

THE STATE OF NEW HAMPSHIRE

CARROLL, SS.

SUPERIOR COURT

Patrick M. McAvoy, Esq. et al.

v.

4150 Estero, LLC

Docket No. 212-2017-CV-00100

**ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

The plaintiff, Patrick M. McAvoy, Esq. (“McAvoy”), acting in his capacity as the special personal representative of the probate estate of Margaret A. Funai (“Mrs. Funai”), brought this action against the defendant, 4150 Estero, LLC (“Estero”), seeking injunctive relief and an accounting for redemption of real property sold by levy of execution. (Court index #1.) Albert Funai (“Mr. Funai”) was joined as a plaintiff pursuant to Superior Court Civil Rule 15.<sup>1</sup> (Court index #27.) Estero now moves for summary judgment, arguing that the plaintiffs failed to redeem the property within one year from the date of its sale, pursuant to RSA 529:26. (Court index #29.) In response, the plaintiffs filed a cross-motion for summary judgment, arguing that their attempt to redeem the property was timely. (Court index #33.) Based on the parties’ pleadings, the relevant facts, and the applicable law, the court finds and rules as follows.

**FACTS**

The following undisputed facts are drawn from the parties’ pleadings, affidavits, and answers to interrogatories. McAvoy is the court-appointed special personal representative of the probate estate of Margaret A. Funai, now pending in the Probate Court for Middlesex County in Massachusetts. (Compl. ¶ 1.) Estero is a New Hampshire limited liability company with a

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<sup>1</sup> The court refers to McAvoy and Mr. Funai collectively as the “plaintiffs.”

principal place of business in Moultonborough, New Hampshire. (Id. ¶ 2.) Ben Sanders (“Sanders”) is the sole member of Estero. (Sanders Aff. ¶ 2.)

On February 28, 1977, Mr. and Mrs. Funai (the “Funais”) purchased real property located on Merrivale Road in Moultonborough, New Hampshire (the “property”). (Compl. ¶ 5.) On March 25, 2016, Metro Health Foundation of NH, Inc., obtained a judgment against the Funais. (Sheriff’s Deed, Carroll County Registry of Deeds, Book 3277, Page 314 (August 11, 2016)) (hereinafter “Sheriff’s Deed”). Consequently, Belknap Superior Court issued a writ of execution for the property. (Id.) On May 31, 2016, the Carroll County Sheriff’s Office issued a “Notice of Sheriff’s Sale” informing the Funais that the property was to be sold at public auction on July 26, 2016 (the “sheriff’s sale”). (Notice of Sheriff’s Sale (May 31, 2016).) The terms of the sale required the winning bidder to pay a 10% deposit on the date of the sheriff’s sale, with the balance to be paid within 15 days thereafter. (Id.)

Estero attended the sheriff’s sale and placed a winning bid of \$125,000. (Sanders Aff. ¶ 4.) Estero paid the Sheriff’s Office for the property as early as July 26, 2016, but no later than August 5, 2016.<sup>2</sup> (Sanders Aff. ¶ 5; Def.’s Answer to Pl.’s Interrog. #3, Records of Payments Made to Carroll County Sheriff’s Office.) Estero also made three payments to the Carroll County Registry of Deeds on August 12, 2016, in the amounts of \$1,875, \$25, and \$20. (Def.’s Answer to Pl.’s Interrog. #3, Records of Payments Made to Carroll County Sheriff’s Office.) On August 11, 2016, the Carroll County Sheriff’s Office delivered to Estero a sheriff’s deed to the property. (Sanders Aff. ¶ 6; Sheriff’s Deed.) The sheriff’s deed was recorded on August 11,

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<sup>2</sup> Plaintiff’s Interrogatory #3 requested that Estero “provide the full details of the means by which the Defendant made payment to the Carroll County Sheriff’s Department” for the property. In response, Estero provided copies of checks and receipts that were issued after the Sheriff’s sale. The first depicts a treasurer’s check in the amount of \$16,000, issued by Meredith Village Savings Bank on July 27, 2016, and made payable to the Carroll County Sheriff’s Office. Another depicts a Meredith Village Savings Bank checking withdrawal slip, dated August 5, 2016, in the amount of \$110,375.22, signed by Sanders and accompanied by a receipt. However, in his affidavit, Sanders asserts that Estero paid the Carroll County Sheriff’s Office by a single check in the amount of \$125,000. (Sanders Aff. ¶ 5.) For the reasons discussed in this order, this alleged contradiction is immaterial.

2016, in the Carroll County Registry of Deeds at Book 3277, Page 315. (Id.)

Sometime within the following year, Mrs. Funai passed away and McAvoy was appointed as the personal representative of her probate estate. (See Compl. ¶ 1.) On August 4, 2017, Attorney Richard McPartlin (“McPartlin”) attempted to contact Estero on behalf of McAvoy. (See Sanders Aff. ¶ 8.) McPartlin left a voicemail requesting that Estero contact him to provide an accounting for redemption. (Id.) Sanders received the voicemail, but did not contact McPartlin. (Id.) Accordingly, on August 10, 2017, McAvoy brought this action, seeking injunctive relief and an accounting for redemption. The parties have now filed cross-motions for summary judgment.

#### LEGAL STANDARD

Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” RSA 491:8-a, III; see also Super. Ct. Civ. R. 12(g). “An issue of fact is ‘material’ for purposes of summary judgment if it affects the outcome of the litigation under the applicable substantive law.” VanDeMark v. McDonald’s Corp., 153 N.H. 753, 756 (2006) (citation omitted). The moving party has the burden of proving its entitlement to summary judgment. Concord Grp. Ins. Cos. v. Sleeper, 135 N.H. 67, 69 (1991). In evaluating cross-motions for summary judgment, the court “consider[s] the evidence in the light most favorable to each party in its capacity as the nonmoving party and, if no genuine issue of material fact exists, . . . determine[s] whether the moving party is entitled to judgment as a matter of law.” Deere & Co. v. State, 168 N.H. 460, 470 (2015). The court may not “weigh the contents of the parties’ affidavits and resolve factual issues[.]” but must simply determine “whether a reasonable basis exists to dispute the facts

claimed in the moving party's affidavit at trial." Iannelli v. Burger King Corp., 145 N.H. 190, 193 (2000) (citations omitted).

#### ANALYSIS

In moving for summary judgment, Estero argues that pursuant to RSA 529:26, the Funais were entitled to redeem the property within one year from the date of the sheriff's sale. (See Mem. Law Supp. Def.'s Mot. Summ. J. at 3–4.) Because McAvoy did not contact Estero for an accounting within one year from the date of the sheriff's sale, Estero asserts that the plaintiffs lost their right to redeem the property. (Id.) The plaintiffs counter that under RSA 529:26, the sale of the property was not completed until the Carroll County Sheriff's Office transferred the sheriff's deed to Estero. (Mem. Law Supp. Pls.' Cross-Mot. Summ. J. at 3.) Accordingly, the plaintiffs contend that McAvoy timely requested an accounting and that they have not forfeited their right to redeem the property. (Id. at 5.)

RSA 529:26 grants debtors the right to redeem real property that was levied by sale. In relevant part, it provides that "[t]he sale and deed made in pursuance thereof shall be void if, within one year after the sale, the debtor shall pay or tender to the purchaser the purchase money . . . ." RSA 529:26. If the parties do not agree as to the amount to be paid to redeem a property, the debtor may request, and the purchaser shall thereafter provide, an accounting of the amount to be paid. RSA 529:34; see also RSA 479:13. "The purchaser cannot, by his mere failure or refusal to perform the duties imposed upon him . . . prevent the creditor from performing his, and thus cause the debtor to lose his statutory right of redemption." Dziatlik v. Holy Trinity Polish Nat'l Catholic Church, 86 N.H. 234, 236 (1933) (quotation omitted). Accordingly, where judicial proceedings are necessary to determine the amount to be paid, "justice requires that the period of redemption be extended a reasonable time after the conclusion

of the litigation.” Id. Because McAvoy requested an accounting on August 4, 2017, the court must determine whether that request was made within the one-year period for redemption.

The parties dispute the meaning of the word “sale” used in the redemption statute. (Compare Mem. Law Supp. Def.’s Mot. Summ. J. at 3–4 with Mem. Law Supp. Pls.’ Cross-Mot. Summ. J. at 4.) Estero argues that the word “sale” refers to the date of the sheriff’s sale, which was July 26, 2016. (Mem. Law Supp. Def.’s Mot. Summ. J. at 3–4; Mem. Law Supp. Def.’s Obj. Pls.’ Cross-Mot. Summ. J. at 2.) As such, Estero contends that McAvoy’s request for an accounting was not timely. (See id.) The plaintiffs argue that “sale” refers to the date on which title to the property was delivered to Estero, which was August 11, 2016. (Pls.’ Cross-Mot. Summ. J. at 3.) Therefore, the plaintiffs maintain that the request for an accounting was made within one year from the date of the sale. (See id.)

In order to decide if either party is entitled to judgment as a matter of law, the court must determine the meaning of the word “sale” as it appears in the statute. “The interpretation and application of statutes present questions of law.” Clare v. Town of Hudson, 160 N.H. 378, 384 (2010) (quotation omitted). “When examining the language of a statute, [the court] ascribe[s] the plain and ordinary meaning to the words used.” Upton v. Town of Hopkinton, 157 N.H. 115, 118–19 (2008) (citation omitted). “In construing a statute, [the court] will neither consider what the legislature might have said nor add words that it did not see fit to include.” Forster v. Town of Henniker, 167 N.H. 745, 750 (2015) (citation omitted); see also Petition of State of N.H. (State v. James Milner), 159 N.H. 456, 457 (2009) (“[The court] must give effect to all words in a statute, and presume that the legislature did not enact superfluous or redundant words.”). If the language of the statute is not ambiguous, the court “will not examine legislative history.” Forster, 167 N.H. at 750.

Depending on how it is used, the word “sale” can have two meanings. The plaintiffs interpret “sale” to mean “a contract transferring the absolute or general ownership of property from one person or corporate body to another for a price[,]” whereas Estero interprets “sale” to mean an “exhibition for selling.” *Sale*, Webster’s Third New International Dictionary (2002); see also Sale, Black’s Law Dictionary (10th ed. 2014) (“sale” means the “transfer of property or title for a price” or the “agreement by which such a transfer takes place”). However, both meanings are used within RSA Chapter 529. For example, RSA 529:25 provides that “proceeds of the sale shall be applied . . . .” There, a sale is necessarily the transfer of title for a price. In contrast, RSA 529:20 provides that “[n]otice of the time and place of sale shall be given to the debtor . . . .” In that case, a sale is an exhibition for selling.

Within the context of RSA 529:26, the court finds that a “sale” is best defined as “the transfer of title for a price.” Pursuant to RSA 529:26, redemption occurs when the debtor pays or tenders to the purchaser the purchase money. Additionally, the effect of redemption is to void the sale and the deed made in pursuance thereof. *Id.* Therefore, as a practical matter, a debtor’s right to redeem cannot actually be exercised until the purchaser has paid the purchase money to the seller, and the redemption cannot take effect until a deed has issued. Accordingly, the court holds that in order for a sale to have occurred under RSA 529:26, the purchaser must have tendered the purchase money, and the seller must have transferred title to the property by deed.<sup>3</sup> It would be unjust for the court to hold, as Estero argues it should, that a debtor’s one-year period for redemption starts running before the debtor is actually able to redeem his property under the statute.

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<sup>3</sup> It is not necessary for the deed to have been recorded because “an execution not recorded is good against the debtor and his heirs.” *Morse v. Child*, 7 N.H. 581, 584 (1835); see also RSA 529:24 (“[N]o sale of a greater interest than a term of seven years shall be valid, except against the debtor and his heirs, unless the execution and the return are so recorded.”).

The New Hampshire Supreme Court has not interpreted the meaning of the word “sale” within the redemption statute. However, the court finds that Ex parte Lynn, 727 So.2d 90 (Ala. 1999), is instructive to the present case. In Lynn, the Supreme Court of Alabama considered a similar statutory provision, finding that “the one-year period for redeeming property sold by a sheriff to satisfy a judgment debt begins to run on the date of the sale.” Id. at 91. The debtor in that case gave notice of her intent to exercise her right to redemption nearly two years after the date of the sheriff’s sale. Id. at 91, 91 n. 1. However, her notice was given within one year from the date that the sheriff deeded the property to the purchaser. Id. at 91 n. 1. The court found that “[f]or an effective sale of property, there must be an execution, and delivery, of a deed to the property.” Id. at 91. Because the debtor exercised her right to redeem within one year from the date of the deed, the court concluded that she had exercised her right to redeem the property within one year from the sale of the property to the purchaser. Id. at 91–92.

In the instant case, the sheriff’s sale was held on July 26, 2016. Estero paid the purchase money to the Carroll County Sheriff’s Office as early as July 26, 2016, but no later than August 5, 2016. The Sheriff’s Office delivered the sheriff’s deed to Estero on August 11, 2016. Therefore, the court finds that the sale—the transfer of title for a price—occurred on August 11, 2016. Pursuant to RSA 529:26, the Funais were entitled to redeem the property within one year from August 11, 2016. Accordingly, because McAvoy requested an accounting on August 4, 2017, and petitioned the court for an accounting on August 10, 2017, the court holds that the request for an accounting was made within the one-year period for redemption.

Furthermore, the court finds that because Estero did not provide an accounting when one was requested, it effectively prevented the plaintiffs from exercising their right to redeem the property. Because litigation was required to determine not just the amount of redemption, but

the right to redeem the property, the court holds that justice requires that the period of redemption be extended to a reasonable time after the conclusion of this litigation. See Dziaulik, 86 N.H. at 236.

Finally, in moving for summary judgment, neither party has addressed the plaintiffs' request for the court to establish the amount of the redemption payment. (See Compl. ¶ C.) Instead, the plaintiffs request that the court order Estero to provide an accounting of its expenses, as described in RSA 529:26, to the plaintiffs so that they may redeem the property. (Pls.' Cross-Mot. Summ. J. ¶ C.) Accordingly, the court finds that the plaintiffs have waived their original request for the court to establish the amount of redemption. Estero is therefore ordered to provide the plaintiffs with an accounting of its expenses, as required by RSA 529:26 and RSA 529:34, within 60 days from the date of this order. The plaintiffs shall thereafter have 60 days to either redeem the property or file an action disputing the amount of redemption owed. See RSA 529:34; RSA 479:14. The plaintiffs' right to redeem the property under RSA 529:26 shall expire after 120 days from the date of this order.


Any motion for reconsideration that may be filed will be addressed within the initial 60 days and will not toll the deadlines set forth in this order.

#### CONCLUSION

For the foregoing reasons, the defendant's motion for summary judgment is DENIED. The plaintiffs' cross-motion for summary judgment is GRANTED.

So Ordered.

Date: ~~January~~ <sup>February 4</sup>, 2019

  
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Amy L. Ignatius  
Presiding Justice