

COMMONWEALTH OF MASSACHUSETTS  
TRIAL COURT  
LAND COURT DEPARTMENT

TAX CASE NO. 18 TL 001223

TOWN OF TYNGSBOROUGH

v.

PAULA RECCO

)  
) PLAINTIFF'S REPLY MEMORANDUM  
) IN SUPPORT OF ITS  
) MOTION FOR JUDGMENT  
) ON THE PLEADINGS

**Plaintiff is permitted to seek relief under "Operative" or "Original" Complaints.**

Per Mass R. Civ. P. 54 (c), the Plaintiff ("Town") is permitted to raise the relief sought under both "Operative" and "Original" complaints, as so identified by the Defendant.<sup>1</sup> The Defendant and multiple amici have briefed extensively on the issue of G.L. c. 60, § 64 ("§ 64") foreclosures and the Town has now elected to offer it for the Court's consideration. This is likewise consistent with the Court's statement during its January 30, 2024 Status Conference that parties may "tak[e] into account [in their motions] everything...in the amicus briefs and everything [we] have as an idea of how this should be resolved." *Audio Transcript of Hearing at 10:52:44am.*

**Factual statements in the Affidavit should be considered by the Court.**

The statements in Plaintiff's Exhibit 3 Affidavit are not hearsay.<sup>2</sup> Furthermore, even if they are hearsay, they fall under the 804(b)(3) "statement against interest" exception because they were "contrary to the declarant's proprietary or pecuniary interest" as Defendant's real estate broker. *Id.* The broker's statements should not be disregarded by the Court.

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<sup>1</sup> Rule 54, in pertinent part, states, "... every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

<sup>2</sup> The statements were not offered to "establish the truth of the words contained in the statement[s]," Mass. R. Civ. P. 801(c), but rather to establish, *inter alia*, that the Defendant had several opportunities to negotiate a fair-market selling price for her property (to be able to redeem), but refused to do so.

Likewise, the Town understands the general prohibition against fact-finding at the 12(c) stage.<sup>3</sup> However, the Town urges that the Court take judicial notice of the affidavit's facts rather than converting this into a motion for summary judgment.<sup>4</sup> The statements by the Defendant's real estate broker, as reported by Attorney Kane, are so likely to be provably true that judicial notice would not be inappropriate. As the Town seeks an equitable remedy, it is crucial for the Court to consider all the facts, including the ones in the affidavit that were not available to the Town until after the Court's most recent hearing.

**The Town is not precluded from returning the surplus.**

Even if we assume arguendo that G.L. c. 60 lacks a specific procedure by which taxpayers can reclaim surplus after foreclosure, that does not mean they are "absolutely precluded" from doing so.<sup>5</sup> The Defendant and amici cite *Kelly v. City of Boston*, 348 Mass. 385 (1965), to argue municipalities cannot voluntarily return surplus proceeds. However, that case is so factually and contextually distinct, and the holding so obviously unconstitutional, that it cannot be assumed to apply to the facts of this case.<sup>6</sup> Unlike in *Kelly*, the Town here is trying to return the surplus proceeds. Even setting aside the constitutional infirmity of *Kelly*, that fundamental factual difference alters how a court might decide the case. And because the Town

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<sup>3</sup> See *Management Corp. v. Planning Bd. of Gosnold*, 82 Mass. App. Ct. 793, 801 (2012)).

<sup>4</sup> Mass. R. Civ. P. 12(c) states: "If...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."

<sup>5</sup> In *Tyler*, the Supreme Court upheld its ruling in an earlier New York takings ordinance case "[b]ecause [it] did not 'absolutely preclud[e] an owner from obtaining the surplus proceeds of a judicial sale...' *Tyler v. Hennepin Cnty., Minnesota*, 598 U.S. 631, 644 (2023) (quoting *Nelson v. City of New York*, 352 U.S. 103 (1956)). Here, municipalities have the ability, and the unavoidable obligation, to do so.

<sup>6</sup> "The court in *Kelly* held, [m]anifestly on any theory of 'equity and good conscience' a municipality has no power to pay out money whenever there may be a surplus after a sale of real estate following foreclosure of a tax title. Such disbursements without statutory authority would be wholly voluntary." *Kelly v. City of Bos.*, 348 Mass. 385, 389 (1965). This violates the Constitution and has been overruled by *Tyler*. As stated in Plaintiff's Memorandum, such disbursements today are not voluntary. The Plaintiff in *Kelly* argued G.L. c. 60, § 28, discussed below, applied to real property and the SJC erroneously disregarded that interpretation. - which would have allowed for the accounting of and return of surplus. That decision was plainly wrong. See Amicus Brief of...Brown Legal PLLC, Ex. 6, Kelly Appellant Brief Excerpt.

can and will return any surplus to the Defendant, the Court does not need to constitutionally invalidate this statute.

**G.L. c. 60, § 68 (“§ 68”).**

§ 68 states in relevant part “[a]ny person... shall, if he desires to redeem, file an... offer to redeem upon such terms as may be fixed by the court. Thereupon the court... may...make a finding allowing the party to redeem, within a time fixed by the court, upon payment to the petitioner of [the taxes, interest, costs and reasonable attorney’s fees]. The court may impose *such other terms as justice and the circumstances warrant.*” (Emphasis added). Regarding jurisdiction, the remedy sought is closely “tethered” to the Court’s specific jurisdictional grant over rights of redemption.<sup>7</sup> In this case, the law in question (§ 68) relates specifically to redemption. The matter at hand is in the redemption stage of proceedings, the Defendant has promised to redeem, and the order sought is one specifically related to effectuating redemption. Thus, the proposed order of sale, tethered as it is to the Court’s specific jurisdictional grant, is on firmer ground in “impos[ing] such other terms as justice and the circumstances warrant.” In ensuring a constitutional outcome for both parties, the mandated redemption is an inherently equitable order in this case where an adequate and timely remedy at law is not available. While such an order would likely be inappropriate in other situations, due to the open constitutional question as well as other issues that have interfered with the Town’s ability to collect its past-due taxes, justice and these unique circumstances warrant it.

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<sup>7</sup> In *Bask, Inc. v. Mun. Council of Taunton*, 490 Mass. 312 (2022), the Supreme Judicial Court (“SJC”) overruled this Court’s application of the phrase “make such other decree as justice and equity may require” because the Court’s order was held not sufficiently “tethered” to the Land Court’s specific jurisdictional grant. In that case, the law related to special permitting, but the SJC ruled this Court’s equitable order affected the process of issuing licenses.

G.L. c. 60, § 28 (“§ 28”).

The Town would like to apologize and clarify that any reference it made to G.L. c. 60, § 24 (“§ 24”) in its March 15, 2024 Combined Memorandum of Law was an inadvertent scrivener’s error. All such references should have been to § 28, which 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.”

§ 24, which the Defendant was justified in referencing due to Plaintiff’s scrivener’s error, applies to seizure and sale of *goods*. However, there is clearly no such reference to goods in § 28. There is no language in either section that ties one to the other.

The Town understands that the appeals court in *Butkus v. Charles L. Silton, Inc.*, 95 Mass. App. Ct. 1112 (2019) (unpublished) did not “address” the defendant city’s request that the court construe § 28 as applying solely to personal property. Nevertheless, the court went out of its way to recognize (when it did not need to), that “there is no language in the statute [suggesting § 28 applies only to personal property]” and it also pointed out that no Massachusetts court had yet cited or interpreted § 28. *Id.* at \*3. Thus, after the Court’s order of foreclosure brings the case to a close, it exists as a viable path by which a municipality can make the surplus available to be returned to a former property owner.

G.L. c. 60, § 43 (“§ 43”).

While the Defendant is correct that the *Kelly* court was quick to dismiss § 43 as a mechanism by which a municipality could be forced to return equity to an owner, today’s circumstances (as emphasized above) are different, and at least one 2001 SJC case appears to have added teeth to § 43. As suggested in Plaintiff’s Memorandum, the SJC, in *Milford v. Boyd* 434 Mass. 754 (2001), exhibited flexibility in authorizing how towns make necessary payments

after foreclosure. It authorized the plaintiff to pay condo fees as a cost out of the proceeds from foreclosure sale despite the lack of a specific mechanism to make such a payment. Logic suggests the same theory could apply here.

**No Mechanism Required.**

Finally, following foreclosure and absolute title passing to the Town, the Town has several other options that allow it to protect Ms. Recco's property rights while keeping what is owed. For example, the Town may provide a detailed accounting to Ms. Recco and to the winning bidder at public auction and have the winning bidder write two checks: one to the Town to pay the taxes, interest, fees and costs and one to Ms. Recco with the surplus. In this way, the Town does not implicate G.L. c. 60 after foreclosure and all parties are protected.

**Conclusion**

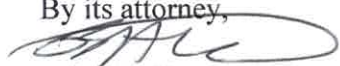
The Town is sympathetic to Ms. Recco's very difficult situation, and to the paramount importance of her constitutional rights. However, the Town does not believe her rights are being violated. She can and will receive back her equity. And thus, the Town is frustrated at the prospect of what could be years of waiting and/or litigating this matter to receive what the Defendant acknowledges she owes. Judgment should enter for the Plaintiff so it can receive what it is owed, and then account to Ms. Recco so her surplus can be returned.

Respectfully submitted,

April 1, 2024

Town of Tyngsborough

By its attorney,



Brian H. Kane

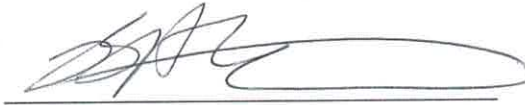
BBO# 651625

116 Pleasant St. #312

Easthampton, MA 01027

CERTIFICATE OF SERVICE

I certify that on April 1, 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](mailto: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](mailto:stephen.rider@swrpc.com).

A handwritten signature in black ink, appearing to read 'B. Kane', is written over a horizontal line.

Brian H. Kane