

NO. 052923

IN THE SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA

LEE LAFFERTY,

APPELLANT

VS.

LOWELL B. COGAR,

APPELLEE.

FROM THE CIRCUIT COURT OF RALEIGH COUNTY

BRIEF OF APPELLANT,
LEE LAFFERTY
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POINTS AND AUTHORITY RELIED UPON BY APPELLANT

West Virginia Code, Chapter 11A, Article 3, Section 22

West Virginia Code, Chapter 11A, Article 3, Section 23

West Virginia Code, Chapter 11A, Article 3, Sections 19 and 21

Uniform Partnership Act, Chapter 47B, Article 1, Section 2

Uniform Partnership Act, Chapter 47B, Article 2, Section 1

Uniform Partnership Act, Chapter 47B, Article 2, Section 4

Uniform Partnership Act, Chapter 47B, Article 3, Section 1 (1) and (2)

Uniform Partnership Act, Chapter 47B, Article 4, Section 1

Uniform Partnership Act, Chapter 47B, Article 4, Section 2

Uniform Partnership Act, Chapter 47B, Article 5, Section 1

Rollyson v. Jordan, 205 W.Va. 368, 518 S.E.2d 372 (1999)

Gates v. Morris 135 SE 2d 473 {W.Va. 1941}

Realmark Developments, Inc. v. Ranson 588 SE 2d 150

Hicks ex rel Saus v. Jones 617 SE2d 457 (W. Va. 2005)

62B Am Jur 2d Process 151

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INTRODUCTORY NOTE

The Appellant, Lee Lafferty, the Defendant below, will be referred to as "Lafferty"; the Appellee, Lowell B. Cogar, the Plaintiff below, will be referred to as "Appellee"; Judge Robert A. Burnside, Jr., Judge of the Circuit Court of Raleigh County, will be referred to as "the Court"; the Office of the Clerk of the County Commission of Raleigh County will be referred to as "the Clerk"; Chapter 11A, Article 3 of West Virginia Code will be referred to as the "Sheriff's Tax Sale Act"; and Chapter 47B, Articles 1 through 7 will be referred to as the "Uniform Partnership Act".

PROCEDURAL HISTORY

That on November 22, 2002 Lafferty purchased a certain 13.77 acre tract of land on Old Grandview Road in Shady Spring District, Raleigh County, West Virginia, from the Sheriff of Raleigh County, which property was delinquent for the year of 2001 and purchased said tract for the sum of \$1,500.00, which land was titled in the name of Whitco Associates, a General West Virginia Partnership.

That on or about the 30th day of December, 2003, Lafferty prepared a list of persons or entities to be served with notice to redeem and filed same with the Clerk of the County Commission of Raleigh County, as required by Chapter 11A, Article 3, Section 19(a). (A copy of said list is attached to Plaintiff's Complaint as Exhibit C).

Thereafter, on the 6th day of January, 2004, the Clerk of the County Commission, in compliance with Chapter 11A, Article 3, Section 22, served the persons and entities required to be served by certified mail return receipt requested and by publication. The owner of the property, Whitco Associates, was served at P.O. Box 685, Beckley, West Virginia 25801, in accordance with the business address stated on the recorded Partnership Agreement of record in the Office of the Clerk of the County Commission of Raleigh County, West Virginia, on Roll 92, at Page 2553. (A copy of said Partnership Agreement is attached to Plaintiff's Complaint as Exhibit B). Jerry C. Whitt, one of the partners to Whitco Associates, was served at Rt. 1, Box 113, Glen Morgan, West Virginia 25847 and Lowell B. Cogar, the other partner, was served by publication. The return of service on Whitco Associates shows that notice was placed in its box on January 7, 2004, January 13, 2004, and January 27, 2004, but was unclaimed. The return on Jerry C. Whitt shows that notice was served on January 10, 2004, January 22, 2004 and January

25, 2004 at his home address at 1264 Sullivan Road, Glen Morgan, West Virginia 25847, but was unclaimed. Thereafter, the Clerk of the County Commission of Raleigh County, West Virginia, served Whitco Associates, Jerry C. Whitt and any unknown heirs of Jerry C. Whitt, and Lowell B. Cogar and any unknown heirs of Lowell B. Cogar by publication (a copy of the Notice of Publication is attached as Exhibit 1 to Lafferty's Motion for Summary Judgment), which shows that the publication was run February 12, 2004, February 19, 2004 and February 26, 2004.

No one who was served attempted to redeem the property prior to March 31, 2004 and, thereafter, the Clerk of the County Commission of Raleigh County, West Virginia issued the Deed for the subject property to the purchaser at the sale by the Sheriff, which Deed is dated the 7th day of April, 2004 and was recorded on April 8, 2004. (A copy of said Deed is attached to the Plaintiff's Complaint as Exhibit A).

After title to the property was acquired by Lafferty, he expended the sum of \$2,512.61 to construct a road upon the property, thereby the partnership would be unjustly enriched by the cost of the improvement to the property by Lafferty if the Clerk's Deed is set aside and Appellee is entitled to redeem as at the time of the construction of the improvement Lafferty was a bona fide purchaser without notice.

ISSUES

ISSUE 1:

Is a partner in a West Virginia partnership in which name real property is titled entitled to personal notice of a right to redeem pursuant to Chapter 11A, Article 3, Section 19 and 21 of the West Virginia Code, since the West Virginia Partnership Act, Chapter 47B, Article 3, Section 3 clearly states that property acquired by a partnership is property of the partnership and not of the partners individually, and the interest of a partner in a partnership is only the right to receive his or her share

of the profits which is a personal property right only? (Chapter 47B, Article 5, Section 2)

ISSUE 2:

Was the Circuit Judge clearly wrong in granting Summary Judgment pursuant to the Appellee's Motion for Summary Judgment?

ARGUMENT ON ISSUE 1:

The fundamental purpose of having written law is to allow the persons controlled by such laws to be informed and be able to conform their conduct to the requirements of the law. When the law is ambiguous or silent as to the requirement of said law then it is incumbent upon the Courts to interpret the law/statute to enable people to conform to the requirements of the law/statute.

The legislature in enacting the Sheriffs Tax Sale Act chose not to define in Chapter 11A, Article 3, Section 19 or Section 21 who or what class of people or entity is required to be sent notice of the right to redeem when such real property has been sold for delinquent taxes to an individual at a tax lien sale by the Sheriff. This Court seems to imply in **Rollyson v. Jordan** 518, SE2d 372 (W.Va. 1999) that Section 23 of Article 3 of Chapter 11A defines who is to receive personal notice to redeem under Subsection (a) by the phrase "the owner of, or any other person who was entitled to pay the taxes on, any real estate for which a tax lien thereon was purchased by an individual." However, it is Lafferty's position that that Section of the Sheriff's Tax Sale Act only defines who may redeem on behalf of the true owner or any lien holder of record in recognition of the fact that aside from individual people, there are entities which are true owners or are the lien holders of record on the subject property, such as partnerships, limited partnerships,

corporations, an LLC, trusts or estates, which entities do not have a persona to actually appear at the Sheriff's Office and tender the money to redeem, but such entities may act through agents, officers, servants or employees to actually appear and pay the money to the Sheriff to redeem said property for and on behalf of such entities since the Section is, in fact, titled "Redemption From Purchase; Receipt; List of Redemptions; Lien; Lien of Person Redeeming Interest of Another; Record." This, however, does not mean that the agents, officers, servants or employees are entitled to personal notice to redeem, but only that they may redeem for and on behalf of the entity.

Chapter 11A, Article 1, Section 9 of Act entitled "Payment of taxes by co-owner or other interested party; lien" seems to be appropriate as a definition of who may pay taxes on real property, which provides "any owner of real estate..., or any person having a lien on the land, or an undivided interest therein, or any other person having an interest in the land, or in an undivided interest therein, which he desires to protect, shall be allowed to pay the whole, but not a part of the taxes assessed thereon." It is obvious from the use of these words or phrases that the legislature is referring to an interest in the title to the land or a lien holder of record. Therefore, persons not having an interest in the title to or lien on the land are not entitled to pay taxes on any real estate. If a person is not entitled to pay taxes on the real property in question then why would such person be entitled to notice to redeem as required by Chapter 11A, Article 3, Section 19?

The undisputed facts in this case show that the partnership known as Whitco Associates acquired the subject real property in the partnerships name by Deed dated the 20th day of January, 1994 from Jerry C. Whitt, single, which is of record in the Office of the Clerk of the County Commission of Raleigh County, West Virginia, in Deed Book

Roll 53, at Page 564 and said real property was still titled in the name of Whitco Associates when the real property went delinquent for the 2001 real property taxes and was sold to Lafferty in October 2002 for \$1,500.00 and remained in the partnerships name until the Clerk's Deed in April, 2004.

The Uniform Partnership Act codified at Chapter 47A, Article 2, Section 3 clearly and unequivocally states that "property acquired by a partnership is property of the partnership and not of the partners individually. Section 4 of Article 2 clearly and unequivocally states that (a) property is partnership property if acquired in the name of (1) the partnership." In Article 5, Section 1 it clearly and unequivocally states "a partner is not a co-owner of partnership property and has no interest in partnership property which can be transferred, either voluntarily or involuntarily." Article 5, Section 2 states that "the only transferable interest of a partner in the partnership is the partner's share of the profits and losses of the partnership and the partner's right to receive distributions. The interest is personal property." Therefore, it is clear from these provisions of the Uniform Partnership Act that a partner, individually, is not an owner of any title of partnership real property. If Appellee is not an owner in the title to the subject real property titled in the name of the partnership, then on what legal basis can it be held that a partner is entitled to personal notice to redeem? There is no legal basis.

There is nothing in this record to prove, or even suggest that Appellee was a lien holder of record or even a creditor of the partnership in which the real property in question went delinquent, therefore, Appellee has no claim as a lien holder to notice to redeem. In short, Appellee was not legally entitled to notice to redeem in this case and the Clerk's Deed to Lafferty should not be set aside on the grounds that the Appellee did

not receive notice to redeem by Certified Mail as required by Section 22 of Article 3 of the Sheriff Tax Lien Sale Act.

Out of an abundance of caution, Lafferty notified Jerry C. Whitt, one of the partners since he had liens filed against him, his home address was on record in the Clerk's Office and, therefore, he was personally served. Had the Partnership Agreement, which was of record in the aforesaid Clerk's Office complied with the statutory requirement of Chapter 47A, Article 3, Section 3 and listed the address of the partners as so required, Appellee would have been served, but since it only listed the names of the partners, but no address, Appellee was notified through publication on two occasions.

Since jurisdiction over the real property is properly in the Sheriff to sell, and the Clerk to convey, pursuant to statute, and since a partner by statute is not an owner of partnership property titled in the partnership's name, the requirement of notice to any non-owner or non-lien holder would be in the nature of a quasi in rem action, which would only require constructive notice (See 62B Am Jur Process 151), and the record clearly shows that Appellee was served by notice of publication, not once, but twice, by the Clerk prior to the date to redeem expired as required by Article 3, Section 22.

ARGUMENT ON ISSUE 2

This Court's review of a Circuit Court's entry of Summary Judgment is de novo. (See Hicks ex rel Saus v. Jones, supra).

Under the Uniform Partnership Act codified at Chapter 47B, Article 1, Section 2 Knowledge and Notice at subsection (c), it states that "a person notifies or gives a notification to another by taking steps reasonably required to inform the other person in ordinary course, whether or not the other person learns of it." Subsection (a) provides

that a person receives a notification when the notification: (1) comes to the person's attention: or (2) is duly delivered at the person's place of business or at any other place held out by the person for receiving communications. In this case, the Appellee and his partner placed on record their Partnership Agreement, which specifically states that its place of business is P.O. Box 685, Beckley, West Virginia. Service was made on P.O. Box 685, Beckley, West Virginia, and even though no one claimed the notice over a three week period, the notice complies with the provision of the partnership act. Subsequently, the notice to Whitco Associates was published as required by Chapter 11A, Article 3, Section 22.

Chapter 47B, Article 2, Section 1 specifically provides that a partnership is an entity distinct from its partners. Chapter 47B, Article 2, Section 3 provides that "property acquired by a partnership is property of the partnership and not of the partners individually." Chapter 47B, Article 2, Section 4 provides that property is the partnerships when (a) property is partnership property if acquired in the name of the (1) partnership.... In this case, the property was titled in Whitco Associates, therefore, the Appellee, while a partner, did not own the property individually. Therefore, he could only redeem in the name of the partnership and could not redeem individually. Since all reasonable efforts to notify the owner, the partnership, Whitco Associates, was made; the individual partners were not required to be notified even though Lafferty tried to notify the partners by reasonable means. Chapter 47B, Article 3, Section 3 provides that a partnership may file a statement of a partnership's authority and if the partnership does it must include several facts, including (iii) the names and mailing address of the partners. The

agreement filed in the Clerk's Office did not include the partner's addresses. If it had, Appellee Cogar would have been notified at that address.

The Court below has found that a Partner is entitled to notice to redeem individually with respect to property sold by the Sheriff at a tax sale, which was owned by a partnership, which Lafferty believes is clear error based upon the Uniform Partnership Act, Chapter 47B, Article 2, Section 4. The Court cited no valid legal authority for the basis for its ruling that a partner was entitled to notice individually.

There is a difference between a right to pay taxes or redeem property which has been sold for taxes under Chapter 11A, Article 3, Section 23, and the right to receive notice to redeem under Article 3, Sections 19 and 21, which provisions do not define who is to receive notice to redeem, but as a general proposition and logically only the owner of the property and any and all undivided interest owners and any lien holders of record are entitled to notice. While it may be true that a partner may redeem the partnership property, the partner's redemption is for and on behalf of the partnership. This is no different than the President of a Corporation or an Officer of a Corporation being an agent or any of its shareholders of the Corporation redeeming same for the Corporation, but the President or the Officers or shareholders are not entitled to notice personally to redeem only the entity itself is entitled to notice. The Uniform Partnership Act by the provisions cited above and Article 2, Section 1, which state that "a partnership is an entity distinct from its partners" and Article 3, Section 1 (1) and (2) makes a partner equivalent to a shareholder or Officer of a Corporation and the Acts intent was to make Partnerships similar to Corporations. This is particularly true if the provisions of Article 3, Section 7 (c) and (d) are considered as to its identity. Therefore, there is no legal

reason that a partner individually should be entitled to personal service of the notice to redeem.

Lafferty asserts that when the partners filed a copy of the Partnership Agreement of record in the Clerk's Office (see Plaintiff's Exhibit B to the Complaint) it was notice to the world of the Partnership and its place of business address. Notice was sent to the address listed on the Partnership Agreement as so filed with the Clerk. In this case, notice was sent to the Partnership known as Whitco Associates, the owner of the property in question, at the P.O. Box listed in the Partnership Agreement, which was never picked up by the Partnership and, thereafter, the Partnership was also notified by publication as required by law. Therefore, everything required of the purchaser to give notice was done. The fact that Jerry Whitt, one of the partners, was served with notice and the Appellee served by publication was more than was required by law, but Lafferty and the Clerk did everything it could do to give notice to the owner, Whitco Associates, of its right to redeem but no redemption occurred in the time required by law and the Clerk properly and legally conveyed the property to Lafferty pursuant to the statute. There is no explanation by the Appellee as to why, being a Partner, that he was not aware of the fact that the taxes on said property were not paid, nor as to why the Partnership did not pick up its mail from the listed P.O. Box in the Partnership Agreement in the three weeks the Postal Service attempted to deliver said notice. There is no explanation by the Appellee as to why he did not read the newspaper during the three weeks the notice was published for the Partnership or himself, individually, his only claim to setting aside the Clerk's Deed is that no notice was served on him, which this writer believes is a false premise in the first instance based upon the Partnership Act.

The Court below properly found that pursuant to the West Virginia Partnership Act codified at Chapter 47B, *et seq.*, that the Appellee is not an owner of real property titled in the partnership's name, which is an undisputed fact in this case with respect to the real property which is the subject matter of this action. The Court also properly found that the interest of a partner in a partnership is only the right to receive distributions of the profits, which is personal property.

Furthermore, the Court also properly found that the Appellee did not acquire a personal legal obligation for the partnership's obligation to pay the real property tax on the partnership's property and, therefore, the Appellee was not entitled to notice as a creditor for the failure of the partnership to pay real property taxes on the subject property.

There is no evidence in this record that the Appellee is a creditor of the partnership known as Whitco Associates, because of any loan made to it by the Appellee or the payment of any obligation of the partnership for which the Appellee would be entitled to reimbursement pursuant to Chapter 47B, Article 4, Section 1. The subparagraph (c) gives rise to the partnership's obligation to reimburse the partner only if such a loan to or for a payment on behalf of the partnership was actually made to reimburse the partner. There is no corresponding obligation placed on the partner to make any loan or to make any payment for or on behalf of the partnership. Therefore, under the facts in this case, where there is no such loan or payment alleged or proven that would make the Appellee a creditor of the partnership, the provisions of Chapter 47B, Article 4, Section 1 have no application to the facts in this case as the Court below seems to have found and relied upon. This is error.

The Court cited the provision of Chapter 47B, Article 4, Section 1(c) as grounds for the Appellee to be entitled to personal service by certified mail to redeem. However, there is no where in the Section 1 of Article 4 or anywhere else in the partnership statutory provisions that gives the Appellee as a partner a lien on the assets of the partnership in lieu of reimbursement and the subsection (c) specifically states that no other partner shall be required to reimburse the paying partner, except in dissolution of the partnership if not satisfied during the partnership's existence. Therefore, Section 1(c) does not make the Appellee a creditor of the partnership, nor establish the Appellee as a lien holder even if he had paid a debt or, in this case, taxes to protect the asset in question. Since the Appellee paid no prior taxes for which he would be entitled to reimbursement, this provision of the partnership act does not create in the Appellee a right to personal service of notice to redeem simply because he is a partner in the partnership.

The Court below also cited the case of Rollyson v. Jordan, 205 W.Va. 368, 518 S.E.2d 372 (1999) as authority to find that the Appellee was entitled to personal service of the right to redeem. In Rollyson, supra, the descendants of the owner of a one-half interest in a note that was secured by a Deed of Trust on the specific property were held entitled to personal notice because they had the right to pay taxes on the property to protect their first lien status on the property. That case has no relevance to the issue presented by this case since the Appellee, as a partner, has no duty or obligation to pay taxes on the assets of the partnership, pursuant to Article 4, Section 1, nor is personally liable for the non payment of taxes under Chapter 11A, since the Sheriff's only remedy against the delinquent tax payer is to sell the lien on the real property at public auction.

Therefore, since a partner has no duty or obligation to pay real property taxes, nor is personally liable for non-payment of the taxes, his right to reimbursement only makes his interest in paying taxes derivative of the partnership itself because the partner is not an owner, nor lien holder, nor has any interest in the partnership assets specifically, as the Court below pointed out on Page 5 of its written opinion.

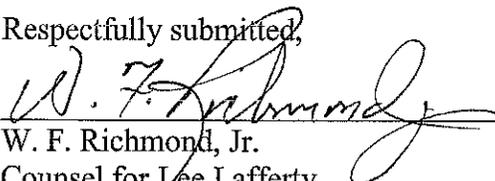
The Court below was clearly wrong to have granted Summary Judgment for the Appellee and must be reversed.

Appellee, in his response brief, to the Petition for Leave to Appeal asserted that a partner is a Trustee for partnership property based upon Chapter 47B, Article 4, Section 4(b)(1), which is a misinterpretation of said subsection. That section is entitled "General Standard of Partner's Conduct and (b)(1) is only referring to partnership property which actually comes into the hands of the partner during the life of the partnership or on winding up the partnership, it does not make the partner a Trustee for all partnership property, particularly property such as is involved in this matter that was from inception titled in the partnership's name. Therefore, the statutory provision cited by Appellee has no relevance to the issue presented on this Appeal.

CONCLUSION

It is respectfully submitted that the Trial Court was clearly wrong to have found that the Appellee was entitled to personal notice to redeem as Appellee was neither the owner of the land, nor a creditor or lien holder of record of the owner of the land and respectfully submits that the Court was clearly and legally wrong and, therefore, the Court's Order of July 19, 2005 should be reversed and remanded with instructions to the Circuit Court to enter an Order granting Defendant's Motion for Summary Judgment.

Respectfully submitted,



W. F. Richmond, Jr.

Counsel for Lee Lafferty

WV State Bar I.D. No. 3095

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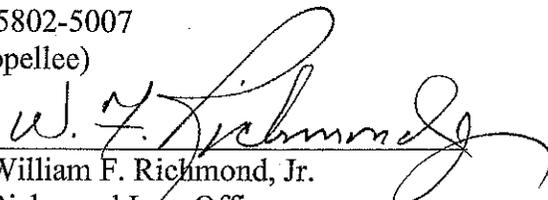
APPELLEE.

FROM THE CIRCUIT COURT OF RALEIGH COUNTY

CERTIFICATE OF SERVICE

I, William F. Richmond, Jr., counsel for Appellant, do hereby certify that the foregoing **BRIEF OF APPELLANT, DOCKETING STATEMENT** and **DESIGNATION OF RECORD** for same have been served upon counsel of record as indicated below by mailing a true and exact copy thereof to the following in a properly stamped and addressed envelope, postage prepaid, and depositing the same in the regular course of the United States mail this 14th day of March, 2006.

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