

13-0957

IN THE CIRCUIT COURT OF KANAWHA, COUNTY, WEST VIRGINIA

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KANAWHA COUNTY, WEST VIRGINIA

RAYMOND RICHARD SMITH,

Plaintiff,

vs.

Civil Action No. 09-C-203

Judge Carrie L. Webster

MARIA CATALANO, et al.,

Defendants.

A. MARIA CATALANO,
JEREMY D. CASTO, AND
JERAD D. CASTO,

Plaintiffs,

vs.

Civil Action No. 11-C-565

Consolidated with

Civil Action No. 09-C-203

SUNRISE ATLANTIC, LLC,
a Florida limited liability company,
HARPAGON MO, LLC., a
Georgia limited liability company,
DON MASON and BRENDA
MASON, his wife,

Defendants.

and

DON MASON and BRENDA MASON,
his wife,

Cross Claimants,

v.

HARPAGON MO, LLC., a Georgia
limited liability company,

Defendants.

**ORDER GRANTING PARTIAL SUMMARY JUDGMENT TO
A. MARIA CATALANO, JEREMY D. CASTO AND JERAD D. CASTO**

This matter came on for hearing on October 31, 2012, upon the Motion For Partial

Summary Judgment filed by A. Maria Catalano and her sons Jeremy D. Casto and Jerad D. Casto

(hereinafter the Catalanos); the Responses thereto filed by Harpagon Mo, LLC and Sunrise Atlantic, LLC (hereinafter Harpagon and Sunrise); the Response and Motion For Summary Judgment filed by Don Mason and Brenda Mason (the Masons), and the Reply of the Catalanos to the filings by Harpagon, Sunrise and the Masons.

The Plaintiff in the original proceeding filed in this matter, Raymond Richard Smith appeared by Timothy J. LaFon; the Catalanos appeared by Stephen L. Thompson; the Masons appeared by Charles M. Love, IV; Harpagon and Sunrise appeared by John Kennedy Bailey; Robert Fletcher appeared by Sprague W. Hazard, and The Poca Valley Bank appeared by Michael T. Chaney, their respective attorneys.

Counsel for the parties did argue their respective positions, and the Court did direct the parties to submit proposed orders to the Court in support of their positions, and did take the matter under advisement for consideration of a decision. Upon such consideration, the Court does make the following findings of fact and conclusions of law:

1. The Catalanos acquired the hereinafter described property, located on the north side of Elk River, below Jarrett's Ford, in Elk tax district, Kanawha County, West Virginia (the "Property"), on June 14, 2001:

Beginning at an iron pin in the easterly right of way line of the New York Central Railroad (now property of the State of West Virginia), original corner of the parcel of land conveyed to Edgar A. Frasher and Ruth M. Frasher, his wife, by Ethel Kelley, widow, by deed dated October 21, 1959, and recorded in the Office of the Clerk of the County Commission of Kanawha County, West Virginia in Deed Book 1294 at page 483, and being the northwesterly corner of Lot "A", said iron pin being also in the center line of an eight (8) foot driveway, S. 62° E. 124.33 feet to a set ½ inch iron pipe; thence S. 28° 30' W. 82.78 feet to a ½ inch iron pipe set; thence N. 62° W. 122.90 feet to a set 5/8 inch steel bolt, also in the easterly right of way line of the New York Central Railroad (now property of the State of West Virginia); thence with said right of way line, N. 27° 30' E., 83 feet to the place of beginning, and containing 10,259 square feet, and being 0.235 acre, more or less, all as shown on a map prepared by Wm. D. Mason, P.E.C.E. No. 4280, dated March 17, 1990, and styled

“Survey for D. T. Tyree Division of a Parcel Known as ‘Lots A & B Division of Frasher Property’ Elk District, Kanawha County, West Virginia”, a copy of which map is recorded in the Office of the Clerk of the County Commission of Kanawha County, West Virginia, in Deed Book 2274 at page 165.

2. On or about April 10, 2006, the Catalanos sold the Property to Raymond Richard Smith (“Smith”) and, as Grantors, executed a Deed on April 14, 2006, which was never recorded in the Office of the Clerk of the Kanawha County Commission.

3. At the time of the sale to Smith, the real estate taxes on the Property for the year 2005 had become delinquent and on November 14, 2006, the Sheriff of Kanawha County did sell the tax lien on the Property for the delinquent taxes for the year 2005.

4. Defendant Sunrise Atlantic, LLC, a Florida limited liability company, (“Sunrise Atlantic”) was the purchaser for the sum of \$1,900 of the tax lien on the Property for delinquent taxes for the year 2005 assessed in the names of the Catalanos.

5. By tax deed dated April 9, 2008, and made of record in Deed Book 2718 at page 897, on April 16, 2008, Vera J. McCormick, the Clerk of Kanawha County Commission, conveyed the Property to Defendant Sunrise Atlantic. A copy of the tax deed was attached to the Catalanos’ Motion as Exhibit A (the “Tax Deed”).

6. By Quitclaim Deed dated May 16, 2008, the Defendant Sunrise Atlantic did grant and convey the Property unto the Defendant Harpagon MO, LLC, a Georgia limited liability company (“Harpagon”). A copy of the said Deed as the same appears of record in the Office of the Clerk of the Kanawha County Commission in Deed Book 2729 at page 65, was attached to the Catalanos’ Motion as Exhibit B.

7. By Deed dated June 13, 2008, the Defendant Harpagon did grant and convey the

Property unto the Defendant Don Mason. A copy of the said Deed as the same appears of record in the Office of the Clerk of the Kanawha County Commission in Deed Book 2724 at page 313 was attached to the Catalanos' Motion as Exhibit C.

8. Following the tax sale, the tax sale purchaser, Sunrise Atlantic, filed a statement with the Kanawha County Clerk pursuant to the provisions of W.Va. Code §11A-3-19 stating that the Catalanos were entitled to notice of the right to redeem the property from sale in order that their interest be protected.

9. The attachments to the Tax Deed dated April 9, 2008 from Vera J. McCormick, the Kanawha County Clerk, to Sunrise reflect that a "Notice To Redeem" was to have been mailed to the Catalanos at the following addresses on January 28, 2008:

- a. Box 912, Clendenin, West Virginia, 25045;
- b. 5024 Elk River Road, South, Elkview, West Virginia, 25071; and
- c. 634 McNabb Drive, Elkview, West Virginia, 25071.

10. The Notices to Redeem sent to all the Catalanos at the addresses set forth in Paragraph 9(a) and (b) were returned as undelivered by the United States Postal Service to the Clerk's Office marked "Return to Sender, Not Deliverable As Addressed, Unable To Forward." Copies of the aforesaid returned envelopes, are attached to the Tax Deed dated April 9, 2008 from Vera J. McCormick, the Kanawha County Clerk, to Sunrise.

11. According to the Affidavits of the Catalanoes filed with the Motion and their Reply Memorandum, the Notices to Redeem sent to all Catalanos at the address of 634 McNabb Drive, Elkview, West Virginia, 25071 were never received by them. The envelopes were returned undelivered to the Clerk's Office by the United States Postal Service marked "Return to

Sender, Unclaimed, Unable To Forward.” Copies of the aforesaid returned envelopes are recorded with the Tax Deed.

12. Also according to the Affidavits of the Catalanoes filed with the Motion and their Reply Memorandum, the Catalanos did not receive any notice of their to redeem the Property from the sale for the 2005 real property taxes.

13. The tax sale purchaser, Sunrise Atlantic, chose not to ask the Kanawha County Clerk to cause notice of the right to redeem to be published in any local newspaper.

14. The Catalanos have provided affidavits to the Court, which have not been refuted by any other party, that the Catalanos did not have actual knowledge of the tax sale until 2008 and were unable to redeem the Property at the time they first learned of the sale, as the Tax Deed had already been recorded in the Kanawha County Clerk's Office.

15. Without being served with notice of the right to redeem the Property from the sale to Defendant Sunrise Atlantic, the Catalanos were unable to learn of the said sale, or of the right to redeem the Property from sale.

16. The title of Don Mason in and to the Property is and was void or voidable in accordance with West Virginia Code §11A-4-4 in the event that the prior owners of record were entitled to be served with notice of the right to redeem and no such notice was provided to them.

17. Although Sunrise, Harpagon and Mason have defended this action on, among other grounds, that the Catalanos were aware that taxes were due upon the Property at the time of the sale to Smith, the issue before this Court is the right of the Catalanos to notice of the right to redeem the property from sale, and whether such notice was timely provided to them in the manner required by law.

18. Sunrise, Harpagon and Mason have also defended this action on, among other grounds, that the Catalanos lack the right to redeem the Property from sale for the 2005 real property taxes by reason of the 2006 sale of the Property to Smith, even though the Deed to Smith has never been made of record in the Kanawha County Clerk's Office.

19. The well-established rule in West Virginia is that "[p]ursuant to W.Va. Code §11A-3-23(a), **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" may redeem the Property from sale.

20. The tax sale purchaser "was required by W.Va. Code §11A-4-4(b), to provide notice to parties **who were of record**" at the time of the providing of the required designation to the Clerk of those parties to whom the County Clerk would mail the notices of the right to redeem. *Reynolds v. Hoke*, 226 W.Va. 497, 501, n. 8 (2010).

21. The Deed from the Catalanos to Smith contained covenants of "general warranty" of title, which included an obligation to assure that the real estate taxes for the 2005 tax year were paid in full.

22. In *Rollyson v. Jordan*, 205 W.Va. 368, 518 S.E.2d 372 (1999) the West Virginia Supreme Court of Appeals held that a party holding a security interest, and clearly not "in title," was entitled to notice of the right to redeem a property from sale by paying the taxes thereon.

The Court said 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) . . . 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) . . . , which persons include "the owner" of such property and "any other person who was entitled to pay the taxes" thereon.

Id., Syl. Pt. 4.

23. Both Sunrise and Harpagon admitted during discovery that the Catalanos were those parties entitled to notice of the right to redeem. Responses of Sunrise Atlantic and Harpagon to “Plaintiffs’ First Set Of Interrogatories, Request For Production Of Documents And Requests For Admissions,” Interrogatory 7, attached to the Catalanos’ Reply Brief.

24. In accordance with the provisions of West Virginia Code §11A-3-23(a) and §11A-4-4(b), the Catalanos were the owners of record at all relevant times when the parties entitled to receive notice of the right to redeem were to be determined.

25. Sunrise, Harpagon and Mason have all defended this action by asserting that notice of the right to redeem the property from sale was mailed to the Catalanos by first class mail, and that such service was effective notice of the right to redeem the property from sale as required by West Virginia Code §11A-3-22.

26. West Virginia Code §11A-3-22 requires that “notice” regarding the sale of a tax lien, and of the right to redeem the property from sale, “**shall be served . . .** in the manner provided for serving process commencing a civil action or by certified mail, return receipt requested.” W.Va. Code, §11A-3-22(b) (emphasis supplied).

27. The attachments to the Tax Deed demonstrate that notice was sent by certified mail, return receipt requested, and that such mail was returned as “undeliverable” and no executed return receipts for the attempted service of the notice of the right to redeem the property from sale are attached to the Tax Deed. No personal service “in the manner provided for serving process commencing a civil action” was attempted upon the Catalanos, and no “returns of service” appear with the Tax Deed evidencing any such service.

28. Mail which has not been either accepted or refused, or which is returned by reason of it being undeliverable, is insufficient for any purpose. *Crowley v. Krylon Diversified Brands*, 216 W.Va. 408, 607 S.E.2d 514 (2004).

29. Strict compliance with statutes governing service is required. *McClay v. Mid-Atlantic Country Magazine*, 190 W.Va. 42, 435 S.E.2d 180 (1993).

30. The Catalanos have affirmed under oath in their affidavits filed with this Court that they have not received any notice of the right to redeem the property from sale as required by West Virginia Code §11A-3-22, and had no actual or other knowledge that any other party had been provided with or served with any Notice to Redeem the Property from sale.

31. Despite having been requested to do so during discovery, both Sunrise and Harpagon failed to set forth in their discovery responses anyone who would provide evidence that the Catalanos were served with notice of the right to redeem the property from sale as required by West Virginia Code §11A-3-22, or documents which evidenced service upon the Catalanos of the required notice of the right to redeem the property from sale.

32. “[T]he tax deed grantee has the burden of proving compliance with the statutory steps required” for the obtaining of a tax deed, including that the notice to redeem the property from sale was properly served upon the party entitled to the notice. *Rebuild America, Inc. v. Davis*, ___ W.Va. ___, (No. 11-0592, March 1, 2012), at 17-18 (slip op.).

33. The Court therefore finds that the Catalanos failed to receive notice of the right to redeem the property from sale as required by as required by West Virginia Code §§11A-3-19(a) and 22.

34. One seeking to obtain complete title to property sold for taxes must comply

literally with the statutory requirements. *State ex rel. Morgan v. Miller*, 177 W.Va. 97, 350 S.E.2d 724 (1986).

35. Any deed delivered to a tax sale purchaser without proof of strict compliance with the provisions of the West Virginia Code is voidable at the election of the party who was deprived of the required notice. *Rebuild America, Inc. v. Davis*, ___ W.Va. ___, (No. 11-0592, March 1, 2012), at 16 (slip op.).

36. The Defendant Don Mason has asserted that he is a *bona fide* purchaser for value, without notice of any defect in the sale of the tax certificate or in the failure to provide notice of the right to redeem upon those parties entitled to the same, and that this Court cannot set aside the Tax Deed or the deed under which he claims his title.

37. The Catalanos dispute that Mason qualifies as a *bona fide* purchaser, and that the title he acquired by his deed is void or, at the least, is voidable at their election.

38. “Generally whatever is sufficient on the face of the record of title to land to direct a purchaser’s attention to the prior rights and equities of third persons will put him upon an inquiry and will amount to notice to him. He is bound to take notice of everything disclosed by the record.” *Simmons v. Simmons*, 85 W.Va. 25, 100 S.E. 743 (1919), Point 4, Syllabus.

39. The Catalanos contend that it is apparent from a review of the Tax Deed that the sale is defective in that the attachments to the same demonstrate that none of them received actual notice of the right to redeem the property from sale.

40. The Catalanos assert that such an omission, which appears upon the face of the Tax Deed and which was of record before Mason acquired his interest, is sufficient to disqualify him from being a *bona fide* purchaser, because a *bona fide* purchaser of land is “one who

purchases for a valuable consideration, paid or parted with, without notice of any suspicious circumstances to put him upon inquiry.” *Stickley v. Thorn*, 87 W.Va. 673, 678, 106 S.E. 240, 242 (1921). Mason, they argue, had “constructive notice” of the defect in the tax sale.

41. In addition, the Catalanos, and others who adopted this position at oral argument, argue that the purchase price for the property paid by Mason—less than half of the sale price in the sale to Smith, and also less than half of the sale price paid by the Catalanos when they acquired the property some years earlier—was so diminished in amount as to reflect the increased risk that the Tax Deed was subject to attack at the time of the sale of the Property to Mason, and also placed him on constructive notice of a defect in the tax sale, thereby removing him from the status of a *bona fide* purchaser.

42. The Catalanos and others also assert that the differences in the warranties contained within the deeds provided actual notice to Mason of a defect in the tax sale process and are also grounds for Mason not to be found to be a *bona fide* purchaser. These parties note that the Deed from Sunrise to Harpagon lacked any warranty, and that the deed from Harpagon to Mason contained only a “special warranty,” whereby Harpagon warranted the title only during their period of ownership—a period of less than a month. By contrast, they point to the Deed from the Catalanos to Smith, which contained a “general warranty,” whereby they agreed to warrant and defend the property against all claims from whatever source.

43. In view of the totality of the circumstances the Court therefore finds that Don Mason does not hold the status of a *bona fide* purchaser as to the interest he acquired in the Property.

44. Under applicable West Virginia law,

[Summary Judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Williams v. Precision Coil, Inc., 194 W.Va, 52, 459 S.E.2d 329 (1995); *Hanks v. Beckley Newspapers Corp.*, 172 S.E.2d 816 (1970).

45. Our Supreme Court has also said that “Rule 56 of the West Virginia Rules of Civil Procedure plays an important role in litigation in this State. It is ‘designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial,’ if there essentially ‘is no real dispute as to salient facts’ or if it only involves a question of law.” *Williams v. Precision Coil, Inc.*, 194 W.Va, 52, 58, 459 S.E.2d 329 (1995) (citing *Painter v. Peavey*, 192 W.Va. 192 n.5, 451 S.E.2d at 758 n.5, quoting *Oakes v. Monongahela Power Co.*, 158 W.Va. 18, 22, 207 S.E.2d 191, 194 (1974)).

46. “When a motion for summary judgment is mature for consideration and properly is documented with such clarity as to leave no room for controversy, the nonmoving party must take the initiative and by affirmative evidence demonstrate that a genuine issue of fact exists.” *Williams v. Precision Coil, Inc.*, 194 W.Va, 52, 58, 459 S.E.2d 329 (1995).

47. “[T]he party opposing summary judgment must satisfy the burden of proof by offering more than a mere ‘scintilla of evidence’ and **must produce evidence sufficient for a reasonable jury to find in a nonmoving party’s favor.**” *Williams v. Precision Coil, Inc.*, 194 W.Va, 52, 60, 459 S.E.2d 329, 337 (1995) (citing *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202, 214 (1986) (emphasis supplied)).

48. The pleadings, answers to interrogatories and admissions on file, together with the

Affidavits, and the arguments of counsel, show that there is no genuine issue as to any material fact and that the Catalanos are entitled to a judgment upon the grounds set forth in their Complaint as a matter of law.

49. The Catalanos have standing to bring this action in accordance with the provisions of West Virginia Code §11A-3-23(a) and §11A-4-4 to have the purported tax sale set aside and held for naught, and also to set aside the conveyances of the Property to Harpagon and Don Mason, by reason of their failure to receive notice of the right to redeem the Property from the tax sale as required by West Virginia Code §11A-3-22.

50. As required by the provisions of West Virginia Code §11A-4-4(a), prior to the commencement of this action, the Catalanos tendered the amounts which would have been required to redeem the Property from sale, together with any taxes which have been paid on the Property since the delivery of the Tax Deed, plus interest thereon at the rate of twelve percent per annum. Mason, Sunrise and Harpagon have refused to allow the Catalanos to reimburse them and to recover the Property.

51. In *Rebuild America, Inc., supra*, the Supreme Court reiterated that this Court could only make preliminary findings as to the entitlement of a party to relief from an improperly-obtained tax sale deed. The Supreme Court held that, in order to afford full relief, this Court must make a finding that the tax deed will be set aside if the Catalanos pay or tender to the tax sale purchaser or their assigns (1) the amount which would have been necessary to redeem the property from sale, (2) the amount of real estate taxes paid since delivery of the tax deed, and (3) interest at 12 % per annum. *Id.*, at 22.

52. In the affidavits filed with their Reply Memorandum the Catalanos affirmed their preparedness to comply with the requirements of West Virginia Code §11A-4-4 to pay the required redemption amounts set out in the statute and the mandate of the Supreme Court of Appeals.

53. The Catalanos have requested that this Court determine which of the parties are entitled to the reimbursement of (1) the amount which would have been necessary to redeem the property from sale, (2) the amount of real estate taxes paid since delivery of the tax deed, and (3) interest at 12 % per annum, and to allow them to tender those amounts in accordance with West Virginia Code §11A-4-4 and *Rebuild America, supra*. Neither of Sunrise, Harpagon or Mason have asserted their entitlement to such proceeds.

54. Because the Catalanos were deprived of the statutorily mandated notice of their right to redeem the property from sale, their Motion For Partial Summary Judgment is GRANTED. Within one month of the date of the entry hereof the Catalanos shall pay the amount required under West Virginia Code §11A-4-4 to redeem the Property from sale into the registry of the Court, together with a notice setting forth their calculation of the amount they believe to be correct, which notice shall be served upon the parties to this proceeding. Any party believing the same to be incorrect, or asserting their entitlement to the proceeds, shall file a response within ten (10) days of the date of service of the notice. If the parties are unable to resolve any dispute arising from the same, they may request a hearing on the same from this Court.

55. Upon the payment into the registry of the court as aforesaid the Tax Deed dated April 9, 2008, and made of record in Deed Book 2718 at page 897 on April 16, 2008, as well as the subsequent conveyances of record in the Office of the Clerk of the Kanawha County Commission in Deed Book 2729 at page 65 and in Deed Book 2724 at page 313, be and the same are set aside and held for naught.

56. The Clerk of this Court shall provide a certified copy of this Order to counsel for the Catalanos, which Order shall be indexed in the office of the Kanawha County Clerk and cross-indexed so as to provide notice to all subsequent purchasers and others advising them that the aforesaid

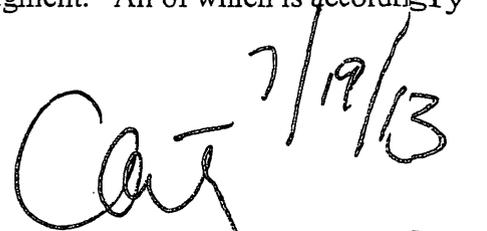
instruments have been set aside and held for naught, and that the title to the Property has been restored to A. Maria Catalano, Jeremy D. Casto and Jerad D. Casto as tenants in common.

57. All parties adversely affected by the provisions hereof are awarded their exceptions to the rulings of the Court.

58. Within fifteen days of the date of the entry hereof the parties shall contact the Court for the scheduling of such further proceedings as they believe appropriate.

59. This Order constitutes a final judgment as the same is defined in Rule 54(b) of the West Virginia Rules of Civil Procedure regarding decrees from which an appeal may lie. The Court finds that the judgment entered herein "completely dispose[s] of at least one substantive claim" as discussed in *Province v. Province*, 196 W.Va. 473, 479, n. 12, 473 S.E.2d 894 (1996), that there is no just reason to delay the entry of judgment, and the Court directs the entry of judgment. All of which is accordingly SO ORDERED.

Entered:


7/19/13
CARRIE L. WEBSTER, JUDGE

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS
DAY OF July 2013
CATHY S. GATSON, CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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