Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX COUNTY

SUPREME JUDICIAL COURT
F.A.R. NO.

APPEALS COURT
NO. 2018-P-0072

LISA A. BUTKUS,
PLAINTIFF,

v.

CHARLES L. SILTON, INC., AND TOWN OF FRAMINGHAM,
DEFENDANTS.

PLAINTIFF-APPELLANT, LISA A. BUTKUS' APPLICATION FOR FURTHER APPELLATE REVIEW

JEREMY L. KAY
BBO #657867
JEREMY L. KAY, P.C.
36 North Bedford Street, Unit C-20
East Bridgewater, MA 02333
508.378.3783 (T)
508.458.9999 (F)
Jeremy@jkaylaw.com

EDMUND A. ALLCOCK
BBO #566718
HALEY M. BYRON, BBO #679152
MARCUS, ERRICO, EMMER & BROOKS, P.C.
45 Braintree Hill Office Park, Suite 107
Braintree, Massachusetts 02184
(781) 843-5000
eallcock@meeb.com

Dated: June 3, 2019

1. Request For Further Appellate Review

The plaintiff-appellant, Lisa A. Butkus ("Butkus"), respectfully applies, pursuant to Mass. R. App. P. 27.1, for further appellate review of the Massachusetts Appeals Court's Rule 1:28 memorandum and order issued on May 13, 2019, affirming the Trial Court's (Kern, J.) June 14, 2017 Judgment on cross motions for partial summary judgment.[1,2]

As detailed below, this case merits further review because it presents a novel issue of statutory construction, constitutional issues and a prior decision of this Court which is either outdated or has been misapplied to result in a municipality retaining an approximately $600,000.00 surplus following a tax distress sale that began over $5,254.56 in unpaid real estate taxes in spite of M.G.L. c. 60, § 28 ("Section 28") entitled "Accounting for Surplus" and providing in full: "The collector shall upon demand give a

---

[1] One of the motions was styled as a "Motion for Judgment on the Pleadings," but the Court applied the summary judgment standard with no objection by either party.

[2] A copy of the Appeals Court's Rule 1:28 memorandum and order is appended hereto as **Exhibit 1** and a copy of the Trial Court's Memorandum of Decision and Order is appended hereto as **Exhibit 2.**

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."

2. Statement of Prior Proceedings

In December 2012, Butkus commenced a proceeding styled, Lisa A. Butkus v. Charles L. Silton, Inc., et. al., Middlesex Superior Court Docket No. MICV2012-04682 ("Butkus v. Silton Glass I"), seeking to recoup, *inter alia*, unpaid wages from her former employers ("Silton Glass").

On August 18, 2014, an Agreement For Final Judgment and Permanent Injunction entered in Butkus v. Silton Glass I and established Silton Glass' debt to Butkus at $250,000.00 along with other obligations to her (the "First Final Judgment").

On September 2, 2014, in an action styled Town of Framingham v. Charles L. Silton, Inc., Soverein Bank, Bank of America, NA., Land Court Docket No. 12TL143399 (the "Tax Lien Case"), judgment entered in favor of the Town of Framingham ("Framingham" or "Town") with regard to a tax taking dated December 3, 2010, and concerning $5,254.56 in unpaid taxes on Silton Glass' real estate (the "Silton Glass Building") from the 2010 fiscal year.

On or about January 29, 2016, the Town held an auction for the Silton Glass Building, and the high bid was $750,000.00 plus approximately $65,000.00 in fees.

On February 17, 2016, before the closing, Butkus commenced this litigation in the Trial Court, by filing a Verified Complaint against Silton Glass and the Town, seeking 1) declaratory judgment that Silton Glass had violated its obligations to her under the First Final Judgment; 2) declaratory judgment that Silton Glass is entitled to an accounting of and the surplus from the planned conveyance of the Silton Glass Building; and 3) an injunction requiring the Town to play the surplus towards Silton Glass' debt to Butkus.[3]

On or about February 24, 2016, before the closing, Silton Glass made written demand to Framingham for an accounting and distribution of the surplus on the sale of the Silton Glass Building pursuant to Section 28.

[3] In what appears to be a minor misunderstanding, the memorandum and order of the Appeals Court indicates that Butkus sought to enjoin the sale of the Silton Glass Building. (See **Exhibit 1**, p. 2). That is not accurate.

On February 26, 2016, Framingham conveyed the Silton Glass Building to the nominee of the high bidder.

On September 6, 2016, Butkus and Framingham filed cross motions for partial summary judgment in the Trial Court on the issue of Framingham's obligation to account for and pay the surplus on the sale of the Silton Glass Building to Silton Glass.[4]

On June 14, 2017, the Trial Court (Kern, J.) denied Butkus' cross motion for partial summary judgment and allowed Framingham's motion, acknowledging that Butkus' constitutional arguments found support in other jurisdictions but holding that the Trial Court is bound by Kelly v. Boston, 348 Mass. 385 (1964).

On July 6, 2017, Butkus filed a petition for leave to take an interlocutory appeal pursuant to M.G.L. c. 231, § 118, and same was denied on July 11, 2017.

On November 13, 2017, the Trial Court (Kern, J.) allowed an Agreement for Final Judgment and Permanent

[4] Framingham's motion was styled as a "Motion for Judgment on the Pleadings," but the Court applied the summary judgment standard with no objection by either party.

Injunction between Butkus and Silton Glass establishing that Silton Glass defaulted on its obligations to Butkus and that Butkus is entitled to recover Silton Glass' debt to her from the surplus on the sale of the Silton Glass Building owed by Framingham to Silton Glass (the "Second Final Judgment).

On December 1, 2017, Butkus timely filed a notice of appeal and certification regarding transcript pursuant to Mass.R.App.P. 9(c)(2)(iii).

On January 11, 2018, the clerk of the Trial Court provided Notice to Clerk of the Appeals Court of Assembly of the Record.

On January 19, 2018, Butkus timely docketed the appeal pursuant to Mass.R.App.P. 10(a).

On or about February 8, 2018, Butkus applied for direct appellate review, and the application was denied on May 3, 2018.

On or about August 6, 2018, the Office of Attorney General of the Commonwealth of Massachusetts notified the parties that it does not wish to participate in this case.

On May 13, 2019, the Appeals Court's Rule 1:28 memorandum and order issued affirming the Trial

Court's order on the cross motions but acknowledging that no Massachusetts Court has interpreted Section 28.

Butkus is timely applying for further review and not seeking reconsideration or modification in the Appeals Court.

3. Short Statement of Facts Relevant to Appeal

Besides inaccurately framing Butkus' claim as a collateral attack on the Land Court proceedings, the memorandum and order of the Appeals Court is factually accurate.[5]

Butkus' claim is not a collateral attack on the Land Court proceedings. Butkus is not and never was seeking to redeem a mortgage interest. And, Butkus is not and never was challenging the "absolute title" conveyed by Framingham to the purchaser of the Silton Glass Building.

Butkus' claim seeks enforcement of G.L. c. 60, Section 28 with respect to a surplus from the sale, a surplus that did not exist and could not have been

[5] In what appears to be a minor misunderstanding, the memorandum and order of the Appeals Court indicates that Butkus sought to enjoin the sale of the Silton Glass Building. (See Exhibit 1, p. 2). That is not accurate.

known during the pendency of the Land Court proceedings or before the sale.

General Laws c. 60, Section 28 provides as follows:

> Section 28 Accounting for surplus
>
> The 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.

On or about February 24, 2016, Silton Glass made written demand to Framingham for an accounting and distribution of the surplus pursuant to Section 28.

Framingham has refused to provide an accounting or pay any surplus to Silton Glass and Butkus seeks a declaratory judgment that Section 28 requires Framingham to do so.

4. <u>Statement of Points With Respect To Which Further Appellate Review is Sought.</u>

This case presents the following legal issues:

Whether M.G.L. c. 60, § 28 ("Section 28") entitled "Accounting for Surplus" and providing in full, "The 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,"

requires Framingham to account for and pay Silton Glass (which made timely demand) the approximately $600,000.00 surplus achieved from the sale on distress seizure of the Silton Glass Building which began over $5,254.56 in unpaid real estate taxes from the 2010 fiscal year.

Alternatively, this case presents the issue of whether, if Section 28 does not apply as the Trial Court ruled was dictated by Kelly v. Boston, 348 Mass. 385 (1964), then the tax taking system set forth at G.L. c. 60 is unconstitutional in violation of the takings clauses of the Massachusetts Declaration of Rights and the United States Constitution.

Butkus believes that Kelly is distinguishable or should be overruled, limited or modified as neither Section 28, nor the constitutional implications of it, were squarely addressed.

5. Brief Statement in Support of Further Appellate Review.

The instant appeal presents the Court with a rare opportunity to ensure the Commonwealth's tax taking scheme is administered in conformity with the Takings clauses of Art. 10 of the Massachusetts Declaration of Rights and the Fifth Amendment to the Constitution of

the United States. It involves both constitutional and statutory interpretation issues of first impression in the Commonwealth, and issues of what is fair and lawful in the treatment of financially distressed citizens, citizens who are typically not in an economic position to challenge municipal action.

The need for further appellate review is highlighted by the totally different analyses applied by the Trial Court and the Appeals Court. The Trial Court decision acknowledged that Butkus' constitutional arguments find support in other jurisdictions but determined itself bound by Kelly v. Boston, 348 Mass. 385 (1964).

The Appeals Court, on the other hand, did not discuss Kelly but it did note in footnote 4 that Section 28 has never previously been interpreted by a Massachusetts court before, inaccurately, framing Butkus' claim as a collateral attack on the Land Court proceedings.

Butkus' claim is not a collateral attack on the Land Court proceedings. It is an action to enforce Section 28 with regard to a surplus that did not even exist at the time of the Land Court proceedings. Butkus is not and never was seeking to redeem a

mortgage interest. And, Butkus is not and never was challenging the "absolute title" conveyed by Framingham to the purchaser of the Silton Glass Building. Butkus' sole interest is in the surplus from the sale, a surplus that did not exist and could not have been known during the pendency of the Land Court proceedings or before the sale.

No matter what approach is taken, this matter raises an important legal conflict between G.L. c. 60, § 28 and the Takings clauses of Art. 10 of the Massachusetts Declaration of Rights and the Fifth Amendment to the Constitution of the United States (on one side) and Kelly v. Boston, 348 Mass. 385 (1964) (on the other side), which conflict can only be resolved by this Court's consideration.

And, this Court should grant further appellate review because the existing application results in a system which allows municipalities to deprive already financially distressed property owners who are unable to pay their real estate taxes of the right to retain the equity built up in their property.

It is Butkus' position that Section 28, which the lower courts have declined to enforce, unambiguously requires Framingham to account for any surplus on its

sale of the Silton Glass Building and to pay that amount to Silton Glass.

General Laws c. 60 specifically provides as follows:

> Section 28 Accounting for surplus
>
> The 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.

(Emphasis added). Since Silton Glass has made timely "demand," it is beyond reasonable dispute that Framingham must give a "written account" and pay "any surplus" to Silton Glass. There is no reasonable alternative interpretation of G.L. c. 60 or Section 28.

Not enforcing Section 28 would render G.L. c. 60 unconstitutional as a taking of private property in violation of Art. 10 of the Massachusetts Declaration of Rights and the Fifth Amendment to the Constitution of the United States.

Article 10 of the Massachusetts Declaration of Rights provides in relevant part as follows:

> no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this

> commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

Likewise, the Fifth Amendment to the Constitution of the United States provides in relevant part as follows: "private property [shall not] be taken for public use, without just compensation."

While no Massachusetts judicial decisions have addressed the constitutionality of G.L. c. 60, post-Kelly decisions by the Supreme Courts of Vermont and New Hampshire and the United States District Court for the District of Columbia have determined that tax taking schemes similar to that effectuated by the lower courts in this case violate the takings clauses contained in those states' constitutions and the Fifth Amendment to the Constitution of the United States. *See* Thomas Tool Services, Inc., v. Town of Croydon, 761 A.2d 439 (N.H.2000); Bogie v. Town of Barnet, 270 A.2d 898 (VT 1970); Coleman v. District of Columbia, Civil Action No. 13-1456 (D.D.C.2014).

In Thomas Tool, the Supreme Court of New Hampshire struck down a similar tax taking scheme as

violative of the takings clause of the New Hampshire state Constitution. Like Art. 10 of the Massachusetts Declaration of Rights, Article 12 of the New Hampshire state Constitution requires "just compensation" in the event of a taking. Id.

In Thomas Tool, the New Hampshire Supreme Court held that the "statutory alternative tax lien procedure is constitutional only if it is read to limit the taking of the taxable property to the extent necessary to satisfy the tax debt, interest, reasonable costs and fees, and a reasonable penalty." Thomas Tool, 761 A.2d 439 at 441.

Similarly, Bogie v. Town of Barnet, 270 A.2d 898 (VT 1970), stated, "[a] policy which encouraged municipal governments to promote situations where it was authorized to acquire the property of its own taxpayers at unconscionable discounts, to the enrichment of the town treasury…is fraught with danger and we find not contemplated by the legislative enactment." Id. at 900.

Bogie went on to hold, "[t]o withhold the surplus from the owner would be to violate the fifth amendment to the constitution, and…take his property for public use without just compensation." Id. "The

corresponding rights under the Vermont Constitution upon a taking by public authority appear in Chapter I, Article 2. Satisfaction of the statutory procedures, although they may meet the test of due process, does not negate the obligation to account for the excess proceeds received from the sale." Id.

Recent Federal analysis is the same. In Coleman v. District of Columbia, Civil Action No. 13-1456 (D.D.C.2014), the District of Columbia sought to retain an entire surplus. Id. at 2-3. The Court conducted an exhaustive analysis of Takings Clause jurisprudence and ultimately concluded: "a Takings Clause violation will not arise when a tax-sale statute provides an avenue for recovery of the surplus equity…a Takings Clause violation will arise when a tax-sale statute grants a former owner an independent property interest in the surplus equity and the government fails to return that surplus." Id. at 45-46.

The bottom line is that G.L. c. 60 can only pass constitutional muster if Section 28 is included therein, given its plain meaning, and enforced. That is not happening in the Commonwealth due to the

present application of Kelly v. Boston, 348 Mass. 385 (1964).

As discussed above, the Town and the Trial Court relied on Kelly v. Boston, 348 Mass. 385 (1964), along with secondary references and citations thereto when the reality is that Kelly did not squarely address the issues raised by the instant case. Neither Section 28 nor the constitutional issues raised herein were before the Court in Kelly in 1964. Had they been raised, Kelly likely would have been decided differently.

It is clear that the statutory purposes of G.L. c. 60, s. 1, et. seq. are (1) to ensure that a municipality is paid what it is owed when it undertakes a tax taking; and (2) to protect the integrity of the title accepted by a purchaser who buys seized land. Buk Lhu v. Dignoti, 431 Mass. 292, 296 (2000). Nothing in the statute indicates that its purpose is also to secure a windfall to a municipality following a tax taking. There simply is no public policy supported by such an unfair result. Furthermore, the Massachusetts Declaration of Rights and the Constitution of the United States prohibit

interpreting the law in such a fundamentally unconscionable way.

For the foregoing reasons, Butkus requests that this Court grant further appellate review of this appeal and clarify or reverse its holding in Kelly so that financially vulnerable citizens of the Commonwealth will not continue to be prejudiced by its interpretation.

Respectfully submitted,

/s/ Jeremy L. Kay
JEREMY L. KAY
BBO #657867
JEREMY L. KAY, P.C.
36 North Bedford Street, Unit C-20
East Bridgewater, MA 02333
508.378.3783 (T)
508.458.9999 (F)
Jeremy@jkaylaw.com

/s/ Edmund A. Allcock
EDMUND A. ALLCOCK
BBO #566718
HALEY M. BYRON, BBO #679152
MARCUS, ERRICO, EMMER & BROOKS, P.C.
45 Braintree Hill Office Park
Suite 107
Braintree, Massachusetts 02184
(781) 843-5000
eallcock@meeb.com

Exhibit 1

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

In the case no. 18-P-72

LISA A. BUTKUS

vs.

CHARLES L. SILTON, INC., & another.

Pending in the Superior Court for the County of Middlesex

Ordered, that the following entry be made on the docket:

Judgment affirmed.

By the Court,

Joseph F. Stanton, Clerk

Date May 13, 2019.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-72

LISA A. BUTKUS

VS.

CHARLES L. SILTON, INC., & another.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

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

[1] Town of Framingham.

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.[2]

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

[2] By the time of the auction, Silton's tax debt had increased to approximately $115,000.

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.[3] 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).

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.

[3] 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).

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,[4]

[4] 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.

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.[5] Silton,

[5] 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

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.

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

---

redemption). See also Devine 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).

Dorrian, 479 Mass. at 271.[6]

Judgment affirmed.

By the Court (Vuono,
Wolohojian &
McDonough, JJ.[7]),

Joseph F. Stanton

Clerk

Entered: May 13, 2019.

[6] 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.

[7] The panelists are listed in order of seniority.

Exhibit 2

15

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 16-00437

LISA A. BUTKUS

vs.

CHARLES L. SILTON, INC. & another[1]

MEMORANDUM OF DECISION AND ORDER ON TOWN OF FRAMINGHAM'S MOTION FOR JUDGMENT ON THE PLEADINGS AND PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

The plaintiff, Lisa Butkus ("Butkus"), seeks declaratory judgment that the reach and apply defendant, Town of Framingham ("the Town"), is required to return the surplus money from a recent tax foreclosure sale of 618 Waverly Street ("the Property") to the former owner, defendant Charles L. Silton, Inc. ("Silton"). The Town has moved for judgment on the pleadings with respect to Counts II and III[2] of the plaintiff's complaint and has also requested an award of attorney's fees. Butkus has cross-moved for summary judgment on the same counts. For the following reasons, the Town's motion is **ALLOWED** as to Counts II and III, but **DENIED** as to the request for attorney's fees, and Butkus's cross motion is **DENIED**.

BACKGROUND[3]

On December 3, 2010, the Town executed a tax taking for non-payment of real estate taxes on the Property, which was recorded on January 18, 2011. On January 3, 2012, the Town filed a Petition to Foreclose the Rights of Redemption against Silton for failure to pay taxes on

[1] Town of Framingham (Reach and Apply Defendant)
[2] Count I of the Complaint pertains solely to defendant Silton and alleges breach of a settlement agreement. Count II is for declaratory judgment seeking a declaration that the Town is required to pay any surplus proceeds from the foreclosure auction to Silton, and Count III is for reach and apply of those proceeds.
[3] This background section focuses solely on Butkus's claims against the Town.

the Property since 2010. The case was litigated in Land Court, *Town of Framingham* v. *Charles L. Silton, Inc.*, LCTL2012-143399, and, on September 2, 2014, the Town obtained a Final Judgment for Foreclosure.[4]

Meanwhile, in December 2012, Butkus commenced an action against Silton, her former employer, for unpaid wages. *Lisa A. Butkus* v. *Charles L. Silton, Inc.*, MICV2012-04682. In August 2014, the parties settled and Butkus obtained a $250,000 final judgment against Silton, which included a mortgage on the Property.[5]

In January 2016, the Town held an auction for the Property[6] and it was sold to the highest bidder for $750,000. After the fees were paid, the total amount the buyer paid for the Property was $815,000. On or about February 24, 2016, Silton made a written demand to the Town for an accounting and distribution of the surplus proceeds from the sale pursuant to G. L. c. 60, § 28.[7] The Town did not provide the accounting and has not paid any surplus.

DISCUSSION[8]

Summary judgment shall be granted where there are no genuine issues of material fact and where the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); *Cassesso* v. *Commissioner of Corr.*, 390 Mass. 419, 422 (1983). The moving party bears the

[4] By the time final judgment issued, the Town asserts that Silton's tax bill had grown to over $100,000. Additionally, it does not appear that Silton appealed the Land Court decision.

[5] The parties' settlement agreement stipulated that Silton would repay the $250,000 owed in monthly installments of $2,788.46. According to the agreement, the mortgage was meant to serve as security for Butkus should Silton fail to make these monthly payments. The agreement required that Silton pay all taxes on the Property when due and failure to do so constituted a default which resulted in the entire balance and interest then accrued being due.

[6] The Town argues that the auctioned property is different from the Property Butkus has an interest in because the Town combined neighboring parcels, which included 618 Waverly Street, to create the property that ultimately was auctioned.

[7] Section 28 is entitled Accounting for Surplus and states: "The 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."

[8] Because the Town relies on documents it filed earlier in this case to support its Supplemental Memorandum in Opposition to the Plaintiff's Motion for Approval of Reach and Apply Attachment and responded to the plaintiff's proposed material facts, this court will apply the summary judgment standard.

burden of demonstrating the absence of a triable issue. *Pederson* v. *Time, Inc.*, 404 Mass. 14, 16-17 (1989). The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. *Flesner* v. *Technical Commc'ns Corp.*, 410 Mass. 805, 809 (1991); *Kourouvacilis* v. *General Motors Corp.*, 410 Mass. 706, 716 (1991). Once the moving party establishes the absence of a triable issue, the party opposing the motion must respond with evidence of specific facts establishing the existence of a genuine dispute. *Pederson*, 404 Mass. at 17.

In *Kelly* v. *Boston*, the Supreme Judicial Court held that a municipality is permitted to retain the surplus proceeds from a tax foreclosure sale, and the former owner, and other individuals with an interest in the property, are not entitled to any surplus. 348 Mass. 385, 388 (1965). Notwithstanding, the plaintiff argues that *Kelly* does not control because the Supreme Judicial Court did not explicitly address G. L. c. 60, § 28 in its decision. However, this court disagrees. In reaching its decision in *Kelly*, the Court examined the statute's text as well as its legislative history. See *id.* at 387-389. The Court concluded that the Legislature's 1915 adoption of the present tax sale system indicated an intent that the surplus from tax foreclosure sales would now belong to the municipality. *Id.* at 387-388 (under the previous system the surplus returned to the prior property owner).[9]

Moreover, nothing in the fifty years since *Kelly* was decided has altered this conclusion. In fact, the right of a municipality to retain the surplus proceeds from a tax foreclosure sale has been reaffirmed and continues to be applied in Land Court cases, including the case underlying this action. See, e.g., *Devine* v. *Nantucket*, 16 Mass. App. Ct. 548, 552-553 (1983) ("Indeed, the

[9] This court also notes that § 28's language does not appear to pertain to tax foreclosure sales, particularly when read in the context of the entire chapter.

current policy is to permit towns to keep tax title land and proceeds of sale if it is sold after foreclosure of redemption rights."); *Tallage LLC* v. *Meaney*, 23 LCR 375, 377 (2015) ("[U]nlike mortgage foreclosures or executions on money judgments in ordinary civil cases, the tax-foreclosing party keeps all surplus. Once the right of redemption has been foreclosed, tax title is 'absolute' and neither the property owner nor any party claiming through the owner (such as mortgagees, lienors, or attaching creditors) has any claim, then or later, to the property or any part of its value."). Therefore, controlling case law is clear that Butkus is not entitled to receive any payment from the Town because the Town is not required to return the surplus proceeds from the Property's sale to Silton. This court also notes that Gordon, J. reached the same conclusion in his earlier decision denying the plaintiff's Motion for Approval of Reach and Apply Attachment, which was treated as a Motion for Preliminary Injunction. See Paper No. 9 (Mar. 18, 2016) (Gordon, J.).

Additionally, the plaintiff argues that the Town's retention of the surplus is an unconstitutional taking. Although this argument has found support in other jurisdictions, see, e.g., *Bogie* v. *Barnet*, 270 A.2d 898, 903 (Vt. 1970), this court is bound by precedent and Massachusetts appellate case law explicitly authorizes a municipality to retain the surplus proceeds from a tax foreclosure sale. Accordingly, this court must find in the Town's favor.

ORDER

For the foregoing reasons, the Town's Motion for Judgment on the Pleadings is **ALLOWED** and the plaintiff's Cross Motion for Summary Judgment is **DENIED**. The Town's request for attorney's fees is **DENIED**.

Leila R. Kern
Justice of the Superior Court

Dated: June 14, 2017

CERTIFICATE OF SERVICE

I, Jeremy L. Kay, do hereby certify that on or before June 3, 2019, I served a copy of the attached application as follows:

Charles L. Silton, Inc., by e-mail to its Attorney, Thomas Kenney at: tom@piercemandell.com

Town of Framingham, by e-mail to its Attorney, Peter Brown at: pbrown@dambrosiobrown.com

/s/ Jeremy L. Kay
Jeremy L. Kay

CERTIFICATE PURSUANT TO MASS.R.APP.P. 16(k)

I, Jeremy L. Kay, do hereby certify that I believe the attached Application complies with Mass.R.App.P. 27.1 including the length limit. Compliance with the length limit was ascertained by using my work processor's word count feature.

/s/ Jeremy L. Kay
Jeremy L. Kay,BBO#657867