

COMMONWEALTH OF MASSACHUSETTS

TRIAL COURT

LAND COURT DEPARTMENT

TAX CASE NO. 18 TL 001223

TOWN OF TYNGSBOROUGH)

v.)

PAULA RECCO)

**PLAINTIFF TOWN OF TYNGSBOROUGH'S COMBINED MEMORANDUM OF LAW
IN SUPPORT OF ITS RULE 12(C) MOTION FOR JUDGMENT ON THE PLEADINGS
AND MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR
JUDGMENT ON THE PLEADINGS OR ITS ALTERNATIVE MOTION TO DISMISS**

It has been almost 20 years since the Defendant Paula Recco ("Ms. Recco") last paid property taxes to the town in which she lives. This has greatly benefitted her and deprived the Plaintiff Town of Tyngsborough ("the Town") of more than \$260,000 in taxes and interest. (See Exh. 1). This is not fair, this is extremely significant to the Town, and, with several viable, constitutional, and statutorily permissible paths by which the Court can resolve this matter today, it is time to bring it to a close in favor of the Plaintiff in its efforts to finally collect property taxes from the Defendant.

Overshadowing this entire legal exercise, and lending weight to the Court entering a judgment on behalf of the Town, is the fact that the Town is actively fighting to give the Defendant precisely what she argues for (her equity), while the Defendant oddly fights against the Town's ability to do so. It seems unnecessary for the Plaintiff, the Defendant or the Court to spend additional resources on this matter because 1) it is inevitable that Defendant will have to

pay her past-due property taxes and interest, 2) it is inevitable that the Plaintiff will have to make available and return the surplus to her, and 3) the compounding interest and potential Plaintiff's attorney's fees continue to deplete her equity by more than a tank of gas (about \$45) every day and \$200 per hour, respectively. Setting aside that it is this very same equity her litigation is seeking to preserve, and given that it is just a matter of time before Ms. Recco must necessarily "render unto Caesar what is Caesar's" (and nothing more) *see Tyler v. Hennepin County*, 598 U.S. 631, 647, the Town can only speculate as to what the purpose of this endeavor is. Regardless, whatever her motivation, this path is taken at the expense of Tyngsborough, which would like to receive its past-due property tax from Ms. Recco now.

CHAPTER 60 FORECLOSURE AND DISTRIBUTION OF POTENTIAL SURPLUS

Notwithstanding Plaintiff's initial strategic decision to avoid waging a constitutional battle over G.L. c. 60, the Town nonetheless believes it remains a viable, and indeed, the preferred, statutory method for municipalities to ensure the collection of property taxes while also making possible surplus known and available to the former property owner to be returned. At a minimum, the 23 other municipalities represented by this office, and the 16 municipalities identified as being represented by Brown Legal PLLC in its Amicus Brief, are in agreement. One such town has, without consequence, already done so¹ and, if the Court forecloses on the Defendant's rights of redemption under § 64, the Town of Tyngsborough intends to do so as well.

The Defendant, the Attorney General, and other amici give an incredible amount of

¹ See Exh. 2, "Town of Oxford Notice of Surplus," providing an example of the mechanism by which the Town of Oxford, in explicit compliance with *Tyler*, accounted for and made the surplus remaining after the public auction available to the former property owner. See also Affidavit of Brian Kane, Exh. 3 in which affiant identifies attests to a conversation with Peter Brown, Esq. of Brown Legal PLLC in which Attorney Brown confirms the return without consequence or controversy of almost \$28,000 in surplus to a property owner following a § 64 foreclosure.

weight to the notion that it is *just not possible*, absent a specific mechanism identified in the statute, for a municipality to adhere to this newly articulated constitutional requirement to make the surplus after foreclosure available to the property owner. The idea that “[b]ecause Chapter 60 does not contain any means to return [the]surplus equity, a tax taking under Chapter 60 inevitably results in an [unconstitutional] uncompensated taking[.]” see Amicus Brief of the Attorney General, at 3, is both illogical and unsupported by law.

CHAPTER 60 HAS MECHANISMS TO RETURN SURPLUS

As argued below, the Town does not believe a specific mechanism is required to allow it to act constitutionally. However, insofar as the Court finds such a mechanism necessary, the Town rejects the premise that there are no statutory authorities that permit it to do so and provides two examples.

G.L. c. 60, § 24

G.L. c. 60, § 24 states “[t]he collector shall upon demand give a written account of every sale on distress or seizure and charges, and pay to the owner any surplus above the taxes, interest and charges of keeping and sale.” In the only case the Town is aware of in which § 24 was raised by a party seeking the return of surplus, *Butkus v. Charles L. Sifton, Inc.*, 95 Mass. App. Ct. 1112 (2019) (unpublished) (attached as Exh. 4), the City of Framingham, in fighting to *keep* the property owner’s equity, disagreed that § 24 meant they had to account for the surplus after foreclosure sale and return it. Rather, the city argued that § 24 applied only to personal property and not to real property. In response, the appeals court seemed to disagree and stated, “Here, we conclude that neither [party seeking the return of surplus is] entitled to the surplus from the town’s sale of the property under G. L. c. 60, § 28, because...both parties were required to assert their purported interests...prior to the date of the foreclosure judgement...” *Id.* at *2.

Furthermore, in footnote 5. *id.* at *3², the appeals court noted that the words of the section did *not* say what the town claimed and it highlighted that the issue of § 24 had not been litigated previously. Thus, while rejecting the property owner's § 24 claim for other reasons, the appeals court suggested that, had the surplus-seeking party acted prior to foreclosure, § 28 may have saved her equity. Thus, while it was a distinct possibility § 28 protected the property owner *before Tyler*, it now seems that it *can* protect the property owner. § 28 is an open and viable mechanism for a property owner to claim the surplus.³

G.L. c.60, § 43

Insofar as a specific mechanism may be required, another example is provided in G.L. c.60, § 43, in which it directs that the proceeds from a foreclosure sale "shall be applied... to...all costs, charges and terms of redemption in any way resulting from [the] sale." The SJC ruled in *Milford v. Boyd*, 434 Mass. 754 (2001) that payment for condominium fees owed to the condo association should be paid directly from those sale proceeds, despite such payment not being otherwise enumerated. *Id.* at 760. This exact principle applies here, allowing the town, again, to pay to the Defendant the surplus as a cost resulting from the sale.

Insofar as they are necessary, specific mechanisms are already available in c. 60. They have been briefed in past cases, and statutory interpretation or other circumstances conspired against their adoption. Post-*Tyler*, these statutory sources now provide the authority.

² "The town urges that we construe § 28 as extending solely to the surplus proceeds of tax taking sales of personal property. Without addressing the issue, we note that there is no language in the statute to that effect, and observe that, to our knowledge, no Massachusetts court has had occasion to cite, much less interpret it." *Id.* at *3

³ It is with specific reference to § 24 that the Town of Oxford made the surplus available to the property owner to claim after a § 64 foreclosure. See Exh 2, Town of Oxford Notice of Surplus.

NO MECHANISM NECESSARY

The Town is skeptical about what role the Court plays in a municipality's constitutional decisions after the Court's job is done foreclosing on the Defendant's right of redemption. *Kelly v. City of Boston*, 348 Mass. 385, a case heavily relied upon by all parties opposing the constitutionality of G.L. c. 60, says clearly, "[w]e think it is clear... that the Legislature intended the surplus...to belong to the municipality." *Id.* at 388 (emphasis added). Thus, what role, if any, does the Court play in determining what the Town does with that surplus once the Town owns it? Likewise, in *Tallage Lincoln, LLC v. Williams*, 485 Mass. 449 (2020), the Supreme Judicial Court ("SJC") included a comprehensive appendix in which it summarized in detail the entire G.L. c. 60 municipal tax collection scheme. *Id.* at 460-470. In it, there is quite obviously no role identified for a Land Court judge after it forecloses on a defendant's rights of redemption, other than possible vacation of judgment or an order of eviction, neither of which implicate the Court in what a municipality does with its possession after foreclosure.

And, of course, while it seems incredibly unlikely (and, perhaps, inconceivable) that Ms. Recco or the Court sincerely believe Tyngsborough might somehow abscond with Ms. Recco's equity rather than return it, the Town nonetheless believes it is entitled to virtually the same judicial presumption that it will "fulfill all its obligations" as the Commonwealth has been given in eminent domain cases. *See Talbot v. Hudson*, 16 Gray 417, 431-432 (1860) in which the SJC upheld the validity of an eminent domain statute that was challenged by the plaintiffs because "it contain[ed] no reasonable, certain and adequate provision for compensation to those whose property [had been] taken[.]" Obviously, a municipality is not "the sovereign," as suggested by the SJC, and may not be entitled to that same presumption. However, whatever presumption it *does* have - that it will "fulfill its obligations" - suggests the lack of a "specific mechanism" by

which it could return the Defendant's equity is not an impediment to a § 64 foreclosure order. In other words, the Town can be expected to fulfill its constitutional obligations, making a specific mechanism unnecessary to accomplish the goal.

Finally, regarding *Kelly*, the case on which the Defendant, the Attorney General, and others have relied so heavily: it has most obviously been smashed, leaving its holding relatively meaningless after the *Tyler* decision. The SJC literally scoffed at the plaintiff who dared to suggest "equity and good conscience" required that the equity to be returned to her ("Manifestly on any theory of 'equity and good conscience' a municipality has no power to pay out money whenever there may be a surplus[,]” *Kelly*, at 389). But she was right. Not only do municipalities have the power to pay out money whenever there may be a surplus but they now have a constitutional obligation.

The context in which the *Kelly* court ruled that disbursements of surplus after foreclosure sale “without statutory authority would be wholly voluntary,” *id. at 389*, and that a municipality “has no power” to pay out the surplus, is so different from today's post-*Tyler* context that it renders reliance on those *Kelly* edicts nonsensical.

Because it was presumed constitutional at the time, and because statutory interpretation suggested the General Court intended surplus to stay solely with the town, the only way a town could be required to return the equity would be with a specific mechanism. Otherwise, it *was* “voluntary,” which at the time meant no municipality would do it. Thus, the admonition at the time - and always in the context of the municipality fighting to keep everything it could - was that a specific mechanism needed to be in place to make it happen. That specific mechanism is no longer necessary because the return of the equity is no longer voluntary.

Although the Town does not believe it should be necessary to say, a failure to make the surplus available and then return it after foreclosure could render the municipality or even the officials involved subject to suit in Superior Court or even federal court. It would be a violation of the Constitution. *See* Amicus Brief of the Attorney General at 3. Such legal jeopardy for failure to follow a constitutional requirement suggests that it is not at all voluntary for a municipality to make a property owner's equity available to be returned. As said so precisely in the Brief of Amicus Curiae New England Legal Foundation in Support Of Neither Party at 11, "Tyler has made it absolutely clear that the surplus must be surrendered, and so municipal resistance is now futile."

FIXING THE TERMS OF REDEMPTION AND REQUIRING SALE

It is unfortunate that the Town must reiterate again that it has been actively arguing to be able to return the equity to Ms. Recco while she has failed to avail herself of that opportunity. But it is because of that, in part, that the Court's limited redemption-related equitable powers are implicated.

Judgement entered again Ms. Recco in 2022. But per *Tallage*, a "taxpayer may move to vacate the judgment *upon payment of the full redemption amount...*" *Id.* at 469 (emphasis added). And it was on that basis that this case was re-opened. Up until the most recent status conference held by this Court, the Defendant has claimed she was still trying to do so. However, the following facts are relevant and call into question the strength of Ms. Recco's motivation to actually redeem. As set forth in the related Motion, the Town reiterates that...

- 1) the amount of accumulated past-due taxes and interest is over \$260,000. See Exh. 1.
- 2) the Defendant promised to redeem and has failed to do so despite an historically strong real estate market and despite the generous amount of time provided by the Court; *See*

Memorandum of Law in support of Defendant Paula Recco's Motion to vacate Default Judgment, December 9, 2022.

- 3) the Defendant has received five offers and has refused to accept any of them or to lower her asking price of \$799,900, despite suggestions by her realtor to do so. See Exh. 3 Kane Affidavit ¶¶ 4-5.
- 4) the highest offer she received was \$550,000. *Id.* at ¶ 4.
- 5) Ms. Recco's realtor believes the asking price of \$799,900 is unrealistically high because the comparable local properties against which Ms. Recco compares her property when setting her asking price were much newer and in much better condition. *Id.* at ¶ 7.
- 6) The tax assessed value on the house is \$571,100. *See* Defendant Paula Recco's Amended Answer and Defenses, ¶ 5.

Unfortunately, while the SJC has recognized the "long standing policy in this Commonwealth [that] favors allowing an owner to redeem property taken for the nonpayment of taxes," *see Tallage* at 457 (citations omitted) and that c. 60 "should be interpreted to favor redemption..." *id.*, we are faced with a situation in which the Defendant is making the fulfillment of this favorable treatment towards property owners impossible to fulfill. And this fact also supports the implication of the Court's limited equitable jurisdiction in this matter under G.L. c. 60, § 68.

G.L. 60, § 68 states in pertinent part that "[a]ny person claiming an interest, shall, if he desires to redeem, file... an *offer* to redeem upon such *terms* as may be *fixed by the court*. Thereupon the court shall hear the parties, and may in any case in its discretion make a finding allowing the party to redeem, within a time fixed by the court... The court may impose *such other terms as justice and the circumstances warrant*" (emphasis added).

Ms. Recco made an offer to redeem, the offer was accepted by the Court in allowing the Defendant to redeem. And yet the Defendant hasn't redeemed, despite very generous time offered by the Court.

While the Defendant and various amici have sought to differentiate this case from *Town of Arlington v. Holman*, 14 TL 148023 (Mass Land Ct. November 30, 2016), a case in which the Land Court Judge ordered the sale of the subject property to ensure that the property owner didn't lose her equity to foreclosure, the Town believes the current matter and *Holman* are too similar to ignore.

In *Holman*, the property owner had very significant disabilities and was represented by a guardian ad litem. Because of her disabilities she could not redeem on her own, and at risk of being foreclosed upon and losing everything, the Court, with support of all parties, including the town, agreed to order the sale and the distribution of the proceeds.

In our case, and with no diminishment meant to the disabled party in *Holman*, the Town here is absolutely disabled and needs the Court's help. When it comes to being able to collect its taxes, the constitutional impediment purportedly created by *Tyler* is an enormous disability, as is the extremely delinquent taxpayer here who has the ability to redeem but who refuses to do so. The Court in *Holman* ordered the sale to protect Ms. Holman's equity *and* pay off her debt to the town. The Court can accomplish the same goals here and the Town hopes it can provide the same protection to the Town's property taxes as it did for the property owner's equity.

And finally, the Town reiterates that the other viable method of obtaining its tax revenues, in addition to being a waste of resources, is completely inadequate and incomplete as a legal remedy because of a six year statute of limitations (that will likely be very expensive and time-consuming to litigate) that might not allow the Town to collect a substantial portion of the taxes

and interest owed by Ms. Recco. And without a reasonable legal remedy, and because fairness to the town demands it in this redemption case, the limited equitable jurisdiction available to the Court in *these circumstances* is required.

The Town, therefore, asks that one of the two remedies spelled out in its Motion and this Memorandum be ordered by the Court to assist the Town in receiving its property tax payments.

Respectfully submitted,

March 15, 2024

Town of Tyngsborough

By its attorney,



Brian H. Kane
BBO# 651625
116 Pleasant St. #312
Easthampton, MA 01027

CERTIFICATE OF SERVICE

I certify that on March 15, 2024, I emailed and mailed by first-class mail, a copy of the attached Motion to: Counsel for Paula C. Recco, Caroline Meade, Esq., 50 Island Street, Suite 203B, Lawrence, MA 01840, cmeade@njc-ma.org; to Counsel for MSPCA, Stephen Rider, Stephen W. Rider, P.C., 350 Lincoln Street, Suite 2400, Hingham, MA 02043, stephen.rider@swrpc.com; and to Counsel for Richard Pitman d/b/a Center Hills Barns LLC, Peter G. DeGelleke, Esq., 133 Great Road, Bedford, MA 01730, pdegel2@aol.com.



Brian H. Kane

EXHIBIT 1

Town of Tyngsborough Tax Title Statement

Remit payments to:
Town of Tyngsborough
25 Bryants Lane
Tyngsborough, MA 01879

Michael Recco Jr. Paula C. Recco 4 Danforth Road Tyngsborough MA 01879	Amount Due
	242,752.87
	Amount Paid
	Statement Date
	02/01/2024
	Account Number
	67

-----Detach and return this portion with your payment.-----

If you have questions call: 978-649-2300

For unpaid taxes on property located at: 4 Danforth Road

610

Summary of Account for Delinquent Taxes

Levy Year	Taxes	Liens and Assessments	Coll Int & Fees	Trs Chgs	Trs Interest	Balance Due
2007	1,376.78	0.00	801.72	0.00	4,726.10	6,904.60
2008	5,422.61	0.00	1,952.28	0.00	15,999.27	23,374.16
2009	5,540.14	0.00	1,222.76	0.00	14,671.61	21,434.51
2010	5,724.23	0.00	468.55	0.00	13,434.76	19,627.54
2011	5,718.18	0.00	443.49	0.00	12,421.93	18,583.60
2012	6,170.14	0.00	439.35	0.00	12,293.29	18,902.78
2013	6,351.56	0.00	480.67	0.00	11,590.46	18,422.69
2014	6,258.10	0.00	487.01	0.00	10,357.52	17,102.63
2015	6,554.08	0.00	494.87	0.00	9,696.26	16,745.21
2016	6,865.52	0.00	529.07	0.00	8,985.34	16,379.93
2017	6,709.13	0.00	536.31	0.00	7,644.83	14,890.27
2018	6,890.49	0.00	728.12	0.00	6,579.14	14,197.75
2019	6,845.90	0.00	526.95	0.00	5,439.35	12,812.20
2020	8,301.82	0.00	0.00	0.00	3,570.01	11,871.83
2021	8,261.82	0.00	0.00	0.00	3,241.35	11,503.17
TOTAL	92,990.50	0.00	9,111.15	0.00	140,651.22	242,752.87

INTEREST PER DIEM: 44.7568

***PLUS LEGAL FEES. PLEASE CALL FOR EXACT AMOUNT**

The above balances for prior year's taxes remain unpaid. If payment is not received within the the Town may avail itself of any or all of several remedies available to it for the collection of foreclosure. These remedies are cumulative and the City may choose to exercise any or all of in additional charges to the property owner. Delinquent interest will continue to accrue at four on unpaid taxes and at sixteen (16%) percent on unpaid tax title balances.

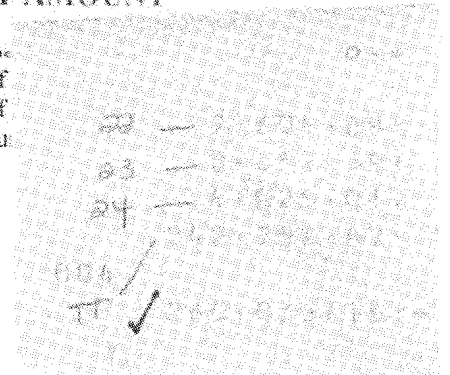


EXHIBIT 2



Brown Legal PLLC
10 Liberty Square, 6th Floor
Boston, MA 02109
617.463.9133
www.brownlegalllc.com

August 22, 2023

SERVED VIA CONSTABLE

Jayne M. Hughes
234 Heard Street
Worcester, MA 01603

**RE: NOTICE OF AVAILABILITY AND ACCESS TO SURPLUS FROM
TAX TITLE FORECLOSURE AND AUCTION OF
31-33 WATCH STREET, OXFORD, MA**

Dear Ms. Hughes:

As you are aware, the undersigned represents the Town of Oxford, Treasurer's Office and Tax Title Custodian relative to its tax title collection efforts and litigation. You were previously notified pursuant to M.G.L. c. 60 § 77B of the Town's intention to sell this property through public auction.

In compliance with the procedures contained in M.G.L. c. 60 § 77B (known as the Tax Title Public Auction Statute), the property was auctioned and conveyed. The auction took place on August 1, 2023. The auction was run by Paul Zekos and his team from the Zekos Group. Mr. Zekos' Massachusetts Auction License Number is 104. The Town was represented by Brown Legal PLLC.

The sale of the property occurred on August 17, 2023. Pursuant to the Terms and Conditions of Sale executed by the Town and the winning bidder, the purchaser was responsible for the following amounts: (a) \$155,000.00 winning bid amount for the purchase price; (b) \$12,400.00 to cover the auctioneer charges; (c) \$5,000.00 special assessment to mitigate some of the Town's legal fees and expenses associated with the tax title foreclosure case, the eviction litigation, the auction, and the real estate closing; and (d) \$1,847.75 for the Fiscal Year 2024 Pro Rata taxes (calculated based upon the sale price).

A copy of the deed to the winning bidder is attached hereto as Exhibit I.

On May 25, 2023, the United States Supreme Court issued a decision in the case of *Tyler v. Hennepin County, Minnesota*, 598 U.S. 631 (2023). In that decision, the U.S. Supreme Court declared that a city or town that forecloses on a property for unpaid taxes and then sells the

property must make any surplus known and available to the former owner. A copy of the *Tyler* decision is attached hereto as Exhibit 2 for your convenience.

Pursuant to the *Tyler* decision and in accordance with M.G.L. c. 60 § 28, the Town is providing you with: (1) an accounting; and (2) the process by which the surplus can be claimed and obtained by you.

1. **Accounting**

The surplus is \$27,967.83. This amount may decrease with any additional fees and costs the Town may need to incur to complete the below-described process. A reasonable estimate has already been utilized for purposes of calculating the surplus.¹ A breakdown of the accounting is attached hereto as Exhibit 3.

2. **Process for Accessing the Surplus**

- a. Timing/Deadline: The Town will hold the funds and make them available to you for **60 days** from the date of service of this legal notice. After 60 days, the surplus will be retained by the Town and will no longer be available to you.
- b. Remittance is only to the Established Former Owner: The Town will *not* be doing any distributions of a surplus to fractional interest holders or non-record interest holders. The Town must have legally sufficient information that the surplus payment is being made in one distribution to the former owner.
- c. Confirmation of Obtaining Funds/Release: Because this is a new process in the Commonwealth of Massachusetts and there can be competing interpretations and opinions of how best to comply with the law, the Town will only distribute the surplus if the former owner executes an acknowledgment of receipt of surplus and a release of claims. The sample form is attached hereto as Exhibit 4.

3. **The Town's Understanding of the Identification of the Former Owner(s)**

The last record owners of the property were James Hughes and Mildred Hughes as tenants by the entirety. Upon Mildred Hughes' passing on April 14, 1981, title to the property vested solely in James Hughes. James Hughes subsequently passed away on March 6, 1992. Pursuant to his fully adjudicated probate, his interest in the subject property was devised to you and your brother, James B. Hughes. Upon James B. Hughes' passing on January 31, 2020 and the subsequent adjudication of his probate, sole titled vested in you as his surviving heir.

¹ \$5,200.00 representing 20 hours of legal work at \$260.00/hour and service expenses.

Jayne M. Hughes
August 22, 2023
Page 3

To claim the surplus within the allowed timeframe (60 days) from the date this notice is served, please contact the undersigned. Service shall run from the date that this notice is left at your home (as above stated) by a constable and a second copy is mailed to you by the same constable.

You may contact me with any questions or concerns. Thank you for your attention to this matter.

Very truly yours,

/s/ Peter A. Brown
Peter A. Brown, Esq.
Attorney for the Town of Oxford,
Treasurer's Office and Tax Title Custodian

Jayne M. Hughes
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Page 3

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August 22, 2023

SERVED VIA CONSTABLE

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- c. **Confirmation of Obtaining Funds/Release**: Because this is a new process in the Commonwealth of Massachusetts and there can be competing interpretations and opinions of how best to comply with the law, the Town will only distribute the surplus if the former owner executes an acknowledgment of receipt of surplus and a release of claims. The sample form is attached hereto as Exhibit 4.

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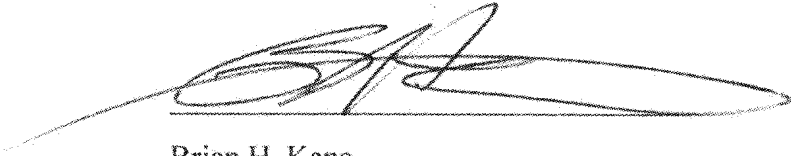
EXHIBIT 3

AFFIDAVIT

Under the penalty of perjury, I, the undersigned affiant, swear or affirm that:

1. On information and belief, on or about February 8, 2024 the real estate broker for Defendant Paula Recco, Lisa Diffley, called the Tyngsboro Town Treasurer's office seeking information on the status of the foreclosure case against her client. The Town instructed Ms. Diffley to call this office.
2. February 9, 2024 and February 28, 2024, Ms. Diffley called this office and inquired about the current foreclosure status of the subject parcel and also what this office knew about a Massachusetts Department of Environmental Protection (MDEP) order and fine that had previously been levied against Ms. Recco.
3. This office told Ms. Diffley about the status of the Town's foreclosure action against Ms. Recco and denied knowledge of an MDEP order or fine.
4. During the course of these calls, Ms. Diffley reported that the property had, up to that time, continued to be listed at \$799,900 and that Ms. Recco had received five offers on the subject parcel, the highest of which had been \$550,000.
5. Ms. Diffley reported that Ms. Recco rejected all offers.
6. Ms. Diffley reported she believes the asking price of \$799,900 was too high but that Ms. Recco had refused her suggestion to lower the asking price or to accept a lower offer.
7. Ms. Diffley reported she believed the asking price was unrealistically high because the comparable local properties against which Ms. Recco apparently compared her property when setting her asking price were much newer and in much better condition.
8. She reported the subject dwelling unit required significant updates and renovations, including a new septic system.
9. According to Ms. Diffley, the subject parcel has now been taken off the market until an environmental consultant reviews the property to help the DEP determine what needs to be done to remedy the situation.
10. Affiant also spoke with Dan Brown, Esq., founder of Brown Legal PLLC, who contributed an amicus brief in this case.
11. Mr. Brown confirmed for the affiant that the Town of Oxford supplied a Notice of Surplus to an equity owner identifying the amount of surplus remaining after a tax foreclosure sale and that the Town did in fact return said surplus to the equity owner without objection from any party, person, or entity.

Dated: March 15 2024



Brian H. Kane

COMMONWEALTH OF MASSACHUSETTS

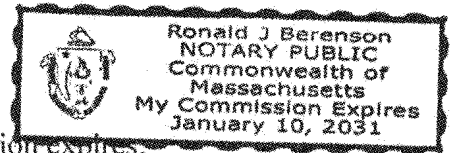
Hampshire, ss.

March 15, 2024

On this day, before me the undersigned notary public, personally appeared the above-named BRIAN H. KANE personally known to me to be the person who signed this document, and acknowledged to me that he signed it voluntarily for its stated purpose.



Notary Public



My commission expires: _____

EXHIBIT 4

95 Mass.App.Ct. 1112

Unpublished Disposition

NOTICE: THIS IS AN UNPUBLISHED OPINION.

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass.

App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover,

such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations

noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

Appeals Court of Massachusetts.

Lisa A. BUTKUS

v.

CHARLES L. SILTON, INC., & another.¹

18-P-72

1

Entered: May 13, 2019.

By the Court (Vuono, Wolohojian & McDonough, JJ.)²

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

*1 In this dispute over the surplus sale proceeds following a real estate tax taking, the plaintiff, Lisa Butkus, appeals from a Superior Court judge's order entering summary judgment in favor of the town of Framingham (town) and the denial of her cross motion for summary judgment. We affirm.

Background. On December 3, 2010, the town executed a tax taking on property located at 618 Waverly Street (property) owned by Charles L. Silton, Inc. (Silton), in the amount of \$ 5,684.87. Notice of the tax taking was duly recorded in the registry of deeds on January 18, 2011. On January 2, 2012, the town filed a petition in the Land Court to foreclose all rights of redemption on the property, and on March 6, 2012, it recorded a notice of its petition in the registry of deeds. The town's petition was allowed and a foreclosure judgment entered

in the town's favor on September 2, 2014. The judgment was recorded on November 17, 2014. On January 26, 2016, the town sold the property at auction for approximately \$ 815,000, the conveyance taking place on February 29, 2016.³

Meanwhile, in December 2012, Butkus filed in the Superior Court a Wage Act claim under G. L. c. 149 against Silton. In August 2014, a judge entered an agreed-upon judgment against Silton in favor of Butkus in the amount of \$ 250,000, to be secured by a mortgage on the property, which Butkus recorded on August 18, 2014. Apparently after learning the town had entered into an agreement via auction to sell the property, Butkus filed -- before the closing -- this action against the town and Silton seeking a declaratory judgment that Silton was entitled to the surplus of the tax debt from the sale, and that Butkus was entitled to a "reach and apply" judgment to satisfy Butkus's unsatisfied money judgment in her Wage Action case against Silton.

On February 29, 2016, after a judge denied Butkus's motion for a reach and apply real estate attachment (which, by agreement of the parties, was treated by the judge as a motion for preliminary injunction to enjoin the town's sale), the town conveyed the property to the nominee of the highest bidder at the auction for \$ 750,000. Thereafter, the town filed a motion for judgment on the pleadings to which Butkus responded with her cross motion for summary judgment.⁴ Following a hearing, a judge denied Butkus's cross motion, and entered summary judgment in favor of the town. Relying on the Supreme Judicial Court's decision in Kelly v. Boston, the judge concluded that municipalities are exclusively entitled to any surplus from tax foreclosure sales. See Kelly v. Boston, 348 Mass. 385, 388 (1965) (Legislature intended that surplus from sale of land taken for nonpayment of taxes belongs to municipality where right of redemption was foreclosed in Land Court).

*2 On appeal, Butkus maintains that the judge erred in entering summary judgment in favor of the town, and in denying her cross motion for summary judgment, because G. L. c. 60, § 28, requires the town to return any surplus from the sale of the property to Silton, and because Kelly v. Boston, 348 Mass. at 88, relied on by the motion judge, is distinguishable from her case.

Standard of review. We review de novo the allowance of a motion for summary judgment. Dorrian v. LVNV Funding, LLC, 479 Mass. 265, 270 (2018). "In a case like this one where both parties have [in essence] moved for summary

judgment, the evidence is viewed in the light most favorable to the party against whom judgment [has entered]" (quotation omitted). *Id.* at 271. A decision on a motion for summary judgment will be upheld if the judge "ruled on undisputed material facts and the ruling was correct as a matter of law" (citation omitted). *M.P.M. Bldrs., LLC v. Dwyer*, 442 Mass. 87, 89 (2004).

Discussion. Butkus contends that pursuant to G. L. c. 60, § 28, the town must pay over to Silton the surplus from the foreclosure sale of the property, to be used to satisfy her judgment against Silton. To this end, Butkus argues that the statute requires the tax collector to "give a written account of every sale on distress or seizure and charges, and pay to the owner any surplus above the taxes, interest and charges of keeping and sale." The town denies that G. L. c. 60, § 28,⁵ applies, and counters that G. L. c. 60, § 64, controls the sale proceeds because that section specifies that "[t]he title conveyed by a tax collector's deed or by a taking of land for taxes shall be absolute after foreclosure of the right of redemption by decree of the [L]and [C]ourt." Consequently, the town argues, "interests in the land of one claiming through the record owner, such as 'mortgagees, lienors, attaching creditors' ... are terminated by the [Land Court] decree." *Sandwich v. Quirk*, 409 Mass. 380, 384 (1991). We agree.

Once a municipality forecloses all rights of redemption, "§ 64 clears the record title so that the municipality may sell the property or keep it for municipal purposes, free of the claims of the prior owner and other persons whose rights are extinguished." *Sandwich*, 409 Mass. at 384. See *Lhu v. Dignoti*, 431 Mass. 292, 296 (2000) ("The purpose of absolute title under § 64 is to clear the new title of all encumbrances placed on the property by the prior record owner").

Here, we conclude that neither Silton nor Butkus were entitled to the surplus from the town's sale of the property under G. L. c. 60, § 28, because the foreclosure judgment issued by the Land Court on September 2, 2014, terminated any

interests they may have held in the property. See G. L. c. 60, § 64; *Sandwich*, 409 Mass. at 384. The town, having acquired its interest in the property through a tax taking, held "absolute" title to the property as of the date of the Land Court foreclosure judgment. G. L. c. 60, § 64. Accordingly, Butkus and Silton are charged with notice of the town's interest in the property when the town recorded its notice of tax taking, and notice of petition in the Land Court. Consequently, both parties were required to assert their purported interests in the property in the town's Land Court action prior to the date of the foreclosure judgment, September 2, 2014. See *Sandwich*, *supra*. Butkus obtained her August 2014 Wage Act money judgment against Silton -- which included a mortgage to her from Silton on the property -- but failed to intervene in the Land Court case to assert her interest. She further delayed filing this action against Silton and the town until February 2016 -- more than a year after the Land Court foreclosure judgment.⁶ Silton, for its part, was a party to the town's Land Court action, yet made no attempt to redeem its ownership interest in the property, nor did it appeal the Land Court judgment. Thus, Butkus's and Silton's inaction prior to the entry of the Land Court foreclosure judgment necessarily extinguished their asserted interests in the property, enabling the town to "sell the property ... free of [Butkus's and Silton's] claims." See *Sandwich*, 409 Mass. at 384.

*3 We conclude that neither Butkus nor Silton was entitled to the surplus from the town's sale of the property on February 29, 2016, because by then, neither retained any interest in the property. *Sandwich*, 409 Mass. at 384. Thus, the judge correctly entered summary judgment in favor of the town. See *Dorrian*, 479 Mass. at 271.⁷

Judgment affirmed.

All Citations

95 Mass.App.Ct. 1112, 125 N.E.3d 799 (Table), 2019 WL 2082058

Footnotes

- 1 Town of Framingham.
- 2 The panelists are listed in order of seniority.
- 3 By the time of the auction, Silton's tax debt had increased to approximately \$ 115,000.
- 4 While the town styled its dispositive motion as one for judgment on the pleadings, given Butkus's cross motion for summary judgment, which raised matters outside of the pleadings, the judge correctly applied the summary judgment

standard to the town's motion. See Mass. R. Civ. P. 12 (c), 365 Mass. 754 (1974) ("If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56"). See also *Golchin v. Liberty Mut. Ins. Co.*, 466 Mass. 156, 159 (2013).

- 5 The town urges that we construe § 28 as extending solely to the surplus proceeds of tax taking sales of personal property. Without addressing the issue, we note that there is no language in the statute to that effect, and observe that, to our knowledge, no Massachusetts court has had occasion to cite, much less interpret it.
- 6 To preserve her asserted interest, Butkus was required to seek intervention in the town's Land Court action, rather than the Superior Court, because the Land Court has "exclusive jurisdiction of the foreclosure of all rights of redemption from titles conveyed by a tax collector's deed or a taking of land for taxes." G. L. c. 60, § 64. Butkus counters that she was unaware of the town's Land Court action because the town spelled the address for the property incorrectly on the instrument of taking, and because the town necessarily was aware of her interest in the property. Her argument is unavailing. The town filed its Land Court foreclosure petition on January 3, 2012, some thirty-six months before Butkus recorded her mortgage on the property in August of 2014, and roughly eleven months before Butkus filed the action before us. Accordingly, at the time the town filed its Land Court foreclosure petition, the town was not chargeable with knowledge of Butkus's asserted interest. See G. L. c. 60, § 6 (mandating notification of "all persons appearing to be interested" of petition to foreclose rights of redemption). See also *Deying v. Nantucket*, 449 Mass. 499, 507 (2007); *Frost Coal Co. v. Boston*, 259 Mass. 354, 357-358 (1927) (town established constructive notice of pending petition where it recorded instrument of taking).
- 7 Because Butkus held no interest in the property after the Land Court entered the foreclosure judgment in favor the town on September 2, 2014, we need not address the judge's rejection of her claim that the town's retention of the surplus is contrary to G. L. c. 60, § 28 (see note 4, supra). Nor do we address Butkus's argument that the town's actions constitute an unconstitutional taking of the property without just compensation, except to observe that Butkus did not hold title to the property she claims was unconstitutionally taken. Likewise, we need not address the town's contention that the holding in *Kelly v. Boston*, 348 Mass. 385 (1965), by itself, precludes Butkus's claim.