

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 35442

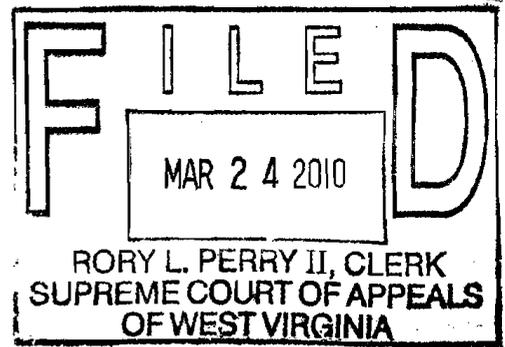
EARL J. REYNOLDS and
ANNA REYNOLDS,

Petitioners/Appellants,

v.

JERRY I. HOKE, SR.,

Respondent/Appellee.



Appellee's Brief

Appeal from the Circuit Court of Monroe County

Honorable Robert A. Irons, Judge

Case No. 08-C-52

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Counsel for the Appellee, Jerry I. Hoke, Sr.

I.

KIND OF PROCEEDING AND NATURE OF RULING

This appeal concerns the validity of a tax deed granted to the Appellee, Jerry I. Hoke, Sr. The Appellants allege that they were entitled to notice of the right to redeem the subject property before a tax deed was granted to Mr. Hoke. Since such notice was not given, they contend that the tax deed should be set aside.

On the other hand, Mr. Hoke maintains that the Appellants were not entitled to notice of the right to redeem as they were not the record owners of the subject property at the time the tax lien attached, and possessed only a quitclaim deed that was not even within the chain of title. Accordingly, Mr. Hoke avers that the Monroe County Circuit Court properly granted him summary judgment after considering all of the facts and circumstances of this matter, as he took all reasonable steps necessary to assure that notice of the right to redeem was provided to the appropriate persons so entitled.

II.

STATEMENT OF FACTS

The small tract of land which is the subject of this dispute was deeded to Bill and Rose Reynolds in 1977, and is located at Moncove Lake near Gap Mills, Monroe County, West Virginia. The 2005 property taxes assessed against this land went delinquent, and the tax lien was sold at the Monroe County Sheriff's tax sale on October 24, 2006. See Certificate of Sale dated October 24, 2006 (attached as an Exhibit to Respondent's Response to Petitioner's Interrogatories). Jerry I. Hoke, Sr., purchased this parcel at the tax sale. Id.

Following the tax sale Mr. Hoke requested a title examination be performed on the subject tract by the undersigned law firm in order to determine what persons were entitled to receive notice of the right to redeem. Affidavit of Darla M. Ingles, ¶ 2. The title search revealed that the property was owned by Bill and Rose Reynolds. Id. at ¶ 3(a). The title examination also showed that there had been no deed or outconveyances from Mr. and Mrs. Reynolds, or their respective Estates, to any other party. Aff. at ¶ 3(c). Finally, the title search confirmed that there were no probate records filed for either Mr. or Mrs. Reynolds, nor any other record indicating that they were no longer alive, or if deceased, whether they passed testate or intestate. Id. at ¶3(b) and (c).

Pursuant to the results of the title examination Mr. Hoke requested that the Monroe County Clerk send notice of the right to redeem to Bill and Rose Reynolds at the address listed for them on the Certificate of Sale in Van, West Virginia, as this was the address to which their tax statements were being sent. See Request to Notify (attached as an Exhibit to Respondent's Response to Petitioner's Interrogatories). Since Beverly Haynes' name was also listed on the Certificate of Sale a separate notice was sent to her out of an abundance of precaution (although there was no instrument of record showing that she had any interest in the subject property, or any fiduciary relationship to either Bill or Rose Reynolds).

Ms. Haynes accepted and signed the certified mail receipt for all three notices. See Certified Mail Domestic Return Receipts (attached as an Exhibit to Respondent's Response to Petitioner's Interrogatories). Notices were also mailed to Bill and Rose Reynolds at the address listed on their original deed, but these notices were not accepted. See Envelopes Stamped Not Deliverable as Addressed (attached as an Exhibit to Respondent's Response to Petitioner's Interrogatories). In addition to the actual notice that was accepted by Beverly Haynes on behalf of the landowners, constructive notice was also given to any and all other parties who may have been interested in the subject property by virtue of a legal notice published in the local newspaper to "Bill Reynolds and

Rose Reynolds, The Unknown Heirs and Creditors of Bill Reynolds and Rose Reynolds" advising of the right to redeem the subject property. See Certificate of Publication (attached as an Exhibit to Respondent's Response to Petitioner's Interrogatories). After the time had passed for redemption, and with no person having redeemed the property, Mr. Hoke requested and was issued a deed to the tract by the Monroe County Clerk on April 15, 2008. Exhibit B, Petition to Set-Aside Deed.

The Appellants claim that they received an interest in the subject property by virtue of a quitclaim deed dated February 8, 2006, which was signed on March 27, 2006, and recorded on June 7, 2006. Exhibit A, Petition to Set-Aside Deed. Their deed was recorded after the property taxes on this parcel had already gone delinquent. Appellants' Grantor was "BEVERLY HAYNES", as so identified in all capital letters at the top of the deed. The Appellants, "ANNA REYNOLDS and EARL J. REYNOLDS" were similarly labeled with all capital letters as the grantees.

Although there was reference to the passing of Bill and Rose Reynolds in the body of the deed - and to a judgment¹ in a case

¹The final paragraph of the deed indicates that it is "in furtherance of a judgement in the case styled: The Estate of Bill Reynolds, Jackie Reynolds, Jim Reynolds, and Anna F. Reynolds v. Beverly Haynes, filed in Boone County, West Virginia[.]" However, no such judgment was recorded with the deed (or at anytime thereafter). A copy of a "Settlement Agreement" signed the same date as the deed was attached to the Petition filed below, which presumably was the document erroneously referred to as a "judgement" within the body of the deed. Exhibit C,

involving the Estate of Bill Reynolds in Boone County - there was no effort made in the drafting of the deed to indicate that it should be indexed under the names of either of the allegedly deceased persons.

Consequently, it is not disputed that this quitclaim deed was not indexed under the name of either Bill Reynolds or Rose Reynolds, and therefore would remain hidden from a title searcher. Moreover, the deed failed to even indicate exactly what interest in the subject property may have even been owned by Beverly Haynes, and therefore what interest, if any, she actually conveyed to the Appellants. Accordingly, it is impossible to determine from reviewing this deed whether it actually transferred any interest in the subject property to the Appellants. In any event, since this deed was not discovered during the title examination, no notice of the right to redeem was mailed to the Appellants.

Petition to Set-Aside Deed.

III.

TABLE OF AUTHORITIES

W.Va. Code § 11A-4-4(b) 9, 10, 11
W.Va. Code § 11A-1-2.10
W.Va. Code § 11A-1-3.10
66 Am.Jur. 2d, Records and Recording Laws § 110 (2008).13
Citizens Nat'l Bank v. Dunnaway, 184 W.Va. 453, 400 S.E.2d 888
(1990) 13,14
W.Va. Code § 11A-3-1915
W.Va. Code § 11A-3-2315
W.Va. Code § 11-22-616
W.Va. Code § 11-4-816
W.Va. Code § 11A-3-217

IV.

STANDARD OF REVIEW

A circuit court's entry of summary judgment is reviewed de novo. Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755, Syll. Pt. 1 (W.Va. 1994).

No title acquired pursuant to this article shall be set aside in the absence of a showing by clear and convincing evidence that the person who originally acquired such title failed to exercise reasonably diligent efforts to provide notice of his intention to acquire such title to the complaining party or his predecessors in title. W.Va. Code § 11A-4-4(b).

V.

RESPONSE TO ASSIGNMENT OF ERROR

The Monroe County Circuit Court did nor err in granting summary judgment to the Appellee as:

1. The Appellants were not the record owners of the subject property at the time the tax lien attached, and notice of the right to redeem was properly given to their predecessors in title.
2. The Appellants have failed to establish that they own any interest in the subject property as their deed is outside the chain of title and were therefore not entitled to notice of the right to redeem.
3. There was no duty on behalf of the Appellee to make some additional inquiry at the Assessor's and/or Sheriff's office in order to properly examine the state of the title to the subject property for purposes of identifying those persons entitled to notice of the right to redeem.

VI.

DISCUSSION

As the purchaser of a tract of land at the Sheriff's tax sale, Jerry Hoke had the responsibility to make reasonably diligent efforts to provide a notice of the right to redeem to the persons so entitled, and the Appellants herein had the burden of proving by clear and convincing evidence that he did not do so in order to have his tax deed set aside:

No title acquired pursuant to this article shall be set aside in the absence of a showing by clear and convincing evidence that the person who originally acquired such title failed to exercise reasonably diligent efforts to provide notice of his intention to acquire such title to the complaining party or his predecessors in title.

W.Va. Code § 11A-4-4(b) (Emphasis supplied). However, the Appellants presented absolutely no evidence below that the efforts made by Mr. Hoke to give the appropriate persons notice of the right to redeem were not reasonable in all respects.

To the contrary, the undisputed evidence in this case shows that the record owners of the subject property were given actual notice; and, that the Appellants did not even have a deed within the chain of title for this property. Obviously recognizing these fatal flaws with their case, the Appellants assert that Mr. Hoke should have made additional inquiries outside of the office where the property records for Monroe County reside and beyond the scope of a normal title examination. However, absolutely no evidence was presented suggesting such efforts were necessary. Consequently,

the Monroe County Circuit Court's decision to grant summary judgment in favor of Mr. Hoke should be upheld.

1. The Appellants were not the record owners of the subject property at the time the tax lien attached, and notice of the right to redeem was properly given to their predecessors in title.

Pursuant to W.Va. Code § 11A-1-2, the lien for the 2005 real estate taxes assessed against the subject tract attached to it on July 1, 2004. Accordingly, anyone acquiring title to the property after that date would obviously be charged with notice of that lien, and of the duty to pay those taxes before they went delinquent. Pursuant to W.Va. Code § 11A-1-3, the taxes for both halves of the tax year became delinquent for this tract by April 1, 2006. It is undisputed that the Appellants acquired their deed after the tax lien attached (it was signed on March 27, 2006), and recorded it after the taxes were delinquent (on June 7, 2006). Exhibit A, Petition to Set-Aside Deed. Obviously, they took whatever interest they acquired in the property subject to the tax lien.

However, having acquired an alleged interest in the subject property after the tax lien attaches does not necessarily entitle them to notice of the right to redeem if the property is later sold at the tax sale. In fact, W.Va. Code § 11A-4-4(b) specifically recognizes that notice "to the complaining party or his predecessors in title" is sufficient. Obviously, there would be no reason for this code section to read in that fashion unless it was

meant to apply to the situation at hand - where persons with alleged title acquired after the tax lien attaches complain about a lack of notice.

The bottom line is simple. The taxes went delinquent under the name of Bill and Rose Reynolds, and it is completely undisputed that there were no records on file in the Monroe County Clerk's Office that any title researcher could have found which would have identified any other persons as the record owners of the property.² These persons were therefore the ones to whom notice of the right to redeem was owed, and such notice was actually served and accepted by their agent.³ Consequently, as the Appellants' predecessors in title did receive actual notice, the Appellants themselves cannot now have the tax deed set aside as specifically prohibited by W.Va. Code § 11A-4-4(b).

²The Appellants concede in their Brief that their deed was not indexed under the name of either Bill or Rose Reynolds as grantors, and that no probate records had been filed for either of them in Monroe County. Appellant's Brief, p. 4.

³The Appellants allege that Beverly Haynes was Executrix of the Estate of Bill Reynolds, although this fact has never been documented, nor is there is any allegation as to the status of Rose Reynolds' Estate. *Id.* It appears that the Appellants' complaint is better directed to Ms. Haynes who would have owed them a fiduciary duty if they are heirs to the Estate of Bill Reynolds, since it is undisputed she received the pertinent notice, and allegedly failed to forward it to them.

2. The Appellants have failed to establish that they own any interest in the subject property as their deed is outside the chain of title and were therefore not entitled to notice of the right to redeem.

The Appellants have the burden of proof in this case and it is an extreme one - clear and convincing evidence. However, they failed to establish the simplest fact of all: That they have a valid title to the subject property which gives them standing to challenge any alleged lack of notice. It is undisputed that they have a deed from a person who is not in the chain of title to the property. There are no records filed in Monroe County proving that Beverly Haynes had any interest whatsoever in and to the subject property which she could convey to the Appellants.

The Appellants contend that Bill and Rose Reynolds are deceased. However, it has never even been suggested whether they died testate or intestate, or who all of their heirs were. Obviously, without the proper recording of probate records such information remains a mystery, and prevents any title researcher from determining what interest, if indeed any, the Appellants may have received in and to the subject tract by virtue of their quitclaim deed (or due to some kinship relationship with Bill and Rose Reynolds). The failure of the Appellants to file any probate records for these Estates along with their deed was a critical omission solely of their own creation which precludes any title searcher from determining that anyone owns the subject property other than Bill and Rose Reynolds.

Accordingly, no title examiner could possibly state that their quitclaim deed constitutes anything more than a cloud on title without such documentation. And, since the deed was not properly drafted so that it would be indexed under the names of Bill and Rose Reynolds, no title examiner can even find it to determine that it constitutes a cloud on title. How can the Appellants complain about the alleged lack of notice, when they cannot even establish they are bona fide holders of an interest in the subject property? If they cannot prove they actually own an interest in the property, then they certainly cannot have the tax deed set aside for lack of notice.

As Judge Irons noted below in his ruling below granting summary judgment:

The burden is on the person seeking to protect himself or or herself, under the recording laws, against the rights of intervening third parties, and to see that all of the prerequisites of a valid and complete recordation are complied with. 66 Am.Jur. 2D, *Records and Recording Laws* § 110 (2008). The Petitioners failed to meet this burden and did not have the deed indexed in such a fashion as to give constructive notice of their interest in the subject real estate to third parties.

Order Granting Respondent's Motion for Summary Judgment, p. 6. The Appellants herein simply have no standing to complain of a lack of notice of the right to redeem when they did not even take the minimal steps necessary to insure their deed was properly indexed and placed within the chain of title to the subject property.

This Court previously recognized in Citizens National Bank of

St. Albans v. Dunnaway, 184 W.Va. 453, 400 S.E.2d 888 (1990), that constructive notice of the right to redeem was sufficient in a situation where a deed of trust was not properly indexed. Noting that "[a]lthough extraordinary efforts might have discovered the deed of trust, extraordinary efforts are not constitutionally required." 184 W.Va. at 458. Since reasonably diligent efforts would not have found the Appellants' deed in this instance, there can be no argument that Mr. Hoke failed to adhere to the statutory requirements necessary to receive a tax deed.

3. There was no duty on behalf of the Appellee to make some additional inquiry at the Assessor's and/or Sheriff's office in order to properly examine the state of the title to the subject property for purposes of identifying those persons entitled to notice of the right to redeem.

The Appellants of course recognize the tenuous nature of their arguments and attempt to deflect attention from their own title issues by arguing that something more was required to determine if they were entitled to notice of the right to redeem rather than a basic title examination. In fact, the Appellants seem to suggest that some sort of verbal inquiry with both the Assessor's office and Sheriff's office should have been made in order to determine who may have had a redeemable interest in the subject property.

Obviously, the Assessor and Sheriff do not maintain records upon which one routinely relies to determine title to real estate, and the Appellants offered no evidence whatsoever to the contrary.

In fact, the Appellants presented no affidavits from any lay or expert witness suggesting that such inquiry was indeed necessary or required, nor do they recite any statutory authority requiring something extra. Quite to the contrary, the applicable statute confirms a title examination is all that is required, and there are other pertinent statutes which otherwise address the concerns raised by the Appellants.

In order to determine exactly what type of inquiry was necessary, one need look no further than to the statutory section which is specifically labeled "What purchaser must do before he can secure deed." W.Va. Code § 11A-3-19. That section specifically refers to the fact that the purchaser can provide the clerk with evidence of the additional expenses he incurred which may include "reasonable legal expenses incurred for the services of any attorney who has performed an examination of the title to the real estate and rendered a written opinion and certification thereon[.]" W.Va. Code 11A-3-19(a). It is also required by W.Va. Code § 11A-3-23(a)(3) that the title examination expenses be paid if the property is redeemed.

There is no statutory authorization for reimbursement of legal expenses beyond a normal title examination. Therefore, it makes no sense to suggest that something beyond a title search was required. However, even though the Appellants may be disappointed with this conclusion there were other statutory provisions which provided

safeguards for them.

At the time of the recording of their deed the Appellants were required by statute to present the Clerk's Office with an appropriately completed Sales Listing Form. W.Va. Code §11-22-6.⁴ This statute required the Assessor to "note any new owner of the real property indicated on the sales listing form upon the landbooks." These changes are supposed to be made on at least a monthly basis to the current year landbooks when the Assessor receives the monthly transfer list from the County Clerk's office. W.Va. Code § 11-4-8.

⁴W.Va. Code § 11-22-6 provides in part:

On or after the first day of July, one thousand nine hundred ninety-six, the clerk may not record any document with or without stamps affixed unless there is tendered with the document a completed and verified sales listing form for the benefit and use of the state tax commissioner. Preprinted forms for this purpose shall be provided to each clerk by the tax commissioner.

The forms shall require the following information: (1) If the last deed in the chain of title represents the last transfer of the property, the names of the grantor and grantee and the deedbook and page number; or (2) if the last transfer was not made by deed, the source of the grantor's title, if known; or (3) if the source of the grantor's title is unknown, a description of the property and the name of the person to whom real property taxes are assessed as set forth in the landbook prepared by the assessor. In all cases the forms shall require the tax map and parcel number of the property, the district or municipality in which the real property or the greater portion thereof lies, the address of the property, the consideration or value in money, including any other valuable goods or services, upon which the buyer and seller agree to consummate the sale, and any other financing arrangements affecting value. The sales listing form required by this paragraph is to be completed in addition to, and not in lieu of, the declaration required by this section[.]

Pursuant to W.Va. Code § 11-22-6, the Sheriff is required, upon receipt of the Sales Listing Form, to send the new owner "such notice as the person would thereafter otherwise be entitled to receive pursuant to the provisions of chapter eleven-a [Collection and Enforcement of Property Taxes] of this code as a result of the person's interest in the real property;" and to advise the new owner "of any due and unpaid taxes assessed against the property." Id. Furthermore, pursuant to W.Va. Code § 11A-3-2, the publication of the second delinquent list for the property taxes would have taken place in September, 2006, and that statute echoed the requirement for the Sheriff to provide notice of the delinquent property taxes to those persons who had submitted a proper sales listing form. W.Va. Code § 11A-3-2(b)(3).⁵

Accordingly, assuming that the Appellants submitted a proper Sales Listing Form and made inquiry as to the status of their taxes at the time of the recording of their deed (which it appears they did not since the taxes were then delinquent); then the Sheriff had a statutory duty to mail them a notice advising of the delinquent taxes then imposed against the property, and to send them notice at the time of the publication of the second delinquent list. Whether

⁵However, this statute also makes clear that allegedly not receiving any such notice is no defense to the granting of a tax deed: "In no event shall failure to receive the mailed notice by the landowner or lienholder affect the validity of the title of the property conveyed if it is conveyed pursuant to section twenty-seven or fifty-nine of this article." W.Va. Code § 11A-3-2(b).

the Sheriff sent such notice to the Appellants is unknown, but there was certainly no extra duty imposed on Mr. Hoke to consult with the Sheriff's Office about the Appellants' title when that Office had statutorily imposed duties to follow.

Furthermore, the Assessor would have had a duty to update the landbooks upon receipt of the sale listing form and/or the Clerk's transfer list. The Appellants introduced evidence below that they had been added to the landbooks for the 2007 tax year. Apparently they were not added for the then current tax year of 2005 when their deed was recorded, or for the following year in 2006. But once again, Mr. Hoke would incur no extra duty beyond procuring a regular title examination as it was not his responsibility to insure that the Assessor's Office was performing its job functions properly.

Accordingly, there were various levels of protection afforded to persons such as the Appellants herein via the statutes recited above. It is difficult to understand exactly why they maintain that Mr. Hoke had some duty not imposed by law or statute to supervise the Offices of the Sheriff and the Assessor for Monroe County or to inquire therein. If these Offices performed their statutory duties then the Appellants concerns would have been addressed, and if not, then some further inquiry by Mr. Hoke would have been fruitless.

PRAYER FOR RELIEF

For the foregoing reasons the Appellee, Jerry I. Hoke, Sr., respectfully requests that this Court enter an Order upholding the granting of summary judgment to him by the Monroe County Circuit Court.

JERRY I. HOKE, SR.
By Counsel



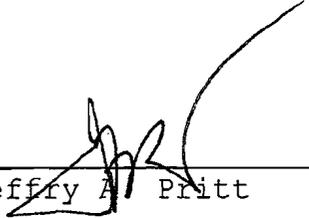
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CERTIFICATE OF SERVICE

I, Jeffry A. Pritt, counsel for the Appellee, Jerry I. Hoke, Sr., do hereby certify that service of the attached APPELLEE'S BRIEF was hereby made upon the Appellants by depositing a true and correct copy of the same in the U. S. mail, postage prepaid, and properly addressed to their counsel of record:

John H. Bryan, Esq.
P.O. Box 366
Union, West Virginia 24983

this 23rd day of March, 2010.



Jeffry A. Pritt