

SUPERIOR COURT
OF THE
STATE OF DELAWARE

FRED S. SILVERMAN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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March 31, 2008

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Re: *Wilmington Savings Fund Society v. Sharon F. Francis*
A/K/A Sharon F. Cephas,
C.A. No. 07L-04-059J

Upon Buyer's Motion to Vacate Sheriff's Sale – *DENIED*

Dear Counsel:

Buyer, One-Pie Investments, LLC, asks the court to set aside a sheriff's sale. The land is encumbered with a federal tax lien that the sale may not clear. If the sale is confirmed, Buyer may be stuck. To make it worse, while this motion was pending, the structure on the land, a townhouse, was severely damaged by water. So, for both reasons – the federal lien and the water damage – Buyer opposes confirmation.¹

The Seller, which is a commercial lender, and the Sheriff want the sale confirmed. Basically, they argue that for sheriff sales the rule is *caveat emptor*, let

¹ 10 *Del. C.* § 4976; Super. Ct. Civ. R. 69(d).

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the buyer beware. The lien was on record and the sale was regular. Therefore, the court should not protect the buyer from the buyer's inadequate due diligence. As for the post-sale, pre-confirmation water damage, Seller argues that equitable title passed at the sale and so did the risk of loss.

The Buyer replies that the circumstances surrounding the tax lien, explained below, were so unusual a typical buyer would not have realized that the property might not be free-and-clear after the sale, and the problem is attributable to Seller. The buyer further contends that it should not bear the risk of loss between the sale and confirmation. In the final analysis, the outcome turns on the court's broad discretion.² Toward that end, the parties have provided helpful oral argument and legal memoranda.

I.

A. Buyer's Contentions as to the Federal Tax Lien

According to Buyer, the tax lien problem is a function of two things: First, Seller failed to tee-up the lien properly. Second, the federal I.R.S. recently changed its approach to enforcing junior federal tax liens.

Under federal law,³ Seller may name the United States of America as a defendant, serve it, and refer to the lien in the complaint. By failing to do that, Seller left itself and Buyer exposed to a post-sale, claim by the I.R.S. Until recently, the federal authorities had not asserted the government's rights. Seller claims that sellers

² 2 Victor B. Woolley, *Practice in Civil Actions in Delaware*, § 1108 (1906) (as affirmed in *Burge v. Fidelity Bond and Mortgage Company*, 648 A.2d 414, 420 (1994)).

³ 28 U.S.C.A. § 2410 (1996).

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would include the federal liens in their Rule 69⁴ affidavits and send them to the I.R.S. And, that would be that. But, a new revenue officer has now come to town, bringing a more aggressive approach to federal tax lien enforcement.

Buyer admits that it knew about the government lien here, and six months before this sale the federal government had asserted its rights in a monition sale. Nevertheless, Buyer's counsel thought there was a legal distinction, for federal enforcement purposes, between monitions and foreclosures. Buyer further contends that after the sale, its settlement attorney opined that the lien would survive the foreclosure sale. Finally, Buyer argues that confirming the sale would bestow a windfall on Seller because, in effect, Seller is being freed of the federal tax at Buyer's expense.

B. Seller's Contention and Court's Holding as to the Federal Tax Lien

Seller contends, and the court holds, it is settled law that "state law is effective to divest government junior liens in cases such as [this]."⁵ The decision here is controlled by *United States v. Brosnan*,⁶ which is squarely on point. *Brosnan* specifically analyzes the statute on which Buyer relies, 28 U.S.C. § 2410. While that statute may seem to require that the United States be named as a party and served in a foreclosure, *Brosnan* explains that § 2410 is "purely permissive in tenor."⁷ In other words, while § 2410 waived sovereign immunity, thereby allowing Seller to bring the United States into the foreclosure, §2410 did not require the Government's participation. And, to the minority's distress there, *Brosnan* holds that the sheriff's sale "forecloses the Government's lien without making it a party or giving it any

⁴ Super. Ct. Civ. R. 69(g).

⁵ *United States v. Brosnan*, 363 U.S. 237, 252 (1960).

⁶ *Id.*

⁷ *Id.* at 246.

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notice whatsoever.”⁸

In this case, it appears that Seller, consistent with state law, notified the Internal Revenue Service about the foreclosure. Therefore, it does not appear that the federal lien has survived the sheriff’s sale, in light of *Brosnan*. Accordingly, there is no reason to set aside the sale, based on concern over threats by the I.R.S.

II.

Concerning the post-sale water damage. It appears that the parties allowed the former owner to remain in possession. Neither party sought a writ of possession. Buyer was unwilling to undertake that expense while this litigation was pending. Meanwhile, the former owner allowed a pipe to freeze and rupture. The townhouse sustained at least \$10,000 in damage and the unit has been condemned.

As to risk of loss, Delaware generally follows the majority rule that upon signing a real estate contract, the purchaser has “become in equity the owner of the land and premises, they are his to all intents and purposes and, as such, any loss caused to them must be borne by him.”⁹ When the purchase is at a sheriff’s sale, the result is the same. The “. . . purchaser at the sheriff’s sale is vested with equitable title to the Property.”¹⁰ It follows, therefore, that the risk of loss is also transferred at a sheriff’s sale.

Indeed, the law on this has been settled since 1841. *Miles v. Wilson*¹¹ explained that equitable owners are entitled to any increase in the property’s value

⁸ *Id.* at 254.

⁹ *Briz-Ler Corporation*, 171 A.2d 65, 67 (Del. 1961).

¹⁰ *Soliman v. Spencer*, 115 B.R. 471, 479 (D.Del. 1990).

¹¹ 3 Harr. 382 (Del. Super. 1841).

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after its sale and before confirmation. By the same token, *Miles* holds that the buyer “is liable to any loss or injury that may happen to the property within the same time period.” *Miles* further holds that the law places the buyer at a sheriff’s sale in the same position.¹²

III.

In conclusion, the court is satisfied that the sale was correct and the risk of loss passed to Buyer. Moreover, the parties are both sophisticated business entities. Neither side is entitled to special treatment. In this case, it appears that Buyer got less than it expected. If that is so, it is a cost of doing business.

For the foregoing reasons, Buyer’s Motion to Vacate Sheriff’s Sale is **DENIED**. The sale is **CONFIRMED**.

IT IS SO ORDERED.

Very Truly yours,

/s/ Fred S. Silverman

FSS:mes
cc: Donald L. Gouge, Jr., Esquire
Prothonotary
Sharon F. Francis A/K/A Sharon F. Cephas

¹² *Id.* at *2.