No. 22-

IN THE

Supreme Court of the United States

COUNTY OF ONTARIO, NEW YORK,

Petitioner,

v.

BRIAN L. GUNSALUS, GLIEE V. GUNSALUS, JOSEPH M. HAMPTON AND BRENDA S. HAMPTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

BFP v. Resolution Trust Corp., 511 U.S. 531 (1994) ("*BFP*") held the auction price obtained at a mortgage foreclosure conducted in accordance with the statutory requirements of state law constitutes "reasonably equivalent value" in the context of a fraudulent conveyance action under 11 U.S.C. § 548 of the Bankruptcy Code.

The question presented here is: did the Second Circuit err in refusing to extend the holding of *BFP* to a lawfully conducted tax foreclosure, where New York tax foreclosure law provides for ample notice, opportunity to cure and judicial oversight of the process, and where there is no evidence of a clear and manifest intent by Congress to allow 11 U.S.C. § 548 to impinge upon the important state interests in securing real estate titles and collecting real property taxes?

PARTIES TO PROCEEDINGS AND RELATED CASES

The parties to these proceedings are identified on the front cover. Related cases are denominated as follows:

1) *Gunsalus v. County of Ontario*, United States Court of Appeals for the Second Circuit, Case No. 20-3865-bk. Judgment entered June 27, 2022.

2) *Hampton v. County of Ontario*, United States Court of Appeals for the Second Circuit, Case No. 20-3868-bk. Judgment entered July 5, 2022.

3) *Gunsalus v. County of Ontario*, United States District Court for the Western District of New York, Case No. 20-CV-6134-FPG. Judgment entered June 25, 2020.

4) *Hampton v. County of Ontario*, United States District Court for the Western District of New York, Case No. 20-CV-6135-FPG. Judgment entered June 25, 2020.

5) *Gunsalus v. County of Ontario*, United States District Court for the Western District of New York, Case No. 17-CV-6810-FPG. Judgment entered July 18, 2018.

6) *Hampton v. County of Ontario*, United States District Court for the Western District of New York, Case No. 17-CV-6808-FPG. Judgment entered July 18, 2018.

7) *Gunsalus v. County of Ontario*, United States Bankruptcy Court for the Western District of New York, AP No. 17-2008-PRW. Judgment on the issues presented to this Court entered November 6, 2017. Final judgment entered February 19, 2020.

8) *Hampton v. County of Ontario*, United States Bankruptcy Court for the Western District of New York, AP No. 17-2009-PRW. Judgment on the issues presented to this Court entered November 6, 2017. Final judgment entered February 19, 2020.

9) *In Re Brian L. Gunsalus and Gliee V. Gunsalus*, United States Bankruptcy Court for the Western District of New York, BK No. 2-17-20445 (Chapter 13). Judgment on the issues presented to this Court entered November 6, 2017. Final judgment entered February 19, 2020.

10) *In Re Joseph M. Hampton and Brenda S. Hampton*, United States Bankruptcy Court for the Western District of New York, BK No. 2-17-20459 (Chapter 13). Judgment on the issues presented to this Court entered November 6, 2017. Final judgment entered February 19, 2020.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, County of Ontario, New York (the "County") hereby petitions the Court for a writ of certiorari from the judgments of the United States Court of Appeals for the Second Circuit below.

OPINIONS BELOW

The Second Circuit's opinion affirming the District Court's opinion in the Gunsalus matter determining that the presumption under *BFP v. Resolution Trust Co.* did not apply to fraudulent conveyance action under 11 U.S.C. § 548 seeking to set aside a lawfully conducted New York tax foreclosure proceeding (App. pp.1a-15a) is reported and may be found at *Gunsalus v. County of Ontario*, 37 F.4th 859 (2d Cir. 2022).

The Second Circuit's summary order affirming the District Court's opinion in the Gunsalus matter determining that the presumption under *BFP v. Resolution Trust Co.* did not apply to fraudulent conveyance action under 11 U.S.C. § 548 seeking to set aside a lawfully conducted New York tax foreclosure proceeding (App. pp. 16a-19a) is unreported and may be found at *Hampton v. County of Ontario*, 2022 U.S. App. LEXIS 18424 (2d Cir. 2022).

The District Court's opinion granting the County's application for a direct appeal to the Second Circuit from the final judgment of the Bankruptcy Court pursuant to 28 U.S.C. § 158 in both the *Gunsalus* and *Hampton* matters (App. pp. 20a-24a) is unreported and can be found at *Gunsalus v. County of Ontario*, 2020 U.S. Dist. LEXIS 111752 (W.D.N.Y. 2020).

The Bankruptcy Court's decision and order, which issued a final judgment setting aside the tax foreclosure of the *Gunsalus* property as a fraudulent conveyance pursuant to 11 U.S.C. § 548 (App. pp. 25a-49a) is reported and can be found at *Gunsalus v. Ontario County*, 613 B.R. 1 (Bankr.W.D.N.Y. 2020).

The Bankruptcy Court's decision and order, which issued a final judgment setting aside the tax foreclosure of the *Hampton* property as a fraudulent conveyance pursuant to 11 U.S.C. § 548 (App. pp. 50a-74a) is unreported and can be found at *Hampton v. Ontario County*, 2020 Bankr. LEXIS 447 (Bankr.W.D.N.Y. 2020).

The District Court's opinion reversing the Bankruptcy Court's Decision and Order dismissing both adversary proceedings (App. pp. 75a-89a) is reported and can be found at *Hampton v. Ontario County*, 588 B.R. 671 (W.D.N.Y. 2018).

The Bankruptcy Court's decision and order dismissing the adversary proceedings in both matters (App. pp. 90a-112a) is reported and can be found at *Gunsalus v. Ontario County*, 576 B.R. 302 (Bankr.W.D.N.Y. 2017).

JURISDICTION

The Second Circuit entered judgment in *Gunsalus* on June 27, 2022. The County invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1), having filed a timely petition for writ of certiorari under Rule 13.

STATUTORY PROVISIONS INVOLVED

This action arises under 11 U.S.C. § 548(a)(1)(B), the text of which is included at App. p. 113a.

STATEMENT OF THE CASE

Prior to the underlying *in rem* tax foreclosure proceedings that are the subject of this matter, the Gunsalus Respondents owned property located in the Town of Phelps, Ontario County, New York (the "Gunsalus Property") and the Hampton Respondents owned real property located in the Town of Gorham, Ontario County, New York (the "Hampton Property"). The County is the enforcing officer for the collection of delinquent real property taxes under New York Real Property Tax Law ("RPTL") Article 11. Because of unpaid delinquent real property taxes assessed to the Gunsalus Property as of January 1, 2014, that property was foreclosed under Article 11 of the RPTL in June 2016. (App. p. 3a). Because of unpaid delinquent property taxes assessed to the Hampton Property as of January 1, 2015, that property was foreclosed under RPTL Article 11 in March 2017. (App. p. 17a).

RPTL Article 11 provides a detailed process and procedures for the enforcement of unpaid real property taxes. Enforcement of unpaid taxes begins with the filing of the List of Delinquent Taxes in the County Clerk's Office, which serves as a notice of pendency. RPTL § 1122. For any given tax year, a property will be included on this list when the tax is not paid after ten (10) months have elapsed from the January 1st lien date.

Pursuant to RPTL § 1123, *in rem* foreclosure proceedings regarding taxes due January 1st of a given year may be commenced twenty-one (21) months after the January 1st lien date. Once the tax foreclosure petition is filed in the county clerk's office, notices of the *in rem* foreclosure proceedings, as required by RPTL § 1125(1)(a), are mailed to the record owner by both certified mail, return receipt requested and by first-class mail. In addition to the record owner, notices are also sent to any other person whose name and address are reasonably ascertainable and whose right, title or interest in the property was a matter of public record and would be affected by the termination of the redemption period, as required by RPTL § 1125(1)(a).

The statutory notices contained the following provisions:

a) That interested parties had the right to redeem the Property by paying the full amount of unpaid tax liens including interest and penalties on or before the redemption deadline date;

b) That the redemption deadline date was January 15, 2016 (in the Gunsalus matter) and January 13, 2017 (in the Hampton matter);

c) That any interested party could serve a verified answer upon the County Attorney, setting forth the nature of their interest and any defense or objection to the foreclosure. Such answer was required to be served and also filed in the County Clerk's Office on or before the redemption deadline date; and

d) That the failure to redeem the Property or answer the petition by an interested party would forever bar and foreclose all right, title and interest and equity of redemption in and to the Property, and that a judgment of foreclosure could be taken by default.

See RPTL § 1125.

Pursuant to RPTL§ 1124(1), notices of tax foreclosure proceedings were published in two different local newspapers on three separate occasions in within six weeks after the tax foreclosure petition was filed. In addition, notices of the *in rem* tax foreclosure proceedings were posted in three (3) public places within the County, namely, the Ontario County Treasurer's Office, the Ontario County Clerk's Office and in the Ontario County Courthouse in accordance with RPTL § 1124(4).

The Gunsalus Respondents filed and served a verified answer to the foreclosure petition prior to the expiration of the redemption deadline. The Gunsalus Property was not redeemed prior to the redemption deadline. The answer did not allege defective notice or any failure by the County to comply with the statutory requirements of RPTL Article 11 in its conduct of the *in rem* tax foreclosure proceedings against the Property. In June 2016, Ontario County Supreme Court granted summary judgment to the County, striking the Gunsalus Respondents' answer, and awarded final judgment to the County foreclosing the Gunsalus Property pursuant to RPTL 1136. (App. p. 3a). No appeal was ever filed by or on behalf of the Gunsalus Respondents from the final judgment in state court.

The Hampton Respondents did not redeem the Hampton Property or answer the *in rem* tax foreclosure petition on or before the January 13, 2017 redemption deadline. As a result, a default judgment was awarded to the County in March 2017, foreclosing the Hampton Property pursuant to RPTL § 1131. (App. p. 17a). Pursuant to RPTL § 1131, the Hampton Respondents had the right to file an application to vacate the default judgment of foreclosure in state court within thirty (30) days of entry of the default judgment. In such an application, the state court's focus would have been whether the applicant had a meritorious defense to the proceedings, a reasonable excuse for the default or if vacatur was warranted "for sufficient reason and in the interests of substantial justice," which is a matter of discretion for the trial court. *See County of Ontario v. Lundquist 1996 Living Trust*, 155 A.D.3d 1567 (4th Dep't 2017).

Although RPTL § 1166 allows the County to conduct a public sale of properties subsequent to the entry of the foreclosure judgment, this public sale does not constitute a "foreclosure sale" for these purposes. A "foreclosure sale" takes place upon the entry of the tax foreclosure judgment pursuant to RPTL § 1136, since at that point in time, the property owner's right title and interest in the property is extinguished and title becomes vested in the taxing authority. *See Wisotzke v. Ontario County*, 409 B.R. 20, 23 (Bankr.W.D.N.Y. 2009) *aff'd* 382 Fed. Appx. 99 (2d Cir. 2010). In other words, the price obtained at the foreclosure sale is the extinguishing of the outstanding tax lien in exchange for the foreclosure of the property.

In April 2017, the Gunsalus Respondents and the Hampton Respondents each filed a Chapter 13 bankruptcy

petition in the United States Bankruptcy Court for the Western District of New York. On May 3, 2017, the Gunsalus Respondents and the Hampton Respondents each commenced an adversary proceeding, seeking to overturn the lawfully conducted *in rem* tax foreclosure of the Property as a fraudulent conveyance under 11 U.S.C. § § 548 and 550. The County answered the adversary proceeding complaints in May 2017.

On July 31, 2017, the County moved to dismiss both adversary proceedings pursuant to Fed.R.Civ.Proc. 12(b)(6) and Fed.R.Bankr.Proc 7012 on the ground that the United States Supreme Court precedent of *BFP v. Resolution Trust*, 511 U.S. 531 (1994), which holds that a judicially supervised mortgage foreclosure of real property that follows applicable state law requirements constitutes "reasonably equivalent value" and therefore cannot be a constructively fraudulent conveyance under 11 U.S.C. § 548, should be extended to apply to *in rem* tax foreclosure proceedings. On November 6, 2017, the Bankruptcy Court granted the County's motion dismiss both adversary proceedings, holding:

> Because the Court agrees with the County, that a judicially supervised tax foreclosure action conducted by the County in full compliance with New York's Article 11 RPTL is entitled to the presumption of having provided reasonably equivalent value for purposes of 11 U.S.C. § 548(a)(1)(B)(i), the complaints do not state a claim for which relief can be granted. The motion of the County to dismiss the complaint in each of these adversary proceedings, under Rule 12(b)(6) FRCP, is GRANTED. The

> complaint in [this] adversary proceeding is DISMISSED, with prejudice.

Gunsalus v. Ontario County, 576 B.R. 302 (Bankr.W.D.N.Y. 2018) (App. G). The Bankruptcy Court issued an 18-page decision which expounded on the reasons to extend the holding of *BFP v. Resolution Trust* to *in rem* tax foreclosure proceedings conducted in accordance with New York law.

Respondents appealed the 2017 Bankruptcy Court Order to the District Court. On July 18, 2018, the District Court reversed the prior order of the Bankruptcy Court, holding that the presumption afforded by *BFP v. Resolution Trust* did not extend to lawfully conducted tax foreclosure proceedings conducted under RPTL Article 11. The District Court reinstated both adversary proceeding complaints remanded these matters for further proceedings. *Hampton v. Ontario County*, 588 B.R. 302 (W.D.N.Y. 2018) (App. E).

On remand, both adversary proceedings were jointly tried before the Bankruptcy Court in December 2019. On February 16, 2020, the Bankruptcy Court issued a decision and order avoiding the *in rem* tax foreclosure of the Property as a fraudulent conveyance under 11 U.S.C. § § 522(h) and 548(a)(1)(B) of the Bankruptcy Code, finding that the Gunsalus Respondents and the Hampton Respondents were insolvent as of the date of the foreclosure and that the extinguishing of tax liens of $1,290 in exchange for the Gunsalus Property, which was valued at $22,000 and the extinguishing of tax liens in the amount of $5,201 in exchange for the Hampton Property, which was valued at $28,000 did not constitute "reasonably

equivalent value" under 11 U.S.C. § 548. *See Gunsalus v. Ontario County*, 613 B.R. 1 (Bankr.W.D.N.Y. 2020) (App. C); *Hampton v. Ontario County*, 2020 Bankr. LEXIS 447 (Bankr.W.D.N.Y. 2020) (App. D).

The County appealed the final judgment from the Bankruptcy Court, which included review of the District Court reversal of the earlier dismissal to the Second Circuit. The District Court granted the County's application pursuant to 28 U.S.C. § 158(d)(2)(A)(iii) for a direct appeal to the Circuit Court from the final Bankruptcy Court judgment in both matters on June 25, 2020. *Gunsalus v. County of Ontario*, 2020 U.S. Dist. LEXIS 111752 (W.D.N.Y. 2020) (App. E). On June 27, 2022, the Second Circuit issued its decision in the *Gunsalus* matter, affirming the orders of the lower courts, holding that the presumption of "reasonably equivalent value" afforded by *BFP* to lawfully conducted mortgage foreclosure actions did not apply to lawfully conducted tax foreclosure for purposes of a 11 U.S.C. § 548 fraudulent conveyance action. *Gunsalus v. County of Ontario*, 37 F.4th 859 (2d Cir. 2022) (App. A). On July 5, 2022, the Second Circuit issued a summary order in the *Hampton* matter affirming the orders below based upon its June 27, 2022 holding in *Gunsalus*. *Hampton v. County of Ontario*, 2022 U.S. App. LEXIS 18424 (2d Cir. 2022) (App. B).

The County now petitions for a writ of certiorari from this Court.

REASONS FOR GRANTING THE WRIT

I. THERE IS A SPLIT AMONGST THE CIRCUITS AS TO WHETHER THE BFP PRESUMPTION APPLIES TO TAX FORECLOSURES

To date, there are decisions from the Second, Fifth, Seventh, Ninth and Tenth Circuits analyzing whether the BFP presumption applies to tax foreclosure proceedings. *See Gunsalus v. County of Ontario*, 37 F.4th 859 (2d Cir. 2022); *Smith v. SIPI, LLC*, 811 F.3d 228 (7th Cir. 2016) *cert. denied* 580 U.S. 823 (2016)[1]; *In re Tracht Gut, LLC*, 836 F.3d 1146 (9th Cir. 2016); *Kojima v. Grandote Int'l, LLC*, 252 F.3d 1146 (10th Cir. 2001). The Fifth, Ninth and Tenth Circuits have applied the BFP presumption to lawfully conducted tax foreclosures, while the Second and Seventh Circuits have held that lawfully conducted tax foreclosures may be set aside as fraudulent conveyances under 11 U.S.C. § 548.

1. The BFP Case

In determining that the price obtained in a lawfully conducted mortgage foreclosure was entitled to a presumption of "reasonably equivalent value" for purposes of 11 U.S.C. § 548, this Court analyzed the procedural safeguards provided under state law for the conduct of mortgage foreclosure actions:

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1. The Debtors in *Smith* filed a petition for writ of certiorari seeking review of the Seventh Circuit's holdings regarding the limitation of damages awarded. No party petitioned for writ of certiorari regarding the application of the *BFP* presumption.

> All States permit judicial foreclosure, conducted under direct judicial oversight; about half of the States also permit foreclosure by exercising a private power of sale provided in the mortgage documents. . . Foreclosure laws typically require notice to the defaulting borrower, a substantial lead time before the commencement of foreclosure proceedings, publication of a notice of sale, and strict adherence to prescribed bidding rules and auction procedures. Many States require that the auction be conducted by a government official, and some forbid the property to be sold for less than a specified fraction of a mandatory presale fair-market-value appraisal. . . When these procedures have been followed, however, it is "black letter" law that mere inadequacy of the foreclosure sale price is no basis for setting the sale aside, though it may be set aside (*under state foreclosure law*, rather than fraudulent transfer law) if the price is so low as to "shock the conscience or raise a presumption of fraud or unfairness."

BFP, 511 U.S. at 542 (citations omitted).

This Court recognized that the value obtained in a forced sale setting would never approach fair market value due to the circumstances surrounding forced sales.

> One must suspect the language means that fair market value cannot – or at least cannot always – be the benchmark. That suspicion becomes a certitude when one considers that

> market value, as it is commonly understood, has no applicability in the forced-sale context; indeed it is the very *antithesis* of forced-sale value. . . In short, 'fair market value' presumes market conditions that, by definition, simply do not obtain in the context of a forced sale.

BFP, 511 U.S. at 537.

Due to the fact that the price obtained at a foreclosure sale would never approach "fair market value," this Court focused on the necessary and key elements in state foreclosure statutes, namely: (1) notice; (2) ample opportunity to cure; and (3) judicial oversight of the process, and held that "a fair and proper price, or a 'reasonably equivalent value,' for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been met." *BFP*, 511 U.S. at 545.

In the various cases that have determined whether to extend the *BFP* presumption to tax foreclosures, various Circuit Courts, including the Second Circuit have improperly placed their entire focus on the presence or absence of competitive bidding at an auction sale, rather than the totality of the procedural safeguards that apply to the tax foreclosure process. The circuit courts have read into the *BFP* decision a mandatory requirement of a public auction with competitive bidding for the presumption to apply to a tax foreclosure, when there is no such statement in *BFP* making competitive bidding an absolute requirement. This has resulted in a split amongst the Circuit Courts as to whether the *BFP* presumption should apply in the tax foreclosure context.

This Court explicitly limited its holding in *BFP* to mortgage foreclosure actions, stating that the "considerations bearing upon other foreclosures and forced sales (to satisfy tax liens, for example) may be different." *BFP*, 511 U.S. at 535 (footnote 3). Given the split amongst the Circuit Courts on this issue, it is respectfully submitted that the time has come for this Court to clarify whether a tax foreclosure that is lawfully conducted within the confines of state laws and regulations is entitled to a presumption of "reasonably equivalent value" under 11 U.S.C. § 548.

2. The Fifth, Ninth and Tenth Circuits

The Fifth, Ninth and Tenth Circuits have rejected the notion that the value exchanged in the forced sale context was indicative of whether *BFP* should be applied. Rather than focusing solely on the presence or absence of competitive bidding in the tax foreclosure process, the Fifth Circuit focused on the presence of notice, ample opportunity to cure and judicial oversight of the process in the subject tax foreclosure statutes, as well as the policy impacts of allowing 11 U.S.C. § 548 to potentially invalidate lawfully conducted tax foreclosures.

Specifically, the Fifth Circuit applied *BFP* to Oklahoma's strict foreclosure system of conducting *in rem* tax foreclosure proceedings. *T.F. Stone Co. v. Harper*, 72 F.3d 466 (5th Cir. 1995). In *T.F. Stone*, property valued at $65,000 was foreclosed. *Id.* at 467. In determining whether to apply *BFP* to the Oklahoma tax foreclosure procedures, the Fifth Circuit expressly rejected arguments that the value received in the tax foreclosure of the subject property should be analyzed to determine the validity

of the process. *Id.* at 470 ("the *BFP* Court's analysis expressly eschewed any consideration of the substantive value received in a forced-sale context and instead pinned the validity of the transfer on whether the forced sale was non-collusive and conducted in compliance with state law").

The Fifth Circuit engaged in a detailed analysis of several factors outlined in *BFP*, namely: (1) the unreliability of "fair market value" as a benchmark in analyzing whether to apply 11 U.S.C. § 548 to a forced sale; (2) the policy effects such a determination would have upon tax foreclosure; and (3) the effect that subjecting lawfully conducted tax foreclosure proceedings to judicial challenges under 11 U.S.C. § 548 would have upon essential state interests. Although the Fifth Circuit was reviewing the phrase "present fair equivalent value" under 11 U.S.C. § 549 of the Code, it relied upon *BFP*'s analysis of "reasonably equivalent value" under 11 U.S.C. § 548 and essentially considered the terms interchangeable. Specifically, the Fifth Circuit stated as follows.

> Moreover, the Court's decision in BFP relied on intermediate principles that are directly applicable in determining whether a forced sale is made "for present fair equivalent value". . . First, "reasonably equivalent value" in § 548 cannot be measured by reference to "fair market value," since Congress could have used the language of "fair market value" had it intended such a benchmark. *Id.* at 1761. Second, reference to the fair market value of real property is especially inappropriate in the context of a forced sale. *Id.* at 1761-62 ("Market

value cannot be the criterion of equivalence in the foreclosure-sale context."). Third, any effort to ascertain what constitutes a "reasonable" or "fair" forced-sale price requires a policy judgment that courts ought not attempt. *Id.* at 1762 ("Such judgments represent policy determinations which the Bankruptcy Code gives us no apparent authority to make."). Fourth, judicial interpretation of § 548 implicates an "essential state interest" in that "'the general welfare of society is involved in the security of the titles to real estate,' and the power to ensure that security 'inheres in the very nature of [state] government.'" *Id.* at 1764-65 (quoting *American Land Co. v. Zeiss*, 219 U.S. 47, 60, 55 L. Ed. 82, 31 S. Ct. 200 (1911)).

These four principles are instructive in deciding this case. First, § 549(c)'s use of the phrase "present fair equivalent value" and its corresponding exclusion of "fair market value" rhetoric raises at least a "suspicion," as Justice Scalia put it, "that fair market value cannot - or at least cannot always - be the benchmark" under § 549. *Id.* at 1761. Second, Bryan County's sale of the Oklahoma property . . . was a forced sale - and "market value, as it is commonly understood, has no applicability in the forced-sale context; indeed, it is the very antithesis of a forced-sale value." *Id.* That Bryan County's sale . . . was a tax sale rather than a mortgage foreclosure sale does not change the reality that it was a forced sale.

> Third, any judicial effort to determine the purported content of "such a thing as a 'reasonable' or 'fair' forced-sale price," *id.* at 1762, would require policy judgments that are inappropriate for courts and fraught with the same difficulties in the context of both mortgage foreclosure sales and sales conducted to satisfy delinquent tax obligations. Finally, the essential state interest in ensuring "security of the titles to real estate" is equally salient in both mortgage foreclosure sales and tax sales of real property. A reading of § 549(c) that contemplated a substantive benchmark such as fair market value, however, "would have a profound effect upon that interest: the title of every piece of realty purchased at foreclosure [or a tax sale] would be under a federally created cloud." *Id.* at 1765. Given the presumption against reading federal laws to impinge on traditional areas of state regulation in the absence of a clear and manifest statutory mandate, we find it inappropriate to adopt such an approach . . .

T.F. Stone Co., 72 F.3d at 471.

The Ninth Circuit also applied *BFP* to tax foreclosures conducted under California law and upheld the denial to amend an adversary proceeding complaint to add a cause of action to void a tax foreclosure as a fraudulent conveyance under 11 U.S.C. § 548. *Tracht Gut, LLC v. Los Angeles County Treasurer*, 836 F.3d 1146 (9th Cir. 2016). In its decision, the Court considered the policy factors outlined in *BFP*, holding:

> Because the policy of deferring to state law on matters of real estate applies as much to tax sales as to mortgage foreclosures, and because tax sales in California contain the procedural safeguards that apply to mortgage foreclosures, a tax sale conducted in accordance with California state law conclusively establishes that the price received at the tax sale was for reasonably equivalent value. That means that the sale did not represent a fraudulent transfer under 11 U.S.C. § 548(a). 836 F.3d at 1154.

In addition, Bankruptcy Courts within the Ninth Circuit have applied the *BFP* holding to forfeitures occurring after a default under a land sale contract. When a vendor sells real estate under an installment sale contract, the vendor retains legal title until all installments under the contract are paid, at which time a deed transferring legal ownership of the property to the vendee is given. *See e.g. Vermillion v. Scarborough*, 176 B.R. 563, 566 (Bankr.D.Or. 1994). In the event of a default, the vendor may declare a default and retain all prior installment payments as liquidated damages. *Id.* at 567. The Oregon Bankruptcy Court applied the *BFP* presumption to a forfeiture under an installment land contract, reasoning that upon a default, Oregon law requires the vendor to set a redemption period of between 60 and 120 days to cure the default by making all delinquent installment payments, further stating that Oregon law provided for notice, opportunity to cure and procedural protection afforded to defaulting parties. *Id.* at 569. The Court further found that *BFP* "emphatically directs" that bankruptcy law be interpreted to support state laws in areas with the state's province, and that 11 U.S.C. § 548 contained no statutory

direction that would authorize impinging upon the state's basic interest in securing real estate titles. *Id.* at 569-570. *See also Burke v. McCanna*, 202 B.R. 778 (Bankr. D.N.M. 1996) (New Mexico Bankruptcy Court finding that forfeiture under installment land contract that complied with state law not a fraudulent transfer under 11 U.S.C. § 548); *Butler v. Goldetsky*, 552 N.W.2d 226 (Minn. 1996) (Minnesota Supreme Court, after certification of question by bankruptcy court, holding that deed cancellation under installment land contract not a fraudulent transfer where all procedural safeguards under state law were followed).

Likewise, the Tenth Circuit extended the application of *BFP* to Colorado's tax foreclosure process. *Kojima v. Grandote Int'l, LLC*, 252 F.3d 1146 (10th Cir. 2001). The Tenth Circuit stated that the "decisive factor" in determining whether a tax sale constitutes "reasonably equivalent value is a state's procedure for tax sales, and further noted that there was no claim before them that the tax sale was conducted in violation of Colorado law. *Kojima*, 252 F.3d at 1152. The *Kojima* Court further acknowledged that there was a split amongst courts regarding whether the *BFP* presumption applied to tax foreclosures, and despite there not being explicit language in the *BFP* opinion requiring sales to be held at public auction with competitive bidding, considered the auction process under Colorado law to be a decisive factor. *Id.*

The Fifth, Ninth and Tenth Circuits extended the applicability of *BFP* to lawfully conducted tax foreclosure proceedings conducted under state law by analyzing the totality of the circumstances, namely, the presence of notice, ample opportunity to cure and judicial oversight of the process, as well as the chilling policy effects of

allowing 11 U.S.C. § 548 to invalidate such proceedings in the bankruptcy context. Even though the tax foreclosure statutes in these cases also provided for auction sale with competitive bidding, the Fifth, Ninth and Tenth Circuits focused on the totality of due process safeguards, as well as the lack of any Congressional intent to impinge upon the vital state interest in collecting taxes.

In addition, Bankruptcy Courts in the Fourth, Sixth and Eighth Circuits have extended *BFP* to tax foreclosures. The Bankruptcy Court for the Western District of Michigan has applied the *BFP* presumption to tax foreclosures operated as strict foreclosures, much like RPTL Article 11. *Fisher v. Moon*, 355 B.R. 20 (Bankr. W.D.Mich. 2006). In dismissing a 11 U.S.C. § 548 fraudulent conveyance cause of action, the court stated as follows:

> Although this may seem like a harsh result, there is a public policy issue at stake. First, it is in the best interest of everyone that property be available for purchase by a third party and returned to the tax rolls. Next, as stated by the Supreme Court, 'the general welfare of society is involved in the security of the titles to real estate.' If the position urged by the Debtor were followed, 'the title to every piece of realty purchased at foreclosure would be under a federally-created cloud.' No purchaser would be able to claim title free of liens, if the foreclosed upon party could file bankruptcy and prevail in a fraudulent transfer suit, even when the taxing authority followed the required procedures.

Fisher, 355 B.R. at 25 (citations omitted). *See also RL Mgt. Group, LLC v Coffman,* 2014 Bankr. LEXIS 206, at *17 (Bankr.E.D.Mich 2014) (also applying *BFP* to a Michigan tax foreclosure); *Washington v. County of King William*, 232 B.R. 340, 344 (Bankr.E.D.Va. 1999) (Upon review of the notice requirement, the opportunities to redeem under the Virginia tax foreclosure statute, and the taxing authority's strict compliance with statutory requirements, Bankruptcy Court determined that the tax foreclosure of property constituted "reasonably equivalent value under *BFP*); *Russell-Polk v. Bradley*, 200 B.R. 218, 221 (Bankr.E.D.Mo. 1996) (11 U.S.C. § 548 cause of action dismissed where Bankruptcy Court found that the Missouri tax foreclosure statute provided the same protections as found in mortgage foreclosure proceedings.)

Bankruptcy Courts within the Third Circuit are split with respect to the applicability of *BFP* to tax foreclosures. *Compare Crespo v. Immanuel*, 569 B.R. 624, 633 (E.D.Pa. 2017) ("[g]iven the similarities between the procedural protections applicable to upset tax sales and foreclosure sales in Pennsylvania, the Bankruptcy Court correctly held *BFP* extends to upset tax sales under the Pennsylvania Tax Sale Law") *with GGI Properties, LLC v. City of Millville*, 568 B.R. 231 (Bankr.D.N.J. 2017) (Focusing primarily upon the absence of competitive bidding, New Jersey Bankruptcy Court held that *BFP* presumption held not to apply to New Jersey tax foreclosure proceeding). Although the Third Circuit has analyzed whether the *BFP* presumption can be applied to a New Jersey tax foreclosure in a 11 U.S.C. § 547 action to set aside a voidable preference, it largely rejected arguments that *BFP* should apply on the ground that the term "reasonably equivalent value" has no applicability in

a 11 U.S.C. § 547 preference action. *Hackler v. Arianna Holdings, LLC*, 938 F.3d 473, 479 (3d Cir. 2019).

3. The Second and Seventh Circuits

The Second Circuit rejected the argument that the *BFP* presumption should be extended to lawfully conducted tax foreclosures on the ground that the New York tax foreclosure state is a strict foreclosure statute, which does not provide for an auction sale with competitive bidding. *Gunsalus*, 37 F.4th at 865-866. The Second Circuit did not consider all of the procedural safeguards provided under RPTL Article 11, such as notice, ample opportunity to cure and judicial oversight of the process, but rather focused solely on the lack of an auction sale with competitive bidding. *Gunsalus*, 37 F.4th at 865 ("The Court adverted to the protections afforded by the current mortgage foreclosure laws of many states, including notice to the defaulting borrower, a substantial lead time before the commencement of foreclosure proceedings, publication of a notice of sale, strict adherence to prescribed bidding rules and auction procedure, and perhaps most importantly, foreclosure by sale with the surplus reverting to the debtor.") However, the Second Circuit editorialized this Court's decision in *BFP* – nowhere in that decision does it state that an auction sale with competitive bidding is the most important factor.

The Seventh Circuit also refused to extend the *BFP* presumption to tax foreclosures under the Illinois tax foreclosure statute, under which bidders compete to purchase a tax lien rather than the property itself, by bidding on the interest rate to be charged on the tax lien. *Smith v. SIPI, LLC*, 811 F.3d at 237. The lowest bidder

then is granted the tax lien and a certificate of purchase which then triggers a redemption period for the property owner or other interested party to redeem the property by paying the delinquent tax lien at the interest rate set during the bidding process. *Id.* The Seventh Circuit considered what it termed "the critical differences between the overbid method in *BFP* and the interest rate method used in Illinois tax sales" and held that the *BFP* presumption does not apply to Illinois tax sales. *Id.* at 238.

4. These Matters Present an Opportunity for this Court to Clarify a Conflicting Body of Law.

The cases at bar present this court with an opportunity to clarify a body of law that has been in flux since *BFP* was decided in 1994. Should tax foreclosures conducted in compliance with state be presumed to constitute "reasonably equivalent value" in a fraudulent conveyance action under 11 U.S.C. § 548? Or are there certain features of state foreclosure statutes that are required as prerequisites before the presumption of "reasonably equivalent value" will attach?

Several of the circuit courts have interpreted *BFP* to require a public auction with competitive bidding in order to be afforded a presumption of "reasonably equivalent value" under 11 U.S.C. § 548. *BFP* discussed the typical statutory requirements of state foreclosure laws, including notice to the defaulting borrower, a substantial lead time before the commencement of foreclosure proceedings, publication of a notice of sale, and strict adherence to prescribed bidding rules and auction procedures. *BFP*, 511 U.S. at 542. However, as the Bankruptcy Court noted below, this Court did not mandate any one particular state

foreclosure law requirement that it deemed necessary for the *BFP* holding to apply. *See* App. G, p. 104a. Contrary to the holding of the Second Circuit, the *BFP* holding does not deem a public auction with competitive bidding to be "mandatory" for the presumption of "reasonably equivalent value" to apply.

This Court's statement that the *BFP* holding only applied to mortgage foreclosures and its further statement that the considerations for tax foreclosures and other forced sales "may be different" suggests that it was waiting for a specific tax foreclosure case in order to conduct such an analysis. Given the split amongst the various courts on this issue, it is respectfully submitted that the cases at bar present the opportunity for this Court to clarify its holding in *BFP* and issue binding precedent as to whether a lawfully conducted tax foreclosure can be set aside as a fraudulent conveyance under 11 U.S.C. § 548.

II. ALLOWING A LAWFULLY CONDUCTED TAX FORECLOSURE TO BE SET ASIDE AS A FRAUDULENT CONVEYANCE IMPINGES UPON ESSENTIAL STATE INTERESTS.

1. BFP Requires Clear Congressional Statement of Intent to Displace an Important State Interest.

In analyzing whether a mortgage foreclosure action conducted under state law could be set aside as a constructively fraudulent transfer under 11 U.S.C. § 548(a)(2)(B), this Court spoke repeatedly to the interpretation of federal statutes which impact traditional state regulation and/or the existence, force, and function of established institutions of local government. This Court noted:

> Absent a clear statutory requirement to the contrary, we must assume the validity of this state-law regulatory background and take due account of its effect. "The existence and force and function of established institutions of local government are always in the consciousness of lawmakers and, while their weight may vary, they may never be completely overlooked in the task of interpretation," (cites omitted). 511 U.S. at 539.

This court further stated:

> But absent clearer textural guidance than the phrase "reasonably equivalent value" - a phrase entirely compatible with pre-existing practice - we will not presume such a radical departure. (citations omitted). *cf. United States v. Texas*, 507 U.S. [529, 534], 113 S.Ct. 1631, 1634, 123 L.Ed.2d 245 (1993) (statutes that invade common law must be read with presumption favoring retention of long-established principles absent evident statutory purpose to the contrary). 511 U.S. at 543.

This court further noted:

> Federal statutes impinging upon important state interest "cannot ... be construed without regard to the implications of our dual system of government ... [W]hen the Federal Government takes over... local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and

national authority, those charged with the duty of legislating [must be] reasonably explicit." F. Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum.L.Rev. 527, 539-40 (1947), quoted in *Kelly v. Robinson*, 479 U.S. 36,49-50 n. 11, 107 S.Ct. 353,360-362 n. 11,93 L.Ed.2d 216 (1986). It is beyond question that an essential state interest is at issue here: we have said that "the general welfare of society is involved in the security of titles to real estate" and the power to ensure that security "inheres in the very nature of [state] government." *American Land Co. v. Zeiss*, 219 U.S. 47, 60, 31 S.Ct. 200, 204, 55 L.Ed. 82 (1911). Nor is there any doubt that the interpretation urged by petitioner would have a profound effect upon that interest: the title of every piece of realty purchased at foreclosure would be under a federally created could. . . To displace traditional state regulation in such a manner, the federal statutory purpose must be "clear and manifest," *English v. General Electric Co.*, 496 U.S. 72, 79, 110 S.Ct. 2270, 2275, 110 L.Ed.2d 65 (1990). *Cf. Gregory v. Ashcroft*, 501 U.S., at 460- 461, 111 S.Ct. at 2401 (1991). Otherwise the Bankruptcy Code will be construed to adopt, rather than to displace, pre-existing state law. *See Kelly*, *supra*, 479 U.S., at 49, 107 S.Ct., at 361-361; *Butner v. United States*, 440 U.S. 48, 54-55, 99 S.Ct. 914, 917-918, 59 L.Ed.2d 136 (1979); *Vanston Bond-Holders Protective Comm. v. Green*, 329 U.S. 156, 171, 67 S.Ct. 237, 244, 91 L.Ed. 162 (1945) (Frankfurter, J., concurring). 511 U.S. at 544.

In other words, in order to find that 11 U.S.C. § 548 displaces a state's ability to enforce and collect delinquent real property taxes, a court must find a clear statement of intent for this result. The reality is that there is absolutely no evidence demonstrating a "clear and manifest" intent by Congress to displace the vital governmental interest in timely collection of property taxes and to circumvent the lawful consequences of a state court tax foreclosure through 11 U.S.C. § 548. Federal statutes which invade longstanding state law principles are to be read with "a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident. In such cases, Congress does not write upon a clean slate. To abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common-law." *United States v. Texas*, 507 U.S. 529, 534 (1993) (citations omitted).

The plain language of 11 U.S.C. § 548 states no such clear and manifest intention to overturn state tax foreclosure law. Furthermore, the legislative history of 11 U.S.C. § 548 does not reveal any such intention either, and also demonstrates that Congress was aware that it had the opportunity to address the question regarding whether a nonjudicial foreclosure sale could be set aside as a fraudulent transfer, but instead elected not to address the issue.

11 U.S.C. § 548 was amended in 1984 to add the phrase "voluntary or involuntarily transfer" to 11 U.S.C. § 548(a) of the Bankruptcy Code. In the Congressional Record Statements, Senator DeConcini of Arizona and Senator Dole of Kansas exchanged comments, specifically inquiring as to whether this legislation would support

recent court holdings regarding whether nonjudicial foreclosure sales could be set aside in bankruptcy under 11 U.S.C. § 548. The specific exchange contained in the Congressional Record was as follows:

> MR. DeCONCINI: Then I am correct in concluding that parties in bankruptcy proceedings who seek avoidance of petition foreclosure sales would find no support for their arguments in these amendments?
>
> MR. DOLE: The Senator's conclusion is correct.

See 130 Cong. Rec. S13771-72 (*daily ed.* October 5, 1984).

In amending 11 U.S.C. § 548, Congress was specifically aware of conflicting court opinions addressing whether noncollusive foreclosure sales could be set aside under 11 U.S.C. § 548, and chose not to address the issue, despite its awareness "that parties in bankruptcy proceedings who seek avoidance of petition foreclosure sales would find no support for their arguments in these amendments." This cannot be said to be a "clear and manifest intent" to impinge upon New York tax foreclosure law.

2. The Circuits Are Split as to Whether a State's Interest in Securing Titles to Real Estate is Superior to the Bankruptcy Interest of Providing a Debtor with a Fresh Start.

The Second Circuit found that, despite there being no clear and manifest statement of this intention by Congress, that "[the County's] legitimate interest in tax collection cannot overcome Congress' policy choice

that 'reasonably equivalent value' must be obtained for a transfer of a debtor's property in the bankruptcy context. *Gunsalus*, 37 F.4th at 866. The Seventh Circuit similarly held that the purpose of 11 U.S.C. § 548 was superior to a state's interest in timely collection of delinquent real estate taxes. *Smith*, 811 F.3d at 238 ("This holding is true to § 548 and the broader purposes of the Bankruptcy Code and its fraudulent transfer provisions to ensure both a fair distribution of the debtor's assets among creditors and a fresh start for the debtor.")

However, the Fifth and Ninth Circuits were more deferential to the essential state interest in securing titles to real estate and the timely collection of taxes. *See T.F. Stone Co.*, 72 F.3d at 471 ("[T]he essential state interest in ensuring 'security of the titles to real estate' is equally salient in both mortgage foreclosure sales and tax sales of real property. . . Given the presumption against reading federal laws to impinge on traditional areas of state regulation in the absence of a clear and manifest statutory mandate, we find it inappropriate to adopt such an approach to our interpretation. . .") *See also Tracht Gut*, 836 F.3d at 1153 ("The [BFP] Court's rationale also applies to tax sales. As stated by the BAP, 'federal courts should pay considerable deference to state law on matters relating to real estate. Like mortgage foreclosures, tax foreclosure sales conducted by state and local governments are governed by state law.") (citations omitted).

There is no question that property tax collection is of vital importance to local governments. *See RL Mgt. Group, LLC,* 2014 Bankr LEXIS 206, at *17 ("The taxes involved are the lifeblood of government units and enable them to carry out essential government functions for the

benefit of their citizens.") Property taxes finance essential and mandated local government services. In New York, the majority of government services are performed by county governments, including many services legally defined as state obligations. New York counties fund and provide the following services: (1) social services, including public assistance and food stamp programs; public health programs and other services and programs for the elderly and disabled; (2) public safety, including a Sheriff's department, a county jail, a district attorney's office, a probation department and juvenile prosecution/ youth detention costs; (3) transportation and public works, including county airports, county highways and bridges and capital projects; (4) mental hygiene and health services; and (5) other offices providing essential public services such as the county clerk, department of motor vehicles, board of elections, child support collection and enforcement and veterans' services.

It should not vary by circuit as to whether a state's interest in securing titles to real estate and in the timely collection of real estate taxes is superior or subordinate to the Bankruptcy interest in ensuring a fair distribution of a debtor's assets among creditors and a fresh start for the debtor. Accordingly, the cases at bar present an opportunity for this Court to clarify the interest of local government units to finance essential government services, as this interest relates to fraudulent conveyance law under 11 U.S.C. § 548.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the County respectfully requests that this Court issue a writ of certiorari to review the decisions of the Second Circuit below.

Dated: September 21, 2022
Rochester, New York

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED JUNE 27, 2022

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2021

(Argued December 16, 2021; Decided June 27, 2022)

No. 20-3865-bk

BRIAN L. GUNSALUS, GLIEE V. GUNSALUS,

Plaintiffs-Appellees,

v.

COUNTY OF ONTARIO, NEW YORK

Defendant-Appellant.[*]

Appeal from the United States District Court
for the Western District of New York
No. 20-cv-6134
Frank P. Geraci, Jr., Chief Judge, Presiding.

Before: CABRANES, PARKER, and LEE, *Circuit Judges.*

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* The Clerk of Court is respectfully directed to amend the official caption as set forth above.

Appendix A

Defendant-Appellant, County of Ontario, appeals from a judgment of the United States District Court for the Western District of New York (Geraci, J.). Plaintiffs-Appellees sought to set aside the loss of their home to the County as a result of a tax lien foreclosure. The Bankruptcy Court set aside the transfer as a fraudulent conveyance on the grounds that it was not for "reasonably equivalent value." We AFFIRM.

BARRINGTON D. PARKER, *Circuit Judge*:

BACKGROUND

This case arises from the foreclosure of a tax lien on a home in Ontario County, New York, owned by a married couple, Brian and Gliee Gunsalus, which resulted in the loss of title to their home. Following the foreclosure, the couple filed for protection under Chapter 13 of the Bankruptcy Code and filed a complaint seeking to avoid the loss of their home on the grounds that it was a fraudulent conveyance. The Bankruptcy Court set aside the transfer, and the County appeals, raising two questions. The first is whether the Gunsaluses had standing to bring the avoidance proceeding. The second is whether the transfer effected by Ontario County in foreclosing on the lien was entitled to the presumption of having yielded "reasonably equivalent value" under Section 548 of the Bankruptcy Code. We answer yes and no, respectively.

The property in question is a modest family home. Mrs. Gunsalus has lived there her entire life and for the past fifteen years she and Mr. Gunsalus have lived there

with their disabled adult son. They owned the home free and clear of mortgages. Due to a temporary reduction in Mr. Gunsalus' wages, the couple was unable to pay their real estate taxes, and the property became subject to a tax lien in the amount of unpaid taxes, $1,290.

After the lien remained unpaid for a number of months, the County instituted proceedings pursuant to Article 11 of New York's Real Property Tax Law ("RPTL") to enforce the lien. *See* RPTL §§ 1120 *et seq.* The County first included the property on the "List of Delinquent Taxes" filed in the County Clerk's Office. *See id.* § 1122. The County then filed a petition that commenced an *in rem* tax foreclosure action.

The Gunsaluses answered the petition and the County, in turn, moved for summary judgment. The Gunsaluses opposed that motion and cross-moved for an extension of time to pay the overdue taxes. The Ontario County Supreme Court denied the cross-motion and granted the County's motion. In June 2016, the Ontario County Supreme Court entered a final judgment of foreclosure awarding the County possession of, and title to, the home. The Gunsaluses were permitted to continue residing in the property pending the outcome of this litigation.

In May 2017, the County scheduled an auction of the property, which was sold to a third party for $22,000. The unpaid taxes, as noted, had amounted to $1,290. Pursuant to Article 11, the County pocketed the difference ($20,710), which meant that the Gunsaluses were required to forfeit to the County all of their accumulated equity.

These procedures, authorized by Article 11, are known as "strict foreclosure." Under "strict foreclosure," a creditor (here the County) asks the court to set a deadline for payment of a debt (here unpaid taxes) secured by the tax lien. If the lien is not paid by the deadline, as occurred here, the court enters an order transferring title and possession of the property to the creditor. There is no foreclosure sale. Instead, the transfer occurs by court order and the transferee can then sell the property, as the County did.

Approximately three weeks before the auction, the Gunsaluses filed for protection under Chapter 13 of the Bankruptcy Code. To qualify under Chapter 13, a debtor must present a plan that, among other things, provides "adequate protection" to secured creditors like the County. Moreover, under Chapter 13, the County retains its lien until the tax arrears is paid in full. *See* 11 USC § 1325(a)(5)(B)(i)(I). Accordingly, the Gunsaluses' Chapter 13 plan provided that the County would receive all delinquent real estate taxes plus 12% interest. The Gunsaluses have made all delinquent tax payments, and they have continued to pay the new property taxes that have accrued since the judgment of foreclosure. During the bankruptcy proceedings, the Gunsaluses sought to avail themselves of the federal homestead exemption under Section 522(d)(1), which allows a debtor to exclude a home from the bankruptcy estate.

Shortly after the Chapter 13 filing, the Gunsaluses commenced a proceeding in Bankruptcy Court to set aside the transfer of their home to the County on the grounds that it was a fraudulent conveyance under Sections 548

and 522 of the Code. To establish a fraudulent conveyance, a debtor must prove, among other things, that the debtor received less than a reasonably equivalent value in exchange for the transfer. *See* 11 U.S.C. § 548(a).

The Bankruptcy Court dismissed the complaint. Relying on the United States Supreme Court's opinion in *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (1994), the Bankruptcy Court held that a tax lien foreclosure proceeding conducted in compliance with Article 11 of the RPTL, like the mortgage foreclosure at issue in *BFP*, "is conclusively presumed to have provided reasonably equivalent value for purposes of 11 U.S.C. § 548(a)(1)(B)(i)." App'x 121.

On appeal, the District Court reversed. It reasoned that the mortgage foreclosure procedures at issue in *BFP* differed in material respects from the tax foreclosure procedures in the RPTL, explaining that

> [t]he Court in *BFP* expressly stated that state foreclosure laws had evolved to "avoid the draconian consequences of strict foreclosure," . . . but the RPTL has not. Unlike the foreclosure law in *BFP* and the "typical" state laws that the Supreme Court described before reaching its holding, the RPTL is a strict foreclosure regime that does not provide for a *pre-seizure* auction whereby the debtor may recovery equity. This difference between the RPTL and the state laws the *BFP* Court considered is significant to fraudulent conveyance analysis.

App'x 11 (footnote omitted). The District Court remanded the case to the Bankruptcy Court for trial on the fraudulent conveyance claim, where the Gunsaluses prevailed. The Bankruptcy Court found that the Gunsaluses had met their burden of proving that the transfer of their home worth at least $22,000 in exchange for satisfaction of the $1,290 tax debt owed Ontario County was, among other things, not for "reasonably equivalent value."[1]

This appeal followed. *See* 28 U.S.C. § 158(d)(1). We review legal determinations *de novo*. *See In re Anderson*, 884 F.3d 382, 387 (2d Cir. 2018).

DISCUSSION

The County seeks reversal on two grounds. First, the County argues that the Gunsaluses lack standing to challenge the transfer of their property. Secondly, the County argues that the District Court erred by refusing to extend the holding of *BFP* from the mortgage foreclosure regime at issue there to the tax lien foreclosure regime at issue here.

I

We first turn to the County's contention that 11 U.S.C. § 522(c)(2)(B) of the Code deprived the Gunsaluses of standing to bring the avoidance proceeding. We review

1. Both the Bankruptcy Court and the District Court conducted proceedings in the present case alongside those raised by another similarly situation set of property owners, Joseph M. Hampton and Brenda S. Hampton. Before us, the County has also appealed the District Court's judgment in the Hamptons' case in Appeal No. 20-3868.

this issue *de novo. See Bank Brussels Lambert v. Coan (In Re AROChem Corp.)*, 176 F.3d 610, 620 (2d Cir. 1999).

Section 522 of the Code authorizes debtors to exempt certain transfers of property. *See* 11 U.S.C. § 522. In Bankruptcy Court, the Gunsaluses claimed the federal homestead exemption, which allows a debtor to exempt a home from the bankruptcy estate. *See id.* § 522(d)(1). The Code provides that debtors who are eligible for the federal homestead exemption have standing to bring avoidance actions. *See id.* § 522(h); *Deel Rent-A-Car, Inc. v. Levine*, 721 F.2d 750, 754 (11th Cir. 1983).

The Code also provides, however, that exempted property is subject to certain limitations. Under Section 522(c)(2)(B), for example, certain exempted property remains liable for a tax lien:

> Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose . . . before the commencement of the case, except . . .
>
> (2) a debt secured by a lien that is—
>
> (B) a tax lien, notice of which is properly filed.

The County contends that this Section renders the Gunsaluses ineligible for the federal homestead exemption and deprives them of standing. We disagree. Section 522(c)(2)(B) is straightforward. It merely requires that the

Gunsaluses—who seek to avoid the transfer of their home and *not* to avoid paying off the tax lien on that home—remain liable for the unpaid taxes even if the fraudulent conveyance action succeeds.

The Gunsaluses' Chapter 13 plan achieves just that result. In accordance with 11 U.S.C § 1325, the plan provides that the County retains its lien until its secured claim for tax arrears is paid in full. The plan affords the Gunsaluses five years to pay their delinquent real estate taxes in full and, as noted, they are paying off that obligation in accordance with the plan.

The County thus incorrectly interprets Section 522(c)(2)(B) as barring the Gunsaluses from claiming the federal homestead exemption, when it merely provides that exempt property remains liable for a tax lien. They are not, as the County would have it, attempting to avoid paying the tax lien; they are attempting to avoid a transfer of the property. Accordingly, Section 522(c)(2)(B) does not deprive the Gunsaluses of standing under Section 522(h).

II

A

Next, the County challenges the District Court's holding that the forfeiture of the Gunsaluses' home is not entitled to the presumption of an exchange for "reasonably equivalent value" under Section 548(a). The Bankruptcy Code empowers debtors to set aside a transfer of property if (1) the debtor had an interest in property;

(2) a transfer of that interest occurred on or within two years of the bankruptcy petition; (3) the debtor was insolvent at the time of the transfer or became insolvent as a result of the transfer; and (4) the debtor received "less than a reasonably equivalent value in exchange for such transfer[,]" 11 U.S.C. § 548(a); *see id.* § 522(h). The parties agree that this case concerns only the fourth element. *See id.* § 548(a)(1)(B)(i).

Of the three statutory terms—"reasonably," "equivalent," and value"—only the last is defined. "Value" means, for purposes of Section 548, "property, or satisfaction or securing of a . . . debt of the debtor," 11 U.S.C. § 548(d)(2)(A). *See BFP*, 511 U.S. at 535-36. To decide whether a transfer is for "reasonably equivalent value," courts consider "whether the debtor has received value that is substantially comparable to the worth of the transferred property." *Id.* at 548. Were we writing on a clean slate, we would easily conclude that the transfer here is not entitled to the legal presumption of being in exchange for "reasonably equivalent value." Common sense dictates that receipt of $1,290 for a property that was sold for $22,000 fails the "reasonably equivalent value" test. But the County contends that this approach does not resolve this appeal because in the mortgage foreclosure context, the Supreme Court in *BFP* weighed in on the meaning of "reasonably equivalent value."

In *BFP*, the debtor, a partnership formed to buy a home in California, defaulted on its home loan payments. *Id.* at 533. The home later sold at a mortgage foreclosure sale for $433,000. *Id.* at 533-34. The debtor alleged that

the home was actually valued at $725,000 and therefore challenged the sale as constructively fraudulent because the $433,000 it received was not, in the debtor's view, "reasonably equivalent" to the $725,000 it alleged the home was worth. *Id.* at 534.

The Supreme Court rejected that argument. It held that when a mortgage foreclosure sale is conducted in compliance with state law, the price received at that sale is the worth of the home—and, consequently, is "reasonably equivalent value." *Id.* at 545. In reaching this result, the Court emphasized that over the years, many state mortgage foreclosure laws had evolved from a system of strict foreclosures to one of foreclosures by sale. *See id.* at 541-42. Under the strict foreclosure regime (like that of RPTL Article 11), when a debtor had failed to make past due mortgage payments, after a certain time period, his entire interest in the property was forfeited, regardless of any accumulated equity. *Id.* at 541. By contrast, foreclosures by sale—such as the sale in *BFP*—ensured that (1) foreclosures would occur by sale, (2) the proceeds of that sale would be used to satisfy the debt, and (3) any surplus over the debt would be refunded to the debtor. *See id.* Foreclosures by sale, the Court noted, emerged to "avoid[] the draconian consequences of strict foreclosure." *Id.* "Since then," the Court went on, "States have created diverse networks of judicially and legislatively crafted rules governing the foreclosure process, to achieve what each of them considers the proper balance between the needs of lenders and borrowers." *Id.* at 541-42. The Court adverted to the protections afforded by the current mortgage foreclosure laws of

many states, including notice to the defaulting borrower, a substantial lead time before the commencement of foreclosure proceedings, publication of a notice of sale, strict adherence to prescribed bidding rules and auction procedure, and perhaps most importantly, foreclosure by sale with the surplus reverting to the debtor. *Id.* at 542. "When these procedures have been followed," the Court stated, "mere inadequacy of the foreclosure sale price is no basis for setting the sale aside . . . ." *Id.*

Ultimately, the Court held that "the consideration received from a noncollusive, real estate mortgage foreclosure sale conducted in conformance with applicable state law" is conclusively presumed to be an exchange for "reasonably equivalent value" under 11 U.S.C. § 548(a). *Id.* at 533. Critical to that conclusion was the existence of an auction or sale which would permit some degree of market forces to set the value of the property even in distressed circumstances. *Id.* at 545-49. Because distressed properties that must be sold in the time and manner established by state mortgage foreclosure law are, the Court reasoned, "simply worth less," "reasonably equivalent value" in the mortgage foreclosure context is the foreclosure sale price itself. *Id.* at 549 (emphases omitted).

For those reasons, the Court explained, courts may not engage in the policy judgment of setting aside a mortgage foreclosure sale merely because the sale itself yielded a price that a court deemed inadequate. *See id.* at 542. The Court therefore rejected the debtor's view that the $433,000 home was actually worth $725,000. Instead,

because the sale was conducted in compliance with state foreclosure-by14 sale law, the home was worth $433,000. And because the value received by the debtor was equal to what the home was "worth," the Court held that the debtor had necessarily received "reasonably equivalent value" under Section 548.

B

In the County's view, *BFP* instructs that so long as state foreclosure law provides a debtor with (1) notice; (2) ample opportunity to cure; and (3) judicial oversight of the process, any foreclosure conducted in compliance with state foreclosure law necessarily yields "reasonably equivalent value" under Section 548. Here, the County contends that the RPTL contains those elements and that the transfer was conducted in compliance with the RPTL. Consequently, the County argues, *BFP* compels the conclusion that the transfer of the Gunsaluses' home was necessarily in exchange for "reasonably equivalent value."

For a host of reasons, we disagree. First, *BFP* itself rejects this contention. As Justice Scalia noted, *BFP* "covers only mortgage foreclosures of real estate. The considerations bearing upon other foreclosures and forced sales (*to satisfy tax liens*, *for example*) may be different." 511 U.S. at 537 n.3 (emphasis added). That admonition is dispositive because, as we have seen, the strict foreclosure procedures under the RPTL offer far fewer debtor protections than the mortgage foreclosure procedures at issue in *BFP*. *See In re Smith*, 811 F.3d 228, 239 (7th Cir.

2016) (finding that a state's tax foreclosure protections must compare favorably to the mortgage foreclosure protections in *BFP* in order to receive a presumption of "reasonably equivalent value"); *In re Hackler*, 938 F.3d 473, 479 (3d Cir. 2019) (same).

Although the County eventually sold the Gunsaluses' home, unlike the sale in *BFP*, the sale occurred *after* foreclosure. The transfer of the Gunsaluses' title, equity and all their interests in the home—the transfer that is relevant for Section 548(a)(1)(B) purposes—had already occurred by the time the County auctioned off the property. The auction was conducted solely for the benefit of the County and the amount of the proceeds bears no relation to the amount of the tax debt that led to the foreclosure. Moreover, under the RPTL, the County pockets the difference between the tax debt and the sales proceeds and is not accountable to other creditors for what it does with the proceeds. Suffice it to say that under no reasonable calculus do these procedures convey to the debtor value that is substantially comparable to the worth of the transferred property. *See BFP*, 511 U.S. at 548. In short, because the RPTL procedures are fundamentally different from the protections in place in *BFP*, that case is of little assistance to the County.

In addition, the County's position would produce results that are fundamentally at odds with the goals of bankruptcy law. Here, it would give the County a windfall at the expense of the estate, the other creditors, and the debtor— which is precisely what the Code's fraudulent conveyance provisions are intended to prevent. *See In re*

Smith, 811 F.3d at 238-39. For these reasons, we agree with the District Court that the transfer here should not be presumed to be in exchange for "reasonably equivalent value" under Section 548.

Finally, the County expresses concerns that our reading of Section 548 will hamper its ability to collect delinquent real property taxes. We are not insensitive to those concerns, but they do not carry the day on this appeal. First, Ontario County's legitimate interest in tax collection cannot overcome Congress' policy choice that "reasonably equivalent value" must be obtained for a transfer of a debtor's property in the bankruptcy context. *See In re Murphy*, 331 B.R. 107, 120 (Bankr. S.D.N.Y. 2005). As we have previously admonished, "there is a strong presumption of not allowing a secured creditor to take more than its interest." *In re Harris*, 464 F.3d 263, 273 (2d Cir. 2006); *see also In re Smith*, 811 F.3d at 238 (noting that one goal of fraudulent conveyance law is to avoid a "windfall to one creditor at the expense of others"). Second, the County's concerns are unfounded in this case. As noted, the Gunsaluses have proposed in their Chapter 13 plan to pay the County all delinquent real estate taxes plus 12% interest. The Gunsaluses have also made all tax payments that have subsequently come due under the plan. Third, even to the extent that today's ruling could, as the County cautions, introduce a degree of disruption to the County's collection of delinquent property taxes, that disruption arises from the interplay between the strict foreclosure regime of the RPTL and a Bankruptcy Code fashioned by Congress to afford relief to debtors. By its very nature, the Code upsets common and state

law property interests and recalibrates the relationship between debtors and creditors.

For these reasons, we conclude that the District Court correctly held that the transfer of the Gunsaluses' home to the County was not entitled to the presumption of having provided "reasonably equivalent value" under Section 548.

CONCLUSION

We **AFFIRM** the judgment of the District Court.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED JULY 5, 2022

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 20-3868-bk

JOSEPH M. HAMPTON, BRENDA S. HAMPTON,

Plaintiffs-Appellees,

v.

COUNTY OF ONTARIO, NEW YORK,

Defendant-Appellant.[*]

July 5, 2022, Decided

Appeal from a judgment of the United States District Court for the Western District of New York. (Geraci, Jr., C.J.).

PRESENT: José A. Cabranes, Barrington D. Parker, Eunice C. Lee, *Circuit Judges.*

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is **AFFIRMED**.

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* The Clerk of Court is respectfully directed to amend the official caption as set forth above.

Appendix B

The Hamptons are a married couple who owned a home located in Ontario County, New York that was free and clear of mortgages. In 2015, the couple failed to pay their real estate taxes, totaling $5,201.87. Ultimately, a default judgment of foreclosure was entered in Ontario County's favor on March 2, 2017, which entitled the County to possession of and all equity in the property. Two months later, the Hamptons filed a Chapter 13 bankruptcy plan providing for payment of their entire tax arrears. Shortly afterwards, they filed an avoidance proceeding against the County, seeking to set aside the transfer of their home in tax foreclosure as constructively fraudulent under 11 U.S.C. § 548(a)(1)(B). Two weeks later, the County sold the home at auction for $27,000. The County notified the bidders, however, that title to the Hamptons' home was in dispute and would not be transferred until determination of this adversary proceeding. In Bankruptcy Court, the transfer of the Hamptons' home was set aside as constructively fraudulent because it was not in exchange for "reasonably equivalent value" under Section 548.[1] We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We first address standing. The "[Bankruptcy] Code provides that debtors who are eligible for the federal

1. Both the Bankruptcy Court and the District Court conducted proceedings in this case alongside those raised by another similarly situated set of property owners, Brian L. Gunsalus and Gliee V. Gunsalus. The County also appealed the District Court's judgment on those claims, which we have resolved. *See Gunsalus v. Cnty. of Ontario, New York*, F.4th , No. 20-3865-BK, 2022 U.S. App. LEXIS 17596, 2022 WL 2296945 (2d Cir. June 27, 2022).

homestead exemption have standing to bring avoidance actions." *Gunsalus v. Cnty. of Ontario, New York*, __F.4th __, No. 20-3865-BK, 2022 U.S. App. LEXIS 17596, 2022 WL 2296945, at *3 (2d Cir. June 27, 2022). The County contends that the Hamptons are ineligible for the federal homestead exemption—and therefore have no standing—pursuant to 11 U.S.C. § 522(c)(2)(B), which provides that:

> Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose . . . before the commencement of the case, except . . .
>
> > (2) a debt secured by a lien that is— (B) a tax lien, notice of which is properly filed.

The County is wrong. Section 522(c)(2)(B) "merely requires that the [Hamptons] . . . remain liable for the unpaid taxes even if the fraudulent conveyance action succeeds." *Gunsalus* , __F. 4th __, 2022 U.S. App. LEXIS 17596, 2022 WL 2296945, at *3. Because the Hamptons' "Chapter 13 plan achieves just that result[,]" *id.*, Section 522(c)(2)(B) does not render them ineligible for the federal homestead exemption. We thus reject the County's views on standing.

Second, we turn to the County's contention that the Supreme Court's ruling in *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (1994), entitles the transfer of the Hamptons' home to the legal presumption of being an exchange for "reasonably

equivalent value" under 11 U.S.C. § 548(a)(1)(B)(i). We disagree. As we explained in *Gunsalus*:

> *BFP* itself rejects this contention. As Justice Scalia noted, *BFP* 'covers only mortgage foreclosures of real estate. The considerations bearing upon other foreclosures and forced sales (to satisfy tax liens, for example) may be different. That admonition is dispositive because . . . the strict foreclosure procedures [at issue here] offer far fewer debtor protections than the mortgage foreclosure procedures at issue in *BFP*. *See In re Smith*, 811 F.3d 228, 239 (7th Cir. 2016) (finding that a state's tax foreclosure protections must compare favorably to the mortgage foreclosure protections in *BFP* in order to receive a presumption of "reasonably equivalent value"); *In re Hackler & Stelzel*, 938 F.3d 473, 479 (3d Cir. 2019) (same).

__F.4th __, 2022 U.S. App. LEXIS 17596, 2022 WL 2296945, at *5 (cleaned up). Accordingly, we reject the County's views on *BFP*.

We **AFFIRM** the judgment of the District Court.

FOR THE COURT
Catherine O'Hagan Wolfe, Clerke of Court

/s/

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK, FILED JUNE 25, 2020

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Case # 20-CV-6134-FPG

ORDER

GLIEE V. GUNSALUS, *et al.*,

Plaintiffs,

v.

COUNTY OF ONTARIO, NEW YORK, *et al.*,

Defendants.

Case # 20-CV-6135-FPG

ORDER

JOSEPH M. HAMPTON, *et al.*,

Plaintiffs,

v.

COUNTY OF ONTARIO, NEW YORK, *et al.*,

Defendants.

Appendix C

The plaintiffs in the above cases brought adversary proceedings against Ontario County (the "County") as part of their respective bankruptcy actions. In both adversary proceedings, the plaintiffs sought to avoid the transfer of their homes in tax foreclosure as constructively fraudulent under 11 U.S.C. § 548(a)(1)(B). In the present appeals, the County challenges the bankruptcy court's decision to avoid the transfers of the plaintiffs' properties. *See* 20-CV-6134, ECF No. 1-1; 20-CV-6135, ECF No. 1-1.

This is not the first appeal in these actions. Previously, the Court resolved two questions of law pertaining to adversary proceedings: first, it ruled that the plaintiffs had standing "to bring [] avoidance proceeding[s] under Sections 522(h) and 548 of the Bankruptcy Code" notwithstanding the County's tax liens; and second, it held that the County was not entitled to a "conclusive presumption of having provided reasonably equivalent value for the foreclosure of [the plaintiffs'] homes." *Hampton v. Ontario County, New York*, 588 B.R. 671, 678 (W.D.N.Y. 2018). As a result of these rulings, the Court reversed the bankruptcy court's decision dismissing the case and remanded the case for further proceedings. *See id.* The County attempted to appeal the Court's order to the Second Circuit Court of Appeals, but the Second Circuit declined the appeal because the order "contemplate[d] significant further proceedings in the bankruptcy court related to the merits." 20-CV-6135, ECF No. 3-1 at 37 (internal quotation marks omitted); *see also* 20-CV-6134, ECF No. 3-1 at 37.

Now that the bankruptcy court has reached and resolved the merits of the adversary proceedings, the

County again seeks review at the Second Circuit. For efficiency's sake, the County moves for certification of a direct appeal under 28 U.S.C. § 158(d)(2)(A) and Federal Rule of Bankruptcy Procedure 8006. Section 158(d)(2)(A) allows an appellant to leapfrog the district court and seek direct review with the circuit court. *See generally Weber v. United States*, 484 F.3d 154 (2d Cir. 2007) (discussing Section 158(d)(2)(A)). In order for the appellant to obtain such relief, the district court must certify that one of three conditions exist. *See* 28 U.S.C. § 158(d)(2)(A)(i)-(iii). As is relevant here, certification is appropriate where "an immediate appeal from the judgment, order, or decree may materially advance the progress of the case." *Id.* § 158(d)(2)(A)(iii).

Courts have held that mere efficiency or speed is not, on its own, enough to justify a direct appeal under this condition. *See, e.g.*, *In re Gravel*, No. 11-10112, 2019 Bankr. LEXIS 2576, 2019 WL 3783317, at *7 (D. Vt. Aug. 12, 2019) ("[A]rguments emphasizing that direct appeal is a faster resolution of the legal questions and simply a more efficient route to the circuit court, are not sufficient on their own to satisfy [this condition]."). The two-step appeals process is normally preferable to direct review because it allows issues to "percolate" and ensures the development of a "coherent body of bankruptcy case-law." *Weber*, 484 F.3d at 160; *see also id.* at 161 (stating that the Second Circuit "will be reluctant to accept cases for direct appeal when we think that percolation through the district court would cast more light on the issue and facilitate a wise and well-informed decision").

In this case, however, further district-court review would not serve those purposes: this Court has already definitively ruled on the legal issues that the County wishes to appeal, and so any more "percolation" would be pointless. It makes more sense to allow the Second Circuit to have its say on these issues. Thus, considerations of judicial economy, efficiency, *and* the development of bankruptcy-related case law favor direct review. *Accord In re Qimonda AG*, 470 B.R. 374, 389-90 (E.D. Va. 2012) (where district court had already addressed issues in first appeal, "th[e] matter ha[d] already adequately 'percolated' in the district court" and direct review was appropriate); *In re Gravel*, 2019 Bankr. LEXIS 2576, 2019 WL 3783317, at *8 (certifying direct appeal under similar circumstances). For these reasons, the Court agrees with the County that direct review will "materially advance the progress of the case." 28 U.S.C. § 158(d)(2)(A)(iii); *see Weber*, 484 F.3d at 158 (stating that immediate review is appropriate where the lower court "has made a ruling which, if correct, will essentially determine the result of future litigation").

The plaintiffs oppose the County's motion to the extent that it intends to appeal any of the factual issues that the bankruptcy court resolved on remand. *See* 20-CV-6135, ECF No. 5 at 6. Because the County confirms that it "does not seek review of the findings of fact made by the Bankruptcy Court in its February 2020 final order," 20-CV-6135, ECF No. 7 at 3, the plaintiffs' concern is unfounded.

Accordingly, the County's motions for certification of direct appeal (20-CV-6134, ECF No. 3; 20-CV-6135, ECF No. 3) are GRANTED. The County has established that certification is appropriate and required under 28 U.S.C. § 158(d)(2)(A)(iii).

IT IS SO ORDERED.

Dated: June 25, 2020
Rochester, New York

/s/ Frank P. Geraci, Jr.
HON. FRANK P. GERACI, JR.
Chief Judge
United States District Court

APPENDIX D — DECISION AND ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF NEW YORK, DATED FEBRUARY 19, 2020

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

Bankruptcy Case No. 17-20445-PRW,
Chapter 13

In re:

GLIEE V. GUNSALUS,
BRIAN L. GUNSALUS, SR.,

Debtors,

Adversary Proceeding No. 17-2008-PRW

GLIEE V. GUNSALUS,
BRIAN L. GUNSALUS, SR.,

Plaintiffs,

vs.

ONTARIO COUNTY, NEW YORK,
JOHN DOE, JANE DOE,

Defendants.

February 19, 2020, Decided

Appendix D

DECISION AND ORDER AVOIDING TRANSFER OF REAL PROPERTY UNDER 11 U.S.C. § 522(H) AND § 548(A)(1)(B), RESTORING TO DEBTORS TITLE TO REAL PROPERTY UNDER 11 U.S.C. § 550(A) AND OVERRULING OBJECTION TO HOMESTEAD EXEMPTION

PAUL R. WARREN, U.S.B.J.

Gliee Gunsalus and Brian Gunsalus filed a Chapter 13 petition on April 28, 2017. A few days later, the Gunsaluses commenced this adversary proceeding, under 11 U.S.C. § 522(h) and § 548(a)(1)(B), seeking to avoid the involuntary transfer of title to their home to Ontario County, a transfer that occurred in connection with a real property tax foreclosure action. The Gunsaluses request, as a remedy, that title to their home be restored to them, under 11 U.S.C. § 550(a), either by cancellation of the Treasurer's Deed held by Ontario Country or by way of a deed from Ontario County reconveying title to them. For the reasons that follow, the relief sought by Mr. and Mrs. Gunsalus in their Complaint is **GRANTED**.

I.

JURISDICTION

This is a core proceeding under 28 U.S.C. § 157(b)(2)(B), (H) and (O). The Court has jurisdiction under 28 U.S.C. § 1334. The parties expressly consented to the entry of a final judgment by this Court. (ECF AP No. 59

¶ 8).[1] The Court held a trial with respect to the disputed facts on December 10, 2019. Under Rule 52(a)(1) FRCP, made applicable to this proceeding by Rule 7052 FRBP, this decision sets out the Court's specific findings of fact, based on the evidence introduced at trial and the uncontested facts as stipulated by the parties, together with the Court's conclusions of law. The Court will enter a final judgment in a separate document as required by Rule 58(a) FRCP, made applicable to this adversary proceeding by Rule 7058 FRBP.

II.

PROCEDURAL HISTORY[2]

A brief review of the procedural history of this adversary proceeding may be useful, as this litigation has covered much ground in the lead-up to trial. This action was commenced on May 3, 2017. (ECF AP No. 1).

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1. References to the docket for the adversary proceeding (Case No. 17-2008) are identified as "ECF AP" and references to the docket in the main bankruptcy case (Case No. 17-20445) are identified as "ECF BK."

2. This adversary proceeding is substantially similar to *Hampton v. Ontario Cnty. of NY*, Case No. 17-02009-PRW. The parties in both cases are represented by the same attorneys, the pleadings are nearly mirror images, and the trials were held *seriatim*. However, because the specific facts in each action must be detailed, as required by Rule 52(a)(1) FRCP, to support the Court's decision (with differing citations to the record), two separate decisions are being issued. It is hoped that this approach will ease, not increase, the work of an appellate court in reviewing the decision in each adversary proceeding.

The Gunsaluses immediately requested the issuance of a preliminary injunction, to preserve the *status quo* during the pendency of the action. (ECF AP Nos. 6, 7). A preliminary injunction was granted. (ECF AP No. 15). As a consequence, the County has refrained from transferring title to the Gunsaluses' home to a third-party, pending resolution of this action. The County filed a timely Answer to the Complaint. (ECF AP No. 18). The County also filed an objection to the federal homestead exemption claimed by the Gunsaluses, (ECF AP No. 22), which objection has been opposed by the Gunsaluses. (ECF AP No. 23).

The Court promptly issued an Order scheduling a Rule 16 conference and requiring the parties to file a discovery plan. (ECF AP No. 19). The parties filed their joint discovery plan, by which the parties affirmatively consented to the entry of a final judgment by this Court. (ECF AP No. 20). In late July 2017, the County filed a motion to dismiss the adversary proceeding, asserting that the County was entitled to the legal presumption of having provided reasonably equivalent value in connection with the tax foreclosure. (ECF AP Nos. 25, 28). The Gunsaluses opposed the County's motion. (ECF AP Nos. 27, 29). The motion was taken under submission on September 15, 2017 and, on November 6, 2017, this Court issued a Decision and Order granting the County's motion to dismiss, holding that the County was entitled to a presumption of having given reasonably equivalent value in the taking of title to the Gunsaluses' home by the tax foreclosure. (ECF AP No. 30).

Appendix D

The Gunsaluses took a timely appeal of this Court's decision to the District Court. (ECF AP No. 43). In deference to the District Court, this Court held confirmation of the Gunsaluses' Chapter 13 plan in abeyance, under Rule 8007(e)(1) FRBP, pending resolution of the appeal. (ECF BK No. 47). On July 19, 2018, the District Court issued a Decision and Order, reversing this Court's decision—holding that the County was not entitled to a presumption of having provided reasonably equivalent value in exchange for the transfer of the Gunsaluses' home—and remanding the action for further proceedings consistent with its decision. (ECF AP No. 52). This Court immediately issued an Order scheduling a Rule 16 conference and lifting the suspension of proceedings in the Chapter 13 case. (ECF AP No. 53). The County then took a timely appeal of the District Court's decision to the Second Circuit. (ECF AP No. 55). Again, in deference to the Circuit Court, this Court issued an Order suspending proceedings in the Chapter 13 case, under Rule 8007(e)(1) FRBP. (ECF AP No. 56).

On January 17, 2019, upon being advised that the Second Circuit had dismissed the County's appeal as premature, this Court immediately issued an Order scheduling a Rule 16 conference, requiring the parties to file a new discovery plan, and lifting the suspension of proceedings in the Chapter 13 case. (ECF AP Nos. 57, 58).[3] The parties filed a revised discovery plan, suggesting a trial date of February 29, 2020, and again affirmatively consenting to the entry of a final judgment by this Court. (ECF AP No. 59). The Court issued a Scheduling

3. The Mandate of the Court of Appeals for the Second Circuit was entered on the docket in this case on March 14, 2019. (ECF AP No. 61).

Order establishing—among other deadlines—a date for conclusion of discovery and scheduling a trial for June 26, 2019 (considerably sooner than had been suggested by the parties). (ECF AP No. 60). The parties persuaded the Court to move the trial to a date in early December 2019, resulting in the issuance of an Amended Scheduling Order. (ECF AP 64). The parties repeatedly requested minor changes to various deadlines set by the Court, all of which the Court granted to enable the parties to fully prepare for trial. (ECF AP Nos. 65-69, 71, 72, 74).

Less than a week before trial, the County requested an open-ended adjournment of the trial date. (ECF AP No. 88). The Court denied that request, by Order directing that the trial would commence on December 10, 2019. (ECF AP No. 91). The parties then stipulated to the admissibility of appraisal reports and the qualifications of each party's appraiser. (ECF AP No. 92). The parties also stipulated to certain uncontested facts. (ECF AP No. 94). Consequently, the only factual issues to be resolved at trial were: (1) whether the Gunsaluses received reasonably equivalent value in exchange for the involuntary transfer of their home; and (2) whether the Gunsaluses were insolvent at the time of the transfer of title to their home to the County.

Immediately following the conclusion of trial, the Court entered an Order requiring the parties to file post-trial briefs, with proposed findings of fact and conclusions of law. (ECF AP No. 100). In keeping with that Order, post-trial briefs were filed by the parties on January 17, 2020 (ECF AP Nos. 103, 104), at which point the matter was taken under submission. This decision and resulting judgment fully adjudicate this action.

Appendix D

III.

ISSUES

The two narrow factual issues before the Court are: (1) whether the County provided reasonably equivalent value to the Gunsaluses, in exchange for the involuntary transfer of title to their home in satisfaction of a tax lien totaling $1,290.29; and (2) whether the Gunsaluses were insolvent at the time of the transfer or were rendered insolvent as a result of the transfer.

Based on the evidence introduced at trial and the uncontested facts in the record, the Court finds that—(1) the County did not provide reasonably equivalent value for the Gunsaluses' home; and (2) the Gunsaluses were insolvent at the time of the transfer.

IV.

FINDINGS OF FACT[4]

A. Fair Market Value of the Subject Property

Mr. and Mrs. Gunsalus have owned a modest home located at 1338 White Road, Town of Phelps, New York,

4. The findings of fact are based on the Complaint and Answer, testimony and exhibits introduced at trial, in addition to facts not in dispute as a result of stipulations between the parties. (ECF AP No. 94). Mrs. Gunsalus and Mr. Gunsalus both testified at trial. Having had the opportunity to observe this testimony, the Court found the Gunsaluses to be forthcoming and completely credible.

since April 1, 2006 ("Property"), where they live together with their disabled adult son. (ECF AP No. 94 ¶ 1; Trial Transcript ("Tr.") at 6:25-7:1-9). Mrs. Gunsalus has lived that home for her entire life. (Tr. at 5:10-15). Due to a temporary reduction in Mrs. Gunsalus' income, the Gunsaluses were unable to pay the 2014 real estate taxes on the Property. (Tr. at 88:23-89:1-14). The parties have stipulated that the unpaid taxes totaled $1,290.29. (ECF AP No. 94 ¶ 5).

As a result, the County commenced a tax foreclosure action under Article 11 of New York Real Property Tax Law ("RPTL"), by serving a notice as required by RPTL § 1125(1)(a). (ECF AP No. 1 ¶ 27). The notice informed the Gunsaluses that the deadline to redeem their home from the tax foreclosure, by fully paying the delinquent taxes, was January 15, 2016. (*Id.*). When the Gunsaluses did not redeem the Property, the County moved for and was granted summary judgment by the Ontario County Supreme Court. (*Id.* ¶¶ 35, 36). A final judgment of foreclosure was entered by the state court on June 9, 2016. (ECF AP No. 94 ¶ 2). By operation of RPTL § 1136, the judgment of foreclosure awarded the County immediate possession of and title to the Gunsaluses' home, in exchange for which the $1,290.29 tax lien was satisfied. There was no mortgage or other encumbrance on the Property. (ECF BK No. 1, Sch. D).

The value of the Gunsaluses' home was considerably greater than the amount of the County's tax lien. In advance of trial, the parties stipulated to both the qualifications of each of their respective appraisers and

the admissibility of the appraisers' reports. (ECF AP No. 93).[5] According to the appraisers, as expert witnesses, the Gunsaluses' home had a fair market value of between $28,000 and $30,000 on June 9, 2016, the date the County was awarded title to the home. (Plaintiffs' Trial Ex. 5; Defendant's Trial Ex. A). Almost a year later, on May 17, 2017, the County conducted a post-foreclosure auction sale of the Property, under RPTL § 1136.[6] (ECF AP No. 15). It must be emphasized that, at the time of the post-foreclosure auction sale, the Gunsaluses had already been stripped of title to the Property and the County was selling its fee interest in the Property. Under RPTL § 1136, the County was entitled to keep any proceeds resulting from the auction sale, after satisfaction of the tax lien. A price of $22,000 was bid by a third-party (and accepted by the County) for the Property, to satisfy a tax lien of $1,290.29. (ECF AP No. 27 at 5). Under state law, the County is entitled to keep 100% of the surplus—amounting to more

5. Interestingly, in its post-trial brief, the County argues that *neither* appraisal report is reliable—asserting that the comparable sales considered by both appraisers were flawed. (ECF AP No. 103, Part 2, Proposed Conclusions of Law ¶¶ 10-18). As the County would have it, the Court should dismiss the action for want of any proof as to the fair market value of the Property. (*Id.*). The Court, as the finder of fact, is not persuaded that the appraisal reports should be ascribed no probative value. Additionally, the amount bid by a third-party at the post-foreclosure auction does provide evidence of the Property's fair market value (albeit at the low end of the valuation spectrum).

6. By stipulation, the County was required to notify bidders that title to the Property was in dispute—which would certainly chill bidding. (ECF AP No. 15 ¶ 5). Further, the County agreed that it would not transfer title to a third party until this adversary proceeding was resolved. (*Id.* ¶ 1).

than $20,000. The County reaped a sizeable windfall, while the Gunsaluses lost 100% of the equity in the Property, all in keeping with state law.

The Court finds that the amount of $22,000, bid by a third-party at auction, and the County's appraised value of $30,000 provide the low-water and high-water marks for the fair market value of the Property. The appraisal reports in evidence provide a fair market value ranging from $28,000 to $30,000. The amount bid at the post-foreclosure auction ($22,000) is fairly close to the appraised valuation range, further demonstrating to the Court that the appraisals are reliable here. The Court finds that the Fisher appraisal (Plaintiffs' Trial Ex. 5), introduced in evidence by the Gunsaluses, is the most persuasive valuation and entitled to greater weight than the Taras appraisal (Defendant's Trial Ex. A). Therefore, the Court finds as fact that the fair market value of the Property, at the time of the entry of the foreclosure judgment in favor of the County, was $28,000. In exchange for transfer of title to the Property worth $28,000, the Gunsaluses received only forgiveness of a $1,290.29 tax lien.

B. Financial Condition of the Gunsaluses on the Date of Transfer

Without actually saying so, the County appears to concede that the Gunsaluses were insolvent on June 9, 2016, the day that their title to the Property was involuntarily transferred to the County. In its post-trial submission, the County merely summarizes—but doesn't quarrel with—the evidence introduced at trial as

showing the Gunsaluses had assets valued at $8,693.39 and liabilities totaling $16,643.02 on the date of the transfer. (ECF AP No. 103-1 ¶¶ 9, 10).[7] The Court finds that there is no genuine dispute over the fact that the Gunsaluses were insolvent on the date that the Property was transferred.

Additionally, and alternatively, the Courts finds that the evidence introduced by the Gunsaluses at trial overwhelmingly demonstrates that they were insolvent on the date of the transfer. (*See* ECF AP No. 104 at 15-17 (detailing the Gunsaluses' balance sheet as of June 9, 2016 with citations to the record)). Using the statutory formula for computing the value of assets, under 11 U.S.C. § 101(32)(A), the evidence introduced at trial proves that the value of the Gunsaluses' assets—for insolvency purposes—was $0.00. (*Id.* at 15-16 (summarizing assets with citations to trial exhibits and trial testimony)). The evidence introduced at trial also proves that the Gunsaluses' liabilities on the date of transfer totaled $20,768.84. (*Id.* at 17 (summarizing liabilities with citations to trial exhibits and trial testimony)).

Therefore, the Court finds that the Gunsaluses had a net worth of -$20,768.84 on June 9, 2016, the date that title to the Property was involuntarily transferred to the County. Simply put, the Gunsaluses were insolvent on the day that their Property was transferred.

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7. The County incorrectly includes, in its tally of assets, those assets that were fully exempt, contrary to the formula set out in 11 U.S.C. § 101(32)(A).

Appendix D

V.

CONCLUSIONS OF LAW

A. The Transfer Must Be Set Aside as Constructively Fraudulent

In remanding this case, the District Court has tasked this Court with determining whether the transfer of the Property should be set aside as a constructively fraudulent transfer under the Bankruptcy Code. *Hampton v. Ontario Cty.*, 588 B.R. 671 (W.D.N.Y. 2018). The statutory framework for making that determination is found in 11 U.S.C. § 522(h) and § 548(a)(1)(B). The Gunsaluses have based their claim for relief in the Complaint on that precise statutory framework.

The Bankruptcy Code empowers *a trustee* to set aside a constructively fraudulent conveyance, if the following elements are proved: (1) the debtor had an interest in the property; (2) a transfer of the property occurred within two years of the filing of the bankruptcy petition; (3) the debtor was insolvent at the time of the transfer or became insolvent as a result of the transfer; and (4) the debtor received less than reasonably equivalent value in exchange for the property transfer. 11 U.S.C. § 548(a)(1)(B). And under § 522(h) of the Code, *the debtor* may avoid the transfer of that property if: (1) the transfer was not voluntary; (2) the property was not concealed by the debtor; and (3) the trustee did not attempt to avoid the transfer. 11 U.S.C. § 522(h) and (g)(1). The party seeking to avoid a constructively fraudulent transfer has

the burden of proving each element by a preponderance of the evidence. *Clinton Cty. Treasurer v. Wolinsky*, 511 B.R. 34, 38 (N.D.N.Y. 2014); *Schneider v. Barnard*, 508 B.R. 533, 547 (E.D.N.Y. 2014).

Here, there is no dispute that the Gunsaluses have satisfied each of the statutory elements under § 522(h) of the Code—the transfer was not voluntary, the Property was not concealed, and the trustee did not attempt to avoid the transfer. Further, the parties have stipulated that the Gunsaluses have satisfied the first and second elements necessary to prevail on an action under § 548(a)(1)(B) of the Code—they had an interest in the Property and the transfer took place within 2 years of the filing of the bankruptcy petition. (ECF AP No. 94 ¶¶ 3, 4). Only the insolvency and reasonably equivalent value elements are in dispute. And, there is no genuine dispute over the fact that the Gunsaluses were insolvent at the time of the transfer. The County's post-trial brief tacitly concedes as much. (ECF AP No. 103 ¶¶ 9, 10). Further, the evidence introduced at trial overwhelmingly proves that the Gunsaluses were insolvent, using the formula established by § 101(32)(A) of the Code.

The only element genuinely in dispute at trial was the last element under 11 U.S.C. § 548(a)(1)(B)—whether the Gunsaluses received reasonably equivalent value in exchange for the transfer of title to their home. "The test used to determine reasonably equivalent value in the context of a fraudulent conveyance requires the court to determine the value of what was transferred and to compare it to what was received." *Barber v. Golden Seed Co.*, 129 F.3d 382, 387 (7th Cir. 1997) (citing *Matter*

of Fairchild Aircraft Corp., 6 F.3d 1119, 1125-26 (5th Cir. 1993)). "[T]he formula for determining reasonably equivalent value is not a fixed mathematical formula; rather, the standard for 'reasonable equivalence should depend on all the facts of each case,' an important element of which is fair market value." *Id.* at 387 (quoting *In re Bundles*, 856 F.2d 815 (7th Cir. 1988)); *see also In re Smith*, 811 F.3d 228, 235 (7th Cir. 2016). The Court must determine whether the Gunsaluses' economic position immediately after the tax foreclosure was equivalent to their economic position before the tax foreclosure. *In re Clay*, Case No. 14-27268-GMH, 2015 Bankr. LEXIS 2039, at *7 (Bankr. E.D. Wis. June 19, 2015).

The Court has determined, based on the appraisal reports received in evidence by stipulation and the sale price bid by a third-party at auction, that the Gunsaluses' home had a fair market value of $28,000 at the time of the transfer. In exchange, the Gunsaluses received value in the form of relief from the County's $1,290.29 tax lien. There were no other liens or encumbrances on the Property. Under RPTL Article 11, the County was awarded absolute title to the Property and the Gunsaluses' equity of redemption was forfeited. *See* RPTL § 1136. Simply put, the County expunged its $1,290.29 tax lien in exchange for which it was awarded title to property worth $28,0000—a purchase price equal to 4.6% of fair market value. Alternatively, if the price received by the County at the post-seizure auction ($22,000) is viewed to be a better indicator of fair market value, the Gunsaluses fare no better. Expunging a $1,290.29 tax lien, in exchange for title to property worth $22,000, represents a purchase price equal to 5.9% of fair market value. The Court holds that a purchase price amounting

to between 4.6% and 5.9% of fair market value is not reasonably equivalent to the value of the Property. *See In re Smith*, 811 F.3d at 238 ("A purchase price between 3.8% and 8.8% of fair market value is not reasonably equivalent to the value of the property.").

In arguing that the Gunsaluses have failed to prove that reasonably equivalent value was not provided, the County makes two arguments. First, the County argues that the Gunsaluses cannot obtain any relief under § 548 of the Code because all of the surplus equity, after payment of the tax lien, is fully exempt under the federal homestead exemption. (ECF AP No. 103-1 at 6). As a result, as the County sees it, the Gunsaluses' action based on a constructively fraudulent conveyance must be dismissed because it provides no benefit to creditors, it only benefits the Gunsaluses. (*Id.*). Second, the County argues that reasonably equivalent value *was* provided, because the amount of the tax lien satisfied by the transfer is not "disproportionately small" when compared to the value of the Property. (*Id.* at 10-11). Neither argument survives scrutiny.

In support of its first argument—that only the Gunsaluses benefit, not the creditors, by avoidance of the tax foreclosure—the County relies heavily on *In re Murphy*, 331 B.R. 107 (Bankr. S.D.N.Y. 2005).[8] As the *Murphy* court described the situation before it:

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8. The string citation of other cases in the County's brief—in an effort to bolster the *Murphy* recovery-cap—are all corporate Chapter 11 cases that have no relevance here. (*See* ECF No. 103 at 5-6).

> This case is extremely unusual. If the transfer is completely avoidable under Section 548 and recoverable under Section 550, all creditors and administrative expenses will be paid in full *upon the completed liquidation of debtor's estate, and there will be a substantial surplus remaining*, based on the alleged value of the Property . . . . In simple terms, the issue is who has the right to the surplus funds as between debtor and [the foreclosing governmental unit].

Id. at 121 (emphasis added). The *Murphy* court held that the constructively fraudulent conveyance of the debtor's property could be set aside only to the extent necessary to pay prepetition and administrative creditors claims, thereby allowing the foreclosing governmental unit to keep the debtor's surplus equity of approximately $300,000. *Id.* at 125-26. But, *Murphy* does not stand for the sweeping proposition suggested by the County. *Murphy* is distinguishable in several critical respects.

First, while *Murphy* was initially filed as a Chapter 13 reorganization case, it was converted to a Chapter 7 *liquidation* in just over two weeks. (*See* U.S. Bankruptcy Court S.D.N.Y. Case No. 04-20092-rdd, ECF Nos. 1, 6, 8, 12). Second, while the debtor listed the subject property as an asset, she was allowed to claim only a $10,000 homestead exemption with respect to the subject property under CPLR § 5206(a).[9] (*Id.* ECF No. 3, Sch. A, C).

9. *Murphy* was decided long before the effective date of statutory amendments that allowed debtors in New York State to claim the federal exemptions, instead of the New York exemptions.

Further, under CPLR § 5206(a), the New York homestead exemption—unlike the federal homestead exemption—is subordinated to and effectively eliminated by a tax lien for purposes of § 522(g)(1) of the Code. *See In re Johnson*, 449 B.R. 7 (Bankr. W.D.N.Y. 2011). Third, the Chapter 7 trustee in *Murphy* did commence an action to avoid the transfer of the subject property. These seemingly innocuous facts are significant in understanding why *Murphy* found that the debtor "was not *legally* harmed by the forfeiture of the Property." *In re Murphy*, 331 B.R. at 126. The debtor in *Murphy* was legally entitled to nothing under § 522(g)(1) and (h) of the Code, by operation of CPLR § 5206(a).

Here, (very much unlike *Murphy*), the Gunsaluses *have claimed the federal exemption* in the Property. (ECF No. 1, Sch. A/B, C). And, it so happens, the federal homestead exemption available to the Gunsaluses is sufficient in amount as to render 100% of the "surplus" remaining, after satisfaction of the tax lien, fully exempt. The Gunsaluses have a legal right to claim the federal homestead exemption under 11 U.S.C. § 522(b)(2). Unlike the debtor in *Murphy*, under § 522(g)(1) and (h) of the Code, the Gunsaluses will be *legally harmed* by the loss of the fully-exempt surplus equity.

It is this critical distinction that impales the County's effort to convince this Court to extend the *Murphy* "recovery-cap" to this case. In *Murphy*, the debtor

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See N.Y. Debt. & Cred. Law § 285 (effective Jan. 21, 2011). A very different circumstance than presented in this case.

had no rights under either § 522(g) or (h) of the Code, because the Chapter 7 trustee *did* bring an action under § 548 of the Code. Further, by operation of the New York homestead exemption statute, the debtor's property in *Murphy* was not exempt for purposes of § 522(g)(1) of the Code. N.Y. CPLR Law § 5206(a) ("But no exempt homestead shall be exempt from taxation or from sale for non-payment of taxes or assessments."); *see also In re DSI Renal Holdings, LLC*, AP No. 14-50356, 2020 Bankr. LEXIS 283, at *22 (Bankr. D. Del. Feb. 4, 2020) ("For the debtors to obtain equity, they must have avoidance powers themselves [under § 522(h)] or the ability to benefit from those of the trustee [under § 522(g)].") (citing *In re Messina*, 687 F.3d 74 (3d Cir. 2002)).

Here, (very much unlike *Murphy*), the Gunsaluses *do* have the right to seek to avoid the transfer of their Property under §§ 522(g) and (h) because: (1) they claimed the *federal* homestead exemption; (2) the transfer of the Property was not voluntary; (3) the Property was not concealed; (4) the transfer is avoidable by the trustee under § 548; and (5) the trustee did not attempt to avoid the transfer. 11 U.S.C. §§ 522(f)-(g). The County's reliance on *Murphy*, as applied to the facts of this case, would require that the Court read §§ 522(g) and (h) completely out of the Code—stripping the Gunsaluses of their statutory right to avoid the transfer under those Code provisions. It is axiomatic that a statute must not be interpreted in a way that renders a provision a nullity. *See Doe v. Bridgeport Police Dep't*, 198 F.R.D. 325, 341 (D. Conn. 2001) (citations omitted).

As the County would have it, if property that is the subject of a § 548 avoidance action is not *liquidated* solely for a dollar-for-dollar benefit to the creditors, then resort to the Code's fraudulent transfer provisions is improper. The County's myopic view—which this Court flatly rejects—ignores the larger purpose served by the bankruptcy system. "[T]he broader purposes of the Bankruptcy Code and its fraudulent transfer provisions [is] to ensure *both* a fair distribution of the debtor's assets among creditors *and a fresh start for the debtor*." *In re Smith*, 811 F.3d at 238 (emphasis added). "*Fraudulent transfer remedies can also help provide a fresh start to debtors*, at least in circumstances like this where the fraud is constructive." *Id.* at 239 (emphasis added). By retaining their fully-exempt surplus equity (and the affordable and modest housing it represents), while repaying the County and their unsecured creditors over 5 years through a Chapter 13 plan, the Gunsaluses will receive a fresh start, the County will receive full payment for both pre-petition and post-petition taxes, and unsecured creditors will receive a fair distribution.

In support of its second argument—that the amount of the tax lien satisfied by the transfer is not "disproportionately small" when compared to the value of the Property—the County has cherry-picked a few cases in a transparent attempt to tip the table its way. (ECF AP No. 103-1 at 9-10). The County argues that, if the difference between the value of the property transferred and the amount of the debt satisfied in exchange for that transfer *is modest* (here $26,709.71), then the consideration given cannot (ever) be found to be disproportionately small

for purposes of the reasonably equivalent value analysis. (*Id.*). In support of that argument, the County cites three cases where the difference between the value of property and the debt satisfied in exchange for transfer of that property *was* found to be disproportionately small—the range of difference in those cases was $91,000, $425,000 and $970,000, respectively. (*Id.*).

Perhaps the County's stated resoluteness in making this argument is belied by the fact that it devotes less than a full page to the argument in its post-trial brief. Rather than simply rejecting the County's argument out of hand as nonsense, the Court would observe that other courts have set aside constructively fraudulent conveyances where the difference between the value of the property transferred and the tax lien satisfied was quite modest. *See In re Clay*, Case No. 14-27268-GMH, 2015 Bankr. LEXIS 2039 (Bankr. E.D. Wis. June 19, 2015) (setting aside the transfer of property worth $40,700 to satisfy a tax debt of $11,259.21); *Clinton Cty. Treasurer v. Wolinsky*, 511 B.R. 34 (N.D.N.Y. 2014) (setting aside the transfer of property worth $25,500 to satisfy a tax lien of $4,250.25); *County of Clinton v. Warehouse at Van Buren St., Inc.*, 496 B.R. 278 (N.D.N.Y. 2013) (setting aside the transfer of property worth $120,000 to satisfy a tax lien of approximately $29,000); *In re Wentworth*, 221 B.R. 316 (Bankr. D. Conn. 1998) (setting aside the transfer of property worth $20,700 to satisfy a tax lien of $1,515.63). Here, the Court holds that consideration given by the County ($1,290.29) was disproportionately small as compared to the fair market value of the Property ($28,000).

The Court holds that the Gunsaluses have carried their burden of proof on all elements necessary to prevail on a cause of action under 11 U.S.C. § 522(h) and § 548(a)(1)(B). Consequently, the involuntary transfer of title to Ontario County under RPTL § 1136, is avoidable as a constructively fraudulent conveyance, under § 522(h) and § 548(a)(1)(B) of the Code.

B. Recovery of Property Transferred is Appropriate Remedy

Once a transfer has been avoided, § 550 of the Code provides that the trustee (or debtor acting under § 522(h)) may recover for the benefit of the estate, the property transferred, or, if the court orders, the value of the property. 11 U.S.C. § 550(a). For purposes of § 550(a), the County is the "initial transferee" because, under RPTL § 1136, the County was awarded absolute title to the Property upon entry of the judgment of foreclosure. *See Wisotzke v. Ontario Cnty.*, 409 B.R. 20 (W.D.N.Y. 2009). Although the County did conduct a post-foreclosure auction about a year after the County took title, this Court enjoined the County from transferring title to the Property to the successful third-party bidder. "[T]he initial transferee has no defense against liability under § 550." *In re Smith*, 811 F.3d at 244. "Faithful to the language of the statute, the courts have given a very broad construction to the phrase 'benefit of the estate.' Benefit for purposes of § 550 includes both direct benefits to the estate (*e.g.*, an increased distribution*) and indirect ones (e.g., an increase in the probability of a successful reorganization)*." *In re Tronox Inc.*, 464 B.R. 606, 613-14 (Bankr. S.D.N.Y. 2012) (emphasis added).

Here, the Court finds that return of title to and possession of the Property to the Gunsaluses will provide an indirect but important benefit to the estate—it will greatly increase the probability of a successful reorganization under the Chapter 13 plan. The reconveyance of title and possession will result in the Gunsaluses keeping modest and affordable housing, which appears to require only minimal operational costs, thereby greatly increasing their financial ability to make all plan payments, while keeping current their ongoing property taxes. By comparison, a money judgment against the County (for the surplus proceeds) would force the Gunsaluses to find other modest (and affordable) housing for themselves and their disabled son—a very speculative proposition at best. The Court finds that the appropriate remedy under § 550(a) is to restore to the Gunsaluses possession of and absolute title to the Property.

Under § 550(a)(1) of the Code, the County is directed to take all steps necessary to restore the Gunsaluses' ownership and possessory rights to the Property, as set forth in the Deed dated July 16, 2002, recorded in the Ontario County Clerk's Office at Index No. IN 2002 011601, Book/Page D 01079 0915. Any deed to the Property from the Ontario County Treasurer to the County of Ontario, issued by virtue of the June 9, 2016 judgment of foreclosure, is cancelled. As a result, the post-foreclosure auction and the incipient transfer of title to a third-party buyer is voided. The County is directed to refund to the third-party bidder any funds paid in connection with the auction. The tax lien that precipitated this litigation may remain in place, against the Property, until the pre-

petition tax debt secured by that lien has been repaid through the Chapter 13 plan.

C. The County's Objection to Homestead Exemption is Overruled

As a housekeeping matter, having cleared the path for the Gunsaluses' Chapter 13 plan to move toward confirmation, the County's objection to the claimed homestead objection must be considered. (ECF BK No. 24). The County argues that the plain language of § 522(c)(2)(B) makes the claimed federal homestead exemption wholly unavailable to the Gunsaluses. The County is wrong.

As the Gunsaluses correctly argue in opposition to the County's objection, the plain language of § 522(c)(2)(B) provides that property exempted remains liable for any debt secured by a tax lien, until the lien is satisfied. (ECF BK No. 29). Consequently, during the pendency of this Chapter 13 case, the County's tax lien on the Property remains in place while the tax debt is paid through the Chapter 13 plan. The Gunsaluses' homestead exemption is subject to that lien, by operation of § 522(c)(2)(B). But, the federal homestead exemption is available to and has been properly claimed by the Gunsaluses under § 522(b). The County's objection is **OVERRULED**. The Chapter 13 trustee and the Gunsaluses are directed to take such steps as are necessary to bring a Chapter 13 plan before the Court for a confirmation hearing.

Appendix D

VI.

CONCLUSION

The transfer of the Property is **AVOIDED** under 11 U.S.C. § 522(h) and § 548(a)(1)(B). Any deed from the Ontario County Treasurer to the County, issued pursuant to the judgment of foreclosure, is **CANCELLED**. The post-foreclosure auction and incipient transfer of title from the County to a third-party buyer is **VOIDED**. The County is directed to refund to the third-party bidder any funds paid in connection with the auction. The County is directed to promptly convey all right, title, and interest in and to the Property to the Gunsaluses under 11 U.S.C. § 550(a). The County is permitted to reinstate its $1,290.29 pre-petition tax lien against the Property (less credit for any payments made), until satisfied through the Chapter 13 plan. The County's objection to the Gunsaluses' federal homestead exemption is **OVERRULED**. The Chapter 13 trustee is to schedule a hearing for confirmation of a Chapter 13 plan; at least 28 days' notice of that hearing is to be served on all creditors by counsel to the Gunsaluses.

The Court will enter a separate judgment avoiding the tax foreclosure, as required by Rule 58(a) FRCP and Rule 7058 FRBP. The Clerk of Court is to serve notice of entry of judgment as required by Rule 9022 FRBP. The Clerk of Court is directed to immediately close this adversary proceeding after entry of judgment in accordance with this decision.

Appendix D

IT IS SO ORDERED.

DATED: February 19, 2020
Rochester, New York

/s/
HON. PAUL R. WARREN
United States Bankruptcy Judge

APPENDIX E — DECISION AND ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF NEW YORK, DATED FEBRUARY 19, 2020

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

Bankruptcy Case No. 17-20459-PRW, Chapter 13

In re: JOSEPH M. HAMPTON,
BRENDA S. HAMPTON,

Debtors.

Adversary Proceeding No. 17-2009-PRW

JOSEPH M. HAMPTON, BRENDA S. HAMPTON,

Plaintiffs,

vs.

ONTARIO COUNTY, NEW YORK,
JOHN DOE, JANE DOE,

Defendants.

February 19, 2020, Decided

Appendix E

DECISION AND ORDER AVOIDING TRANSFER OF REAL PROPERTY UNDER 11 U.S.C. § 522(H) AND § 548(A)(1)(B), RESTORING TO DEBTORS TITLE TO REAL PROPERTY UNDER 11 U.S.C. § 550(A) AND OVERRULING OBJECTION TO HOMESTEAD EXEMPTION

PAUL R. WARREN, U.S.B.J.

Joseph Hampton and Brenda Hampton filed a Chapter 13 petition on May 2, 2017. A few days later, the Hamptons commenced this adversary proceeding, under 11 U.S.C. § 522(h) and § 548(a)(1)(B), seeking to avoid the involuntary transfer of title to their home to Ontario County, a transfer that occurred in connection with a real property tax foreclosure action. The Hamptons request, as a remedy, that title to their home be restored to them, under 11 U.S.C. § 550(a), either by cancellation of the Treasurer's Deed held by Ontario Country or by way of a deed from Ontario County reconveying title to them. For the reasons that follow, the relief sought by Mr. and Mrs. Hampton in their Complaint is **GRANTED**.

I. JURISDICTION

This is a core proceeding under 28 U.S.C. § 157(b)(2)(B), (H) and (O). The Court has jurisdiction under 28 U.S.C. § 1334. The parties expressly consented to the entry of a final judgment by this Court. (ECF AP No. 59 ¶ 8).[1] The Court held a trial with respect to the disputed

1. References to the docket for the adversary proceeding (Case No. 17-2009) are identified as "ECF AP" and references to the docket in the main bankruptcy case (Case No. 17-20459) are identified as "ECF BK."

facts on December 10, 2019. Under Rule 52(a)(1) FRCP, made applicable to this proceeding by Rule 7052 FRBP, this decision sets out the Court's specific findings of fact, based on the evidence introduced at trial and the uncontested facts as stipulated by the parties, together with the Court's conclusions of law. The Court will enter a final judgment in a separate document as required by Rule 58(a) FRCP, made applicable to this adversary proceeding by Rule 7058 FRBP.

II. PROCEDURAL HISTORY[2]

A brief review of the procedural history of this adversary proceeding may be useful, as this litigation has covered much ground in the lead-up to trial. This action was commenced on May 5, 2017. (ECF AP No. 1). The Hamptons immediately requested the issuance of a preliminary injunction, to preserve the *status quo* during the pendency of the action. (ECF AP Nos. 7, 8). A preliminary injunction was granted. (ECF AP No. 16). As a consequence, the County has refrained from transferring title to the Hamptons' home to a third-party, pending resolution of this action. The County filed a timely Answer to the Complaint. (ECF AP No. 19). The

2. This adversary proceeding is substantially similar to *Gunsalus v. Ontario Cnty. of NY*, Case No. 17-02008-PRW. The parties in both cases are represented by the same attorneys, the pleadings are nearly mirror images, and the trials were held *seriatim*. However, because the specific facts in each action must be detailed, as required by Rule 52(a)(1) FRCP, to support the Court's decision (with differing citations to the record), two separate decisions are being issued. It is hoped that this approach will ease, not increase, the work of an appellate court in reviewing the decision in each adversary proceeding.

County also filed an objection to the federal homestead exemption claimed by the Hamptons, (ECF AP No. 23), which objection has been opposed by the Hamptons. (ECF AP No. 24).

The Court promptly issued an Order scheduling a Rule 16 conference and requiring the parties to file a discovery plan. (ECF AP Nos. 20, 21). The parties filed their joint discovery plan, by which the parties affirmatively consented to the entry of a final judgment by this Court. (ECF AP No. 22). In late July 2017, the County filed a motion to dismiss the adversary proceeding, asserting that the County was entitled to the legal presumption of having provided reasonably equivalent value in connection with the tax foreclosure. (ECF AP Nos. 26, 27). The Hamptons opposed the County's motion. (ECF AP Nos. 28, 29). The motion was taken under submission on September 15, 2017 and, on November 6, 2017, this Court issued a Decision and Order granting the County's motion to dismiss, holding that the County was entitled to a presumption of having given reasonably equivalent value in the taking of title to the Hamptons' home by the tax foreclosure. (ECF AP No. 32).

The Hamptons took a timely appeal of this Court's decision to the District Court. (ECF AP No. 43). In deference to the District Court, this Court held confirmation of the Hamptons' Chapter 13 plan in abeyance, under Rule 8007(e)(1) FRBP, pending resolution of the appeal. (ECF BK No. 44). On July 19, 2018, the District Court issued a Decision and Order, reversing this Court's decision—holding that the County was not

entitled to a presumption of having provided reasonably equivalent value in exchange for the transfer of the Hamptons' home—and remanding the action for further proceedings consistent with its decision. (ECF AP No. 54). This Court immediately issued an Order scheduling a Rule 16 conference and lifting the suspension of proceedings in the Chapter 13 case. (ECF AP No. 55). The County then took a timely appeal of the District Court's decision to the Second Circuit. (ECF AP No. 56). Again, in deference to the Circuit Court, this Court issued an Order suspending proceedings in the Chapter 13 case, under Rule 8007(e)(1) FRBP. (ECF AP No. 57).

On January 17, 2019, upon being advised that the Second Circuit had dismissed the County's appeal as premature, this Court immediately issued an Order scheduling a Rule 16 conference, requiring the parties to file a new discovery plan, and lifting the suspension of proceedings in the Chapter 13 case. (ECF AP Nos. 58, 59).[3] The parties filed a revised discovery plan, suggesting a trial date of February 29, 2020, and again affirmatively consenting to the entry of a final judgment by this Court. (ECF AP No. 61). The Court issued a Scheduling Order establishing—among other deadlines—a date for conclusion of discovery and scheduling a trial for June 26, 2019 (considerably sooner than had been suggested by the parties). (ECF AP No. 62). The parties persuaded the Court to move the trial to a date in early December 2019, resulting in the issuance of an Amended Scheduling

3. The Mandate of the Court of Appeals for the Second Circuit was entered on the docket in this case on February 12, 2019. (ECF AP No. 60).

Order. (ECF AP 65). The parties repeatedly requested minor changes to various deadlines set by the Court, all of which the Court granted to enable the parties to fully prepare for trial. (ECF AP Nos. 66-70, 72, 74, 75).

Less than a week before trial, the County requested an open-ended adjournment of the trial date. (ECF AP No. 88). The Court denied that request, by Order directing that the trial would commence on December 10, 2019. (ECF AP No. 89). The parties then stipulated to the admissibility of appraisal reports and the qualifications of each party's appraiser. (ECF AP No. 92). The parties also stipulated to certain uncontested facts. (ECF AP No. 93). Consequently, the only factual issues to be resolved at trial were: (1) whether the Hamptons received reasonably equivalent value in exchange for the involuntary transfer of their home; and (2) whether the Hamptons were insolvent at the time of the transfer of title to their home to the County.

Immediately following the conclusion of trial, the Court entered an Order requiring the parties to file post-trial briefs, with proposed findings of fact and conclusions of law. (ECF AP No. 99). In keeping with that Order, post-trial briefs were filed by the parties on January 17, 2020 (ECF AP Nos. 102, 103), at which point the matter was taken under submission. This decision and resulting judgment fully adjudicate this action.

Appendix E

III. ISSUES

The two narrow factual issues before the Court are: (1) whether the County provided reasonably equivalent value to the Hamptons, in exchange for the involuntary transfer of title to their home in satisfaction of a tax lien totaling $5,157.73; and (2) whether the Hamptons were insolvent at the time of the transfer or were rendered insolvent as a result of the transfer.

Based on the evidence introduced at trial and the uncontested facts in the record, the Court finds that—(1) the County did not provide reasonably equivalent value for the Hamptons' home; and (2) the Hamptons were insolvent at the time of the transfer.

IV. FINDINGS OF FACT[4]

A. Fair Market Value of the Subject Property

Mr. and Mrs. Hampton have owned a dilapidated home located at 4583 Lincoln Avenue, Canandaigua, New York, since August 27, 2010 ("Property"), where they live together with their two teenage children. (ECF AP No. 93 ¶ 1; Trial Transcript ("Tr.") at 10). The Hamptons fell behind on their 2015 and 2016 real estate taxes on the

4. The findings of fact are based on the Complaint and Answer, testimony and exhibits introduced at trial, in addition to facts not in dispute as a result of stipulations between the parties. (ECF AP No. 93). Mr. and Mrs. Hampton testified at trial. Having had the opportunity to observe this testimony, the Court found Mr. and Mrs. Hampton to be forthcoming and completely credible.

Property. (ECF AP No. 1 ¶ 30; Tr. at 8). The parties have stipulated that the unpaid taxes totaled $5,157.73. (ECF AP No. 93 ¶ 5).

As a result, the County commenced a tax foreclosure action under Article 11 of New York Real Property Tax Law ("RPTL"), by serving a notice as required by RPTL § 1125(1)(a). (ECF AP No. 1 ¶ 31). The notice informed the Hamptons that the deadline to redeem their home from the tax foreclosure, by fully paying the delinquent taxes, was January 13, 2017. (*Id.*). When the Hamptons did not timely file an answer in the state court proceeding, or pay the taxes owed prior to the January 13, 2017 deadline, the County Court of Ontario County entered a default judgment of foreclosure on March 2, 2017. (*Id.* ¶ 34; Plaintiff's Trial Ex. 2). By operation of RPTL § 1136, the judgment of foreclosure awarded the County immediate possession of and title to the Hamptons' home, in exchange for which the $5,157.73 tax lien was satisfied. There was no mortgage on the Property. (ECF AP No. 1 ¶ 20). The only lien on the Property was held by the Ontario County Department of Social Services. (*Id.*; ECF BK No. 1, Sch. D). There is no indication in the Petition as to the value of that lien and no proof of claim has been filed by the Ontario County Department of Social Services.

The value of the Hamptons' home was considerably greater than the amount of the County's tax lien. In advance of trial, the parties stipulated to both the qualifications of each of their respective appraisers and the admissibility of the appraisers' reports. (ECF AP No. 94). According to the appraisers, as expert witnesses,

the Hamptons' home had a fair market value of between $60,000 and $87,000 on March 7, 2017, the date the County was awarded title to the home. (Plaintiffs' Trial Ex. 4; Defendant's Trial Ex. A). A few months later, on May 17, 2017, the County conducted a post-foreclosure auction sale of the Property, under RPTL § 1136.[5] (ECF AP No. 16). It must be emphasized that, at the time of the post-foreclosure auction sale, the Hamptons had already been stripped of title to the Property and the County was selling its fee interest in the Property. Under RPTL § 1136, the County was entitled to keep any proceeds resulting from the auction sale, after satisfaction of the tax lien. A price of $27,000 was bid by a third-party (and accepted by the County) for the Property, to satisfy a tax lien of $5,157.73. (ECF AP No. 29 at 5). Under state law, the County is entitled to keep 100% of the surplus—amounting to more than $21,000. The County reaped a sizeable windfall, while the Hamptons lost 100% of their equity in the Property, all in keeping with state law.

Upon careful review of each appraiser's report, the Court finds that the difference in valuations arrived at by the appraisers—$60,000 by the County's appraiser and $87,000 by the Hamptons' appraiser—is so divergent, and so much greater than the amount bid by a third-party at auction ($27,000), that little weight should be given to either appraisal. However, the Court does find that the

5. By stipulation, the County was required to notify bidders that title to the Property was in dispute—which would certainly chill bidding. (ECF AP No. 16 ¶ 5). Further, the County agreed that it would not transfer title to a third party until this adversary proceeding was resolved. (*Id.* ¶ 1).

County's lower valuation ($60,000) is closer to the mark, more persuasive, and should be given greater weight than the Hamptons' appraisal. Even though the amount bid at auction was most likely depressed by the announced title dispute, the Court finds that, on the facts of this case, the amount bid at auction ($27,000) is the best evidence of the Property's value.[6] Based on the evidence found to be reliable, the Court finds that the Property had a fair market value ranging between $27,000 and $60,000 on the day of the involuntary transfer. After weighing the evidence, the Court finds as fact that the fair market value of the Property, at the time of the entry of the foreclosure judgment in favor of the County, was $27,000. In exchange for transfer of title to the Property worth $27,000, the Hamptons received only forgiveness of a $5,157.73 tax lien.

B. Financial Condition of the Hamptons on the Date of Transfer

Without actually saying so, the County appears to concede that the Hamptons were insolvent on March 7, 2017, the day that their title to the Property was involuntarily transferred to the County. In its post-trial submission, the County merely summarizes—but doesn't quarrel with—the evidence introduced at trial as showing the Hamptons had assets valued at $526.89 and liabilities totaling $9,276.28 on the date of the transfer. (ECF AP No.

6. In reversing this Court's decision granting the County's motion to dismiss, the District Court observed—"If anything, the sale price[] of . . . $27,000 [is] evidence of the propert[y's] worth." *Hampton v. Ontario Cty.*, 588 B.R. 671, 677 (W.D.N.Y. 2018).

102-1 ¶¶ 9, 10).[7] The Court finds that there is no genuine dispute over the fact that the Hamptons were insolvent on the date that the Property was transferred.

Additionally, and alternatively, the Courts finds that the evidence introduced by the Hamptons at trial overwhelmingly demonstrates that they were insolvent on the date of the transfer. (*See* ECF AP No. 103 at 11-12 (detailing the Hamptons' balance sheet as of March 7, 2017, with citations to the record)). Using the statutory formula for computing the value of assets, under 11 U.S.C. § 101(32)(A), the evidence introduced at trial proves that the value of the Hamptons' assets—for insolvency purposes—was $226.89. (*Id.* at 11 (summarizing assets with citations to trial exhibits and trial testimony)). The evidence introduced at trial also proves that the Hamptons' liabilities on the date of transfer totaled $12,156.28. (*Id.* at 12 (summarizing liabilities with citations to trial exhibits and trial testimony)).

Therefore, the Court finds that the Hamptons had a net worth of -$11,929.39 on March 7, 2017, the date that title to the Property was involuntarily transferred to the County. Simply put, the Hamptons were insolvent on the day that their Property was transferred.

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7. The County notes that, apart from some personal belongings, the Hamptons owned a single asset on March 7, 2017—a checking account with a balance of $526.89. (ECF AP No. 102 at 2). The County incorrectly includes the full balance of the Hamptons' checking account in its asset analysis, contrary to the formula set out in 11 U.S.C. § 101(32)(A). The checking account was, in fact, partially exempted under 11 U.S.C. § 522. *See* 11 U.S.C. § 101(32)(A)(ii); (ECF BK No. 1, Sch. C).

Appendix E

V. CONCLUSIONS OF LAW

A. The Transfer Must Be Set Aside As Constructively Fraudulent

In remanding this case, the District Court has tasked this Court with determining whether the transfer of the Property should be set aside as a constructively fraudulent transfer under the Bankruptcy Code. *Hampton v. Ontario Cty.*, 588 B.R. 671 (W.D.N.Y. 2018). The statutory framework for making that determination is found in 11 U.S.C. § 522(h) and § 548(a)(1)(B). The Hamptons have based their claim for relief in the Complaint on that precise statutory framework.

The Bankruptcy Code empowers *a trustee* to set aside a constructively fraudulent conveyance, if the following elements are proved: (1) the debtor had an interest in the property; (2) a transfer of the property occurred within two years of the filing of the bankruptcy petition; (3) the debtor was insolvent at the time of the transfer or became insolvent as a result of the transfer; and (4) the debtor received less than reasonably equivalent value in exchange for the property transfer. 11 U.S.C. § 548(a)(1)(B). And under § 522(h) of the Code, *the debtor* may avoid the transfer of that property if: (1) the transfer was not voluntary; (2) the property was not concealed by the debtor; and (3) the trustee did not attempt to avoid the transfer. 11 U.S.C. § 522(h) and (g)(1). The party seeking to avoid a constructively fraudulent transfer has the burden of proving each element by a preponderance of the evidence. *Clinton Cty. Treasurer v. Wolinsky*, 511

B.R. 34, 38 (N.D.N.Y. 2014); *Schneider v. Barnard*, 508 B.R. 533, 547 (E.D.N.Y. 2014).

Here, there is no dispute that the Hamptons have satisfied each of the statutory elements under § 522(h) of the Code—the transfer was not voluntary, the Property was not concealed, and the trustee did not attempt to avoid the transfer. Further, the parties have stipulated that the Hamptons have satisfied the first and second elements necessary to prevail on an action under § 548(a)(1)(B) of the Code—they had an interest in the Property and the transfer took place within 2 years of the filing of the bankruptcy petition. (ECF AP No. 93 ¶¶ 3, 4). Only the insolvency and reasonably equivalent value elements are in dispute. And, there is no genuine dispute over the fact that the Hamptons were insolvent at the time of the transfer. The County's post-trial brief tacitly concedes as much. (ECF AP No. 102-1 ¶¶ 9, 10). Further, the evidence introduced at trial overwhelmingly proves that the Hamptons were insolvent, using the formula established by § 101(32)(A) of the Code.

The only element genuinely in dispute at trial was the last element under 11 U.S.C. § 548(a)(1)(B)—whether the Hamptons received reasonably equivalent value in exchange for the transfer of title to their home. "The test used to determine reasonably equivalent value in the context of a fraudulent conveyance requires the court to determine the value of what was transferred and to compare it to what was received." *Barber v. Golden Seed Co.*, 129 F.3d 382, 387 (7th Cir. 1997) (citing *Matter of Fairchild Aircraft Corp.*, 6 F.3d 1119, 1125-26 (5th

Cir. 1993)). "[T]he formula for determining reasonably equivalent value is not a fixed mathematical formula; rather, the standard for 'reasonable equivalence should depend on all the facts of each case,' an important element of which is fair market value." *Id.* at 387 (quoting *In re Bundles*, 856 F.2d 815 (7th Cir. 1988)); *see also In re Smith*, 811 F.3d 228, 235 (7th Cir. 2016). The Court must determine whether the Hamptons' economic position immediately after the tax foreclosure was equivalent to their economic position before the tax foreclosure. *In re Clay*, Case No. 14-27268-GMH, 2015 Bankr. LEXIS 2039, at *7 (Bankr. E.D. Wis. June 19, 2015).

The Court has determined, on the facts of this case, that the widely disparate valuations set out in the appraisals received in evidence do not provide the best indicator of fair market value. Instead, the Court finds that the sale price bid by a third-party at auction ($27,000) is the best evidence of the value of the Hamptons' home at the time of the transfer. In exchange, the Hamptons received value in the form of relief from the County's $5,157.73 tax lien. The only other encumbrance on the Property was a lien for temporary assistance filed by the Ontario County Department of Social Services, the amount of which is not stated in the lien (and is assumed by the Court to be zero). Under RPTL Article 11, the County was awarded absolute title to the Property and the Hamptons' equity of redemption was forfeited. *See* RPTL § 1136. Simply put, the County expunged its $5,157.73 tax lien in exchange for which it was awarded title to property worth $27,0000, based upon the price bid at auction. Expunging a $5,157.73 tax lien, in exchange for title to property worth $27,000,

represents a purchase price equal to 19.1% of the value of the property. The Court holds that a purchase price equal to 19.1% of fair market value is not reasonably equivalent to the value of the Property.

Alternatively, if the Court were to find that the valuation of the Property set out in the County's appraisal[8] was a better indicator of the fair market value of the Property, then the County would have expunged its $5,157.73 tax lien in exchange for which it was awarded title to property worth $60,000—a purchase price equal to 8.6% of fair market value. The Court holds that a purchase price amounting to between 8.6% and 19.1% of fair market value is not reasonably equivalent to the value of the Property. *See In re Smith*, 811 F.3d at 238 ("A purchase price between 3.8% and 8.8% of fair market value is not reasonably equivalent to the value of the property.").

In arguing that the Hamptons have failed to prove that reasonably equivalent value was not provided, the County makes two arguments. First, the County argues that the Hamptons cannot obtain any relief under § 548 of the Code because all of the surplus equity, after payment of the tax lien, would be exempted by the Hamptons under

8. The Court finds that the valuation set out in the Hamptons' appraisal is unrealistic and of no probative value. Further, because the Court finds that the County's involuntary taking of title cannot survive scrutiny, under § 548(a)(1)(B), where the fair market value is set at $27,000, no purpose would be served in debating whether the appraised value of $87,000 might be accurate. It is an unnecessary data point, the inclusion of which doesn't move the needle toward a different outcome.

the federal homestead exemption. (ECF AP No. 102-1 at 6). As a result, as the County sees it, the Hamptons' action based on a constructively fraudulent conveyance must be dismissed because it provides no benefit to creditors, it only benefits the Hamptons. (*Id.*). Second, the County argues that reasonably equivalent value *was* provided, because the amount of the tax lien satisfied by the transfer is not "disproportionately small" when compared to the value of the Property. (*Id.* at 8). Neither argument survives scrutiny.

In support of its first argument—that only the Hamptons benefit, not the creditors, by avoidance of the tax foreclosure—the County relies heavily on *In re Murphy*, 331 B.R. 107 (Bankr. S.D.N.Y. 2005).[9] As the *Murphy* court described the situation before it:

> This case is extremely unusual. If the transfer is completely avoidable under Section 548 and recoverable under Section 550, all creditors and administrative expenses will be paid in full *upon the completed liquidation of debtor's estate, and there will be a substantial surplus remaining*, based on the alleged value of the Property. . . . In simple terms, the issue is who has the right to the surplus funds as between debtor and [the foreclosing governmental unit].

9. The string citation of other cases in the County's brief—in an effort to bolster the *Murphy* recovery-cap—are all corporate Chapter 11 cases that have no relevance here. (*See* ECF No. 103 at 5-6).

Id. at 121 (emphasis added). The *Murphy* court held that the constructively fraudulent conveyance of the debtor's property could be set aside only to the extent necessary to pay prepetition and administrative creditors' claims, thereby allowing the foreclosing governmental unit to keep the debtor's surplus equity of approximately $300,000. *Id.* at 125-26. But, *Murphy* does not stand for the sweeping proposition suggested by the County. *Murphy* is distinguishable in several critical respects.

First, while *Murphy* was initially filed as a Chapter 13 reorganization case, it was converted to a Chapter 7 *liquidation* in just over two weeks. (*See* U.S. Bankruptcy Court S.D.N.Y. Case No. 04-20092-rdd, ECF Nos. 1, 6, 8, 12). Second, while the debtor listed the subject property as an asset, she was allowed to claim only a $10,000 homestead exemption with respect to the subject property, under CPLR § 5206(a).[10] (*Id.* ECF No. 3, Sch. A, C). Further, under CPLR § 5206(a), the New York homestead exemption—unlike the federal homestead exemption—is subordinated to and effectively eliminated by a tax lien for purposes of § 522(g)(1) of the Code. *See In re Johnson*, 449 B.R. 7 (Bankr. W.D.N.Y. 2011). Third, the Chapter 7 trustee in *Murphy* did commence an action to avoid the transfer of the subject property. These seemingly innocuous facts are significant in understanding why *Murphy* found that the debtor "was not *legally* harmed

10. *Murphy* was decided long before the effective date of statutory amendments that allowed debtors in New York State to claim the federal exemptions, instead of the New York exemptions. *See* N.Y. Debt. & Cred. Law § 285 (effective Jan. 21, 2011). A very different circumstance than presented in this case.

by the forfeiture of the Property." *In re Murphy*, 331 B.R. at 126. The debtor in *Murphy* was legally entitled to nothing under § 522(g)(1) and (h) of the Code, by operation of CPLR § 5206(a).

Here, (very much unlike *Murphy*), the Hamptons *have claimed the federal exemption* in the Property. (ECF No. 1, Sch. A/B, C). And, it so happens, the federal homestead exemption available to the Hamptons is sufficient in amount as to render 100% of the "surplus" remaining, after satisfaction of the tax lien, fully exempt. The Hamptons have a legal right to claim the federal homestead exemption under 11 U.S.C. § 522(b)(2). Unlike the debtor in *Murphy*, under § 522(g)(1) and (h) of the Code, the Hamptons will be *legally harmed* by the loss of the fully-exempt surplus equity.

It is this critical distinction that impales the County's effort to convince this Court to extend the *Murphy* "recovery-cap" to this case. In *Murphy*, the debtor had no rights under either § 522(g) or (h) of the Code, because the Chapter 7 trustee *did* bring an action under § 548 of the Code. Further, by operation of the New York homestead exemption statute, the debtor's property in *Murphy* was not exempt for purposes of § 522(g)(1) of the Code. N.Y. CPLR Law § 5206(a) ("But no exempt homestead shall be exempt from taxation or from sale for non-payment of taxes or assessments."); *see also In re DSI Renal Holdings, LLC*, AP No. 14-50356, 2020 Bankr. LEXIS 283, at *22 (Bankr. D. Del. Feb. 4, 2020) ("For the debtors to obtain equity, they must have avoidance powers themselves [under § 522(h)] or the ability to benefit

from those of the trustee [under § 522(g)].") (citing *In re Messina*, 687 F.3d 74 (3d Cir. 2002)).

Here, (very much unlike *Murphy*), the Hamptons *do* have the right to seek to avoid the transfer of their Property under §§ 522(g) and (h) because: (1) they claimed the *federal* homestead exemption; (2) the transfer of the Property was not voluntary; (3) the Property was not concealed; (4) the transfer is avoidable by the trustee under § 548; and (5) the trustee did not attempt to avoid the transfer. 11 U.S.C. §§ 522(f)-(g). The County's reliance on *Murphy*, as applied to the facts of this case, would require that the Court read §§ 522(g) and (h) completely out of the Code—stripping the Hamptons of their statutory right to avoid the transfer under those Code provisions. It is axiomatic that a statute must not be interpreted in a way that renders a provision a nullity. *See Doe v. Bridgeport Police Dep't*, 198 F.R.D. 325, 341 (D. Conn. 2001) (citations omitted).

As the County would have it, if property that is the subject of a § 548 avoidance action is not *liquidated* solely for a dollar-for-dollar benefit to the creditors, then resort to the Code's fraudulent transfer provisions is improper. The County's myopic view—which this Court flatly rejects—ignores the larger purpose served by the bankruptcy system. "[T]he broader purposes of the Bankruptcy Code and its fraudulent transfer provisions [is] to ensure *both* a fair distribution of the debtor's assets among creditors *and a fresh start for the debtor*." *In re Smith*, 811 F.3d at 238 (emphasis added). "*Fraudulent transfer remedies can also help provide a fresh start to*

debtors, at least in circumstances like this where the fraud is constructive." *Id.* at 239 (emphasis added). By retaining their fully-exempt surplus equity (and the affordable and modest housing it represents), while repaying the County and their unsecured creditors over 5 years through a Chapter 13 plan, the Hamptons will receive a fresh start, the County will receive full payment for both pre-petition and post-petition taxes, and unsecured creditors will receive a fair distribution.

In support of its second argument—that the amount of the tax lien satisfied by the transfer is not "disproportionately small" when compared to the value of the Property—the County has cherry-picked a few cases in a transparent attempt to tip the table its way. (ECF AP No. 102-1 at 8). The County argues that, if the difference between the value of the property transferred and the amount of the debt satisfied in exchange for that transfer *is modest* (here $21,842.27), then the consideration given cannot (ever) be found to be disproportionately small for purposes of the reasonably equivalent value analysis. (*Id.*). In support of that argument, the County cites three cases where the difference between the value of property and the debt satisfied in exchange for transfer of that property *was* found to be disproportionately small—the range of difference in those cases was $91,000, $425,000 and $970,000, respectively. (*Id.*).

Perhaps the County's stated resoluteness in making this argument is belied by the fact that it devotes less than a full page to the argument in its post-trial brief. Rather than simply rejecting the County's argument out of hand as nonsense, the Court would observe that other courts

have set aside constructively fraudulent conveyances where the difference between the value of the property transferred and the tax lien satisfied was quite modest. *See In re Clay*, Case No. 14-27268-GMH, 2015 Bankr. LEXIS 2039 (Bankr. E.D. Wis. June 19, 2015) (setting aside the transfer of property worth $40,700 to satisfy a tax debt of $11,259.21); *Clinton Cty. Treasurer v. Wolinsky*, 511 B.R. 34 (N.D.N.Y. 2014) (setting aside the transfer of property worth $25,500 to satisfy a tax lien of $4,250.25); *County of Clinton v. Warehouse at Van Buren St., Inc.*, 496 B.R. 278 (N.D.N.Y. 2013) (setting aside the transfer of property worth $120,000 to satisfy a tax lien of approximately $29,000); *In re Wentworth*, 221 B.R. 316 (Bankr. D. Conn. 1998) (setting aside the transfer of property worth $20,700 to satisfy a tax lien of $1,515.63). Here, the Court holds that consideration given by the County ($5,157.73) was disproportionately small as compared to the value of the Property ($27,000).

The Court holds that the Hamptons have carried their burden of proof on all elements necessary to prevail on a cause of action under 11 U.S.C. § 522(h) and § 548(a)(1)(B). Consequently, the involuntary transfer of title to Ontario County under RPTL § 1136, is avoidable as a constructively fraudulent conveyance, under § 522(h) and § 548(a)(1)(B) of the Code.

B. Recovery of Property Transferred is Appropriate Remedy

Once a transfer has been avoided, § 550 of the Code provides that the trustee (or debtor acting under § 522(h)) may recover for the benefit of the estate, the

property transferred, or, if the court orders, the value of the property. 11 U.S.C. § 550(a). For purposes of § 550(a), the County is the "initial transferee" because, under RPTL § 1136, the County was awarded absolute title to the Property upon entry of the judgment of foreclosure. *See Wisotzke v. Ontario Cnty.*, 409 B.R. 20 (W.D.N.Y. 2009). Although the County did conduct a post-foreclosure auction a few months after the County took title, this Court enjoined the County from transferring title to the Property to the successful third-party bidder. "[T]he initial transferee has no defense against liability under § 550." *In re Smith*, 811 F.3d at 244. "Faithful to the language of the statute, the courts have given a very broad construction to the phrase 'benefit of the estate.' Benefit for purposes of § 550 includes both direct benefits to the estate (*e.g.*, an increased distribution) *and indirect ones (e.g., an increase in the probability of a successful reorganization).*" *In re Tronox Inc.*, 464 B.R. 606, 613-14 (Bankr. S.D.N.Y. 2012) (emphasis added).

Here, the Court finds that return of title to and possession of the Property to the Hamptons will provide an indirect but important benefit to the estate—it will greatly increase the probability of a successful reorganization under the Chapter 13 plan. The reconveyance of title and possession will result in the Hamptons keeping modest and affordable housing, which appears to require only minimal operational costs, thereby greatly increasing their financial ability to make all plan payments, while keeping current their ongoing property taxes. By comparison, a money judgment against the County (for the surplus proceeds) would force the Hamptons to find

other modest (and affordable) housing for themselves and their teenage children—a very speculative proposition at best. The Court finds that the appropriate remedy under § 550(a) is to restore to the Hamptons possession of and absolute title to the Property.

Under § 550(a)(1) of the Code, the County is directed to take all steps necessary to restore the Hamptons' ownership and possessory rights to the Property, as set forth in the Deed dated September 21, 2010, recorded in the Ontario County Clerk's Office at Index No. IN 2010 009865, Book/Page D 01250 0658. Any deed to the Property from the Ontario County Treasurer to the County of Ontario, issued by virtue of the March 7, 2017 judgment of foreclosure, is cancelled. As a result, the post-foreclosure auction and the incipient transfer of title to a third-party buyer is voided. The County is directed to refund to the third-party bidder any funds paid in connection with the auction. The tax lien that precipitated this litigation may remain in place, against the Property, until the pre-petition tax debt secured by that lien has been repaid through the Chapter 13 plan.

C. The County's Objection to Homestead Exemption is Overruled

As a housekeeping matter, having cleared the path for the Hamptons' Chapter 13 plan to move toward confirmation, the County's objection to the claimed homestead objection must be considered. (ECF BK No. 20). The County argues that the plain language of § 522(c)(2)(B) makes the claimed federal homestead exemption wholly unavailable to the Hamptons. The County is wrong.

As the Hamptons correctly argue in opposition to the County's objection, the plain language of § 522(c)(2)(B) provides that property exempted remains liable for any debt secured by a tax lien, until the lien is satisfied. (ECF BK No. 25). Consequently, during the pendency of this Chapter 13 case, the County's tax lien on the Property remains in place while the tax debt is paid through the Chapter 13 plan. The Hamptons' homestead exemption is subject to that lien, by operation of § 522(c)(2)(B). But, the federal homestead exemption is available to and has been properly claimed by the Hamptons under § 522(b). The County's objection is **OVERRULED**. The Chapter 13 trustee and the Hamptons are directed to take such steps as are necessary to bring a Chapter 13 plan before the Court for a confirmation hearing.

VI. CONCLUSION

The transfer of the Property is **AVOIDED** under 11 U.S.C. § 522(h) and § 548(a)(1)(B). Any deed from the Ontario County Treasurer to the County, issued pursuant to the judgment of foreclosure, is **CANCELLED**. The post-foreclosure auction and incipient transfer of title from the County to a third-party buyer is **VOIDED**. The County is directed to refund to the third-party bidder any funds paid in connection with the auction. The County is directed to promptly convey all right, title, and interest in and to the Property to the Hamptons under 11 U.S.C. § 550(a). The County is permitted to reinstate its $5,157.73 pre-petition tax lien against the Property (less credit for any payments made), until satisfied through the Chapter 13 plan. The County's objection to the Hamptons' federal

homestead exemption is **OVERRULED**. The Chapter 13 trustee is to schedule a hearing for confirmation of a Chapter 13 plan; at least 28 days' notice of that hearing is to be served on all creditors by counsel to the Hamptons.

The Court will enter a separate judgment avoiding the tax foreclosure, as required by Rule 58(a) FRCP and Rule 7058 FRBP. The Clerk of Court is to serve notice of entry of judgment as required by Rule 9022 FRBP. The Clerk of Court is directed to immediately close this adversary proceeding after entry of judgment in accordance with this decision.

IT IS SO ORDERED.

/s/ HON. PAUL R. WARREN
United States Bankruptcy Judge

DATED: February 19, 2020
Rochester, New York

APPENDIX F — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK, FILED JULY 18, 2018

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Case # 17-CV-6808-FPG

JOSEPH M. HAMPTON & BRENDA S. HAMPTON,

Plaintiffs-Appellants,

v.

ONTARIO COUNTY, NEW YORK
JOHN DOE, & JANE DOE,

Defendants-Appellees.

Case # 17-CV-6810-FPG

GLIEE V. GUNSALUS &
BRIAN L. GUNSALUS, SR.,

Plaintiffs-Appellants,

v.

ONTARIO COUNTY, NEW YORK,
JOHN DOE, & JANE DOE,

Defendants-Appellees.

Appendix F

July 18, 2018, Decided
July 18, 2018, Filed

HON. FRANK P. GERACI, JR.,
United States District Judge.

DECISION AND ORDER

INTRODUCTION

Appellants Mr. and Mrs. Gunsales and Mr. and Mrs. Hampton ("Appellants") appeal[1] from an order of the United States Bankruptcy Court for the Western District of New York, filed November 6, 2017, which granted Appellee Ontario County's Motion to Dismiss Appellants' complaints. ECF No. 1-2. For the reasons stated below, the Bankruptcy Court's decision granting the County's Motion to Dismiss is REVERSED.

BACKGROUND

Although the Court assumes the parties' familiarity with the facts of this case, which are more extensively detailed in the Bankruptcy Court's opinion, a summary follows.

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1. The Gunsaleses and Hamptons filed separate complaints that seek identical relief, arising out of "substantially similar operative facts," ECF No. 32 at 2, and are represented by the same counsel. Additionally, the appellants and appellees used virtually the same briefs in both cases. This Court, like the Bankruptcy Court below, will issue a single decision. The cases are not joined or consolidated. Any citation to "ECF" refers to the docket for case # 17-cv-6806, unless otherwise noted.

Appendix F

I. Gunsalus Foreclosure

The Gunsaluses owned a home in the town of Phelps, New York that was free and clear of mortgages. *See* Case # 17-cv-6810, ECF No. 1-2 at 4. After Mr. Gunsalus was laid off in 2014, the Gunsaluses failed to pay the real estate taxes on their home, totaling $1,236.52. ECF No. 8 at 16. On November 10, 2014, Ontario County began to enforce a lien for the unpaid taxes. ECF No. 1-2 at 4. Pursuant to New York's Real Property Tax Law ("RPTL"), the County waited 21 months before commencing an *in rem* tax foreclosure action on October 2, 2015. *Id.* The Gunsaluses had until January 15, 2016 to redeem their home from foreclosure or serve an answer to the foreclosure action. *Id.* The Gunsaluses answered the foreclosure petition, but a final judgment of foreclosure was ultimately entered on June 1, 2016. *Id.* at 5. Under the RPTL, the judgment entitled the County to possession and all equity in the property. *Id.* The County then scheduled a foreclosure auction of the property for May 17, 2017.

On April 28, 2017, the Gunsaluses filed a Chapter 13 Plan providing for payment of the tax arrears. ECF No. 8 at 16. On May 3, 2017, the Gunsaluses filed an Adversary Proceeding against the County, seeking to avoid the transfer of their home in tax foreclosure as constructively fraudulent pursuant to 11 U.S.C. § 548(a)(1)(B). *Id.* On May 17, 2017, the County sold the home at an auction for $22,000. Pursuant to the parties' stipulation, however, the County notified bidders that title to the Gunsaluses' home was in dispute and would not be transferred to a third party until determination of this adversary proceeding.

Id. at 17. Ontario County is entitled to the entire surplus of approximately $20,763.48. *Id.* at 20.

II. The Hamptons

The Hamptons owned a home in Gorham, New York that was free and clear of mortgages. After Mrs. Hampton lost her job due to chronic health issues, the Hamptons failed to pay their 2015 real estate taxes, totaling $5,201.87. ECF No. 1 at 6; ECF No. 7 at 5. Ultimately, a default judgment of foreclosure was entered in Ontario County's favor on March 2, 2017, which entitled the County to possession and all equity in the property. ECF No. 1 at 7. Two months later, the Hamptons filed a Chapter 13 bankruptcy plan providing for payment of their entire tax arrears. ECF No. 7 at 15. Three days later, they filed an Adversary Proceeding against the County, seeking to avoid the transfer of their home in tax foreclosure as constructively fraudulent pursuant to 11 U.S.C. § 548(a)(1)(B). *Id.* On March 17, 2017, the County sold the home at auction for $27,000. *Id.* at 17. Pursuant to the parties' stipulation, the County notified bidders that title to the Hamptons' home was in dispute and would not be transferred to a third party until determination of this adversary proceeding. Ontario County is entitled to the entire surplus of approximately $21,798.13. *Id.* at 30.

STANDARD OF REVIEW

The district court has jurisdiction to hear final and interlocutory appeals from bankruptcy court orders. *See* 28 U.S.C. § 158(a). The district court reviews findings of fact under the "clear error" standard and findings of

law *de novo. In re Charter Commc'ns, Inc.*, 691 F.3d 476, 483 (2d Cir. 2012). The *de novo* standard also applies to mixed findings of fact and law. *See Travellers Int'l, A.G. v. Trans World Airlines, Inc.*, 41 F.3d 1570, 1575 (2d Cir.1994). The district court may "affirm, modify or reverse a bankruptcy judge's judgment, order or decree or remand with instructions for further proceedings." *Morgan v. Gordon*, 450 B.R. 402, 405 (W.D.N.Y. 2011).

DISCUSSION

Appellants ask the Court to reverse the Bankruptcy Court's order because they believe that it erroneously applied the U.S. Supreme Court's holding in *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (1994) to their case. *See* ECF No. 7 at 9. Ontario County argues that the Bankruptcy Court correctly applied *BFP* and that Appellants lack standing to challenge the transfers of their properties. ECF No. 10 at 50. The Court must first decide the threshold matter of standing before addressing the merits of Appellants' cases. *See Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975); *Cty. of Clinton v. Warehouse at Van Buren St., Inc.*, 496 B.R. 278, 280 (N.D.N.Y. 2013).

I. Standing

Ontario County argues that its tax lien bars Appellants from claiming a federal homestead exemption,[2]

2. The federal homestead exemption allows debtors to keep their home in lieu of it becoming part of the bankruptcy estate and thereby being available to satisfy creditors. *See* Carol A. Pettit

which consequently deprives the Hamptons of standing to bring an avoidance proceeding under Sections 522(h) and 548 of the Bankruptcy Code.

The Appellants claimed the federal homestead exemption under Section 522(d)(1) of the Bankruptcy Code. ECF No. 11 at 31. Under the plain language of Section 522(h), debtors who can exempt property have standing to bring avoidance actions. *See Deel Rent-A-Car, Inc., v. Levine*, 721 F.2d 750, 754 (11th Cir. 1983). Nothing suggests that Appellants are precluded from claiming the federal homestead exemption, and the caselaw that the County uses in its argument to the contrary concerns the New York State homestead exemption, which, unlike the federal homestead exemption, does not protect debtors whose taxes are unpaid. *See Johnson v. Cty. of Chautauqua*, 449 B.R. 7, 12 (W.D.N.Y. 2011). Furthermore, the County interprets Section 522(c)(2)(B) as barring the Appellants from claiming the federal homestead exemption, when it merely provides that exempt property remains liable for a tax lien. *See* 11 U.S.C. § 522(c)(2)(B). Appellants are not attempting to avoid paying the tax liens on their respective properties; they are attempting to avoid a transfer of the property. Accordingly, because Appellants "do not seek to avoid the tax lien under section 545," but are instead challenging "the tax sale as constructively fraudulent under section 548, section 522(c)(2)(B) does not negate their potential standing under section 522(h)." *Hollar v. U.S.*, 174 B.R. 198, 204 (M.D.N.C. 1994). Accordingly,

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& Vastine D. Platte, Cong. Research Serv., R40891, Homestead Exemptions in Bankruptcy After BAPCA (2011).

as the Bankruptcy Court below found, Appellants have standing to bring these suits.

II. Fraudulent Conveyance Elements

Bankruptcy law allows courts to set aside a sale or transfer of an insolvent debtor's property if the transfer was constructively fraudulent. 11 U.S.C. §§ 548(a)(1), 522(h). The goals of fraudulent conveyance law include avoiding a "windfall to one creditor at the expense of others," *In re Smith*, 811 F.3d 228, 238 (7th Cir. 2016) and preventing "a disproportionate loss to the debtor," *In re Chase*, 328 B.R. 675, 681 (D. Vt. 2005).

To state a fraudulent conveyance claim, debtors must allege facts supporting the following statutory elements: (1) the debtor had an interest in the property; (2) a transfer of the property occurred within two years of the bankruptcy petition; (3) the debtor was insolvent at the time of the transfer or became insolvent as a result of the transfer; and (4) the debtor received less than a reasonably equivalent value in exchange for the transfer. 11 U.S.C. § 548(a). Here, the parties only dispute the last element-whether the debtor received less than reasonably equivalent value in exchange for the transfer.

III. "Reasonably equivalent value" as Examined by the Supreme Court in *BFP*

"Reasonably equivalent value" is not defined in Section 548, but the United States Supreme Court examined the term in the mortgage foreclosure context in *BFP v.*

Resolution Trust Corp., 511 U.S. 531, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (1994). The plaintiff in *BFP*, a partnership formed to purchase a beachfront home in California, defaulted on its home loan payments. *Id.* at 533. The home eventually sold at a foreclosure sale for $433,000. *Id.* at 531. Alleging that the home was actually worth over $725,000 at the time of sale, the plaintiff challenged the sale as a fraudulent transfer under Section 548(a). The Court framed the question presented as "whether the amount of debt satisfied at the foreclosure sale (viz., a total of $433,000) is 'reasonably equivalent' to the worth of the real estate conveyed." *Id.* at 536. Before *BFP*, circuit courts used different methods to determine the worth of the real estate conveyed at a foreclosure sale. *Compare Durrett v. Washington Nat. Ins. Co.*, 621 F.2d 201 (1980) (5th Cir. 1980) (indicating in dicta that any foreclosure sale yielding less than 70% of fair market value should be invalidated), *with In re Bundles*, 856 F.2d 815 (7th Cir. 1988) (holding that there is a rebuttable presumption that the foreclosure sale price is sufficient to withstand fraudulent conveyance attack). Some circuits, for instance, "refer[red] to fair market value as the benchmark against which determination of reasonably equivalent value is to be measured." *BFP*, 511 U.S. at 537. The *BFP* Court expressly rejected this method, acknowledging that the term "fair market value" does not appear in Section 548 and has "no applicability in the forced-sale context," which is "the very antithesis of forced-sale value." *Id.* at 537. Property that "must be sold within" the "time and manner strictures of state-prescribed foreclosure" is "simply *worth less*," as no "one would pay as much to own such property as he would pay to own real estate that

could be sold at leisure and pursuant to normal marketing techniques." *Id.* at 539 (emphasis in original).

The Supreme Court ultimately held that a reasonably equivalent value for foreclosed property "is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with." *Id.* at 545. This holding established a conclusive presumption of reasonably equivalent value when the procedures of state foreclosure laws have been followed. In reaching this holding, the Supreme Court emphasized the goals of federalism and ensuring that the "title of every piece of realty purchased at foreclosure would [not] be under a federally created cloud." *Id.* at 544.

Before stating its holding, however, the Supreme Court discussed the evolution of foreclosure in the United States, from the days of "strict foreclosure" where "the borrower's entire interest in the property was forfeited, regardless of any accumulated equity" to the "development of foreclosure by sale (with the surplus over the debt refunded to the debtor) as a means of avoiding the draconian consequences of strict foreclosure." *Id.* at 541. The Supreme Court characterized today's foreclosure laws as "typically requir[ing] notice to the defaulting borrower, a substantial lead time before the commencement of foreclosure proceedings, publication of a notice of sale, and strict adherence to prescribed bidding rules and auction procedures." *Id.* at 542. Significantly, the Supreme Court expressly limited its holding to "*mortgage* foreclosures of real estate," noting that "considerations bearing upon other foreclosures and forced sales (to satisfy tax liens,

for example) may be different." *Id.* at 537 n.3 (emphasis added). The Supreme Court did not elaborate on these precise considerations, which has led to disagreement about whether or not the *BFP* presumption applies to tax lien foreclosure. Here, the Bankruptcy Court answered that question in the affirmative.

IV. The Bankruptcy Court's Application of *BFP* to this Case

The Bankruptcy Court, applying *BFP*'s holding to this case, determined that Ontario County is entitled to a "conclusive presumption of having provided reasonably equivalent value" in exchange for the transfer because the tax lien foreclosure of the Gunsaleses' and Hamptons' properties was conducted in conformity with state law procedures. ECF No. 1-2 at 17. In doing so, the Bankruptcy Court departed from its previous view, expressed in *In re Canandaigua*, 521 B.R. 457 (W.D.N.Y. 2014), that the absence of competitive bidding in the RPTL meant that the *BFP* presumption did not apply to tax foreclosures conducted under the statute. In disavowing its *Canandaigua* decision, the Bankruptcy Court determined that a "careful re-reading of the *BFP* decision" leads to the conclusion "that the presence or absence of competitive bidding was not the keystone to the *BFP* majority's holding." ECF No. 1-2 at 11. The Bankruptcy Court stressed *BFP*'s language that state foreclosure laws "***typically require*** . . . strict adherence to prescribed bidding rules and auction procedures." *Id.* at 12 (quoting *BFP*, 511 U.S. at 542) (emphasis in original). According to the Bankruptcy Court, this language "connotes something common among state laws, but not universal or absolute—

and certainly not 'mandatory.'" *Id.* In other words, to the Bankruptcy Court, the "Supreme Court did not attempt to define a sub-set of state foreclosure law requirements that it deemed to be 'mandatory' for the BFP holding to apply." *Id.*

V. *BFP*'s Application to New York Tax Foreclosure Scheme

To the Bankruptcy Court and to Ontario County, then, *BFP* held that a transfer of debtor property is presumed to be for reasonably equivalent value so long as state foreclosure laws were followed, and that the substance and characteristics of a state foreclosure law are irrelevant when determining whether a debtor receives reasonably equivalent value in exchange for his property. This Court and several other courts in the Second Circuit respectfully disagree with that interpretation of *BFP*'s holding.

The decision below does not fully heed the context of the *BFP* opinion and the lead-up to its holding. The Court in *BFP* expressly stated that state foreclosure laws had evolved to "avoid the draconian consequences of strict foreclosure," 511 U.S. at 541, but the RPTL has not. Unlike the foreclosure law in *BFP* and the "typical" state laws that the Supreme Court described before reaching its holding, the RPTL is a strict foreclosure regime that does not provide for a *pre-seizure* auction whereby the debtor may recover equity.[3] This difference between the

3. Although the County auctioned Appellants' properties, that occurred after the County already took title to the properties

RPTL and the state laws the *BFP* Court considered is significant to fraudulent conveyance analysis. *See, e.g.*, *In re Wentworth*, 221 B.R. 316, 320 (Bankr. D. Conn. 1998); *In re Herkimer*, No. 04-90148, 2005 Bankr. LEXIS 3260, 2005 WL 6237559, at *4 (Bankr. N.D.N.Y. July 26, 2005); *In re Murphy*, 331 B.R. 107, 118 (Bankr. S.D.N.Y. 2005); *Cty. of Clinton*, 496 B.R. at 283.

The Supreme Court in *BFP* acknowledged that fair market value is largely irrelevant in the foreclosure context, but it also described "the inquiry under § 548" as "whether the debtor has received value that is substantially comparable to the *worth* of the transferred property." 511 U.S. at 548 (emphasis added). In other words, the foreclosure in *BFP* was not a fraudulent conveyance because the debtor received value reflecting the worth of its property. The value the debtor in *BFP* received was necessarily less than the fair market value of its property because the mortgage foreclosure "completely redefin[ed] the market in which the property [was] offered for sale; normal free-market rules of exchange [were] replaced by the far more restrictive rules governing forced sales." *Wentworth*, 221 B.R. at 320 (internal quotation marks omitted). Consequently, *BFP* reasoned that "the only legitimate evidence of the property's value at the time it [was] sold [was] the foreclosure-sale price itself." *Id.* (internal quotation marks omitted). The foreclosure-sale price that the debtor in *BFP* received reflected the worth of the property in a distressed, forced-sale situation.

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and thus any bidding rules or procedures did not benefit the Appellants.

The facts supporting *BFP's* holding do not exist here. Unlike the disputed forced sale in *BFP*, the sale of Appellants' property conducted under the RPTL "eliminated rather than redefine[d] the market." *Id.* Accordingly, the rationale underlying *BFP's* presumption of reasonably equivalent value does not apply here because there were "no market forces at work at all." *Murphy*, 331 B.R. at 120. Whereas the forced sale price in *BFP* was at least "legitimate evidence of the property's value," the amount of a tax lien is "*no* evidence whatsoever of" property value. *Id.* If anything, the sale prices of $22,000 and $27,000 are evidence of the properties' worth, but the County and not the Appellants will receive the vast majority of those proceeds. This Court therefore declines to extend *BFP*'s holding to a materially different case.

This holding comports with the Second Circuit's rationale expressed in *In re Harris*, 464 F.3d 263, 273 (2d Cir. 2006). Although the Circuit did not directly reach the merits, it expressed concern in a situation where, as in this case, the RPTL allowed a New York county to receive a "windfall" at the expense of other creditors and cautioned the lower court "that there is a strong presumption of not allowing a secured creditor to take more than its interest." *Harris*, 464 F.3d at 273; *see also In re Chase*, 328 B.R at 681 ("There is nothing in [Vermont's strict foreclosure law] to prevent a foreclosing mortgagee with a debt of $2,000 from foreclosing on property worth $100,000 and retaining the property, notwithstanding the colossal surplus value of the property. When such a transfer occurs, the creditor gets a windfall, the debtor's other creditors suffer, and the purpose of fraudulent conveyance law—making all of the debtor's assets available to his

or her creditors and assuring an equal distribution to similarly situated creditors—is frustrated."). If this Court affirmed the Bankruptcy Court's decision, Ontario County would receive surpluses of nearly $22,000 in one instance and more than $20,000 in another. The Appellants, on the other hand, assert that they would be homeless and unable to repay their other creditors through Chapter 13 bankruptcy. The Second Circuit expressly warned against this result in *Harris*, and its reasoning disfavors extending *BFP*'s presumption to the facts of this case.

This Court also disagrees with the County's argument that allowing the Appellants to avoid their foreclosures would frustrate the County's interest in timely collecting property taxes and ensuring clear title to real estate. Ontario County has a legitimate interest in tax enforcement, but that "interest cannot overcome Congress' policy choice that reasonably equivalent value must be obtained for a transfer of a debtor's property in the bankruptcy context, where the rights of other creditors are prejudiced." *Murphy*, 331 B.R. at 120. Ultimately, state interests must be balanced against "the Bankruptcy Code's strong policy favoring equal treatment of creditors." *In re McMahon*, 129 F.3d 93, 97 (2d Cir.1997). Moreover, the County's interests in collecting taxes and avoiding "clouds on title" would not be upset by fraudulent conveyance avoidance. The Appellants have made all ongoing tax payments that have come due since the deadline to redeem their home passed, and their Chapter 13 plans provide for payment of all their owed real estate taxes. There is also no question of title to the Appellants' homes, as adversary proceedings were filed before the auction and bidders were notified

of the litigation before bidding. The Court is unwilling to subordinate the Appellants' and their other creditors' interests to the County's speculative, unfounded fears.

Reasonable minds may differ over the applicability of *BFP* to the RPTL. *See, e.g.*, Marie T. Reilly, *The Case for the Tax Collector*, 18 *J. Bankr. L. & Pract.* 628 (2009) (arguing that the tax collector's right to surplus should not be challenged by a fraudulent conveyance action). However, given *BFP*'s express reluctance to extend its holding to tax foreclosures and the compelling reasons that other courts in this Circuit have given for refusing to do so, this Court holds that Ontario County is not entitled to the conclusive presumption of having provided reasonably equivalent value for the foreclosure of Appellants' homes.

CONCLUSION

For the reasons stated, the Bankruptcy Court's decision granting Ontario County's Motion to Dismiss is REVERSED. This case is REMANDED to the Bankruptcy Court for further proceedings consistent with this opinion.

IT IS SO ORDERED.

Dated: July 18, 2018
Rochester, New York

/s/ Frank P. Geraci, Jr.
HON. FRANK P. GERACI, JR.
Chief Judge
United States District Court

APPENDIX G — DECISION AND ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF NEW YORK, FILED NOVEMBER 6, 2017

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

Bankruptcy Case No. 17-20445-PRW
Adversary Proceeding No. 17-2008-PRW

GLIEE V. GUNSALUS, BRIAN L. GUNSALUS, SR.,

Debtors/Plaintiffs,

vs.

ONTARIO COUNTY, NEW YORK, JOHN DOE, JANE DOE,

Defendants.

Bankruptcy Case No. 17-20459-PRW
Adversary Proceeding No. 17-2009-PRW

JOSEPH M. HAMPTON, BRENDA S. HAMPTON,

Debtors/Plaintiffs,

vs.

ONTARIO COUNTY OF NEW YORK, JOHN DOE, JANE DOE,

Defendants.

Appendix G

DECISION AND ORDER GRANTING MOTIONS TO DISMISS COMPLAINT

PAUL R. WARREN, U.S.B.J.

The Chapter 13 Debtors in each of these adversary proceedings seek to undo the consequences resulting from the failure to redeem their homes from real estate tax lien foreclosure actions.[1] Ontario County brought those foreclosure actions under Article 11 of the New York Real Property Tax Law ("RPTL"). The Debtors do not dispute the fact that judgments of foreclosure were entered by the state court against their real property, after the Debtors failed to redeem the property by paying the delinquent taxes or by successfully defending the foreclosure actions. The Debtors do not claim that the foreclosure actions were infirm in any respect. Instead, the Debtors claim that the transfers of title to their homes should be set aside by this Court as constructively fraudulent conveyances, under 11 U.S.C. § 548(a)(1)(B).

The Debtors point the Court to its decision in *Canandaigua Land Dev., LLC v. County of Ontario* (*In re Canandaigua*), 521 B.R. 457 (Bankr. W.D.N.Y. 2014) (Warren, J.), *and vacated*, 2017 Bankr. LEXIS 1840 (June 29, 2017), and ask the Court to extend the *Canandaigua*

1. The complaint in each of these adversary proceedings seeks identical relief, arising out of substantially similar operative facts. To the extent some facts are different, the differences are in degree only. The Court will issue a single decision, to be entered on the docket in each case. The caption used in this decision is for convenience. The cases are not being consolidated or joined.

holding to these cases. The County invites the Court to abandon its position in *Canandaigua*, insisting that these actions should be dismissed. Because the Court agrees with the County, that a judicially supervised tax foreclosure action conducted by the County in full compliance with New York's Article 11 RPTL is entitled to the presumption of having provided reasonably equivalent value for purposes of 11 U.S.C. § 548(a)(1)(B)(i), the complaints do not state a claim for which relief can be granted. The motion of the County to dismiss the complaint in each of these adversary proceedings, under Rule 12(b)(6) FRCP, is **GRANTED**. The complaint in each adversary proceeding is **DISMISSED**, with prejudice.

I.

JURISDICTION

The Court has jurisdiction under 28 U.S.C. §§ 157(a), 157(b)(1) and 1334(b). This is a core proceeding under 28 U.S.C. § 157(b)(2)(H). The County has not objected to the Court's jurisdiction under Rule 7012(b) FRBP.

II.

ISSUE

Is the County entitled to the presumption of having provided reasonably equivalent value, for purposes of 11 U.S.C. § 548(a)(1)(B)(i), where it conducted a judicially supervised tax lien foreclosure action in strict compliance with the statutory requirements of Article 11 of New

York's Real Property Tax Law? Having concluded that its decision in *Canandaigua*—answering the same question in the negative—resulted from a flawed application of the principles identified by the Supreme Court in *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (1994), the Court now answers the question in the affirmative.

III.

FACTS

The operative facts concerning the tax foreclosure actions giving rise to these adversary proceedings are not in dispute. A short review of those facts, taken from the complaints, will help frame the discussion.

A. The Gunsalus Situation

Mr. and Mrs. Gunsalus owned a home located at 1338 White Road, in the Town of Phelps, County of Ontario, where they have lived for decades. (ECF AP No. 1 ¶¶ 18, 20).[2] The Gunsaluses failed to pay the 2014 real estate taxes on their home, totaling $1,236.52. (*Id.* ¶ 27). Those taxes were due on January 1, 2014. The Gunsaluses claim that their home had a value of $28,000, based on an appraisal commissioned for purposes of this litigation. (ECF AP No. 27, Affidavit ¶ 5). The Gunsaluses owned

2. References to the docket for the adversary proceeding in each case are identified as "ECF AP" and references to the docket in the main bankruptcy case are identified as "ECF BK."

their home free and clear of any mortgages. (ECF AP No. 1 ¶ 53).

The 2014 real property taxes remained unpaid after a period of 10 months. (ECF AP No. 25, Part 2 ¶ 4). So, on November 10, 2014, enforcement of the lien for unpaid taxes began with the County including the Gunsaluses' property on the "List of Delinquent Taxes," filed in the County Clerk's Office, as required by RPTL § 1122. (*Id.*). The County then waited the required 21 months, from the date the taxes first became due, before commencing the *in rem* tax foreclosure action, as required by RPTL § 1123. (*Id.* ¶ 5). On October 2, 2015, the County commenced its tax lien foreclosure action by serving notice as required by RPTL § 1125(1)(a). (ECF AP No. 1 ¶ 27). The statutory notice informed the Gunsaluses that the deadline to redeem their home from foreclosure was January 15, 2016. (*Id.*). That same notice informed the Gunsaluses that they could serve an answer in defense of the foreclosure action, which needed to be done by January 15, 2016, if at all. (ECF AP No. 25, Ex. B). It is undisputed that the County complied with both the service and publication requirements under RPTL §§ 1125(1)(b) and 1124(1).

The Gunsaluses did not redeem the property by paying the past due taxes. Instead, on January 15, 2016, they served and filed an answer to the foreclosure petition. (ECF AP No. 1 ¶ 32). The County moved for summary judgment on its petition under RPTL § 1136. (ECF AP No. 25, Part 2 ¶ 22). The Gunsaluses opposed that motion and cross-moved for an extension of the redemption deadline. (ECF AP No. 1 ¶ 33). The Ontario County Supreme Court

denied the Gunsaluses' cross-motion. (*Id.* ¶ 35). The state court then granted the County's motion. (*Id.* ¶¶ 35-36). A final judgment of foreclosure was entered on June 1, 2016. (*Id.* ¶ 54). The Gunsaluses did not appeal that judgment or seek reconsideration, and the deadline to do so has long since passed. (ECF AP No. 25, Part 2 ¶ 23). By operation of RPTL § 1136, the final judgment of foreclosure awarded the County possession of and the right to take title to the Gunsaluses' home. At that point, over two years had passed since the unpaid taxes first became due.

Nearly a year after entry of the judgment of foreclosure in favor of the County, an auction re-sale of the property was scheduled for May 17, 2017, under RPTL § 1163. (ECF AP No. 1 ¶ 42). In an effort to stop the sale of their home, the Gunsaluses filed a Chapter 13 petition on April 28, 2017. (ECF BK No. 1). And, on May 3, 2017, the Gunsaluses filed a complaint initiating this adversary proceeding, alleging that the taking of their home was a constructively fraudulent transfer under 11 U.S.C. § 548(a)(1)(B). (ECF AP No. 1). The Gunsaluses contend that the involuntary transfer of their home, worth $22,000 (the price paid at foreclosure), to satisfy delinquent taxes of approximately $1,200, did not provide reasonably equivalent value for that property. (*Id.* ¶¶ 56-59). The Gunsaluses also complain that the County sold their home at auction for $22,000 to satisfy unpaid taxes of $1,236.52, and that it is inequitable for the County to keep the surplus amount. (*Id.* ¶ 49). As a remedy, the Gunsaluses seek to have this Court avoid the transfer of the property and permit them to repay the County the delinquent taxes over 5 years under their Chapter 13 plan. (*Id.* ¶ 45).

B. The Hampton Situation

Mr. and Mrs. Hampton owned a home located at 4583 Lincoln Avenue, in the Town of Gorham, County of Ontario, where they have lived since 2010. (ECF AP No. 1 ¶¶ 18, 20). The Hamptons failed to pay the 2015 real estate taxes on their home, totaling $5,201.87. (*Id.* ¶ 31). Those taxes were due January 1, 2015. The Hamptons claim that their home had a value of $87,000, based on an appraisal commissioned for purposes of this litigation. (ECF AP No. 28, Affidavit ¶ 5). The Hamptons owned their home free and clear of any mortgages. (ECF AP No. 1 ¶ 20).

The 2015 real property taxes remained unpaid after a period of 10 months. (ECF AP No. 26, Part 2 ¶ 4). So, on November 13, 2015, enforcement of the lien for unpaid taxes began with the County including the Hamptons' property on the "List of Delinquent Taxes," filed in the County Clerk's Office, as required by RPTL § 1122. (*Id.*). The County then waited the required 21 months, from the date the taxes first became due, before commencing the *in rem* tax foreclosure action, as required by RPTL § 1123. (*Id.* ¶ 5). On October 3, 2016, the County commenced its tax lien foreclosure action by serving notice, as required by RPTL § 1125(1)(a). (ECF AP No. 1 ¶ 31). The statutory notice informed the Hamptons that the deadline to redeem their home from foreclosure was January 13, 2017. (*Id.*). That same notice informed the Hamptons that they could serve an answer in defense against the foreclosure action, which needed to be done by January 13, 2017, if at all. (ECF AP No. 26, Ex. B). It is undisputed that the County complied with both the service and publication requirements under RPTL §§ 1125(1)(b) and 1124(1).

The Hamptons neither redeemed the property by paying the past due taxes nor served an answer in defense of the foreclosure petition. (ECF AP No. 1 ¶ 32). As a result, a default judgment of foreclosure was entered in favor of the County on March 2, 2017. (*Id.* ¶ 34). The Hamptons did not file an application in state court seeking to vacate the default judgment within 30 days, as permitted under RPTL § 1131. (ECF AP No. 26, Part 2 ¶ 21). On April 7, 2017, the state court's default judgment of foreclosure became non-reviewable under the state statute. (*Id.* ¶ 20). By operation of RPTL § 1136, the final judgment of foreclosure awarded the County possession of and the right to take title to the Hamptons' home.

An auction re-sale of the property was scheduled for May 17, 2017, under RPTL § 1163. (ECF AP No. 1 ¶ 44). On May 2, 2017, the Hamptons filed a Chapter 13 petition. (ECF BK No. 1). And, on May 5, 2017, the Hamptons filed a complaint initiating this adversary proceeding, alleging that the taking of their home was a constructively fraudulent transfer under 11 U.S.C. § 548(a)(1)(B). (ECF AP No. 1). The Hamptons contend that the involuntary transfer of their home, worth $87,000, to satisfy delinquent taxes of approximately $5,200, did not provide reasonably equivalent value for that property. (*Id.* ¶¶ 57-60; ECF AP No. 28 at 13). The Hamptons also complain that the County sold their home at auction for $27,000 to satisfy unpaid taxes of $5,201.87, and that it is inequitable for the County to keep the surplus amount. (ECF AP No. 1 ¶ 50).

Appendix G

IV.

DISCUSSION

A. Rule 12(b)(6) FRCP —Applicable Legal Standard

When considering a motion under Rule 12(b)(6), seeking dismissal of a complaint for failure to state a claim upon which relief can be granted, the Court must accept factual allegations in the complaint as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *Cleveland v. Caplaw Enters.*, 448 F.3d 518, 521 (2d Cir. 2006). The Court must draw reasonable inferences from the complaint in favor of the plaintiff, in determining whether the plaintiff provides "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp.*, 550 U.S. at 570; *Doe v. Columbia Univ.*, 831 F.3d 46, 48 (2d Cir. 2016); *Vaughn v. Air Line Pilots Ass'n, Int'l*, 604 F.3d 703, 709 (2d Cir. 2010); *see also Wacker v. JP Morgan Chase & Co.*, 678 Fed. Appx. 27, 2017 U.S. App. LEXIS 1763, at *2 (2d Cir. 2017). A complaint is plausible on its face when it contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. While the facts alleged in a complaint may turn out to be "self-serving and untrue," "a court at this stage of [a] proceeding is not engaged in an effort to determine the true facts. The issue is simply whether the facts the plaintiff alleges, if true, are plausibly sufficient to state a legal claim." *Columbia*

Univ., 831 F.3d at 48. The court should not consider facts outside the "four corners of the complaint, the documents attached to the complaint as exhibits, and any documents incorporated in the complaint by reference." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 191 (2d Cir. 2007); *Taylor v. Vt. Dep't of Educ.*, 313 F.3d 768, 776 (2d Cir. 2002); *In re Cornerstone Homes, Inc.*, 567 B.R. 37, 45-46 (Bankr. W.D.N.Y. 2017) (Warren, J.).

B. Elements Necessary to a Cause of Action for Constructive Fraud Under 11 U.S.C. § 548(a)(1)(B)

To state a cause of action under 11 U.S.C. § 548(a)(1)(B), the Debtors must allege facts supporting each of the necessary statutory elements: (1) the debtor had an interest in property; (2) a transfer of the property occurred within 2 years of the petition; (3) the debtor was insolvent at the time the transfer occurred or was rendered insolvent by the transfer; and (4) the debtor received less than reasonably equivalent value in exchange for the transfer.

The issue raised by the motions to dismiss these adversary proceedings is whether the last element, absence of reasonably equivalent value, can be adequately pled by the Debtors so as to survive a motion to dismiss under Rule 12(b)(6). If the County is not entitled to the presumption of having given reasonably equivalent value, the complaints will survive the motions to dismiss. However, if the County is entitled to a presumption of having given reasonably equivalent value—by extension of the *BFP* holding to these tax lien foreclosures—the

Debtors cannot allege any set of facts that would tend to prove the absence of "reasonably equivalent value," a necessary element to a claim under 11 U.S.C. § 548(a)(1)(B)(i).

C. Ontario County is Entitled to the Presumption of Having Provided Reasonably Equivalent Value Under *BFP v. Resolution Trust Corp.*

The Gunsaluses and Hamptons claim that the transfer of title to each of their homes is avoidable, as a constructively fraudulent transfer, under 11 U.S.C. § 548(a)(1)(B). (Case No. 17-2008, ECF No. 1; Case No. 17-2009, ECF No. 1). The Debtors urge the Court to extend its holding in *Canandaigua* to these adversary proceedings, by finding that the County is not entitled to a presumption of having provided reasonably equivalent value for the property transferred. (Case No. 17-2008, ECF No. 26 at 7-18; Case No. 17-2009, ECF No. 28 at 7-17). The County insists that, in *Canandaigua*, this Court focused too much on the presence (or absence) of competitive bidding in its refusal to extend the *BFP* reasoning to a tax lien foreclosure conducted under New York's Article 11 RPTL. (Case No. 17-2008, ECF No. 28 ¶¶ 4-13; Case No. 17-2009, ECF AP No. 30 ¶¶ 4-13). The County urges the Court to abandon *Canandaigua* and find that the County is entitled to a presumption of having provided reasonably equivalent value in exchange for the transfer. "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planters Nat'l Bank & Trust Co.*, 335 U.S. 595, 600, 69 S. Ct. 290, 93 L. Ed. 259, 1949-1 C.B.

223 (1949) (Frankfurter, J., dissenting). Having had the benefit of several years—after issuing the *Canandaigua* decision—to study Justice Scalia's majority opinion in *BFP*, the Court must borrow from Justice Bramwell, in saying: "The matter does not appear to me now as it appears to have appeared to me then." *Andrews v. Styrap*, 26 L.T.R. (N.S.) 704, 706 (Ex. 1872) (*quoted in McGrath v. Kristensen*, 340 U.S. 162, 178, 71 S. Ct. 224, 95 L. Ed. 173 (1950) (Jackson, J., concurring)).

1. *Canandaigua's* Rationale and *BFP* Reexamined

This Court, in *Canandaigua*, found that the "*BFP* presumption" did not apply to tax foreclosures conducted under Article 11 RPTL—reaching that conclusion by focusing on the absence of "competitive bidding" under the statutory procedures provided for under Article 11 RPTL. After all, the *BFP* Court said, in limiting its holding to mortgage lien foreclosures, that its consideration of other types of forced sales, such as those to satisfy tax liens, "*may be different*." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 n.3, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (1994) (emphasis added). Lower courts have struggled with *BFP* in the context of tax lien foreclosures. Some courts (including this Court) may have inadvertently elevated the phrase "may be different" to "must be different." Those courts focused on procedural differences between the state's mortgage foreclosure statutes and its tax lien foreclosure statutes. Some of those courts found that the absence of competitive bidding in a state's tax lien foreclosure statute was a basis for holding that *BFP* did not apply to tax foreclosures, even where those tax lien

foreclosure actions were conducted in strict conformity with all of the procedures dictated by state law. *See In re Varquez*, 502 B.R. 186, 193 (Bankr. D.N.J. 2013); *In re Williams*, 473 B.R. 307, 320 (Bankr. E.D. Wis. 2012), *aff'd in part and remanded in part sub nom. City of Milwaukee v. Gillespie*, 487 B.R. 916 (E.D. Wis. 2013); *In re Murphy*, 331 B.R. 107, 120 (Bankr. S.D.N.Y. 2005); *In re Herkimer Forest Prods. Corp. v. Cnty. of Clinton*, No. 04-13978, 2005 Bankr. LEXIS 3260, at *13 (Bankr. N.D.N.Y. July 26, 2005); *In re Harris*, No. 01-10365, 2003 Bankr. LEXIS 2323, at *15-18 (Bankr. N.D.N.Y. Mar. 11, 2003). But, it may be that a great disparity between the fair market value of a property and the amount of the tax lien being foreclosed was the underlying force that pulled the courts in that direction.

The huge disparity between the fair market value of the property in *Canandaigua* ($300,000-$425,000) and the amount of delinquent taxes ($16,594.99) was the shiny object that pulled this Court in the same direction. A similar visceral reaction, by the *BFP* dissenters, to a large disparity between fair market value of the property and the lien being foreclosed—that same shiny object—is evident in the opening sentence of Justice Souter's dissent: "The Court today holds that . . . Congress intended *a peppercorn paid at a non-collusive and procedurally regular foreclosure sale to be treated as the 'reasonable equivalent' of the value of a California beachfront estate*." *BFP*, 511 U.S. at 549 (emphasis added). And nearly 25 years after *BFP*, many courts faced with tax lien foreclosures (including this Court in *Canandaigua*) continue to start their analysis of a fraudulent conveyance claim under

§ 548(a)(1)(B)(i) of the Code with the fair market value of the foreclosed real estate, compared to the amount of the tax lien, and then read *BFP* as turning on one essential factor: the presence or absence of competitive bidding in a state's foreclosure statute. *See, e.g.*, *In re Smith*, 811 F.3d 228, 239 (7th Cir. 2016) ("[W]e read *BFP* as depending . . . on the central role of competitive bidding in an auction for the value of the property itself."). All well and good; but a careful re-reading of the *BFP* decision leads this Court to the conclusion that the presence or absence of "competitive bidding" was not the keystone to the *BFP* majority's holding.

The majority in *BFP* heaped considerable scorn on the Seventh Circuit's decision in *In re Bundles*, 856 F.2d 815 (7th Cir. 1988), noting that the Circuit "refer[s] to fair market value as the benchmark against which determination of reasonably equivalent value is to be measured." *BFP*, 511 U.S. at 536-37. The Supreme Court in *BFP* rejected the use of fair market value as a benchmark, in the context of a forced sale. The *BFP* majority also rejected "the *Bundles* inquiry into whether the state foreclosure proceedings 'were calculated . . . to return to the debtor-mortgagor his equity in the property.'" *Id.* at 540 (quoting *In re Bundles*, 856 F.2d at 824). But, while *BFP* wholly rejected the *Bundles* approach in the context of a mortgage foreclosure, it left open the possibility that things may be different for tax lien foreclosures. *Id.* at 537 n.3. In that light, the recent decision in *Smith* can fairly be viewed as the Seventh Circuit continuing to stubbornly cling to its *Bundles* approach—using fair market value as the benchmark and looking to see whether

the state statute returns to the debtor any equity in the property—when striking down a tax foreclosure judgment as a fraudulent transfer under § 548(a)(1) of the Code.

BFP recognized that "the terms for foreclosure sale are not *standard*. They vary considerably from State to State, depending upon . . . how the particular State values the divergent interests of debtor and creditor." *Id.* (emphasis in original). To conclude, as this Court did in *Canandaigua* (and the Seventh Circuit did last year in *Smith*) that, among the considerably varying requirements of state foreclosure laws listed in *BFP*, "competitive bidding at auction" was the single unvarying and universally necessary requirement for the *BFP* presumption to apply is not supported by the language used by the *BFP* majority. *BFP* observed that "[f]oreclosure laws ***typically require*** notice to the defaulting borrower, a substantial lead time before the commencement of foreclosure proceedings, publication of a notice of sale, and strict adherence to prescribed bidding rules and auction procedures." *Id.* at 542 (emphasis added). The Supreme Court did not attempt to define a sub-set of state foreclosure law requirements that it deemed to be "mandatory" for the *BFP* holding to apply. The majority's use of the phrase "typically require" in *BFP* connotes something common among state laws, but not universal or absolute—and certainly not "mandatory." If one can correctly interpret *BFP*'s use of the phrase "typically require" as meaning the same thing as "mandatory," then it would logically follow that: "*Drivers of motor vehicles approaching an intersection are typically required to stop if the traffic light is red.*" Of course, that would be incorrect.

Instead, *BFP* recognized three essential and necessary key protections common to all state foreclosure statutes: (1) notice; (2) ample opportunity to cure; and (3) strict adherence to the requirements of those state statutes. *See In re Crespo*, 569 B.R. 624, 631 (E.D. Pa. 2017) (quoting *In re Lord*, 179 B.R. 429, 436 (Bankr. E.D. Pa. 1995)). And, "[w]hen [the] procedures [under a particular state's law] have been followed, however, it is 'black letter' law that mere inadequacy of the foreclosure sale price is not basis for setting the sale aside, although it may be set aside (*under state foreclosure law*, rather than fraudulent transfer law) if the price is so low as to 'shock the conscience or raise a presumption of fraud or unfairness.'" *BFP*, 511 U.S. at 542 (emphasis in original). "[T]he *BFP* Court's analysis of § 548 expressly eschewed any consideration of the substantive value received in a forced-sale context and instead pinned the validity of the transfer on whether the forced sale was noncollusive and conducted in compliance with state law." *In re T.F. Stone Co.*, 72 F.3d 466, 470 (5th Cir. 1995). Here, there is no dispute that the foreclosure of the tax liens was non-collusive and conducted in strict compliance with prescribed procedures under the state law. Article 11 RPTL provides for notice, ample opportunity to cure, judicial supervision of the action, and requires strict adherence to the procedures spelled out in the statute. Under *BFP*, the fact that the value of the property may have exceeded (even greatly) the amount of the tax liens being foreclosed is not a basis to set aside the transfer of title under § 548(a)(1)(B) of the Code.

2. The County's Refusal to Extend Redemption Deadline and Retention of Surplus Equity Does Not Invalidate Transfer

Over 60 years ago, a unanimous Supreme Court rejected any consideration of the fair market value of a property, in comparison to the dollar amount of extremely modest government liens being foreclosed by the City of New York to recover unpaid water bills through strict foreclosure, under the statutory counterpart to the state's tax lien foreclosure statute. *Nelson v. New York*, 352 U.S. 103, 77 S. Ct. 195, 1 L. Ed. 2d 171 (1956). In *Nelson*, the City foreclosed liens against two pieces of real property to collect unpaid water charges. The first foreclosed parcel was valued at $6,000 and the lien for unpaid water charges was $65.00. *Id.* at 105. The second foreclosed parcel was valued at $46,000 and the lien for unpaid water charges was $814.50. *Id.* at 106. In both actions, the Court observed that notice was given as required by the state statute, and the owners failed to either redeem the property or serve an answer to the City's foreclosure complaints. *See id.* at 105-09. Judgments of foreclosure were entered by default and the City took title. *Id.* at 106. Some time later, the City sold the first parcel for $7,000 and retained all of the surplus proceeds. *Id.* The City kept the second parcel, and retained all of its surplus value. *Id.* The former owners unsuccessfully challenged the transfer of title to the properties in state court, after the City refused to disturb the default judgments of foreclosure. The owners then brought suit in the federal courts, asserting constitutional challenges to the taking of their property. *Id.* at 108-09.

Appendix G

The Supreme Court rejected the former property owners' constitutional challenges to the City's strict foreclosure statute. While the *Nelson* Court had before it a constitutional challenge, not a fraudulent transfer claim under the Bankruptcy Code, the Court's holding bolsters the view that due process considerations, not fair market value (the shiny object), should carry the day: "What the City of New York has done is to foreclose real property for charges four years delinquent and, in the absence of timely action to redeem or to recover any surplus, retain the property or the entire proceeds of its sale. We hold that nothing in the Federal Constitution prevents this where the record shows *adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings*." *Nelson*, 352 U.S. at 110 (emphasis added). Perhaps the *BFP* decision might have proved to be more useful to the lower courts had its mischievous "footnote 3" been replaced with a citation to *Nelson*—and the *Nelson* Court's discussion of the factors that were actually considered in connection with foreclosures to enforce government liens (such as tax liens). Those factors are notice and an opportunity to cure. *See id.* at 110. More recently, the Second Circuit has also rejected constitutional challenges to both (1) a taxing authority's refusal to extend the redemption date after entry of a default judgment of foreclosure and (2) a taxing authority's retention of the surplus proceeds generated from the auction re-sale of the property. *Miner v. Clinton Cnty.*, 541 F.3d 464 (2d Cir. 2008) (citing *Nelson* as authority). Here, the Debtors make similar arguments in an attempt to amplify their claim under 11 U.S.C. § 548(a)(1)(B) of the Code, although the Debtors do not make any constitutional challenges to Article 11 RPTL.

No doubt, upholding these tax lien foreclosure judgments is a harsh result for the Debtors. Both the Gunsaluses and Hamptons have experienced difficult family health issues and are of limited financial means. Losing title to their homes—along with any equity—because of their failure to pay modest real estate taxes will cause untold hardships. Their attorneys point out that Article 11 RPTL, as implemented by Ontario County, is a particularly unforgiving statute. In response to a similar argument in *Nelson*, the unanimous Supreme Court observed: "It is contended that this is a harsh statute. The New York Court of Appeals took cognizance of this claim and spoke of the 'extreme hardships' resulting from the application of the statute in this case. But it held, as we must, that relief from the hardship imposed by a state statute is the responsibility of the state legislature and not of the courts, unless some constitutional guarantee is infringed." *Nelson*, 352 U.S. at 110-11. So too here. The harsh result worked upon the Debtors under New York's Article 11 RPTL is not a reason to interfere with state law through the Bankruptcy Code, absent a clear Congressional mandate.

3. Foreclosure of Tax Liens Involve Essential State Interests

As *BFP* cautioned the lower courts, "Federal statutes impinging upon important state interests cannot . . . be construed without regard to the implications of our dual system of government. . . . To displace traditional state regulation in such a manner, the federal statutory purpose must be clear and manifest . . . . Otherwise,

the Bankruptcy Code will be construed to adopt, rather than to displace, pre-existing state law." *BFP*, 511 U.S. at 544-45 (citations omitted) (internal quotation marks omitted). *BFP* found that the statutes governing mortgage lien foreclosures were a reflection of an "essential state interest"—that being the security of real estate title. *Id.* at 544. To find that the government's foreclosure of its real estate tax liens does not involve an essential state interest (or involves some lesser degree of state interest) is to ignore reality. Comparing the state law interest in mortgage foreclosures with the state law interest in foreclosures to collect delinquent taxes, led one court to find that "the ramifications [concerning tax foreclosures] are more fundamental and of greater importance. The taxes involved are the lifeblood of government units and enable them to carry out essential government functions for the benefit of their citizens." *In re RL Mgmt. Grp., LLC*, No. 13-51849, 2014 Bankr. LEXIS 206, at *17 (E.D. Mich. Jan. 10, 2014).

Real property taxes fund essential and mandated county government services and programs, including: (1) social services—public assistance and food stamps, mental hygiene, public health for the elderly and disabled; (2) public safety—sheriff's departments, county detention facilities, district attorney, public defender, juvenile offender programs; (3) transportation and public works—building and maintaining county highways, bridges, and infrastructure projects; (4) public services—county clerk, motor vehicle departments, board of elections, child support collection, and veterans' services. Local governmental units within counties, such as school

districts, rely heavily on real estate tax revenues to function. (Case No. 17-2008, ECF No. 25, Part 4 at 9-10; Case No. 17-02009, ECF No. 26, Part 4 at 9-10). These are not just important state interests; they are vital state interests. The collection of real estate taxes, to enable the government to function, is an essential state interest. To paraphrase *BFP*: The statute enacted by the New York legislature, to allow local government units to enforce liens for unpaid taxes, reflects "legislatively crafted rules governing the foreclosure process, to achieve what [the state legislature] considers the proper balance between the needs of [government units and property owners]." *BFP* 511 U.S. at 541-42.

Here, the Gunsaluses and Hamptons were provided with notice of the delinquent taxes and notice of the commencement of the action to foreclose the tax liens. Nearly two years elapsed between the date the taxes first became due and the commencement of the action to foreclose the tax liens, during which time the Gunsaluses and Hamptons were provided with ample opportunity to redeem the property by curing the tax arrears. The tax foreclosure proceedings were conducted under the direct judicial supervision of the New York courts, with strict adherence to the statutory requirements of Article 11 RPTL. Judgments of foreclosure were granted by the state court, after notice and an opportunity to be heard. The statutorily proscribed time to appeal the judgments of foreclosure passed, without challenge.

After harmonizing the Supreme Court's holdings in *Nelson* and *BFP*, the Court finds no manifest and clear

federal statutory purpose upon which the Bankruptcy Code should be construed or applied to interfere with property tax lien foreclosures conducted by the government under New York's Article 11 RPTL. Because the Court holds that the County is entitled to a conclusive presumption of having provided reasonably equivalent value, within the meaning of 11 U.S.C. § 548(a)(1)(B)(i), the Gunsaluses and Hamptons cannot state all the necessary elements of a claim for a constructively fraudulent transfer under the Code. *See In re Crespo*, 569 B.R. 624 (E.D. Pa. Mar. 30, 2017); *In re Houchins*, No. 16-20740, 2017 Bankr. LEXIS 891 (Bankr. D. Conn. Mar. 31, 2017); *In re Jacobson*, 523 B.R. 13 (Bankr. D. Conn. 2014); *In re RL Mgmt. Grp., LLC*, No. 13-51849, 2014 Bankr. LEXIS 206 (Bankr. E.D. Mich. Jan. 10, 2014). The complaint in each of these adversary proceedings is dismissed, under Rule 12(b)(6) FRCP.

V.

CONCLUSION

The complaint in each adversary proceedings is dismissed for failure to state a claim upon which relief can be granted because the Court holds that a tax lien foreclosure action, conducted in strict compliance with New York's Article 11 RPTL, is conclusively presumed to have provided reasonably equivalent value for purposes of 11 U.S.C. § 548(a)(1)(B)(i). The motions by Ontario County requesting dismissal of each complaint, under Rule 12(b)(6) FRCP, are **GRANTED**. The adversary proceedings are **DISMISSED**, with prejudice. The Stipulated Orders (Case No. 17-2008, ECF No. 15; Case No. 17-2009, ECF

No. 16) temporarily restraining the County from taking certain steps in connection with the tax foreclosure judgments, such as transferring title to the properties, are of no further force or effect because these adversary proceedings have been dismissed.

IT IS SO ORDERED.

DATED: November 6, 2017
Rochester, New York

/s/
HON. PAUL R. WARREN
United States Bankruptcy Judge

APPENDIX H — STATUTORY PROVISIONS

11 U.S.C. §548 (a)

(1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B)

(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)

(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;