

No. 20-_____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2019

TATIANA REITER, an Individual, and WYECZESLAV RAYTER, an Individual,

Petitioners,

v.

STATE OF NEW JERSEY,

Respondent.

On Petition for Certification to the Supreme Court of New Jersey

PETITION FOR A WRIT OF CERTIORARI

John M. Mills III
Counsel of Record
Attorney ID: 010411976
Mills & Mills P.C.
One Western Avenue
Morristown, NJ 07960
P: (973) 538-0950

Counsel for Petitioners
Tatiana Reiter and Wyeczeslav Rayter

I. QUESTION PRESENTED

As a result of a state court proceeding, the Township of East Hanover was granted a tenancy in common interest with Wyeczeslav Rayter, one of the defendants below, thereby terminating a tenancy by the entirety property interest in a marital home between husband and wife, despite the fact that he was adjudicated to be in compliance with all state statutes, regulations, and township ordinances. This decision violated Wyeczeslav Rayter's constitutional protections under the Fifth and Fourteenth Amendments of the United States Constitution as well as the New Jersey Constitution, Article I.

The question presented is whether a temporary, notwithstanding extended, absence by one spouse from a marital residence justifies a court ordered termination of a tenancy by the entirety property interest in a marital home due to only one spouse, namely Tatiana Reiter, allegedly violating the owner occupancy requirements of an affordable housing agreement where the husband maintained said property at all times as his primary residence.

II. PARTIES TO THE PROCEEDING AND LIST OF DIRECTLY RELATED PROCEEDINGS

The petitioners in this case are Tatiana Reiter and Wyeczeslav Rayter, husband and wife.

The respondent is State of New Jersey. State of New Jersey became the plaintiff below when the matter was transferred from the municipal court to the Morris County Superior Court.

The following proceedings are directly related to this case:

1. Court: Supreme Court of New Jersey
Docket Number: 084111
Case Caption: State of New Jersey, Plaintiff-Respondent, v. Tatiana Reiter, an individual, and Wyeczeslav Rayter, an individual, Defendants-Petitioners.
Date of Judgment: June 30, 2020
2. Court: Superior Court of New Jersey, Appellate Division
Docket Number: A-2167-18T3
Case Caption: State of New Jersey, Plaintiff-Respondent, v. Tatiana Reiter, an individual, and Wyeczeslav Rayter, an individual, Defendants-Appellants.
Date of Judgment: January 15, 2020
3. Court: Superior Court of New Jersey, Chancery Division, Morris County
Docket Number: MRS-C-71-17
Case Caption: State of New Jersey, Plaintiff(s), vs. Tatiana Reiter, an individual, and Wyeczeslav Rayter, an individual, Defendant(s).
Date of Judgment: December 11, 2018

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V. PETITION FOR A WRIT OF CERTIORARI

Tatiana Reiter and Wyeczeslav Rayter respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of New Jersey denying the petition without comment.

VI. OPINIONS BELOW

The decision of the Supreme Court of New Jersey denying a petition for certification of the judgment in A-002167-18 (App. 1a) is unreported, Slip Copy, 2020 WL 3846605. The decision of the Superior Court of New Jersey, Appellate Division on the merits (App. 2a to 20a) is not reported in Atl. Rptr., 2020 WL 224595. The decision of the Superior Court of New Jersey, Chancery Division addressing the tenancy by the entirety issue (App. 21a to 23a and App. 24a to 42a) is unreported.

VII. JURISDICTION

Tatiana Reiter and Wyeczeslav Rayter's petition for certification to the Supreme Court of New Jersey was denied on June 30, 2020. Tatiana Reiter and Wyeczeslav Rayter invoke this Court's jurisdiction under 28 U.S.C. § 1257, having timely filed this petition for a writ of certiorari within ninety days of the Supreme Court of New Jersey Court's judgment.

VIII. CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The New Jersey Constitution of 1947, Article I, para. 20:

Private property shall not be taken for public use without just compensation. Individuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners.

IX. STATEMENT OF THE CASE

This unconstitutional regulatory taking case began in 2016 when the Plaintiff below (hereinafter the “Township” or “Township of East Hanover”) received an anonymous letter stating that Tatiana Reiter and Wyeczeslav Rayter (hereinafter “Reiter” and “Rayter” individually or “Petitioners” collectively) were allegedly violating the Affordable Housing Act by failing to occupy their marital home as their primary residence in violation of statutes and regulations under the affordability controls. As husband and wife, the parties purchased an affordable housing unit in the Hanover Park condominium complex in the Township of East Hanover in Morris County on June 5, 1996. The Unit Deed incorporated the Master Deed, stating the property was subject to resale and rental controls of the Fair Housing Act (hereinafter “FHA”), N.J.S.A. 52:27D-301 to -329.19, regulations adopted by the Council on Affordable Housing (hereinafter “COAH”), and Township Ordinance 15-1989.

The Unit Deed further stated that Petitioners must occupy the unit as their primary residence per all applicable lease provisions, including their Affordable Housing Agreement (AHA) restrictions. The AHA terms, restrictions, and covenants applied for the entire period unless “extended by municipal resolution Such municipal resolution shall provide for a period of extended restrictions and shall be effective upon filing with [COAH] and the Authority.” Additionally, “Neither the Owner nor the Authority shall amend or alter the provisions of this [AHA] without first obtaining the approval of the other party[,]” unless a municipal resolution

extends the restrictions. In April 2002, the parties separated, and Reiter moved to another home in Livingston.

The Township extended the affordability controls and deed restrictions on the property on December 14, 2014 through a Declaration of Restrictive Covenant (“Declaration”) and Resolution 71-2014 (“Resolution”). The Declaration said that “the deed restrictions on the units have been extended, and the units are subject to extended affordability controls limiting the sale, use and re-sale of the units” for a period of 30 years. Thus, the restrictions on Petitioners’ property, which expired in 2016, would remain in effect for another three decades.

On February 6, 2017, the Township served Petitioners with eight summonses, for alleged Township Code violations, with four against each party concerning improperly leasing the affordable unit and failing to occupy the unit as their primary residence. The Township filed a complaint in municipal court on September 20, 2017, alleging violations of the State’s affordable housing regulations. Rayter certified in response that he had continuously resided at the Hanover Park address since 1996, living there with his wife and children only, and that he had never resided at any other property, never leased the property to anyone, and had complied with all restrictions. He admitted his wife, Reiter, moved out of the unit several years previously and has not returned, although he still believes a reconciliation may occur. The Township moved to transfer the case to the Superior Court, Chancery Division.

The trial court determined at the October 15, 2018 bench trial that the Township lawfully extended the affordability controls, and that Petitioners had not

been leasing the property to others. On December 11, 2018, all counts in the complaint were dismissed with prejudice against Rayter and the court found that the Hanover Park unit was his primary residence since it was acquired on June 5, 1996. However, the court found that Reiter moved out of the Hanover Park unit in 2002 and had not made the unit her primary residence since then, in violation of the FHA. Thus, the court terminated Reiter's interest in the unit and transferred same to the Township, as a tenant by the entirety with Rayter. The court stated that if Reiter predeceased Rayter, the Township's interest in the property ceased . . . however, if Rayter died first, the Township would own the property. App. 40a.

Petitioners appealed the decision, arguing that the trial judge erroneously held that the affordability controls and deed restrictions governing the unit should not expire on the date stated in the AHA, and by ordering a partition of the property, which transferred Reiter's interest as a tenant by the entirety to the Township. Petitioners also argued that the judge's remedy was an unconstitutional regulatory taking in violation of the New Jersey and United States Constitutions.

The appellate division affirmed in part, reversed in part, and remanded. The appellate court first affirmed the trial court's decision that the Township's unilateral extension of the June 4, 2016 expiration date through the Declaration and Resolution did not exceed its powers. Petitioners argued that they acquired the Hanover Park unit before December 20, 2004, and were thus subject to N.J.A.C. 5:80-26.5(a)(2), under which "[a]ny unit that, prior to December 20, 2004, received substantive certification from COAH, was part of a judgment of compliance . . . or became subject

to a grant agreement or other contract with either the State or a political subdivision thereof, shall have its control period governed by said grant of substantive certification, judgment or grant agreement or contract" App. 11a.

The appellate division disagreed and said the statutes were already enacted, and the unit was thus subject to those statutes and regulations, and the ordinance. The appellate division pointed out that the regulation did not impose affordability controls on homes constructed prior to the FHA's enactment, but Petitioners' home was constructed after the FHA's enactment. Thus, the Township had legal authority, under either the UHAC or the COAH regulations, to unilaterally extend the ... controls on their units." Society Hill at Piscataway Condominium Ass'n, Inc., v. Twp. of Piscataway, 445 N.J. Super. 435, 448-49 (Law Div. 2016).

In this case, on the other hand, the Affordable Housing Agreement stated that restrictions on defendants' unit would last for 20 years, "unless extended" by a municipal resolution. The Master Deed said that the unit was subject to resale and rental controls in the FHA, COAH regulations, and Township ordinances. The Unit Deed said: "By the acceptance of this Deed, the Grantee consents to any future amendments or revisions of the Master Deed or the Bylaws of the Condominium Association ..., which may be required by the laws or governmental agencies of the State of New Jersey in connection with the ... property described" App. 16a. The appellate division ruled that Petitioners' argument was unavailing regarding the Township's extension of affordability controls.

The appellate court then found that the trial court properly applied the remedy of partition under N.J.S.A. 46:3-17.4 and awarded the Township an expectancy interest based on Reiter's forfeited interest. The East Hanover Zoning Ordinance, ch. 95, art. I, § 95-46.2 (1979) states:

Upon the occurrence of a breach of any of the regulations governing the affordable unit by an owner, developer or tenant, the municipality shall have all remedies provided at law or equity, including but not limited to foreclosure, tenant eviction, municipal fines, a requirement for household recertification, acceleration of all sums due under a mortgage, recoupment of any funds from a sale in the violation of the regulations, injunctive relief to prevent further violation of the regulations, entry on the premises, and specific performance.

East Hanover Zoning Ordinance, ch. 95, art. I, § 95-46.2 (1979). The signed AHA states:

In the event of a threatened breach of any of the terms of this Agreement by an Owner, the Authority shall have all remedies provided at law or equity, including the right to seek injunctive relief or specific performance, it being recognized by both parties to this Agreement that a breach will cause irreparable harm to the Authority, in light of the public policies set forth in the [FHA]

App. 17a.

However, the appellate court disagreed with the trial court's decision to substitute the Township as an owner of the unit as a tenant by the entirety. A tenancy by the entirety "is a form of joint property ownership available only to spouses that is created 'when property is held by a husband and wife with each becoming seized and possessed of the entire estate.'" N.T.B. v. D.D.B., 442 N.J. Super. 205, 218 (App. Div. 2015) (quoting Capital Fin. Co. of Del. Valley, Inc. v. Asterbadi, 389 N.J. Super. 219, 227 (Ch. Div. 2006)). Tenants by the entirety have "an undivided interest ... that encompasses the entire property." N.T.B., 442 N.J. Super. at 219.

Yet, each tenant “holds his or her ‘title and interest independently of the others.’” Id. (alteration in original) (quoting Burbach v. Sussex Cty. Mun. Utils. Auth., 318 N.J. Super. 228, 233 (App. Div. 1999)).

A tenant by the entirety “can alienate his or her right of survivorship, and a judgment creditor of either spouse may levy and execute upon such right,” yet neither can “force the involuntary partition of the subject property during the marriage.” N.T.B., 442 N.J. Super. at 218 (citing Asterbadi, 389 N.J. Super. at 227). Partition can occur only when a tenancy by the entirety is dissolved into a tenancy in common. Freda v. Commercial Trust Co., 118 N.J. 36, 45 (1990). If parties take property ownership as tenants by the entirety, but are not married, they become tenants in common, absent language making the ownership a joint tenancy. Balazinski v. Lebid, 65 N.J. Super. 483, 488 (App. Div. 1961). The appellate court thus remanded that issue to the trial court stating, “we reverse the judge’s order making Rayter and the Township tenants by the entirety and remand for entry of an order declaring that they are tenants in common. App. 19a.

Lastly, the appellate division noted Petitioners’ argument that by terminating a tenancy by the entirety and transferring a tenancy in common interest to the Township in a marital home that the innocent spouse’s property interest is unjustly diminished, in violation of the Taking Clauses in the United States and New Jersey Constitutions. App. 19a. Notwithstanding, the appellate division stated, “[i]t is a well-settled principle that [we] will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is

available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.” App. 19a (quoting Nieder v. Royal Indem. Ins., 62 N.J. 229, 234 (1973) (quoting Reynolds Offset Co. v. Summer, 58 N.J. Super. 542, 548 (App. Div. 1959)).

Petitioners appealed the appellate court decision to the Supreme Court of New Jersey seeking certification. On July 2, 2020 the Supreme Court of New Jersey entered an Order denying the petition for certification without comment.

If the appellate decision stands, the result is that Petitioner Rayter’s tenancy by the entirety property interest will be converted into a tenancy in common with the Township, thereby unconstitutionally diminishing the value of his marital home, despite the fact that he was adjudged by the lower court not to have violated any statute, rule, regulation, or Township ordinance.

X. REASONS FOR GRANTING THE WRIT

The extraordinary and unprecedeted decision of the appellate court to gift the Township a tenancy in common interest in the marital home unjustly diminished the value of the property. The decision unfairly penalizes one spouse that was ruled below to have committed no violation of any statute, rule, ordinance or regulation. Furthermore, the ruling failed to address obvious and manifest inequities inherent in the decision. The appellate division wrongfully upheld the trial court’s decision in dissolving the tenancy by the entirety and forcing a partition of the property.

However the married couple in the case at bar was merely estranged. They are not divorced and one spouse temporarily moving out of a marital home, even if for an extended amount of time, should not operate or constitute grounds for the Township to seize the property without any form of compensation to the married couple. The property was continuously occupied by one of the owners, namely Rayter, from the date the husband and wife purchased the property in 1996 to the present. Due to these circumstances, review by this Court is urgently needed.

A. Terminating A Tenancy By The Entirety Interest In A Marital Home Between Husband And Wife And Gifting the Wife's Interest To The Township As A Tenancy In Common Interest To Be Shared Between the Husband And The Township Constitutes An Unconstitutional Taking Without Compensation.

The appellate division failed even to address whether one spouse may be singled out and ruled to be in violation of the owner occupancy affordability controls, while the property in question was continuously occupied by the other spouse as his primary residence. Moreover, the ruling by the appellate division in dissolving Petitioners tenancy by entirety and creating a new tenancy in common with Rayter and the Township as parties in interest was simply not a permissible adjudication under the laws and statutes of New Jersey. Generally, unless such an issue goes to the jurisdiction of the trial court or concerns matters of substantial public interest, the appellate court will not consider it. Nieder, 62 N.J. at 234. However, issues that substantially implicate public interest will be considered on appeal. *See, e.g., State v. Robinson*, 200 N.J. 1, 20-22 (2009). The circumstances of the present case pose

both substantial public interest concerns as well as jurisdiction concerns. Thus, the appellate division erred in not considering the issue.

The issues involving an alleged breach of owner occupancy affordability controls by only one spouse will have important repercussions throughout the United States. Similarly, the remedy imposed in this case vis-à-vis dissolving a tenancy by the entirety, foreclosing one spouses interest, and converting same to a tenancy in common with the township has the ability to affect thousands of residents that own or reside in affordable housing units throughout the country. The issue has the potential to reach and impact so many individuals and families that the lower courts erred in this instance by failing to recognize the decision substantially implicates public interest.

This unique issue has never been raised in this context before and there are no court cases or rulings from either New Jersey or federal jurisdictions. Additionally, the propriety of the decision was not argued or even discussed prior to the ruling of the trial court because the remedy itself was impermissible. The ruling is prohibited by the New Jersey Legislature through promulgated statutes. *See, N.J.S.A. 46:3-17.4.* The trial court overstepped its jurisdiction and authority. Secondly, the outcome of this case is of substantial public concern. The issues relate to the authority of a court to destroy a tenancy by the entirety based solely on the alleged affordability control violations of a temporarily estranged spouse from the marital home. Moreover, the ruling in both the chancery division and appellate division is

contrary to the express language contained in the Township ordinance regarding enforcement of affordable housing regulations. The applicable ordinance reads:

Such judgment shall be enforceable, at the option of the municipality, by means of an execution sale by the Sheriff, at which time the low-and moderate-income unit of the violating owner shall be sold at a sale price which is not less than the amount necessary to fully satisfy and pay off any first purchase money mortgage and prior liens and the costs of the enforcement proceedings incurred by the municipality, including attorney's fees. The violating owner shall have the right to possession terminated as well as the title conveyed pursuant to the Sheriff's sale.

East Hanover Zoning Ordinance, ch. 95, art. I, § 95-46.2(3) (1979). Nowhere does the ordinance authorize termination of a tenancy by the entirety interest of a husband and wife and converting the property interest into a tenancy in common. Furthermore, nowhere in the Township's ordinance does it permit a regulatory taking of someone's property without just compensation. The Township ordinance permits foreclosing an interest, but not under these circumstances, and by means of a sheriff's sale. Not by giving the property to the Township free of charge where Rayter and his family continue to reside. The decision under the facts presented in this case is so onerous and outrageous that review by this Court is necessary.

Assuming *arguendo*, that the forced partition of the property was legal, which it clearly was not, the enforcement of the appellate division's ruling constitutes a regulatory taking in violation of the Taking Clauses contained in the United States and New Jersey Constitutions. The appellate division declined to consider the question by stating that "[i]t is a well-settled principle that [we] will decline to consider questions or issues not properly presented to the trial court when an

opportunity for such presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.” App. 20a (citations omitted). To the contrary, both great public interest and jurisdictional concerns are raised by the lower court’s ruling.

Both the United States Constitution and the Constitution of New Jersey prohibit the taking of private property for public use without just compensation. *See U.S. Const. amend. V.* The New Jersey Constitution contains the prohibition in Article I. N.J. Const. of 1947 art. I, para. 20. There is a distinction between whether the property is taken by eminent domain because it is useful to the public or whether under the police power because it is harmful. The necessity for monetary compensation for loss suffered to an owner by police power restriction arises when restrictions are placed on property in order to create a public benefit rather than to prevent a public harm. New Jersey Builders Ass’n v. Dep’t of Envt’l. Protection, 169 N.J. Super. 76, 96 (App. Div. 1979). When a regulation is enacted in order to prevent harm, it is a proper exercise of the police power and there is no right to compensation for the diminution in the value of the property. *Id.* There is no doubt that “the government need not normally compensate property owners for restrictions placed on property use pursuant to the police power (i.e., for health, safety or welfare of the public).” In re Recycling & Salvage Corp., 246 N.J. Super. 79, 103-04 (App. Div. 1991).

However, if the regulation unjustly reduces the economic value of the property, for example, it only slightly promotes public welfare, but greatly reduces property value, the regulation may be deemed a taking for which compensation is due. *Id.* at

104. The New Jersey Supreme Court noted that affordable housing is a goal no longer merely implicit in the notion of the general welfare. Fair Share Hous. Ctr. Inc. v. Twp. of Cherry Hill, 173 N.J. 393, 409 (2002). The Township taking Reiter's interest in the property without compensating Rayter serves no legitimate public welfare goal. As noted, the nature of the appellate division's ruling in this case is unwarranted and egregious. The issue deals with the authority and jurisdiction of a court to diminish the value of an innocent bystander's real property without any form of compensation as well as constituting great and substantial public concern.

B. Petitioners Did Not Violate The Owner Occupancy Affordability Control Restrictions Because Rayter Continuously Resided in the Affordable Unit As His Primary Residence From The Date The Parties Purchased The Marital Home In 1996 To The Present.

The appellate division failed to address the issue of whether a temporarily estranged spouse can be ruled to be in violation of the owner occupancy affordability control restriction contained in the Unit Deed where one spouse temporarily moved out of the marital residence. The trial court's decisions on issues of law are subject to plenary review. Manalapan Realty, L.P. v. Twp. Comm. Of Manalapan, 140 N.J. 366, 378 (1995). The trial court's interpretation of law and the legal consequences that flow from established facts are not entitled to any special deference. Ibid. (citations omitted). The appellate division first reiterates the ruling of the trial court on this issue, "finding Reiter violated affordability controls and deed restrictions applicable to their affordable housing unit, a condominium located in the Township of East Hanover (Township)." App. 3a.

Without any further explanation, the appellate division summarily and capriciously concludes the issue by stating, “[w]e affirm the trial court’s rulings on these issues.” Id. Secondly, the appellate division recognizes that the “Unit Deed states that defendants must occupy the unit as their primary residence, in accordance with all applicable lease provisions, including their Affordability Housing Agreement (AHA) restrictions.” App. 4a-5a. Lastly, the appellate division mentions the issue during the recitation of facts:

However, as to Reiter, the judge found she moved out of the Hanover Park unit in 2002 and has not used the property as her primary residence since that time, in violation of the FHA. Accordingly, the judge terminated Reiter’s interest in the Hanover Park unit and transferred her interest to the Township, as a tenant by the entirety with Rayter.

App. 9a. There is no legal analysis and no further statements by the appellate division on point regarding this issue. Due to the fact that the trial court’s decisions on issues of law are subject to plenary review and because the trial court’s interpretation of law and the legal consequences that flow from established facts are not entitled to any special deference, the appellate division failed to adequately review this issue.

The Affordability Agreement of the Petitioners defines primary residence as the unit wherein a Certified Household maintains continuing residence for no less than nine months of the calendar year. Rayter testified at trial and also certified that he continuously occupied the property as his primary residence with either his wife and or children since the date they purchased the property. The trial court found that “Mr. Rayter’s primary residence is and has been, since 1996, 30 Katie Court.”

App. 35a. The Unit Deed to the property states that affordable units shall at all times be occupied by the owner and the owner's household.

Rayter and his family maintained the property at all times since the date of acquiring the property in 1996. The rules and regulations are silent upon the possibility of a husband and wife, holding the property as tenants by the entirety, from separating and one party choosing to temporarily vacate the premises. A married couple cannot be forced to live in the same house if they choose to separate. Regardless, Rayter, a certified household member, maintained continuing residence as required pursuant to the applicable affordable housing agreement. Therefore, the Petitioners did not violate the affordability controls because there existed continuous occupancy of the property by Rayter and or his family as a primary residence the entire time.

Therefore, the trial court erred in ruling that Reiter violated the affordability controls. While it is true that Rayter and Reiter are currently estranged, notwithstanding, they are still married and Rayter certified to the fact that they still hope to reconcile. The affordability controls were never breached by Rayter. Therefore, it is posited to this Court that no violation of the affordability controls occurred and the appellate court erred in affirming this ruling.

Consequently, the appellate division erred in failing to adequately review whether an estranged spouse can be held in violation of an owner occupancy restriction for failing to reside at the property. Reiter cannot be singled out by claiming that only she violated the affordability controls because they are husband

and wife and the property was continuously occupied as a primary residence throughout the duration by either Rayter, Reiter, and or their children. The presumed unity of spouses should apply in this context. *See, Freda*, 118 N.J. at 46. To allow the Township to reach entireties property in satisfaction of an individual spouse's alleged affordability controls violations would necessarily infringe and destroy Rayter's right and interest in the whole of the property.

C. Ordering A Partition Of A Marital Residence And Transferring A Tenancy In Common Interest To The Township Without Any Form of Compensation Is Unconstitutional And Not A Permissible Ruling Under The Facts Presented In This Case.

The appellate division erred in ruling that a partition of the property is the appropriate remedy in this case. The court, in effect, ordered a foreclosure of Reiter's interest and transferred a tenancy in common interest to the Township. App. at 19a. In 1988 the New Jersey Legislature adopted N.J.S.A. 46:3-17.4 which reads, “[n]either spouse may sever, alienate, or otherwise affect their interest in the tenancy by the entirety during the marriage or upon separation without the written consent of both spouses.” N.J.S.A. 46:3-17.4. This statute was recently interpreted for the first time in an appellate court case in 2018. *See, Jimenez v. Jimenez*, 454 N.J. Super. 432 (App. Div. 2018).

The Jimenez case posed “the legal question of whether N.J.S.A. 46:3-17.4 . . . precludes a spouse's unsecured creditor from obtaining the forced partition of real property the spouse and his non-debtor spouse own together as tenants by the entirety. Jimenez, supra, at 433. That court held the statute prohibits such non-

consensual partition. *Id.* The Jimenez court went on to note, “but for the Legislature’s adoption of N.J.S.A. 46:3-17.4, the court would have possessed the equitable authority recognized in Newman v. Chase to consider directing the partition of these spouses’ interests . . .” Jimenez, supra, at 437. The Newman case was decided prior to the adoption of the statute and was superseded by same. *See* Newman v. Chase, 70 N.J. 254, 262 (1976). Therefore, the New Jersey Legislature has expressly eliminated the equitable authority of a court to order partition of a property that is held by a tenancy by the entirety to satisfy claims against only one spouse. It is undisputed that Rayter and Reiter bought the property in 1996, after the applicable statute became effective. They own the property as a tenancy by the entirety and analogous to the creditor of only one spouse in the Jimenez case, only Reiter was ruled to be in violation of the affordability controls by the trial court. Therefore, the claims of the alleged violation in this case are against only one spouse, i.e., against Reiter solely.

A tenancy by the entirety is created when property is held by husband and wife with each becoming seized and possessed of the entire estate. N.T.B., 442 N.J. Super. at 218. A tenant by the entirety can alienate their right of survivorship and only then can a judgment creditor of either spouse levy and execute upon such right. *Id.* at 218. However, neither tenant may force the involuntary partition of the subject property during the marriage. Asterbadi, 389 N.J. Super. at 227. As the record shows, Rayter and Reiter are currently estranged but they are not divorced. Reiter moved out of the property, but her departure is not permanent as the parties are merely separated at

the moment. However, Rayter continued to reside at the domicile and same has remained his primary residence since they first moved into the property in 1996.

The applicable New Jersey Statute "precludes the partition and forced sale of the real property because defendant and his wife own it as tenants by the entirety." Jimenez, *supra*, at 438. The facts in Jimenez are not dissimilar from the facts presented here in that the Jimenez case dealt with a creditor attempting to collect on a judgment after a settlement, and not alleged affordability control violations of only one spouse, as is the case here. Notwithstanding, the facts are similar because the plaintiff was seeking a forced partition of a tenancy by the entirety. It is important to note, however that the property in question in the Jimenez case was a thirty acre tract of undeveloped land in New Jersey and the court nonetheless ruled that a forced partition was prohibited. Id. at 433-34.

In the present case before this Court, the property is a marital residence that Rayter still occupies and calls his home with his son, his son's wife, and Rayter's grandchild. Rayter and Reiter are still husband and wife and Rayter became seized and possessed of the entire estate when they acquired title to the Property in 1996. A judgment ordering a forced partition of the property would be wholly inequitable under these circumstances. Due to the fact that the appellate court in Jimenez overruled prior case law and eliminated the equitable authority of a court to order partition of a tenancy by the entirety in a debtor-creditor situation of only one spouse, it is respectfully posited to this Court that a forced partition of Petitioners' marital home under these facts should similarly be prohibited.

The practical effect of the relief sought is to foreclose the property interests of both spouses, conversion of one spouse's interest into a tenancy in common with the Township, and deprive Petitioners of valuable equity or profit in their home. Essentially, the Township is seeking seizure of property and monetary relief which under the circumstances presented here, is unwarranted and unconstitutional. The appellate division considered the apparent uniqueness, ambiguity, and inequity of the ruling by stating, “[a]s to selling the unit or other issues related thereto, the judge rightfully chose to leave that open for future agreement or litigation.” App. 18a. The appellate division was conceding that these issues would most likely require additional litigation for resolution. The extreme detriment and undue prejudice that would inure to Petitioners is overwhelming. The seizure and forfeiture of the property interests is drastic if not unconscionable.

Moreover, the remedy of a forced partition into a tenancy in common with the Township would constitute an inequitable windfall award to the Township tantamount to seizing the entire property. The equitable interests of Rayter and his family of not being dispossessed by a forced partition from their home should be a significant if not vital factor in the Court's analysis and consideration. The appellate division's ruling as having Rayter and the Township as tenants in common in a marital residence is simply not a reasonable outcome and was certainly not intended by the New Jersey Legislature when they adopted the affordable housing regulations and statutes pertaining to this matter. Furthermore, as mentioned *supra*, the Township Ordinance dictates a sheriff's sale as the proper remedy for foreclosure

based upon violations of the affordability controls and not conversion into a tenancy in common with the Township taking the interest for itself without having to pay a penny. *See, Twp. of East Hanover Zoning Ord. § 95-46.2(P)(3)(1979).*

In sum, the appellate division erred in partitioning the property and clouded its title. The New Jersey Statute precludes such a forced partition. The appellate division in *Jimenez* interpreted the applicable statute and came to the conclusion that a court does not have the authority to force a partition under similar circumstances to this case. If left undisturbed, the appellate division's decision would unfairly diminish the property interest held by Rayter, who was not ruled to be in violation of any affordability control, statute, regulation, or Township Ordinance. All charges in the complaint were dismissed with prejudice against Rayter.

Based upon the New Jersey Statutes, cases, and regulations, the Township cannot force the partition of this property held by a tenancy by the entirety by Petitioners because Rayter still resides in the premises with his family, the parties are still married, and there existed continuous occupancy by either husband, wife, and or their children since the date they acquired title in 1996.

XI. CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

John M. Mills III
Counsel of Record
Mills & Mills P.C.
One Western Avenue
Morristown, NJ 07960
P: (973) 538-0950

Counsel for Petitioners
Tatiana Reiter and Wyeczeslav Rayter

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