STATE OF MICHIGAN

COURT OF CLAIMS

LYNETTE HATHON, and AMY JO DENKINS,

Plaintiffs,

v

STATE OF MICHIGAN,

Defendant.
_____/

OPINION AND ORDER CERTIFYING CLASS

Case No. 19-000023-MZ

Hon. Michael J. Kelly

Pending before the Court is plaintiffs' December 21, 2020 motion to recertify an amended class. The motion is GRANTED as specified herein.

I. BACKGROUND

With this matter having been before the Court on several occasions already, the Court finds that further recitation of the underlying allegations is unnecessary. However, the Court will briefly outline some of the pertinent procedural history. This Court granted plaintiffs' motion for class certification on or about June 7, 2019. Thereafter, the Court issued an opinion and order in August 2019 and concluded that plaintiffs stated a claim under this state's constitution with respect to defendant's retention of surplus proceeds following a tax-foreclosure sale.

On or about July 17, 2020, this state's Supreme Court held that a foreclosing governmental unit's retention of surplus proceeds under the General Property Tax Act was an unconstitutional taking without just compensation under Const 1963, art 10, § 2. *Rafaeli, LLC v Oakland Co*, 505

Mich 429, 437; 952 NW2d 434 (2020). The Court held that "when property is taken to satisfy an unpaid tax debt, just compensation requires the foreclosing governmental unit to return any proceeds from the tax-foreclosure sale in excess of the delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure and sale of the property—no more, no less." *Id.* at 483-484.

After the *Rafaeli* decision, defendant moved to revoke class certification, arguing that *Rafaeli* controlled and that it limited the number of eligible plaintiffs and the amount of damages available to that smaller class of potential plaintiffs. In a December 4, 2020 opinion and order, the Court agreed that plaintiff failed to satisfy its burden of demonstrating that this matter should proceed as a class action because plaintiffs' list of potential plaintiffs did not adhere to the confines of the *Rafaeli* decision. That is, plaintiffs failed to recognize and apply the limits of the *Rafaeli* decision, leaving the Court unable to determine how many, if any, claimants had an eligible claim post-*Rafaeli*. Indeed, plaintiffs did not account for the notion that, under *Rafaeli*, the only property owners entitled to make a claim are those whose properties sold at a foreclosure auction for an amount that exceeded the total debt owed, i.e., the tax delinquency plus interest, penalties, and fees related to the foreclosure. Where there was no indication in plaintiffs' materials how many potential plaintiffs fit within the confines of *Rafaeli*, the Court granted defendants' motion to revoke class certification.

Now, after having granted reconsideration and having permitted plaintiffs to refile a motion seeking class certification in accordance with the Court's December 4, 2020[1] opinion and order, plaintiffs have moved for class certification once again.

After plaintiffs filed their renewed motion but before defendant responded, the Legislature enacted 2020 PA 256. The statute made a number of amendments to the General Property Tax Act and, pertinent to the matter at hand, it established a procedure for claimants to submit claims for an interest in any applicable remaining proceeds following a property-tax foreclosure sale under MCL 211.78m. In particular, MCL 211.78t(1) provides that a claimant may submit a notice of intention for remaining proceeds. The statute contains different provisions for claims arising out of foreclosed properties sold after July 17, 2020—the date *Rafaeli* was released—and for property sold before July 18, 2020. For foreclosed property transferred or sold before July 18, 2020, both of the following apply:

> (*i*) A claim may be made only if the Michigan supreme court orders that its decision in *Rafaeli, LLC v Oakland County*, docket no. 156849, applies retroactively.
>
> (*ii*) Subject to subparagraph (*i*), the notice of intention must be submitted pursuant to subsection (6).[2] [MCL 211.78t(1)(b)(*i*)-(*ii*).]

In addition, PA 256 specifies that claims under the statute are to be made in the circuit court where the foreclosure proceedings occurred. MCL 211.78t(4)-(6).

II. ANALYSIS

A. EFFECT OF PA 256 ON CLASS CERTIFICATION

[1] The order granting reconsideration mistakenly referred to this as a "December 4, 2018" opinion and order.

[2] Subsection (6), i.e., MCL 211.78t(6), contains certain notice requirements a claimant must satisfy.

The motion currently before the Court concerns whether class certification should be granted. Before evaluating the pertinent Court Rule and caselaw, defendant has, based on PA 256, asked the Court to refrain from granting class certification. According to defendant, the claims alleged in the complaint are not compensable because they accrued before July 18, 2020, and there is currently no Supreme Court order declaring that *Rafaeli* applies retroactively. Defendant also emphasizes the language in MCL 211.78t regarding claims being made in circuit court, and argues that this Court would lack jurisdiction over such claims. Plaintiffs have responded by arguing that the requirements of PA 256 do not currently apply, and that the statutory amendments would be unconstitutional if they did apply.

The Court will not wade deeply into the parties' constitutional arguments because, according to the plain language of MCL 211.78t, the statute does not apply to plaintiffs' claims. The statute unambiguously declares that the statutory claims process for excess proceeds applies to foreclosed property transferred or sold before July 18, 2020, but "*only if* the Michigan supreme court orders that its decision in *Rafaeli, LLC v Oakland County*, docket no. 156849, applies retroactively." MCL 211.78t(1)(b)(*i*) (emphasis added). The "only if" language clearly signifies that the new statutory process for claims that predate *Rafaeli* is applicable if, and only if, this state's Supreme Court declares that *Rafaeli* is retroactive. To date, that condition precedent has not been satisfied. Thus, there is nothing within the plain language of MCL 211.78t(1)(b)(*i*) that would permit the Court to apply the new statutory claims process to plaintiffs' claims or to any claims that pre-date *Rafaeli*. See *People v Hayes*, 323 Mich App 470, 473; 917 NW2d 748 (2018) (analyzing similar conditional language in MCL 769.25a, which pertained to life sentencing and juveniles, as being "triggered" if and only if the statutory condition were satisfied).

Contrary to defendant's suggestions, however, that PA 256 does not apply to claims that pre-date *Rafaeli*—such as plaintiffs' claims in the instant case—does not preclude plaintiffs from pursuing or obtaining relief. Initially, this Court already held, prior to the Supreme Court's decision in *Rafaeli*, that plaintiffs possessed a valid claim under Const 1963, art 10, § 2. Defendant has pointed to nothing in PA 256 that can prevent such claims from going forward. Nor has defendant pointed to a convincing reason why a statute could, by implication—as is suggested here—completely bar recovery for plaintiffs in spite of the self-executing right set forth in art 10, § 2 of this state's Constitution. See *Promote the Vote Sec'y of State*, __ Mich App __, __; __ NW2d __ (2020) (Docket Nos. 353977; 354096), slip op at 14 (recognizing that the Legislature is prohibited from curtailing self-executing constitutional rights). In addition, nothing in PA 256 precludes this Court from concluding that *Rafaeli* applies retroactively. And this Court has already done so in its December 4, 2020 opinion and order. Seeing no reason to revisit that decision now, the Court concludes that plaintiffs can state claims under art 10, § 2, regardless of whether PA 256 applies or not.

In sum, the plain language of PA 256 prevents the application of the statute for the time being, which renders hypothetical defendant's jurisdictional and procedural issues that are predicated on PA 256. The Court will not entertain these hypothetical issues. See *Shaw v City of Dearborn*, 329 Mich App 640, 657; 994 NW2d 153 (2019). Nor will the Court consider plaintiff's constitutional challenges to the statute at this time, as doing so is unnecessary until the statute becomes effective with respect to claims that predate *Rafaeli*. Furthermore, there is no merit to defendant's assertion that plaintiffs have no claim under the current state of the law.

B. THE CLASS WILL BE CERTIFIED

MCR 3.501(A)(1) contains requirements for maintaining a class action. Pursuant to the Court Rule, one or more members may maintain a class action on behalf of all members if all of the following requirements are met:

> (a) the class is so numerous that joinder of all members is impracticable;
>
> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
>
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
>
> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice. [MCR 3.501(A)(1).]

"These prerequisites are often referred to as numerosity, commonality, typicality, adequacy, and superiority." *Henry v Dow Chem Co*, 484 Mich 483, 488; 772 NW2d 301 (2009). "[T]he action must meet *all* the requirements in MCR 3.501(A)(1); a case cannot proceed as a class action when it satisfies only some, or even most, of these factors." *A&M Supply Co v Microsoft Corp*, 252 Mich App 580, 597; 654 NW2d 572 (2002). The proponent of the class action bears the burden and "must make an adequate statement of basic facts to indicate that each prerequisite is fulfilled." *Duskin v Dep't of Human Servs*, 304 Mich App 645, 653; 848 NW2d 455 (2014) (citation and quotation marks omitted). The Court may examine the pleadings and any documentation attached to the motion for class certification in order to determine whether the prerequisites have been satisfied. *Henry*, 484 Mich at 502-503. "[W]hen it is necessary to look beyond a party's assertions to determine whether class certification is proper, the courts shall

analyze any asserted facts, claims, defenses, and relevant law without questioning the actual merits of the case." *Id.* at 504.

1. NUMEROSITY

The Court will first address numerosity, which is the issue that caused the Court to grant the motion to revoke class certification back in December 2020. The issue that led to revocation at that point was that plaintiffs failed to provide the Court with any indicia of the number of potential plaintiffs who were eligible for relief by using the measure of damages provided in *Rafaeli*—that is those plaintiffs who were entitled to surplus proceeds from the foreclosure sale in excess of delinquent taxes, interest, penalties, and fees. The problem at that time was that Exhibit A to the original motion for class certification, which purported to be a list of eligible plaintiffs, contained far more individuals than were entitled to compensation under *Rafaeli* because it included claims based on the alleged market value of homes at the time of the foreclosure auctions. However, because *Rafaeli* rejected this approach to measuring damages, the Court concluded that the list provided by plaintiffs could not establish numerosity. As a result, the Court was unable to determine at that time whether the numerosity element was met.

Plaintiffs have rectified this issue with an updated spreadsheet that has been attached as Exhibit A to the December 22, 2020 motion to recertify the class. The problem with the current version of plaintiffs' documentation, however, is that it includes potential plaintiffs with what appear to be untimely claims, based on the reasoning employed in Court's December 4, 2020 opinion and order. In that opinion, the Court held that MCL 600.6431 applied to the named plaintiffs' claims, and that the named plaintiffs timely complied with MCL 600.6431 because their January 2019 notice was filed within one year of the date on which their claims accrued. Having reviewed the parties' arguments and its prior opinion, the Court sees no reason why the notice

requirements contained in § 6431 should not apply to the class members as well. As a result, any class members whose claims accrued more than 1 year before the filing of the January 15, 2019 verified notice of intent filed by plaintiff Lynette Hathon are barred by operation of § 6431. And plaintiffs' prior assertion of the harsh-and-unreasonable-consequences exception, see *Mays v Snyder*, 323 Mich App 1, 35-36; 916 NW2d 227 (2018), aff'd *Mays v Governor*, 506 Mich 157 (2020), is unavailing because it is not apparent any of the putative plaintiffs were ever prevented from seeking a return of the proceeds.

Nevertheless, even removing the potential claimants for whom notice was not given in accordance with § 6431, the documentary evidence submitted by plaintiffs reveals more than enough potential plaintiffs to demonstrate numerosity. There are still several spreadsheet pages in Exhibit A containing claimants who fit within the notice period and who suffered an injury cognizable under *Rafaeli*, with what appears to be in excess of at least 200 plaintiffs who fit within the more narrowly defined class. The information plaintiffs have provided presents "some evidence of the number of class members" and establishes "by reasonable estimate the number of class members" such that the numerosity element has been met. See *Duskin*, 304 Mich App at 653 (citation and quotation marks omitted). To that end, plaintiffs' documentation, as well as "general knowledge and common sense indicate that the class is large." See *Zine v Chrysler Corp*, 236 Mich App 261, 288; 600 NW2d 384 (1999).

2. REMAINING FACTORS

As for the remaining factors, the Court adopts and incorporates its discussion on pages 6-14 of its June 7, 2019 opinion and order in which it previously discussed these same factors. Additionally, the fact that the *Rafaeli* decision resolved the overarching legal question does not take away from the notion that plaintiffs are nevertheless raising a common question that will

determine liability. See *Hill v City of Warren*, 276 Mich App 299, 311; 740 NW2d 706 (2007). Moreover, the Court briefly notes that, with respect to the adequacy factor, plaintiffs have subsequently retained additional counsel, which the Court finds provides additional support for its previous conclusion that plaintiffs' lawyers are adequately qualified to maintain this matter as a class action. Finally, defendant's efforts to apply provisions of MCL 211.78t, which only apply if *Rafaeli* is held by this state's Supreme Court to be retroactive, are unconvincing, because the triggering condition present in the plain language of the statute has not yet been met, meaning that the amendments effectuated by PA 256 do not apply at this time.

III. NOTICE AND CLASS DESCRIPTION

MCR 3.501(B)(3)(c) requires that, in an order certifying a class action, "the court shall set forth a description of the class." Consistent with that mandate, the Court will define the class as follows:

> All persons and entities who, from January 15, 2018, through the final order in this matter, 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 were not refunded the excess/surplus equity as described by the Michigan Supreme Court in *Rafaeli, LLC v Oakland Co*, 505 Mich 429; 952 NW2d 434 (2020).

MCR 3.501(C)(3) requires the Court to determine how, when, by whom, and to whom notice shall be given. Plaintiffs have provided a proposed notice as Exhibit I to their motion to certify the class. The notice contains an overbroad description of the class that does not comport with this Court's decision. As a result, plaintiffs shall submit a revised, proposed notice within 21 days after the issuance of this opinion and order.

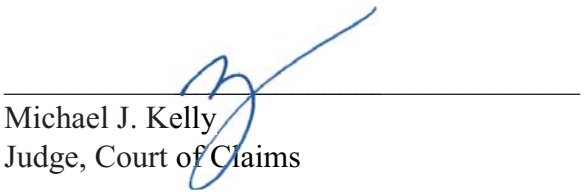
IV. CONCLUSION

IT IS HEREBY ORDERED that plaintiffs' motion to certify the class is GRANTED as specified herein.

IT IS HEREBY FURTHER ORDERED that plaintiffs shall submit a revised, proposed notice in accordance with the class defined in this opinion and order within 21 days.

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

February 22, 2021



Michael J. Kelly
Judge, Court of Claims