UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BENJAMIN COLEMAN, through his Conservator, ROBERT BUNN, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 1:13-cv-01456-EGS
DISTRICT OF COLUMBIA,	)	
Defendant.	)	

DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Defendant, the District of Columbia ("District"), by its undersigned counsel and pursuant to Fed. R. Civ. P. 12(c), moves the Court to grant it judgment on the pleadings. Plaintiffs Robert Bunn, Esq., as conservator for Benjamin Coleman; the Estate of Jean Robinson, through her personal representative Wellington Robinson; the Damages Class; and the Declaratory Relief Class (collectively "Plaintiffs") had no property interest in any surplus equity, and therefore have no basis for a Takings claim.

I. INTRODUCTION

This lawsuit was filed by Mr. Coleman on September 9, 2013. On April 13, 2015, the Court granted Plaintiffs' motion for class certification. Plaintiffs are all District property owners who failed to pay their real property taxes. Plaintiffs were all provided with notice of their tax delinquency pursuant to D.C. Code § 47-1341. Tax-sale purchasers acquired Plaintiffs' property subject to Plaintiffs' rights of redemption by bidding on tax-sale certificates at the District's public auction pursuant to D.C. Code § 47-1346. After a minimum six-month waiting period following the date of the tax-sale, tax-sale purchasers filed complaints in D.C. Superior Court to

foreclosure against Plaintiffs. Plaintiffs failed to remit the amounts required by D.C. Code § 47-1361 in order to redeem and therefore forfeited legal title to their properties.

Plaintiffs now bring this class action, alleging that the District's tax-sale statute, prior to its amendment in 2014, effected an unconstitutional taking of their property without just compensation in violation of the Fifth Amendment. Tax-sale statutes exist in every state, some dating back over a hundred years. Some states provide, either by statute or by their constitution, that any surplus proceeds resulting from a judicial sale of the property be returned to the former owner. As discussed more fully below, many other states do not provide for the return of such surplus.

The Court, in its September 30, 2014 Memorandum Opinion, explained that "[t]he question Mr. Coleman's case presents is: What if the tax-sale statute does not provide a right to the surplus and the statute provides no avenue for recovery of any surplus." *Coleman through Bunn v. District of Columbia*, No. CV 13-1456 (EGS), 2014 WL 4819092, at *17 (D.D.C. Sept. 30, 2014). In this circumstance, the Court held that it must determine whether a property interest in the surplus equity has been created by some other legal source. *Id.* If Plaintiffs do not have a property interest in the surplus equity, their claims must fail. The Court further noted that: "Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" *Id.* (citing *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998)) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). As explained in detail below, nothing in District of Columbia law creates a property interest in the surplus equity of a property that is foreclosed upon pursuant to the District's tax-sale statute.

II. LEGAL STANDARD

Under Rule 12(c) of the Federal Rules of Civil Procedure, "[a]fter the pleadings are closed — but early enough not to delay trial — a party may move for judgment on the pleadings." Fed.R.Civ.P. 12(c). A motion pursuant to Rule 12(c) is appropriately granted when, at the close of the pleadings, "no material issue of fact remains to be resolved, and [the movant] is clearly entitled to judgment as a matter of law." *Montanans for Multiple Use v. Barbouletos*, 542 F.Supp. 2d 9, 13 (D.D.C. 2008) (citations omitted).

When evaluating a motion for judgment on the pleadings under Rule 12(c), courts employ the same standard that governs a Rule 12(b)(6) motion to dismiss. *Jung v. Ass'n of Am. Med. Colls.*, 339 F. Supp. 2d 26, 35–36 (D.D.C. 2004). A court need not accept as true legal conclusions set forth in a complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Accordingly, a court must accept the plaintiff's well-pleaded factual allegations to the extent that "they plausibly give rise to an entitlement to relief," *id.* at 679, and may "only grant judgment on the pleadings if it appears, even accepting as true all inferences from the complaint's factual allegations, that the plaintiff cannot prove any set of facts entitling him to relief." *Lans v. Adduci Mastriani & Schaumberg LLP*, 786 F. Supp. 2d 240, 265 (D.D.C. 2011).

III. DISCUSSION

"The claimant in a takings action bears the responsibility for establishing a compensable property interest." *Page v. United States*, 51 Fed. Cl. 328, 336 (2001) (citing *Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1580 (Fed.Cir.1993)). In this case, Plaintiffs cannot establish a compensable property interest as a matter of law. Even accepting the factual allegations in Plaintiffs' amended complaint, Plaintiffs cannot prove that they have a property interest in the surplus equity.

As explained in detail below, District of Columbia law does not give Plaintiffs a property interest in the surplus equity after a tax-sale foreclosure. Numerous decisions of the D.C. Court of Appeals make it clear that District law has not created a property interest in surplus equity and that there is no interest or remedy beyond what is provided for in the District's tax-sale statute. The D.C. Court of Appeals cases cited by Plaintiffs address only the distribution of marital assets under a wholly separate statute and cannot be held to have created a property interest in surplus equity in a tax-sale case. In fact, the District has been unable to find a single case where a property interest in surplus equity was established by anything other than a statutory provision or a state constitution.

Plaintiffs also cannot establish a property interest in any surplus equity because the District's tax-sale statute does not have a judicial sale and does not create any surplus equity. Finally, it is impossible for Plaintiffs to assert a valid Takings claim because there is no property interest after the D.C. Superior Court issues a judgment foreclosing the right of redemption. For all these reasons, Plaintiffs do not have a valid claim pursuant to the Fifth Amendment and the Court should grant the District's motion for judgment on the pleadings.

A. No Principle of D.C. Law, Nor Any Decision of the D.C. Court of Appeals Creates a Property Interest in Surplus Equity from a Tax-Sale Foreclosure.

Plaintiffs claim "a protected property interest in the equity in [their] home[s] based on principles of D.C. law and decisions of the D.C. Court of Appeals." *Coleman through Bunn v. District of Columbia*, No. CV 13-1456 (EGS), 2014 WL 4819092, at *17 (D.D.C. Sept. 30, 2014). Additionally, Plaintiffs allege in their amended complaint that:

> Equity in a home is undeniably a property right that may not be taken in violation of the Fifth Amendment of the Constitution. Equity is a partial interest in real property and is subject to distribution like other forms of property. The government may not take a citizen's home equity in violation of the Constitution.

Am. Compl. ¶ 102. These broad statements about a right to equity in a home are not relevant to the alleged property interest in this case. Plaintiffs clearly had a property interest in their home equity and a property interest in their fee simple title to their properties. These are the property interests that required notice and a hearing pursuant to due process prior to forfeiture. *See Jones v. Flowers*, 547 U.S. 220, 234 (2006).

The question in this case is not whether Plaintiffs had a property interest in their home equity, but whether any legal principle gave them the right to any surplus equity after the forfeiture caused by the foreclosure judgment. Mr. Coleman's response to the District's Motion to Dismiss concedes as much, stating that: "he has no objection to the Foreclosure Judgment and does not seek to overturn that judgment or recover title to his property; rather, his objection is to the District's independent taking of his **surplus equity**." *Coleman through Bunn v. District of Columbia*, No. CV 13-1456 (EGS), 2014 WL 4819092, at *9 (D.D.C. Sept. 30, 2014) (emphasis added). But, unlike states that provide a right to surplus equity by statute or state constitution, nothing in the District of Columbia's statutes, principles of law, or case law provides an interest in the surplus equity created by a tax-sale foreclosure judgment.

1. District of Columbia Court of Appeals' Decisions Establish that Plaintiffs Do Not Have a Property Interest in the Surplus Equity.

Plaintiffs must establish a compensable property interest by reference to "existing rules or understandings that stem from an independent source such as state law." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). "The 'independent source' underlying a property interest in a particular benefit must be clear enough to provide a citizen with 'an objectively reasonable expectation that he is entitled to' that benefit." *Johnson v. District of Columbia.*, No. CIV A 03-2548 GK, 2006 WL 2521241, at *4 (D.D.C. Aug. 30, 2006) (citing

Hall v. Ford, 856 F.2d 255, 266 (D.C. Cir. 1988)). There is no case and no principle of law in the District of Columbia that gives property owners an objectively reasonable expectation that they are entitled to any surplus equity after a tax-sale foreclosure.

When the Supreme Court has found a property interest from an "independent source," it has been from a state's well-established common law. *See Phillips v. Washington Legal Found.*, 524 U.S. 156, 165 (1998) (explaining that "[t]he rule that 'interest follows principal' has been established under English common law since at least the mid-1700's."); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980) (holding that the Florida Supreme Court had ruled contrary to the long established rule that interest follows principal in rejecting a state property interest). In *Phillips*, the plaintiffs challenged Texas's requirement that the Interest on Lawyers Trust Account (IOLTA) be paid to finance legal services for low-income individuals. 524 U.S. at 160. The Supreme Court held that the plaintiffs had a property interest in the IOLTA because the rule that interest follows principal was firmly embedded in the common law. *Id.* at 165-66.

There is no similarly well-established rule providing a property interest in the surplus equity after a tax-sale foreclosure. In fact, what is well established is the opposite conclusion, that local governments may retain the entire amount of the tax-sale proceeds, and that "the Takings Clause comes into play 'only if the state constitution or tax statutes create [a property interest in the surplus].'" *Coleman through Bunn v. District of Columbia*, No. CV 13-1456 (EGS), 2014 WL 4819092, at *17 n.12 (D.D.C. Sept. 30, 2014) (citing *Ritter v. Ross*, 558 N.W.2d 909, 912 (Wis. Ct. App. 1996)).

Federal Courts in the District of Columbia "construe D.C. law as it has been interpreted by the D.C. Court of Appeals . . . or, in the absence of such guidance, as [they] predict that court

would interpret it . . . ." *Griffith v. Lanier*, 521 F.3d 398, 401 (D.C. Cir. 2008) (citing *Poole v. Kelly*, 954 F.2d 760, 761 (D.C. Cir. 1992)); *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 824 & n.13 (D.C. Cir. 1984)). Accordingly, the first step in determining whether Plaintiffs have a property interest in the surplus equity after a tax-sale foreclosure is to review decisions by the D.C. Court of Appeals to see if it has found a property interest in the surplus equity. The D.C. Court of Appeals has repeatedly denied attempts to assert rights or interests that are not granted by the District's tax-sale statute, and has made clear that there is no property interest in the surplus equity after a tax-sale foreclosure because no statute or state constitution provides such a right.

In the District of Columbia, "[r]ights and liabilities under tax sale proceedings **rest entirely upon the statutes involved**." *Robinson v. District of Columbia*, 372 A.2d 1005, 1008 (D.C. 1977) (emphasis added). This rule is well-founded because "[a] tax sale proceeding is wholly a creature of statute." *Craland, Inc. v. California*, 214 Cal. App. 3d 1400, 1403 (Ct. App. 1989). While the D.C. Court of Appeals in *Robinson* was addressing the rights of a tax-sale purchaser, the rule is no less applicable to the rights of property owners, whose remedies are also clearly set forth in the District's tax-sale statute. Property owners in the District of Columbia whose property is sold at a tax sale are entitled to: a right of redemption pursuant to D.C. Code § 47-1360; the cancellation of sale by the Mayor under certain circumstances pursuant to § 47-1366; and the right to reopen judgments under certain circumstances pursuant to § 47-1379. Until the enactment of § 47-1382.01, well after the foreclosure of Plaintiffs' properties, property owners had no right to their surplus equity under the District's tax-sale statute.

In *Robinson*, the D.C. Court of Appeals recognized that: "Under those common law rules, the purchaser would get nothing unless he got the land itself." 372 A.2d at 1008 (citing 4

Cooley, Taxation s 1553, at 3045 (4th ed. 1924)). The court also recognized that tax-sale purchasers bought tax-sale certificates because of the "possibility of gaining title to a valuable parcel for relatively small sums." *Id.* (citing *United States v. General Douglas MacArthur Senior Village, Inc.*, 366 F. Supp. 302, 306 (E.D.N.Y. 1973)) *aff'd*, 508 F.2d 377 (2d Cir. 1974)). Accordingly, the state of the common law for tax sales in the District of Columbia allowed tax-sale purchasers to obtain fee-simple title for the entire property by paying only the taxes due, with no surplus equity going to the prior record property owner.

The D.C. Court of Appeals has noted that, in regard to tax sales,"[t]he common law has now been modified by a detailed statutory and regulatory regime[.]" *McCulloch v. District of Columbia*, 685 A.2d 399, 402 (D.C. 1996). As noted above, that statutory regime did not provide a right to the surplus equity. In *McCulloch*, the D.C. Court of Appeals again rejected an attempt to create any right, interest, or remedy beyond the statute, explaining that "limited statutory remedies cannot be reconciled with the notion that, on facts such as those revealed by this record, a qualitatively different and more extensive remedy is also authorized." *Id.* The court recognized that:

> To hold that the McCullochs are entitled to recover from the District the fair market value of the properties, when nothing in the statutory scheme relating to tax sales authorizes such relief, would potentially undermine the integrity of the tax sale process, for the District could become liable for amounts far greater than those that it has attempted to collect.

Id. at 403. In this case, to hold that Plaintiffs have a property interest in the surplus equity when no statutory provision authorizes such relief would severely undermine the integrity of the District's tax-sale process. This Court should not interpret D.C. law in such a way when the D.C. Court of Appeals has repeatedly declined to do so.

The D.C. Court of Appeals also rejected an attempt to expand rights beyond the tax-sale statute in *Associated Estates, LLC v. Caldwell*, 779 A.2d 939, 946 (D.C. 2001). In *Associated Estates, LLC*, a tax-sale purchaser made improvements to a property after it received a tax-sale deed from the District. *Id*. at 943. The tax-sale deed was later voided due to errors by the District, and the tax-sale purchaser sought reimbursement from the property owner for the improvements it made. *Id.* at 945. The court refused to provide a right or interest beyond the statute, even though it recognized that "[s]ome jurisdictions, though not the District of Columbia, have ameliorated the potential harshness of this common law rule through legislation that permits the tax sale purchaser to recover the cost of improvements . . . ." *Id.* at 946. The court noted that "it is up to the legislature to take the initiative in this area . . . ." *Id*. This decision makes clear that the D.C. Court of Appeals would not interpret District of Columbia law in a way that provides any additional rights or interests beyond the tax-sale statute, including a property interest in the surplus equity, and would instead rely on the legislature to ameliorate any potential harshness.

Outside of the tax-sale statute context, the D.C. Court of Appeals has also refused to create additional property interests beyond what statutes provide. In *Mamo v. District of Columbia*, the Court of Appeals explained that:

> Nothing in the District's condemnation statute, D.C. Code § 16-1311, *et seq.* (2001), provides for the recovery of business loss, goodwill, or other such consequential damages. Nor is there any explicit provision in the District's Retail Service Station Act ("the RSSA"), D.C. Code § 36-301.01, *et seq.* (2001) which permits the recovery of such damages.

934 A.2d 376, 384 (D.C. 2007). The D.C. Court of Appeals concluded that "there is no District law creating a right to just compensation for consequential damages where the District takes property by eminent domain." *Id.* Similarly, there is no District law creating a right to the

surplus equity after a tax-sale foreclosure, and the D.C. Court of Appeals has not, and would not, create one.

2. The District of Columbia Court of Appeals' Decisions Cited by Plaintiffs Do Not Create a Property Interest in the Surplus Equity After a Tax-Sale Foreclosure.

Plaintiffs claim to have a property interest in the surplus equity after a tax-sale foreclosure based on the D.C. Court of Appeals decisions in *Lewis v. Lewis*, 708 A.2d 249 (D.C. 1998) and *Gore v. Gore*, 638 A.2d 672 (D.C. 1994). Plaintiffs asserted in their opposition to the District's motion to dismiss that these cases stand for the proposition that "District of Columbia law also recognizes that home equity is a property interest subject to distribution as marital property." Pls.' Opp. at 10. As noted above, the issue in this case is not whether home equity is a property interest, but whether there is a property interest in any surplus equity following a tax-sale foreclosure judgment. The fact that home equity is a property interest subject to distribution upon divorce has no bearing on whether a taxpayer has a property interest in surplus equity after a tax-sale foreclosure. In order for there to be a Takings Clause issue, the property interest must survive the tax-sale foreclosure, as surplus proceeds do in states that give the property owners a right to the surplus proceeds. Home equity and legal title are divested by the tax-sale foreclosure unless there is an independent property interest in the surplus equity. Plaintiffs have made no argument that these cases recognize a property interest in the surplus equity after a tax-sale foreclosure.

Lewis and *Gore* have nothing to do with the creation of a legal property interest under District of Columbia law. Both cases address home equity in the context of the distribution of marital property in a divorce proceeding as governed by D.C. Code § 16-910. *Lewis*, 708 A.2d at 254; *Gore*, 638 A.2d at 673. In *Lewis*, the D.C. Court of Appeals held that equity in the home was a marital asset. 708 A.2d at 254. In *Gore*, the D.C. Court of Appeals similarly held that equity could be distributed as marital property. 638 A.2d at 676. D.C. Code § 16-910, and the

D.C. Court of Appeals cases interpreting it, do not establish a property interest entitled to protection under the Fifth Amendment. D.C. Code § 16-910 merely provides for how property acquired during a marriage is to be distributed upon divorce. Nothing in these cases indicates that the D.C. Court of Appeals had created a property interest, much less a compensable property interest, in the surplus proceeds of a tax-sale foreclosure. These cases did not create an objectively reasonable expectation that a property owner is entitled to a property interest in such surplus.

3. The District Has Been Unable to Find Any Case Where a Court Established a Property Interest in Surplus Equity After a Tax-Sale Foreclosure Absent a Statute or State Constitution.

All 50 states and the District of Columbia have tax-sale statutes that result in the forced sale or forfeiture of real property for the failure to pay taxes. *See* Ex. A, District's 50 State Survey of Tax Sale Statutes. Many of these tax sale statutes have been in place for well over a hundred years. *See Ralston v. Hughes*, 13 Ill. 469, 481 (1851) (concerning an 1841 tax sale); *Abell v. Cross*, 17 Iowa 171, 173 (1864) (concerning an 1858 tax-sale foreclosure). Although tax sales exist in every state and have been in place for over a hundred years, the District has been unable to find a single instance where a state or federal court found a property interest in surplus equity on the basis of any legal source other than a state statute or a state constitution. Plaintiffs are asking this Court to be the first court to find an independent property interest in surplus equity after a tax-sale foreclosure on the basis of case law.

Four States — Maine, Massachusetts, New York, and Wisconsin — have all held that there is no property interest in the surplus equity absent a statutory provision or state constitution creating such a right. *See City of Auburn v. Mandarelli*, 320 A.2d 22, 32 (Me. 1974) ("[i]n the absence of contrary provision by statute or constitution, a municipality's title to property

acquired under the tax-lien-mortgage-foreclosure statute is absolute"); *Kelly v. City of Boston*, 204 N.E.2d 123, 125 (1965) ("[w]e think it is clear from the above history of the tax statutes that the Legislature intended the surplus from a sale of land taken for nonpayment of taxes, on which the right of redemption has been foreclosed in the Land Court, to belong to the municipality."); *Sheehan v. Suffolk Cnty.*, 490 N.E.2d 523, 526 (N.Y. 1986) ("[i]t is not unjust for a legislative body to declare that once a taxpayer has abandoned rights in property after such a period has expired, the taxing authority may take a deed in fee. At that point, the former owner can no longer claim any just compensation upon its resale"); *Ritter v. Ross*, 558 N.W.2d 909, 912 (Wis. Ct. App. 1996) ("when a state's constitution and tax codes are silent as to the distribution of excess proceeds received in a tax sale, the municipality may constitutionally retain them as long as notice of the action meets due process requirements.").

Two states — New Hampshire and Vermont — have held that their state constitutions create a property interest in the surplus proceeds, but did not hold that such a property interest existed outside of that state constitutional protection. *See Thomas Tool Servs., Inc. v. Town of Croydon*, 761 A.2d 439, 441 (N.H. 2000)[1]; *Bogie v. Town of Barnet*, 270 A.2d 898, 903 (Vt. 1970). These two cases are not relevant to Plaintiffs' claim as neither indicated that there could be a property interest in surplus equity absent state constitutional protections.

Thirty-two states, and the District of Columbia's recently enacted statute, provide some right to the surplus equity proceeds after a tax-sale foreclosure. Ex. A. It is clear that under the Supreme Court's decision in *Lawton*, a Takings Clause violation would arise in any of these

[1] It is worth noting that prior to interpreting its state constitution to create such a property interest, the New Hampshire Supreme Court held that: "In the absence of contrary provision by statute or constitution, a municipality's title to such property is absolute so that a town is free from either legal or equitable claims by the taxpayer to any surplus realized." *Spurgias v. Morrissette*, 249 A.2d 685, 687 (N.H. 1969) (internal citations omitted).

states if the government failed to return the surplus equity. *United States v. Lawton*, 110 U.S. 146, 149 (1884). Eighteen states, however, still provide no statutory or constitutional right to surplus equity after a tax-sale foreclosure. Ex. A. In spite of the fact that 18 states still retain all the surplus equity after a tax-sale foreclosure, no court in any of those states, or in any other state prior to the adoption of a statutory right to the surplus, has ever held that property owners have a right to their surplus equity based on a legal source other than a state statute or a state constitution.

It is radical to suggest that the tax-sale statutes of 18 states are violating the Takings Clause on the basis of how their divorce statutes treat asset distribution, and yet this is the only basis Plaintiffs propose for finding a property interest post-foreclosure of a tax sale. The D.C. Court of Appeals, in rejecting a claim for relief outside of the statutory provisions of the tax sale, cautioned that "municipal exposure could 'spread, pebble in a pond, until the governmental agency would be engulfed in a tidal wave of liability[,]'" and that "however imposed upon by the clear negligence of the tax claim unit, [the plaintiff is] not entitled to more [than a refund with interest] under the clear intent of the legislature." *McCulloch v. District of Columbia*, 685 A.2d 399, 403-04 (D.C. 1996) (quoting *In re Upset Sale of Properties (Skibo)*, 560 A.2d 1388, 1389 (1989)). The D.C. Court of Appeals has refused to allow municipal liability to spread beyond the remedies provided in the tax-sale statute, even in cases of clear negligence, and it would not find a property interest in surplus equity that would yield the same result.

B. The District's Tax-Sale Statute Does Not Create any Surplus Equity and District Law Does Not Create a Property Interest in Surplus Equity Which Does Not Exist By Statute.

As explained above, there must be a statute or a relevant state constitutional provision in order for there to be a property interest in the surplus equity from a judicial tax sale. Plaintiffs'

challenge to the District's tax-sale statute also faces an even more fundamental problem, that is, the District's tax-sale statute did not provide for a judicial sale and did not generate any surplus proceeds.

The District's tax sale is not an auction for legal title to the tax-delinquent properties as is held in many other states. Instead, the District sells tax-sale certificates to the highest bidder. D.C. Code § 47-1348. The tax-sale certificate does not give the purchaser an instantaneous right to the property; it gives the purchaser the right to bring a foreclosure action after a six-month waiting period and a right to interest and expenses should the property be redeemed. D.C. Code § 47-1348 (a)(10) and (11). Tax-sale purchasers are only required to bid an amount equal to the taxes. D.C. Code § 47-1346 (c).

The District's tax-sale statute defines "surplus" as "the portion of the bid at the tax sale that exceeds the taxes, penalties, interest, and costs for which the property was sold." D.C. Code § 47-1330 (7). Tax-sale purchasers receive no interest on the surplus and the surplus is returned to the tax-sale purchaser upon redemption or upon the issuance of the tax deed. D.C. Code §§ 47-1348, 47-1382. Accordingly, the surplus is not excess proceeds generated by the sale of the property. Instead, it is an interest-free loan to the District in exchange for the right to the tax-sale certificate. Tax-sale purchasers are bidding on a tax-sale certificate that gives them a right to a profitable rate of interest on the taxes due, in the case of redemption, or for a chance to obtain fee-simple title, if there is no redemption. The winner of a tax-sale certificate is whoever provides the District the largest interest-free loan above the taxes, penalties, and interest. This surplus is not connected to whatever surplus equity may exist in the properties.

Mr. Coleman's tax-sale foreclosure illustrates the fact that no surplus equity is generated by the District's tax-sale statute. A tax-sale certificate for Mr. Coleman's property was sold for

$16,317.35, which included $317.35 in taxes, penalties, and interest and $16,000.00 in surplus. Ex. B, Coleman Tax-Sale Certificate. At the time the tax deed was issued, an additional $380.29 in taxes was due and owing. Ex. C, Coleman Tax Deed. This amount was taken out of the $16,000.00 surplus and $15,619.71 was returned to the tax-sale purchaser. At no point in this process was any surplus equity generated. The tax deed "vests in the holder a new and complete title to the property in fee simple." *Gray Properties, Inc. v. Tobriner*, 357 F.2d 829, 830 (D.C. Cir. 1966) (per curiam) (quotations and citation omitted). There was no judicial sale of Mr. Coleman's property; it was instantaneously transferred to the tax-sale purchaser who had previously purchased the right to foreclose upon the tax lien that Mr. Coleman concedes was due and does not challenge.

In each of the cases Plaintiffs cite in support of their alleged property interest, the tax-sale statute at issue ordered a judicial sale that resulted in the surplus proceeds. Only when there is a judicial sale do courts consider whether a statute or state constitution provides a property interest in the surplus generated by that judicial sale.

In *Lawton*, the statute allowed the United States to purchase tax-sale land for two-thirds of its assessed value, unless someone else bid a higher amount. *United States v. Lawton*, 110 U.S. 146, 150 (1884). This resulted in surplus proceeds of $928.50, which was required to be returned to the owner by statute. In *Nelson*, the Supreme Court specifically explained that: "we do not have here a statute which absolutely precludes an owner from obtaining **the surplus proceeds of a judicial sale**." *Nelson v. City of New York*, 352 U.S. 103, 110 (1956). The Court also noted that the tax-sale statute at issue provided: "The court shall have full power * * * in a proper case to direct a sale of * * * lands and the distribution or other disposition of the proceeds of the sale." *Id.* at n.10 (quotations and citation omitted). Under *Lawton* and *Nelson*, a Takings

Clause challenge based on a claim to the surplus proceeds can proceed only if there is a judicial sale which generates such surplus proceeds.

The history of tax-sale statutes makes clear that the common law did not create a property interest in tax-sale surplus proceeds. The Supreme Court of Rhode Island, in addressing the history of tax-sale statutes explained:

> The government's power to tax real estate is attended by the concomitant power to secure tax payments by levy and sale of property on which taxes are overdue. . . . As Blackwell wrote, "[T]he sale of land for taxes is the nearest approach to tyranny that exists in a free government * * *." 2 Blackwell [*A Practical Treatise on the Power to Sell Land for the Non-Payment of Taxes*] § 728 at 683 [(5th ed. 1889)]. Tax sales are or may be inequitably penal in effect; one may forfeit an estate of great worth for delinquency in paying a tax that is a minute fraction of the property's value. *See Yancey v. Hopkins*, 15 Va. (1 Munf.) 419, 428 (1810); 1 Blackwell, supra, § 121 at 117. The inequity of the owner's inordinate loss is often matched by the inequity of the tax-sale purchaser's inordinate gain. For the relatively small sum that the owner was unable to pay, the purchaser can acquire the entire estate. Thus, the purchaser may "obtain acres for cents," achieving through speculation what another has lost through misfortune. *See Lessee of Hughey v. Horrel & Co.*, 2 Ohio 231, 233 (1826); 4 Tiffany, *The Law of Real Property* § 1248 at 1153 (3d ed. 1975).

Albertson v. Leca, 447 A.2d 383, 388 (R.I. 1982). Tax-sale statutes, prior to the creation of judicial sales, resulted in the complete forfeiture of valuable property. While the harshness of the tax-sale statutes has been ameliorated in some states by providing a statutory right to the surplus equity, there is nothing in the common law which provides a right to surplus equity when a property is subject to a tax-sale foreclosure with no judicial sale.

Numerous state courts have recognized the importance of this distinction. A New Jersey court explained that:

> Since the tax sale certificate foreclosure is a strict foreclosure without any further sale of the property, as in the case of a mortgage foreclosure, there can be no 'surplus money' proceedings

> as referred to in the statute and the only remedy of the mortgagee against the holder of the tax sale certificate is that prescribed by the statute, i.e., redemption. . . .

Reconstruction Fin. Corp. v. Haag, 40 A.2d 801, 803 (N.J. Sup. Ct. 1944); *see also Delmond v. Bd. Investors Co.*, 74 N.E.2d 376, 379 (Ohio Ct. App. 1947). New Jersey remains a strict foreclosure tax-sale state, and "at the point of the entry of a judgment of foreclosure, there is no sale, forced or otherwise. There is simply the foreclosure of the debtor's equity of redemption, and the transfer of a fee simple interest in the property to the tax sale certificate holder." *Matter of Varquez*, 502 B.R. 186, 192–93 (Bankr. D.N.J. 2013). The District of Columbia's statute operated the same way. The D.C. Superior Court entered a judgment foreclosing Plaintiffs' right of redemption pursuant to D.C. Code § 47-1378, and the Mayor issued a tax deed transferring the fee simple interest in the property to the tax-sale certificate holder pursuant to D.C. Code § 47-1382. At no point in this process did any judicial sale occur, and no surplus equity was created.

There is no dispute that after notice and a hearing a property owner may forfeit all rights to his or her property for failure to pay taxes. *See Jones v. Flowers*, 547 U.S. 220, 234 (2006). If this Court accepts Plaintiffs' arguments, it would force local governments to hold a judicial sale and provide an opportunity to obtain the surplus anytime the government initiated a forfeiture action for any type of property. The equity of a debtor in realty is a "significant property interest" entitled to due process protection. *McCachren v. U.S. Dep't of Agric., Farmers Home Admin.*, 599 F.2d 655, 656–57 (5th Cir. 1979) (citing *Fuentes v. Shevin*, 407 U.S. 67, 84 (1972)). Accordingly, Plaintiffs were entitled to due process protection for their home equity. Because Plaintiffs received the notice and hearing required by *Mullane v. Central Hanover Bank & Trust Co.*, they could be divested of that property interest without receiving any compensation. 339 U.S. 306, 313 (1950). If there is no judicial sale as part of that forfeiture, it is well-settled that

the property owners lack any remaining property interest upon which to assert a Takings Clause claim.

As the Supreme Court has stated: "People must pay their taxes, and the government may hold citizens accountable for tax delinquency by taking their property. But before forcing a citizen to satisfy his debt by **forfeiting** his property, due process requires the government to provide adequate notice of the impending taking." *Jones v. Flowers*, 547 U.S. 220, 234 (2006) (citations omitted and emphasis added). Black's Law Dictionary defines "forfeiture" as: "1. The divestiture of property without compensation. 2. The loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty. • Title is instantaneously transferred to another, such as the government, a corporation, or a private person. . . ." Black's Law Dictionary 765 (10th ed. 2014). Absent a statutory provision providing for the surplus equity, a tax-sale statute is a forfeiture proceeding. Tax-sale statutes divest property without compensation and result in an instantaneous transfer of title. The Supreme Court "has never required the State to compensate [a property] owner for the consequences of his own neglect." *Texaco, Inc. v. Short*, 454 U.S. 516, 530 (1982). Once Plaintiffs forfeited their property by failing to exercise their right to redeem, they had no property interest that required a judicial sale or the return of the surplus equity from that sale.

C. Under District Law, No Surplus or Property Interest is Created at the Time of the Alleged Taking.

"It is axiomatic that only persons with a valid property interest at the time of the taking are entitled to compensation." *Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed. Cir. 2001) (citing *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473–74 (1973)). Further, "[i]f the claimant fails to demonstrate the existence of a legally cognizable property interest, the court[']s task is at an end." *Am. Pelagic Fishing Co., L.P. v. United States*,

379 F.3d 1363, 1372 (Fed. Cir. 2004) (citing *Maritrans Inc. v. United States*, 342 F.3d 1344, 1352 (Fed. Cir. 2003)). Therefore, to prevail on their Takings Clause claim, Plaintiffs must prove that they had a property interest in the surplus equity after the foreclosure judgment, which they do not challenge. It is clear under District of Columbia law, as interpreted by federal District of Columbia courts, that Plaintiffs did not have a property interest in the surplus equity after the foreclosure judgment.

The legal process and effect of a tax-sale foreclosure judgment and the issuance of the tax deed were clearly set forth in the context of bankruptcy litigation in *Foskey v. Plus Properties, LLC*. 437 B.R. 1 (D.D.C. 2010). At issue in *Foskey* was whether the issuance of a tax-sale deed had violated the automatic stay provision of 11 U.S.C. § 362(a). *Id.* at 9. As in this case, the decision was dependent on "what property interest Foskey possessed, under the D.C. Code, when he filed for bankruptcy." *Id.* at 9. (quoting *In re Foskey*, 417 B.R. 836, 838–39 (Bankr. D.D.C. 2009). This Court explained that:

> Pursuant to the plain terms of that final judgment, Foskey's "right, title, claim, lien, interest or equity of redemption in the Property [were] extinguished" and the Mayor was directed to execute and deliver a deed to Plus Properties in accordance with D.C. Code § 47-1382. Docket No. [1-4] at 21. Accordingly, at the time of the filing of his bankruptcy petition, Foskey had only bare legal title to the property, which interest was subject to divestment upon Plus Properties' performance of its purchase contract and the execution, issuance, and recordation of the deed.

Id. at 10. Accordingly, this Court held that the District's issuance of a tax-sale deed, divesting the property owner of any remaining interest in the property did not violate the automatic stay. *Id.* at 10–11. If the Plaintiffs in this case had a property interest in the surplus equity after the tax-sale foreclosure under D.C. law, then the bankruptcy estate in *Foskey* would have had a property interest protected by the automatic stay. Instead, under D.C. law, a tax-sale foreclosure

judgment without a judicial sale "ends [the delinquent taxpayer's] equitable interest in the property." *Id.* at 3. At the time of the alleged taking, Plaintiffs had no property interest in any surplus equity under D.C. law.

IV. CONCLUSION

Real property taxes are the District's single largest tax source. The District's tax-sale statute is a necessary tool to ensure that real property taxes are paid. As 32 states did before it, the District has recently ameliorated the tax-sale statute's harshness by providing a right to surplus equity by statute. Moving forward, property owners in the District will have a property interest in their surplus equity. However, prior to the statute's recent amendment, and at all times relevant to the tax-sale foreclosures challenged in this action, nothing in District statutory or common law provided Plaintiffs with such a property interest at the time they failed to redeem their properties. Moreover, the District has been unable to find a single example of a court finding such a property interest absent a state statute or a state constitution creating that property interest. Establishing a property interest in surplus equity where none exists would undermine the integrity of the tax-sale process and could make the District liable for amounts far greater than those that it has attempted to collect. The D.C. Court of Appeals has rejected such attempts and this Court should as well.

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Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

DAVID FISHER
Acting Deputy Attorney General, Commercial Division

/s/
WILLIAM D. BURK, D.C. Bar # 464349
Chief, Land Acquisition and Bankruptcy Section

/s/
ANDREW C. EBERLE
Assistant Attorney General
D.C. Bar # 1011542
Suite 1010 South
441 Fourth Street, N.W.
Washington, D.C. 20001
(202) 442-9779
(202) 741-8571 (fax)
Email: Andrew.Eberle@dc.gov
Counsel for the District of Columbia

CERTIFICATE OF SERVICE

I hereby certify that on **June 9, 2015**, a copy of the foregoing motion for judgment on the pleadings was served on the following counsel of record via electronic case filing:

William A. Isaacson (D.C. Bar #414788)
Thomas Keenan
Boies, Schiller & Flexner, LLP
5301 Wisconsin Avenue, NW
Washington, D.C. 20015
Counsel for Plaintiffs

/s/
Andrew C. Eberle