is an appropriate method for pursuing those claims.

The Court must first answer the question about the status of MCL 211.78t as the exclusive method of recovery for plaintiffs in this case before addressing the propriety of class certification. As both sides appear to recognize, the argument in favor of class certification is much stronger if plaintiffs can pursue redress for the unconstitutional taking of surplus proceeds through a process

other than the one prescribed by MCL 211.78t. Indeed, if MCL 211.78t is the one and only process for seeking redress, then plaintiffs must file motions in the various circuit courts where foreclosure occurred, this Court lacks jurisdiction to hear their claims, and class certification is impossible to grant. If, on the other hand, plaintiffs may pursue redress by presenting claims separate from MCL 211.78t, such as inverse condemnation or a direct action under the Michigan Constitution of 1963, then this Court can exercise jurisdiction over the claims against the State and class certification is a viable approach for processing their claims in this Court. Hence, the Court shall first take up the question of the exclusivity of MCL 211.78t and then address class certification.

I. FACTUAL BACKGROUND

On January 26, 2019, Plaintiffs Lynette Hathon and Amy Jo Denkins filed suit in the Court of Claims on behalf of themselves "and all those similarly situated in the Counties of Keweenaw, Luce, Iosco, Mecosta, Clinton, Shiawassee, Livingston, and Branch." Among the seven claims in their complaint were claims for inverse condemnation and unconstitutional taking against the State of Michigan. Plaintiffs alleged that they had owned real property in Shiawassee County, that their property was seized and sold to satisfy "a tax delinquency of approximately $5,200," that the State acted as the foreclosing governmental unit (FGU), that the sale of their property resulted in surplus proceeds beyond the sum required to satisfy their outstanding obligation, and that the State retained the surplus proceeds.[1]

[1] Plaintiffs named as defendants the State and Patricia A. Simon, whom plaintiffs allege served as "the public official who authorizes, handles, and conducts tax foreclosures for opt-out counties and its treasurers, including Keweenaw, Luce, Iosco, Mecosta, Clinton, Shiawassee, Livingston, and Branch Counties[.]" Plaintiffs sued Simon "in her official and personal capacities[,]" but this Court ruled on June 3, 2019, that it lacks jurisdiction to address claims against her in her personal capacity. See *Carlton v Dep't of Corrections*, 215 Mich App 490, 500-501; 546 NW2d 671 (1996).

On June 7, 2019, this Court issued a 15-page opinion and order granting class certification in this case. After that, the world changed on July 17, 2020, when our Supreme Court decided in *Rafaeli* "that our 1963 Constitution protects a former owner's property right to collect the surplus proceeds following a tax-foreclosure sale under Article 10, § 2." *Rafaeli*, 505 Mich at 473. In the wake of that momentous decision, other plaintiffs filed complaints in the Court of Claims seeking just compensation for the State's retention of surplus proceeds.[2] But on December 4, 2020, in light of *Rafaeli*, this Court granted the State's motion to revoke class certification because "numerosity is missing," so plaintiffs were permitted to proceed, but they could do so only on their own behalf.

The next move came from our Legislature. Because our Supreme Court had explained in *Rafaeli* that "[n]othing in our holding today prevents the Legislature from enacting legislation that would require former property owners to avail themselves of certain procedural avenues to recover the surplus proceeds[,]" *id.* at 473 n 108, our Legislature enacted MCL 211.78t, which established such an avenue for recovery of surplus proceeds. After the enactment of MCL 211.78t, this Court once again considered plaintiffs' request for class certification. This Court observed in its written opinion issued on February 22, 2021, that because *Rafaeli* had not yet been given retroactive effect, plaintiffs in this action could not avail themselves of the process prescribed by MCL 211.78t, see MCL 211.78t(1)(b)(*i*), but plaintiffs could instead seek redress on "a valid claim under Const 1963, art 10, § 2." Beyond that, this Court "conclude[d] that plaintiffs can state a claim under art 10, § 2, regardless of whether [2020] PA 256 [i.e., MCL 211.78t] applies or not." Finally, this Court recertified a class under standards prescribed by MCR 3.501(A)(1).

[2] Five other cases are before this Court and, although they are not yet formally consolidated, they are proceeding along with the instant case and those plaintiffs could join a certified class.

The State appealed this Court's decision to certify a class, but our Court of Appeals upheld this Court's ruling. *Breiner v Michigan*, 344 Mich App 387, 411-415; 1 NW3d 336 (2022). Next, the State appealed to our Supreme Court, which "vacate[d] the decision of the Court of Appeals to affirm recertification of plaintiffs' class" and remanded plaintiffs' case "to the Court of Claims to reconsider plaintiffs' motion to recertify the class in light of" our Supreme Court's rulings "in the first instance." *Schafer*, ___ Mich at ___; slip op at 42. In the course of its analysis, our Supreme Court decreed that "MCL 211.78t applies retroactively to all claims that arise from tax-foreclosure sales prior to *Rafaeli*." *Id.* at ___; slip op at 33. Further, our Supreme Court observed that "MCL 211.78t creates a controlling and structured system for the adjudication of tax-foreclosure disputes as the exclusive means of obtaining surplus proceeds." *Id.* at ___; slip op at 35. Against this legal backdrop, this Court must now consider the State's summary disposition motion pursuant to MCR 2.116(C)(4) based on the purported lack of subject-matter jurisdiction as well as plaintiffs' request for class recertification.

II. LEGAL ANALYSIS

As a threshold matter, the State argues that this Court lacks jurisdiction to resolve plaintiffs' claims because MCL 211.78t provides the exclusive mechanism for seeking surplus proceeds and that statute dictates that, to claim surplus proceeds, a claimant must "file a motion in [the] circuit court in which the 'judgement of foreclosure was effective . . . .'" *Schafer*, ___ Mich at ___; slip op at 32 n 99, quoting MCL 211.78t(6). Plaintiffs contend that they need not avail themselves of the process prescribed by MCL 211.78t in order to seek redress from the State. Further, plaintiffs once again ask this Court to recertify a class. This Court shall address those issues in turn, starting with the State's jurisdictional challenge.

A. SUBJECT-MATTER JURISDICTION

By invoking MCR 2.116(C)(4) to request summary disposition, the State has required this Court to examine its subject-matter jurisdiction. "In reviewing a motion under MCR 2.116(C)(4), it is proper to consider the pleadings and any affidavits or other documentary evidence submitted by the parties to determine if there is a genuine issue of material fact." *Toaz v Dep't of Treasury*, 280 Mich App 457, 459; 760 NW2d 325 (2008). This Court must decide "'whether the affidavits, together with the pleadings, depositions, admissions, and documentary evidence demonstrate . . . [a lack of] subject matter jurisdiction.'" *Id.* (alterations in original).

Resolution of the question of jurisdiction depends on analysis of two competing legislative directives. First, MCL 211.78t(11) provides that MCL 211.78t "is the exclusive mechanism for a claimant to claim and receive any applicable remaining proceeds under the laws of this state[,]" and MCL 211.78t(6) states that surplus proceeds must be sought through "a motion in [the] circuit court in which the 'judgement of foreclosure was effective . . . ." *Schafer*, ___ Mich at ___; slip op at 32 n. 99. But, second, in the Court of Claims Act, MCL 600.6401 *et seq.*, our Legislature "expressed its preference for the Court of Claims to serve as the exclusive forum for claims against the state that, until then, parties had litigated in circuit courts." *Christie v Wayne State Univ*, 511 Mich 39, 60; 993 NW2d 203 (2023). Indeed, 2013 PA 164 "amend[ed] MCL 600.6419(1)(a) to create exclusive jurisdiction over 'any claim or demand, statutory or constitutional,' in the Court of Claims 'notwithstanding another law' vesting jurisdiction in circuit courts[.]" *Id.* at 60 n 58. It stands to reason that one of those two directives providing for exclusive jurisdiction must give way to the other. The more logical outcome favors the preeminence of the Court of Claims Act.

By interpreting the exclusivity language of MCL 211.78t(11) to override the clear directive in the Court of Claims Act, this Court would effectively compel the State to appear in circuit courts

scattered across the State of Michigan to defend against claims for surplus proceeds from the state coffers. In contrast, treating the Court of Claims Act as controlling would limit litigation against the State in surplus-proceeds cases to a single forum, i.e., the Court of Claims. More importantly, the Court of Claims Act plainly vests in the Court of Claims the "power and jurisdiction [t]o hear and determine any claim or demand, statutory or constitutional, . . . against the state or any of its departments or officers ***notwithstanding another law that confers jurisdiction of the case in the circuit court.***" MCL 600.6419(1)(a) (emphasis added). To favor the exclusivity language of MCL 211.78t(11) over MCL 600.6419(1)(a) requires disregard for the language of the Court of Claims Act meant to empower the Court of Claims to exercise exclusive jurisdiction over claims against the State.

To be sure, treating the Court of Claims Act as preeminent does not perforce bind the Court of Claims to allow plaintiffs to proceed on a claim entirely divorced from the requirements of MCL 211.78t, such as inverse condemnation. The viability of such a claim is a matter for another day, though, when the State seeks summary disposition under MCR 2.116(C)(8). For now, considering only the threshold question of subject-matter jurisdiction, this Court must deny the State's motion for summary disposition.

B. CLASS CERTIFICATION

Having decided that this Court has subject-matter jurisdiction, the Court must next evaluate plaintiffs' motion for class certification. Plaintiffs have identified the proposed class as follows:

> All persons and entities who, from January 15, 2018 through December 31, 2020, had real property in the counties of Keweenaw, Luce, Iosco, Mecosta, Clinton, Shiawassee, Livingston, and Branch that was foreclosed upon by the State of Michigan under the General Property Tax Act, MCL 211.78, which was then subsequently sold at tax auction for an amount exceeding the minimum bid and who are not refunded the excess/surplus equity as described by the Michigan

Supreme Court in *Rafaeli LLC v Oakland County*, 505 Mich 429; 952 NW2d 434 (2020).

For purposes of this motion, plaintiffs have limited the class to people and entities that owned real property in one of the identified counties that was sold in a tax-foreclosure sale that occurred before December 22, 2020. That date comports with the date set by our Supreme Court in *Schafer*.

To maintain this suit as a class action, plaintiffs must establish the presence of the following five prerequisites identified in MCR 3.501(A)(1): numerosity; commonality; typicality; adequacy; and superiority. *Henry v Dow Chemical Co*, 484 Mich 483, 488; 772 NW2d 301 (2009). All five of the requirements must be met in order for a case to proceed as a class action. *A&M Supply Co v Microsoft Corp*, 252 Mich App 580, 597-598; 654 NW2d 572 (2002).

With respect to numerosity, plaintiffs estimate that 625 people or entities held an ownership interest in a parcel of real property between January 15, 2018, and December 31, 2020, for which the State served as the FGU in a tax-foreclosure action. That is sufficient to satisfy the numerosity requirement. No "particular number of members" is required, "and the exact number of members need not be known as long as general knowledge and common sense indicate that the class is large" enough to make it impractical to require individual lawsuits. *Zine v Chrysler Corp*, 236 Mich App 261, 287-288; 600 NW2d 384 (1999). The State's only disagreement with that conclusion arises from the purported exclusivity of the procedures prescribed in MCL 211.78t, but the Court has not yet concluded that that statute has any bearing on this case.

With respect to commonality, the question is whether "issues of fact and law common to the class 'predominate over those issues subject only to individualized proof.'" *Duskin v Dep't of Human Services*, 304 Mich App 645, 654; 848 NW2d 455 (2014). Plaintiffs cannot merely point to common questions. Instead, they must establish that the common question is "'of such a nature

that is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Id.* In this case, the common question at issue is the legality of the State's surplus proceeds retention. *Rafaeli* answered that question as to liability for the entire proposed class. The issues defendants raise in opposition to a finding of commonality either concern questions that can be addressed with respect to the rights of the class as a whole (e.g., the rights of lienholders), questions that relate to whether a person or entity is appropriate for the class, or damages. None of those issues predominates over the common question of the State's obligation to refund surplus proceeds resulting from the State's sale of real property. Thus, commonality readily exists.

Analyzing typicality and adequacy, the Court disagrees that the factors cited in the State's brief prevent class certification. Plaintiffs' attorneys have devoted years to litigating the core issue, and they are competent to represent the class. Questions concerning the rights of lienholders and how best to address co-owners are matters that will implicate most, if not all, other class members, so they are questions appropriately addressed with the class in future proceedings. Thus, typicality and adequacy have been established.

Finally, the Court agrees with plaintiffs that litigating this case as a class action is superior to requiring each person or entity for whom the State served as the FGU for a tax-foreclosure sale to file a separate suit. Liability and the method for computing damages have already been resolved by our Supreme Court in *Rafaeli*. Hence, superiority manifestly has been established. In sum, this Court concludes that plaintiffs have established each and every requirement for class certification under MCR 3.501(A)(1), so the Court shall once again grant plaintiff's request to certify a class in this case. The Court will soon confer with counsel to discuss notice to the class members.

III. CONCLUSION

For all of the reasons set forth in this opinion, IT IS ORDERED that the State's motion for summary disposition under MCR 2.116(C)(4) is denied, plaintiffs' motion for class recertification is granted, and proposed class counsel is reappointed.

IT IS ORDERED

This is not a final order. It does not resolve the last pending claim or close the case.

Date: 1/15/25

P41017

Hon. Christopher P. Yates
Judge, Court of Claims