

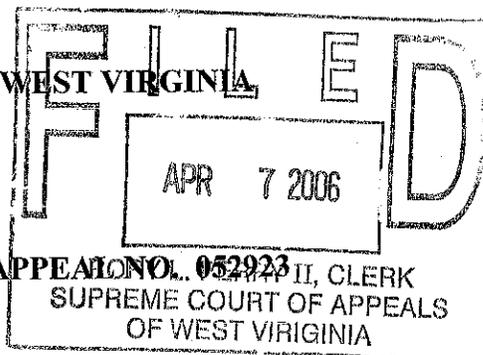
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LEE LAFFERTY,
Appellant,

v.

LOWELL B. COGAR,
Appellee.

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BRIEF OF APPELLEE

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INTRODUCTION

The Appellant, Lee Lafferty, asserts by his appeal that a partner in a West Virginia general partnership is not entitled to a notice of a right to redeem real estate owned by a partnership and sold by the Sheriff for delinquent taxes pursuant to Chapter 11A, Article 3 of the West Virginia Code. Accordingly, a partner in a West Virginia general partnership has no standing to set aside a tax sale deed for failure to receive notice of a right to redeem. Therefore, Lowell B. Cogar, Appellee, and one of two partners in Whitco Associates, the partnership which holds title to the real estate sold at the tax sale, is not entitled to avail himself of the remedy provided in W.Va. Code §11A-4-4 "Right to set aside deed when one entitled to notice not notified."

Appellant makes this argument despite the fact that he listed, "Lowell B. Cogar (address unknown) and any and all unknown heirs of Lowell B. Cogar" as a person to be served a notice to redeem on the list submitted to the County Clerk pursuant to W.Va. Code §11A-3-19 "What a purchaser must do before he can secure a deed." It is stated in W.Va. Code §11A-3-19(a) that a purchaser shall lose benefits of purchase if he fails to meet the requirements set forth therein. W.Va. Code §11A-3-22 requires that the purchaser use "due diligence" to discover the address of any person entitled to notice. Lowell B. Cogar was listed in the local telephone book with his home address. Appellant failed to use due diligence to find the address of Appellee and list the address of Appellee in his list submitted to the County Clerk of those entitled to receive notice. This failure of Appellant by itself forfeited the benefits of the tax sale purchase as a matter of law for noncompliance with W.Va. Code §11A-3-19.

Contrary to Appellant's assertion, Appellee was entitled to receive notice of right to redeem pursuant to W.Va. Code §11A-2-23(a) which provides: "After the sale of any tax lien on

any real estate... the owner of, **or any other person who was entitled to pay the taxes on** [Emphasis added], any real estate for which a tax lien thereon was purchased by an individual may redeem at any time before a tax deed is issued for the real estate.” For reasons set forth hereafter, Appellee, Lowell B. Cogar, was a person entitled to pay taxes on the real estate and thus was entitled to receive a notice to redeem in conjunction with a purchaser’s application for a tax deed. Appellant failed to provide the required notice to redeem to Appellee; therefore, Appellee is entitled to have the tax deed set aside pursuant to W.Va. Code §11A-4-4.

STATEMENT OF THE CASE

Appellee, Lowell B. Cogar, is a partner in a West Virginia general partnership known as Whitco Associates. The other partner is Jerry C. Whitt. The partnership entity was the owner of record for certain real estate (“Partnership Real Estate”) located in Raleigh County, West Virginia. Unfortunately, the real estate taxes on the property were not paid for the year 2001. A Sheriff’s sale for delinquent taxes was held for the Partnership Real Estate on November 22, 2002, and Appellant, Lee Lafferty, was the successful bidder for the sum of \$1,500.00.

On December 20, 2003, Appellant filed a document with the Clerk of the County Commission of Raleigh County, West Virginia (“Clerk”) titled “List of those to be served with notice to redeem for preparation and service of notice”. On that document Appellee was listed with address unknown.

On January 6, 2004 the Clerk mailed a notice of the right to redeem to Whitco Associates and Jerry C. Whitt to addresses set forth on the list provided by Appellant. No notice was sent to Appellee because Appellant listed no address for Mr. Cogar. Instead, the Clerk published in the local newspaper a notice listing Whitco Associates, Jerry C. Whitt and Lowell B. Cogar as parties that could redeem the Partnership Real Estate before April 1, 2004. The Notice to

Redeem ran once per week for three successive weeks commencing February 12, 2004 and ending February 26, 2004. The Notice to Redeem contained an error in the amount paid by Appellant at the Tax Sale and listed the amount paid by Mr. Lafferty as \$876.64. As a result of this error, the amount to redeem was incorrectly listed as \$1,301.14. The correct amount to redeem was \$1,924.50.¹

The Partnership Real Estate was not redeemed prior to the April 1, 2004 deadline. The Clerk issued a Quitclaim Deed to Appellant on April 7, 2004 for the Partnership Real Estate, which was recorded the following day.

NATURE OF PROCEEDING AND RULING OF LOWER COURT

On June 16, 2004, Appellee filed a Complaint in the Circuit Court of Raleigh County, West Virginia which named Appellant as the defendant. The Complaint sought relief pursuant to W.Va. Code §11A-4-4(a) and requested that the tax sale deed of the Partnership Real Estate be set aside for failure to serve a Notice to Redeem on plaintiff, Lowell B. Cogar.

The Complaint averred that Lowell B. Cogar was a person entitled to receive a Notice to Redeem and that notice by publication was not sufficient because due diligence of the purchaser would have found his address in the local telephone book, so as to allow the Clerk to provide personal service. It was also averred that plaintiff had no actual notice of the tax sale.

The parties to this civil action filed respective motions for summary judgment. The Circuit Court, after briefs and a hearing, ruled that Appellee, as a partner in a partnership was a person who is "entitled to pay the taxes thereon" (referring to the Partnership Real Estate) pursuant to W.Va. Code §11A-3-23(a).

¹ See "Motion for Summary Judgment of Defendant Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure" paragraph 4, in which Appellant admitted to the error.

In support of this ruling W.Va. Code §47B-4-1(c) was cited in the May 19, 2005

Memorandum of the Court with the following findings:

A partnership shall reimburse a partner for payments made and indemnify a partner for liabilities incurred by the partner **in the ordinary course of the business** of the partnership or **for the preservation of its business or property**. [Emphasis added.]

The Circuit Judge reasoned that:

Payment of property taxes can fall into either of those categories. It is within the ordinary course of business, or it is an act necessary to the preservation of the property. The effect of this provision is that by operation of partnership law a partner is permitted to redeem and the partnership must reimburse him if he does...

Accordingly, it is the Court's opinion that Plaintiff had the right to redeem the property and that he was correctly included on the list prepared by the Defendant of the persons who had a right to redeem. The failure of the Clerk to give Plaintiff notice as required by law causes the tax deed to be void.

Plaintiff's Motion for Summary Judgment was granted by Order entered May 18, 2005.

DISCUSSION OF LAW

I. PLAIN READING OF APPLICABLE STATUTES SUPPORT A BROAD INTERPRETATION OF THE CLASS OF PERSONS ENTITLED TO NOTICE TO REDEEM.

Appellant's argument takes a simplistic approach and contends that a partner does not have standing to be a person entitled to a Notice to Redeem for partnership real estate because: (1) he is not the owner of the real estate; and (2) he is not a lien holder encumbering the real estate. Accordingly, Appellee, as the partner in a partnership that owns real estate sold for delinquent taxes has no standing to set aside the tax deed. Appellant concedes that Appellee was not provided proper notice; however, improper notice is irrelevant because only those entitled to receive a Notice to Redeem are allowed by statute to set aside the tax deed, and Appellee was not such a person. Consequently, the Circuit Court's ruling that voided the tax sale deed for the failure to provide a Notice to Redeem to Appellee was in error and should be vacated.

W.Va. Code §11A-3-23(a) states:

After the sale of any tax lien on any real estate..., 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 may redeem at any time before a tax deed is issued for the real estate.

Thus, this statute defines those vested with the right to redeem much broader than Appellant's contention and includes not only property owners and lienholders, but also any other person who was entitled to pay the taxes on the real estate subject to the sale. Our Court addressed those required to receive a notice to redeem in *Rollyson v. Jordan*, 205 W.Va. 368, 518 S.E.2d 371 (1999) and held in Syllabus Point 4 that :

The persons entitled to notice to redeem in conjunction with a purchaser's application for a tax deed, pursuant to W.Va. Code §11A-3-19(a)(1) (1994) (Repl. Vol. 1995), are those persons who are permitted to redeem the real property subject to a tax lien or liens, as contemplated by W.Va. Code §11A-3-23(a) (1995) (Repl. Vol. 1995), which person include "the owner" of such property and "any other person who was entitled to pay the taxes" thereon.

For Appellant's contention to be valid, this Court must conclude that lienholders are the only class of individuals or entities other than the owner that are entitled to pay taxes on the real estate for which a tax lien was sold. Such a finding is not supported by the applicable law.

Appellant relies on W.Va. Code §11A-1-9 as restricting the class of persons entitled to pay taxes on real estate to owners and lienholders. The relevant portion of this statute provides:

Any owner of real estate whose interest is not subject to separate assessment, or any person having a lien on the land, or on 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. [Emphasis added.]

It is readily apparent that persons allowed to pay taxes on real estate includes not only owners and liendholders but also persons having an interest to protect in the real estate. "Where the language of a statute is clear and without ambiguity the plain meaning is to be applied

without resorting to the rules of interpretation.” Syllabus Pt. 2 *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 897 (1974). The Circuit Court’s ruling which cited W.Va. Code §47B-4-1(c) under the West Virginia Uniform Partnership Act is clearly consistent with a reading of W.Va. Code §11A-1-9 in that it acknowledges the right of a partner to protect or preserve partnership property. “Statutes which relate to the same subject matter should be read and applied together so that the Legislature’s intention can be gathered from the whole of the enactments.” Syllabus Pt. 3, *Smith v. State Workmen’s Compensation Comm’n*, 159 W.Va. 108, 219 S.E.2d 361 (1975). Therefore, a partner would be a person possessed of an interest in the partnership real estate so as to be entitled by law to protect the real estate by paying the tax assessments thereon. It was the partners that invested the money or borrowed the funds for the real estate purchase. Would they not have the right to protect their investment and be legally allowed to pay the taxes on real estate? What public policy would be served by interpreting a broadly written statute conferring the right to pay tax assessments on real property as prohibiting partners from paying taxes on partnership real estate? The answer is there would be none, and that a partner would be a person entitled to pay the tax assessments on partnership real estate.

II. REDEMPTION STATUTES SHOULD BE LITERALLY CONSTRUED IN FAVOR OF REDEMPTION SO AS TO BE CONSTITUTIONAL AND IN CONFORMANCE WITH COMMON LAW.

Appellant cited W.Va. Code §47B-5-2 for the proposition that a partner in a partnership owning real estate only has an interest in a share of profits and losses of the partnership, and that this interest is personal property. Therefore, a personal property interest of the partner does not constitute an interest in the real estate so as to qualify a partner as a person entitled to pay taxes on the real estate pursuant to W.Va. Code §11A-1-9.

As stated previously, a plain reading of W.Va. Code §11A-1-9 includes owners, lienholders and others having an interest in the land to protect as parties allowed to pay taxes on

real estate. The issue presented is whether a partner is a person vested with an interest to protect in partnership real estate so as to be allowed by statute to pay taxes on the real estate. Furthermore, if a partner is entitled to pay taxes on real estate then Appellant was required to serve notice of the right to redeem on Appellee pursuant to W.Va. Code §11A-2-23(a). The conclusion to this issue of law is that a partner is entitled to pay taxes on the partnership real estate because a partner has a right to the rents or other profits from the real estate and this right constitutes an interest to protect. A financial stake in the profits to be derived from the partnership real estate is an interest in the real estate that a partner is permitted to protect.

The class of persons entitled to pay real estate taxes is broadly written in W.Va. Code §11A-1-9 to include more than the owner of real estate and lienholders and also includes any person having an interest to protect in the real estate. This statute should be interpreted broadly to include all parties having a distinct interest in the real estate. See *Diggs v. Com.*, 6 Va App 300 369 S.E.2d 199 (1988) for the proposition that if the intent of the statute is broad, then the statute is not ambiguous and should be interpreted as written.

The weight of authority from other jurisdictions support persons other than those with a perfected interest in the real estate as having a sufficient interest in the real estate so as to possess a right to redeem. The following are examples of persons with a right to redeem other than owners or lienholders taken from 72 Am Jur 2d (2001 Ed.) State and Local Taxation §910-§913 and includes those entitled to: 1) rents and profits; 2) equitable interest in ownership; 3) right of entry; 4) right of possession or enjoyment; 5) owners of contingent interests; 6) shareholders in corporate assets; 7) co-tenants; 8) or minors or other persons under disability. [Citations omitted.]

W.Va. Code §47B-5-2 entitles a partner to a share of profits and losses from the partnership, to include income from partnership real estate. It further provides that such right would be a personal property interest. This personal property interest is afforded protection under Article III §10 of the Constitution of West Virginia². Therefore, this personal property interest cannot be taken or transferred by the State without due process of law which requires both notice and a reasonable opportunity to contest prior to the deprivation.

If W.Va. Code §11A-1-9 is interpreted as proposed by Appellant to include only record title owners and lienholders, and then applied to §11A-3-19(a)(1) as contemplated by W.Va. Code §11A-3-23(a) as limiting those entitled to a notice to redeem to owners and lienholders of real estate, it would be violative of the due process protection provided by the West Virginia Constitution. Such an interpretation would not protect all the "property interest" established by our common law because it would exclude personal property interests. Consequently, such an interpretation would violate the rule of statutory construction set forth in Syllabus Point 2 of *Smith v. W. Va. State Bd. of Educ.*, 170 W.Va. 593, 295 S.E.2d 680 (1982) which states:

"One of the axioms of statutory construction is that a statute will be read in context with the common law unless it clearly appears from the statute that the purpose of the statute was to change the common law."

It is evident that the applicable statutes are not intended to restrict property rights and are written broadly enough to favor redemption. "Whenever an act of the Legislature can be so construed and applied as to avoid a conflict with the Constitution and give it the force of law, such construction will be adopted by our courts." Syllabus Pt. 4, *State Ex Rel Mountaineer Park v. Polan*, 190 W.Va. 276, 438 S.E.2d 308 (1993).

² A property interest under the Constitution includes not only traditional real and personal property, but also extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing laws or understandings. *White v. Civil Ser. Comm.*, W.Va. 154, 261 S.E.2d 164 (1977).

Property rights are protected under Article III, §10 of the West Virginia Constitution. Personal property rights are included under our common law as rights entitled to constitutional protection; therefore, the right of a partner to receive rents or profits to be derived from partnership real estate is likewise protected. It naturally follows that if the real estate is taken or transferred by governmental action, it would constitute a deprivation of the rights to the rents or profits generated from the real estate. A partner is entitled to his share of rents or profits from partnership real estate, and thus possesses an interest in the real estate. The fact that the interest is personal property derived from real property, and not the real estate itself as asserted by Appellant, does not lessen the constitutional due process protections afforded the partner because the Constitution protects both real and the personal property interests.

CONCLUSION

Appellee, as a partner in a West Virginia general partnership, possesses a property interest in the partnership real estate so as to entitle him to pay the property tax assessment on the partnership real estate pursuant to W.Va. Code §11A-1-9. The property interest in the partnership real estate includes all benefits to the partner resulting from the ownership of the real estate by the partnership. The principal benefit derived by a partner is the right to share in the income or profit or rents generated from the partnership real estate. This right to income from partnership real estate is the personal property of the partner and provides the partner an "interest in the land" as contemplated by W.Va. Code §11A-1-9 and confers upon the partner, pursuant to W.Va. Code §11A-2-23(a), the status of a person allowed to redeem real estate sold at a tax sale because he is a "person who was entitled to pay the taxes on any real estate for which a tax lien thereon was purchased by an individual may redeem at any time before a tax deed is issued for the real estate."

Appellee, as a person entitled to redeem the sale of the tax lien or real estate, was entitled to a notice to redeem pursuant to W.Va. Code §11A-3-19(a)(1). Since Appellee was not provided the required notice to redeem, it is his right pursuant to W.Va. Code §11A-4-4(a) to set aside the tax sale deed. Accordingly, the lower court's ruling voiding the tax sale deed for failure to provide Appellee a proper notice to redeem should be affirmed.

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APPEAL NO. 052923

CERTIFICATE OF SERVICE

I, WILLIAM D. STOVER, counsel for Appellee, Lowell B. Cogar, do hereby certify that I have served the foregoing **BRIEF OF APPELLEE**, by placing a true and exact copy thereof in the United States Mail, postage prepaid this the 04th day of April, 2006:

W. F. Richmond, Jr.
Attorney for Appellant
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WILLIAM D. STOVER