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STATE OF MICHIGAN

COURT OF APPEALS

In re PETITION OF OSCEOLA COUNTY TREASURER FOR FORECLOSURE.

OSCEOLA COUNTY TREASURER,

Petitioner-Appellee,

v

BRIAN FRICK and ESTATE OF JEAN ELLEN POTTER,

Claimants-Appellants.

UNPUBLISHED
June 20, 2024

No. 363873
Osceola Circuit Court
LC No. 20-015828-CZ

Before: MALDONADO, P.J., and K. F. KELLY and REDFORD, JJ.

PER CURIAM.

Claimants, Brian Frick and the Estate of Jean Ellen Potter, appeal by delayed leave granted[1] the circuit court's orders denying their motions for distribution of proceeds remaining after the tax-foreclosure sales of their properties and the satisfaction of their tax debts and related costs. On the basis of this Court's published opinions in *In re Petition of Barry Co Treasurer for Foreclosure*, ___ Mich App ___; ___ NW2d ___ (2024) (Docket No. 362316), and *In re Petition of Muskegon Co Treasurer for Foreclosure*, ___ Mich App ___; ___ NW2d ___ (2023) (Docket No. 363764), we affirm.

I. FACTUAL BACKGROUND

In 2020, the Michigan Supreme Court held that former owners of properties sold at tax-foreclosure sales for more than what was owed in taxes, interests, penalties, and fees had "a cognizable, vested property right to the surplus proceeds resulting from the tax-foreclosure sale of

[1] *In re Petition of Osceola Co Treasurer for Foreclosure*, unpublished order of the Court of Appeals, entered June 20, 2023 (Docket No. 363873).

their properties." *Rafaeli, LLC v Oakland Co*, 505 Mich 429, 484; 952 NW2d 434 (2020). This right continued to exist after fee simple title to the properties vested with the foreclosing governmental unit (FGU). The FGU's "retention and subsequent transfer of those proceeds into the county general fund amounted to a taking of plaintiffs' properties under Article 10, § 2 of [Const 1963]," and the former owners were entitled to just compensation in the form of the return of the surplus proceeds. *Id*. at 484-485. When the Court decided *Rafaeli*, the General Property Tax Act (GPTA), MCL 211.1 *et seq*., did not provide a means by which property owners could recover their surplus proceeds.

In response to the decision in *Rafaeli*, the Legislature passed 2020 PA 255 and 2020 PA 256, effective immediately on December 22, 2020. With the passage of 2020 PA 256, the Legislature added MCL 211.78t to the GPTA. MCL 211.78t provides the procedures that foreclosed property owners must follow in order to recover any proceeds that remain after the tax-foreclosure sale of their properties and the satisfaction of their delinquent taxes, interest, penalties, and fees. Former owners of properties sold after July 17, 2020, who wish to recover any remaining proceeds must first file a notice of intent to claim the proceeds (Form 5743) by the July 1 immediately after the foreclosure of their properties. MCL 211.78t(2). No later than the January 31 after the properties are sold or transferred, the FGU must inform "claimants," i.e., former property owners who timely filed Form 5743, MCL 211.78t(12)(a), of any remaining proceeds and that, to recover theses proceeds, the claimants must file a motion with the circuit court in the foreclosure proceeding. MCL 211.78t(3). This motion must be filed no later than the May 15 after the properties are sold or transferred. MCL 211.78t(4). At the end of this claim period, the FGU responds by verifying that claimants timely filed Form 5743 and identifying any remaining proceeds. MCL 211.78t(5)(i). The circuit court then holds a hearing to determine the relative priority of the claimants' interests in any remaining proceeds. After requiring the payment of a sales commission to the FGU of 5% of the amount for which the property was sold, the trial court then allocates any remaining proceeds in accordance with its determination of priority, and orders the FGU to pay the remaining proceeds to claimants in accordance with the trial court's determination. MCL 211.78t(9).

In this case, there are two claimants each of whom owned real properties in Osceola County and fell behind on their property taxes.

A. CLAIMANT BRIAN FICK

Petitioner, acting as the FGU, foreclosed on Claimant Fick's property, effective March 31, 2021. Petitioner also sent Frick two notices by first-class mail informing him of his right to recover any proceeds that remained and of the necessity of notifying the FGU of his intent to claim the proceeds by filing Form 5743 by July 1, 2021. Frick did not provide timely notice. Frick's foreclosed property was sold at auction for $27,750. After the deduction of his tax delinquency and related costs, and the 5% sales commission authorized by MCL 211.78t(9), the remaining proceeds were $23,501.74.

Frick filed a verified motion to disburse remaining proceeds on May 10, 2022. Petitioner opposed the motion on the basis that Frick did not comply with MCL 211.78t(2)'s July 1 deadline for filing his notice of intent. Frick filed supplemental briefing in which he argued that MCL

211.78t was not the exclusive means of recovering proceeds, and, if it was, it was unconstitutional on various grounds.

B. CLAIMANT ESTATE OF JEAN ELLEN POTTER

Petitioner, acting as the FGU, foreclosed on the property of the Estate of Jean Ellen Potter, effective March 31, 2021. Petitioner also sent the Estate of Ms. Potter two notices by first-class mail informing the Estate of its right to recover any proceeds that remained and of the necessity of notifying the FGU of its intent to claim the proceeds by filing Form 5743 by July 1, 2021. The Estate timely provided notice.

The Estate's property was sold at auction for $43,000. The proceeds remaining after deduction of the Estate's tax delinquency and related costs and the 5% sales commission were $37,564.50. Petitioner sent the Estate the notice required under § 78t(3).

The Estate moved to disburse remaining proceeds on June 23, 2022, suggesting that the wrongful death-saving provision in MCL 600.5852 tolled the filing deadline in § 78t(4). Petitioner opposed the Estate's motion on the basis that the motion was well beyond the May 15 deadline and that the death-saving provision did not apply. The Estate also filed supplemental briefing in which they argued that MCL 211.78t was not the exclusive means of recovering proceeds, and, if it was, it was unconstitutional on various grounds.

After hearing oral argument on claimants' motions, the trial court agreed with petitioner's arguments and entered orders denying claimants' motions.

Claimants now appeal by delayed leave granted.

II. LEGAL ANALYSIS

On appeal, claimants assert that: (1) the trial court erred when it interpreted and applied MCL 211.78t; (2) the deadlines under § 78t(2) and (4) violate procedural and substantive due process; and (3) petitioner's retention of claimants' proceeds amounted to an unconstitutional taking.

We review de novo questions of constitutional law. See *Bonner v Brighton*, 495 Mich 209, 221; 848 NW2d 380 (2014). We also review de novo matters of statutory interpretation, construction, and application. *Johnson v Johnson*, 329 Mich App 110, 118; 940 NW2d 807 (2019). "Statutes are presumed to be constitutional, and we have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Calhoun Co v Battle Creek,* 338 Mich App 736, 743; 980 NW2d 561 (2021) (quotation marks and citation omitted).

A. EXCLUSIVITY OF MCL 211.78t

Claimants first contend that the trial court erred when it interpreted and applied MCL 211.78t as the exclusive means of recovering the proceeds that remained from the tax-foreclosure sales of their properties after their tax debts and associated costs were paid. We disagree.

This Court recently stated that § 78t " 'is the *exclusive mechanism* for a claimant to claim and receive any applicable remaining proceeds under the laws of this state.' " *Muskegon Co*, ___ Mich App at ___; slip op at 4, quoting MCL 211.78t(11). The Legislature is presumed to have intended the meaning that it plainly expressed, and in MCL 211.78t(11), "our Legislature's own words could hardly be clearer[.]" *Muskegon Co*, ___ Mich App at ___; slip op at 4.

Claimants contend that alternate means of recovering proceeds is suggested by: (1) the difference between *Rafaeli*'s "surplus proceeds" and the statute's "remaining proceeds," and (2) MCL 211.78t(12)'s definition of "claimants," as a subset of foreclosed property owners, when read together with the permissive "may" in MCL 211.78t(1). On the basis of these differences, claimants contend that, even if MCL 211.78t is the exclusive means for recovering remaining proceeds if they choose to do so, there still exist alternate means for foreclosed property owners to recover surplus proceeds.

As this Court explained in *Muskegon Co*, to the extent that claimants assert an ambiguity between "remaining proceeds" and "surplus proceeds," this argument is actually aimed at whether 2020 PA 256 addressed the constitutional infirmity of the prior GPTA; it has "no bearing on the separate question of whether our Legislature intended its amendment [to the GPTA] to be the exclusive mechanism for a former property owner to pursue a constitutional claim." *Id*. at ___; slip op at 5. We also reject claimants' interpretation of the use of "may" in MCL 211.78t(1) as signaling an alternate means of recovering remaining proceeds. Rather, it acknowledges that there are valid reasons why former property owners might exercise their discretion by not submitting Form 5743. As did the respondents in *Muskegon Co*, claimants in this case err by assuming "that the alternative to pursuing a claim under MCL 211.78t was to pursue a claim by some other means—rather, their alternative was not to claim an interest in the foreclosed property in the first place." *Id*.

B. CONSTITUTIONAL ARGUMENTS

Claimants next contend that the retention of their proceeds results in an unconstitutional taking and that MCL 211.78t(2) violates procedural and substantive due process. These arguments are unavailing.

Turning first to claimants' allegations that MCL 211.78t violates their rights to substantive due process, this Court recently observed that "[w]hen, as here a constitutional claim is covered by a specific constitutional provision . . . the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *Muskegon Co*, ___ Mich App at ___; slip op at 9 (quotation marks and citation omitted). Claimants' constitutional claims, therefore, must be analyzed under the Takings Clause and under guarantees of procedural due process rather than as violations of substantive due process. See *id*.; see also *Barry Co*, ___ Mich App at ___; slip op at 3.

Both the United States and Michigan Takings Clauses prohibit taking private property for public use without just compensation. US Const, Ams V and XIV; Const 1963, art 10, § 2. These provisions "do not prevent the government from establishing rules requiring property owners to take an affirmative act to preserve their rights in property." *Barry Co*, ___ Mich App at ___; slip op at 4. There is no compensable taking when there exists "a statutory path for property owners

to recover surplus proceeds, but the property owners fail[] to avail themselves of that procedure." *Muskegon Co*, ___ Mich App at ___; slip op at 10, citing *Nelson v New York City*, 352 US 103, 110; 77 S Ct 195; 1 L Ed 2d 171 (1956).

The Legislature provided a statutory pathway for claimants to recover any surplus proceeds due them, and it is undisputed that petitioner provided claimants with notice that informed them of their rights to claim remaining proceeds and the steps to take to exercise their rights. "The first step toward recovery was the minimally burdensome requirement of informing [petitioners] of the intent to assert a claim for any excess proceeds through the timely submission of Form 5743." *Muskegon Co*, ___ Mich App at ___; slip op at 10. Frisk did not avail himself of this opportunity by submitting a timely notice of intent, and the Estate, although it submitted a timely notice of intent, did not timely move for the disbursement of remaining proceeds under § 78t(4). Neither claimant took advantage of the opportunity provided to recover proceeds by complying with the statutory process. Therefore, following the reasoning in *Muskegon Co*, claimants did not suffer a compensable taking. See *id*.

Claimants argue that the reasoning in *Nelson* is inapplicable to the present case because 2020 PA 256 infringes on a constitutional guarantee. They also argue that the *Rafaeli* Court considered the reasoning in *Nelson* and rejected its application. This Court rejected both these arguments in *Muskegon Co*. *Id*. We reject these arguments for the same reasons.

As to due process, the United States and Michigan Constitutions "guarantee that no state shall deprive any person of life, liberty or property, without due process of law." *Cummins v Robinson Twp*, 283 Mich App 677, 700; 770 NW2d 421 (2009) (quotation marks and citation omitted). See US Const, Ams V and XIV; Const 1963, art 1, § 17. These guarantees have procedural and substantive components that protect individual liberty and vested property interests "against certain government actions regardless of the fairness of the procedures used to implement them." *Cummins*, 283 Mich App at 700 (quotation marks and citation omitted). See also *Souden v Souden*, 303 Mich App 406, 413; 844 NW2d 151 (2013). Procedural due process is a flexible concept and "calls for such procedural protections as the particular situation demands." *Muskegon Co*, ___ Mich App at ___; slip op at 8 (quotation marks, citation, and brackets omitted).

Courts generally consider the following three factors to determine what is required by procedural due process:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." [*Id*., quoting *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976).]

This Court held in *Muskegon Co*, ___ Mich App at ___; slip op at 7-8, that the statutory scheme for recovering remaining proceeds set up by our Legislature and followed by the FGU satisfied due process. We need not repeat that analysis here. Claimants have not argued that petitioner did not follow the statutory scheme. Rather, they contend that the notices provided by FGUs are

inadequate because of their timing and because of the information that they do not contain. Claimants' arguments lack merit.

Regarding timing, claimants contend that only notices sent after the tax-foreclosure sale can satisfy due process because only then will it be known whether proceeds exist for former property owners to claim. Claimants are incorrect. *Rafaeli*, 505 Mich at 476-477, held that claimants' right to collect surplus proceeds existed before the tax-foreclosure sale, even if it was not yet a *compensable* claim. See *id*. (stating that, although "plaintiffs' takings claim was not compensable until their properties sold for an amount in excess of their tax debts, that lack of an immediate right to collect the surplus proceeds does not mean that plaintiffs had no right to collect the surplus proceeds at all"). Accordingly, claimants were not deprived of due process simply because petitioner's notices were sent to claimants before the tax-foreclosure sale.

As to the content of the notices, claimants argue that due process is not satisfied because FGUs are not required to inform former property owners about the impending confiscation of their proceeds and because petitioner's notice did not inform them that their proceeds would be confiscated. Claimants also contend that MCL 211.78t(3) is inadequate because it requires FGUs to send notices only to the subset of former property owners who timely filed Form 5743 rather than to all former property owners. Not only do claimants' arguments mischaracterize petitioner's compliance with the distribution requirements in MCL 211.78m(8) as "confiscation," but their arguments ignore the remedial purpose of MCL 211.78 and the due-process protections included in the statutory construct. These arguments reveal that claimants want a different process. They want a postsale process in which FGUs inform foreclosed property owners of the results of the tax-foreclosure sale or transfer of their properties and provide a means for them to claim excess proceeds, even if they did not timely file Form 5743. See *Muskegon Co*, ___ Mich App at ___; slip op at 8-9. Although some states have adopted such systems, Michigan has not. "This Court lacks the authority to override the Legislature's policy choice." *Barry Co*, ___ Mich App at ___; slip op at 4. See also *Muskegon Co*, ___ Mich App at ___; slip op at 9.

Claimants argue that even if MCL 211.78t satisfies due process, enforcement of the deadlines in §§ 78t(2) and (4) should be set aside because they result in consequences that are unduly harsh and unreasonable. We disagree.

The "harsh-and-unreasonable exception" has been applied to statutes of limitations and to notice requirements when the consequences of strictly enforcing a period are so harsh and unreasonable that it " 'effectively divested plaintiffs of the access to the courts intended by grant of the substantive right.' " *Muskegon Co*, ___ Mich App at ___; slip op at 5-6, quoting *Rusha v Dep't of Corrections*, 307 Mich App 300, 311; 859 NW2d 735 (2014).

This Court addressed the same argument in *Muskegon Co* and concluded that "the circumstances of [*Muskegon Co*] do not justify application of the harsh-and-unreasonable consequences exception to the statutory notice requirement of MCL 211.78t(2)." *Muskegon Co*, ___ Mich App at ___; slip op at 7. Because Frick's circumstances are identical with the respondents' in *Muskegon Co*, we reject application of the harsh-and-unreasonable-consequences exception to the enforcement of the July 1 deadline in § 78t(2). The notice requirement in § 78t(2) affects foreclosed property owners' remedy; it does not deprive them of a constitutionally protected right. Rather, § 78t(2) could be said to supplement a former property owner's right to

proceeds remaining after the tax-foreclosure sale of his or her property by imposing a "reasonable, minimal burden on former owners to advise the FGU of their intent to exercise that right by claiming any remaining proceeds." *Id*.

The Estate contends that the trial court should not have enforced § 78t(4)'s May 15 deadline for filing a claim for disbursement because: (1) the Estate did not have a personal representative at the time of foreclosure; (2) the first personal representative died three weeks into his appointment; and (3) enforcing the deadline despite the Estate's having timely notified petitioner of its intent to exercise its right to collect surplus proceeds resulted in petitioner's "confiscation" of more than $37,500. These arguments are unavailing.

That the Estate did not have a personal representative before the foreclosure is irrelevant because the Estate filed a notice of intent that was timely under § 78t(2). The Estate's first personal representative died before the start of the period for filing a claim for the disbursement of proceeds under § 78t(4). The second personal representative was appointed in February 2022, when there remained $2^1/_2$ months to file a claim that would have been timely under § 78t(4). Yet, the claim was not filed until June 2022. Enforcement of § 78t(4)'s deadline did not "effectively divest" claimants of their right to recover surplus proceeds. Rather, the Estate failed to enforce its constitutional right, and its "failure was [the Estate's], not petitioner's and not our Legislature's." *Id*. at ___; slip op at 12.

C. REMAINING ARGUMENTS

The Estate contends that the deadlines under MCL 211.78t are tolled by application of the death-saving provision, MCL 600.5852(1). The Estate is incorrect.

This Court recently held that the savings provision in MCL 600.5852 does not apply to toll the July 1 filing deadline under MCL 211.78t(2). *Barry Co*, ___ Mich App at ___; slip op at 6-7. MCL 600.5852(1) provides:

> If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action that survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run.

This Court reasoned that application of the death-saving provision is precluded by "the Legislature's provision of an exception to the preclusive effect of MCL 211.78t(2) in MCL 211.78*l*(1) . . . ." *Barry Co*, ___ Mich App at ___; slip op at 6. The Estate in the present case met the July 1 deadline for filing Form 5743, but it did not meet § 78t(4)'s May 15 deadline for filing a claim to disburse the remaining proceeds. The same exception to the preclusive effect of the deadline in § 78t(2) applies to the May 15 deadline in § 78t(4). Under § 78t(4), claimants must file their claims for disbursement by May 15 unless they did not receive the required notices of the show-cause hearing and the judicial-foreclosure hearing. In which case, claimants have two years to file a claim. MCL 211.78*l*(1). The Legislature's provision of an exception to the preclusive effect of the May 15 deadline in MCL 211.78*l*(1) "necessarily prohibits the application of any other exceptions, including the death-saving provision." *Barry Co*, ___ Mich App at ___;

slip op at 6. In addition, "the death-saving provision applies only to claims that survive the decedent's death by operation of law." *Id.* at ___; slip op at 7. Any claim to remaining proceeds accrued after foreclosure of the property, which occurred more than 10 years after Ellen Jean Potter died. Because no claim arose before her death, there was no claim to survive her death.

Lastly, claimants contend that relief from petitioner's unjust enrichment is warranted, either by the imposition of a constructive trust or the award of a money judgment. Claimants' position is without merit.

Unjust enrichment is a cause of action to correct a defendant's unjust retention of a benefit owed to another. *Wright v Genesee Co*, 504 Mich 410, 417; 934 NW2d 805 (2019). Unjust enrichment is grounded in the idea that a party "shall not be allowed to profit or enrich himself inequitably at another's expense." *McCreary v Shields*, 333 Mich 290, 294; 52 NW2d 853 (1952) (quotation marks and citation omitted).

A cause of action for unjust enrichment is not available to respondents under the circumstances of this case. "When a statute governs resolution of a particular issue, a court lacks the authority to invoke equity in contravention of the statute." *Thomas v Dutkavich*, 290 Mich App 393, 413 n 9; 803 NW2d 352 (2010). As already indicated, the Legislature provided an exclusive, validly enacted, constitutional scheme by which former property owners can recover the proceeds that remain after tax-foreclosure sales and the payment of the property owners' delinquent taxes and associated costs. Petitioner complied with the scheme; claimants did not. Under these circumstances, an equitable remedy would contravene the Legislature's clearly stated intent and essentially reduce MCL 211.78t to a nullity. See *Muskegon Co*, ___ Mich App at ___; slip op at 5.

Moreover, contrary to claimants' implication, petitioner was not "unjustly enriched." See *Wright*, 504 Mich at 417. The statutory scheme created by our Legislature mandates how FGUs are to use the monies from tax-foreclosure sales, and it leaves FGUs without the discretion to disburse remaining proceeds to foreclosed property owners who did not comply with the requirements of MCL 211.78t. See MCL 211.78m(8). Claimants' argument that relief is warranted under a theory of unjust enrichment is essentially another way of arguing that this Court should apply the harsh-and-unreasonable-consequences exception to bar enforcement of the July 1 deadline. This Court rejected this argument in *Muskegon Co*, ___ Mich App at ___; slip op at 5-7, and we do so again in this case.

D. CONCLUSION

We conclude that the trial court did not err by interpreting and applying MCL 211.78t(2) as the sole mechanism under which claimants could recover their surplus proceeds. The statutory scheme established by our Legislature in response to the decision in *Rafaeli* and followed by petitioner passes constitutional muster. Claimants failed to avail themselves of the statutory

protections. Consequently, they failed to enforce their constitutional rights. “The failure is theirs, not petitioner’s or our Legislature’s.” *Id*. at ___; slip op at 12.

Affirmed.

/s/ Allie Greenleaf Maldonado
/s/ Kirsten Frank Kelly
/s/ James Robert Redford