

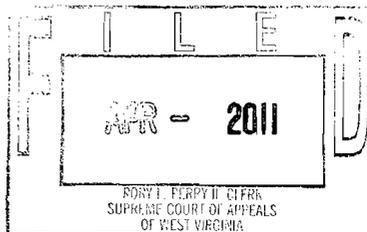
**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

Supreme Court Docket No. 11-0592  
Civil Action No. 08-C-1058 (Circuit Court of Kanawha County)

**MARK E. DAVIS  
TAMMY DAVIS**

**Plaintiffs**

v.



**MIKE RUTHERFORD, Sheriff of Kanawha County;  
VERA J. MCCORMICK, Clerk of the County  
Commission of Kanawha County;  
REBUILD AMERICA, INC., a Florida Corporation;  
REO AMERICA, INCORPORATED, a Florida  
Corporation; and  
THE HUNTINGTON NATIONAL BANK**

**Defendants**

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**RESPONSE TO PETITION FOR APPEAL  
on behalf of Respondents  
THE HONORABLE MIKE RUTHERFORD, Sheriff of Kanawha County and  
THE HONORABLE VERA J. MCCORMICK, Clerk of the  
County Commission of Kanawha County**

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Dated: April 4, 2011

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**I. KIND OF PROCEEDING AND NATURE OF RULING BELOW**

As stated in the Petition for Appeal, this matter concerns a Petition of Appeal of REO America, Incorporated and Rebuild America, Inc. (collectively "Petitioner" or "Rebuild") from an Order of the Circuit Court of Kanawha County, West Virginia ("Circuit Court"), entered September 13, 2010, and also from an Order entered November 4, 2010 denying Petitioner's Motion to Reconsider under Rule 59 of the West Virginia Rules of Civil Procedure. In the underlying Circuit Court action the Plaintiffs, Mark E. Davis and Tammy L. Davis, brought suit

against Mike Rutherford, Sheriff of Kanawha County, Vera McCormick, Clerk of the Kanawha County Commission, Rebuild America, Inc. and REO America, Incorporated, to set aside a tax deed by which the Defendant Clerk conveyed real property to Rebuild America, Inc. as a result of the failure of Mr. and Mrs. Davis' to pay real property taxes for the year 2005. The Circuit Court awarded judgment for Mr. and Mrs. Davis and set aside the tax deed. The Court below also denied Rebuild's Rule 59 Motion to Reconsider without a hearing by order entered November 4, 2010.

## **II. STATEMENT OF FACTS**

The Respondents here, Mark E. Davis and Tammy L. Davis failed to pay the 2005 *ad valorem* property taxes on their real property located at 51 Woodbridge Rd., Charleston, WV 25311.

On May 11, 2006, the Sheriff caused to be published in newspapers of general circulation in Kanawha County, West Virginia a notice of the sale of the tax lien on the Woodbridge Road property, which indicated that the sale was scheduled to occur in November, 2006.

On July 12, 2006, the Respondents, Mark E. Davis and Tammy L. Davis filed a petition under Chapter 7 of the bankruptcy code of the United States in the United States Bankruptcy Court for the Southern District of West Virginia, which petition bore the case number 06-20398.

The Respondents, Mark E. Davis and Tammy L. Davis, did not list the Kanawha County real property taxes as a debt or a lien against their real property, nor did they list the Kanawha County Sheriff or Assessor as parties in interest or as creditors. Also, the Subject Real Property is listed as "exempt" on their Schedule C list of property exempt from the bankruptcy estate.

On September 13, 2006, pursuant to the provisions of W. Va. Code § 11A-3-2, the Sheriff caused to be published a second notice of the public sale of the tax lien on the Woodbridge Road property.

On October 13, 2006, the Sheriff of Kanawha County sent a timely notice of the tax sale by certified mail, as required by W. Va. Code §11A-3-2, to the last known address of the respondents, Mark E. Davis and Tammy L Davis. The records of the Sheriff of Kanawha County indicated that the last known address of Mr. and Ms. Davis was 929 Chappell Rd., Charleston, WV 25304.

On October 17, 2006, the respondents, Mark E Davis and Tammy L Davis were discharged in bankruptcy.

On October 21, 2006, the notice of tax sale was "returned to sender not deliverable as addressed unable to forward" by the United States Postal Service.

Following the return of the notice of tax sale addressed to the Chappell Road property, the Sheriff took no further action, other than the publications, to notify Mark E. Davis and Tammy L. Davis of the pending auction of tax lien on the Woodbridge Road property.

On November 14, 2006, the tax lien on the Woodbridge Road property was sold to the Petitioner ReBuild America, Inc.

In January, 2008, the Clerk sent, by certified mail, a notice to redeem the tax lien on the Woodbridge Road property to the respondents, Mark E. Davis and Tammy L. Davis, as well as the Huntington National Bank. Return receipts were signed by each of the addressees and returned to the Clerk.

On April 14, 2008, the Clerk of the County Commission of Kanawha County delivered a deed to the Woodbridge Road property to ReBuild America, Inc., which deed is of record in the office of the clerk in deed book 2718 at page 710.

### **III. RESPONSE TO ASSIGNMENTS OF ERROR**

- A. THE CIRCUIT COURT ERRED AS A MATTER OF LAW BY DETERMINING THAT THE TAX DEED SHOULD BE DECLARED VOID AND SET ASIDE DUE TO IMPROPER NOTICE.

The Sheriff and the Clerk assert that the notice provided to Mr. and Mrs. Davis and to the Huntington National Bank was adequate to provide each of those persons with the due process of law.

- B. THE CIRCUIT COURT ERRED AS A MATTER OF LAW BY DETERMINING THAT THE TAX DEED SHOULD BE DECLARED VOID AND SET ASIDE PURSUANT TO BANKRUPTCY LAW.

The Sheriff and the Clerk assert that if a stay of collection activities was ordered by the United States Bankruptcy Court for the Southern District of West Virginia, the Sheriff and the Clerk should have desisted from any further action to enforce the tax lien and sell the property at Woodbridge Road.

- C. THE CIRCUIT COURT ERRED BY DENYING REBUILD'S MOTION TO REQUIRE PLAINTIFFS MAKE PAYMENT INTO COURT UPON TERMS ARE SHOULD PROTECT THE DAVISES' GOALS IN THIS CASE REGARDLESS OF THE OUTCOME OF THIS LAWSUIT.

The Sheriff and the Clerk take no position with regard to the third assignment of error.

- D. THE CIRCUIT COURT ERRED BY AVOIDING AND SETTING ASIDE THE TAX DEED WITHOUT FIRST REQUIRING PAYMENT OF THE REDEMPTION AMOUNT TO REBUILD.

The Sheriff and the Clerk take no position with regard to the fourth assignment of error.

### **IV. STANDARD OF REVIEW**

For the reason that the order of the Circuit Court of Kanawha County is in the nature of the entry of a summary judgment in favor of the property owners, the standard of review is *de novo*. *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

## V. DISCUSSION OF LAW

### 1. THE MULTIPLE NOTICES PROVIDED TO MR. AND MRS. DAVIS AND HUNTINGTON NATIONAL BANK NA BY THE SHERIFF AND THE CLERK OF THE PENDING TAX SALE AND OF THEIR RIGHT TO REDEEM THE PROPERTY PROVIDED MR. AND MRS. DAVIS AND THE BANK WITH ADEQUATE DUE PROCESS OF LAW IN THE SALE OF THE WOODBRIDGE ROAD PROPERTY

Prior to the sale of the tax lien on the Woodbridge Road property, the Sheriff properly published notice of the tax sale on two occasions, as is required by statute. As required by West Virginia Code §11A-3-2(b)(1), the Sheriff sent notice of the pending tax sale by certified mail to the owners of the property “to the last known address of each person listed in the land books whose taxes are delinquent”.

The last known address of the owners of the property was 929 Chappell Road, Charleston, West Virginia 25304-2707.<sup>1</sup> However, on October 21, 2006, the notice of tax sale was "returned to sender not deliverable as addressed unable to forward" by the United States Postal Service.

Subsequent to the sale of the tax lien, but before the delivery of the deed by the clerk to the Petitioner, both Mr. and Mrs. Davis and the bank holding the deed of trust actually received a notice, by certified mail, as required by the provisions of W. Va. Code § 11A-3-22, of the opportunity to redeem the property.

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<sup>1</sup> Petitioners note that “the 2005 Kanawha County Property Tax Records for the subject real property provides the mailing address for the Davises as the Chappell Road address. Additionally, the deed by which the Davises acquired title to the Subject Real Property shows that the Davises acquired the Subject Real Property in July 2003. It also shows that the address to which the County Clerk returned the deed was to the Davises’ address at 929 Chappell Road, Charleston, WV”. See Petition for Appeal at 4-5.

The Petitioner here correctly argues that

The findings that the Court relied upon to set aside the tax deed are that the Sheriff did not mail the Notice of Tax Delinquency to the Davises “at the property address”. This is irrelevant. The issue is whether the Sheriff sent the notice to the “last known address” of the owner, not to the “property address” of the property being sold. There is no requirement in the statute that the Sheriff mail the Notice of Tax Delinquency to the property address.

See Petition for Appeal at 7.

Moreover, the Petitioners correctly assert that the fact that the Sheriff did not take further action to notify the owners of the property prior to the tax sale upon the return of an unclaimed certified letter giving notice of that tax sale required by W. Va. Code § 11A-3-2 is not sufficient grounds to set aside the tax sale. It is critical here to distinguish between the notice provided to the property owner prior to the sale of the tax lien and the notice required to be provided to the property owner of his or her right to redeem the property prior to the conveyance of the tax deed.

The sale of the tax lien does not constitute the sale of the property. Rather, it is the transfer of the lien for unpaid property taxes from the public official (the Sheriff) to a private citizen. The title to the property does not change. The encumbrance upon that property changes only in the identity of the lien holder, but not in the nature or in the amount of the encumbrance.

Further, W. Va. Code §11A-3-2 places the responsibility for identifying the property owner on the Sheriff for purposes of giving notice of the pending tax sale. The responsibility for identifying interested parties for notification of the right to redeem, prior to the conveyance of tax deed, is not placed on the Sheriff or the County Clerk, but rather upon the person who has purchased the tax lien at the tax sale. W. Va. Code §11A-3-19.

A tax sale to a private party under West Virginia law involves “state action” since, to accomplish a tax sale, a private party must make use of state procedures with overt, significant assistance of state officials. *Wells Fargo Bank, N.A. v. UP Ventures II, LLC*, 223 W.Va. 407,

675 S.E.2d 883, 886 (2009), citing *Plemons v. Gale*, 396 F.3d 569, 572 (4th Cir.2005). Since state action is involved, the requirements of due process must be satisfied. *Id.*

As recognized by this Court, the U.S. Supreme Court has addressed this constitutional due process issue in *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983), stating:

Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable.

*Wells Fargo Bank*, 223 W.Va. at \_\_\_, 675 S.E.2d at 886. In this case, the Due Process requirements set forth in *Wells Fargo Bank* were met, because there is no dispute that both Mr. and Mrs. Davis and Huntington Bank actually received notices of their right to redeem.

The decision of the United States Court of Appeals for the Fourth Circuit in *Plemons v. Gale*, 396 F.3d 569 (4th Cir. 2005) (*Plemons II*), as well as the preceding and succeeding decisions of this United States District Court for the Southern District of West Virginia in *Plemons v. Gale*, 298 F.Supp.2d 380 (2004) (*Plemons I*) and *Plemons v. Gale*, 382 F.Supp.2d 826 (2005), aff'd *Plemons v. Gale*, 161 Fed.Appx. 334 (4th Cir.(W.Va.) Jan 19, 2006) (*Plemons III*), all addressed due process requirements after the notice of the right to redeem sent by the clerk had been returned as unclaimed.

The District Court initially held that the lien holder had not been reasonably diligent when it followed the return of the certified letter giving notice of the right to redeem by publishing a relatively small announcement in the newspaper. The Court noted that chapter 11A article 3 of the West Virginia Code had been revised by the Legislature to meet the requirements of the *Mennonite Bd. of Missions* decision, and that W. Va. Code § 11A-3-22 accordingly requires that “tax lien purchasers must exercise due diligence in identifying and locating parties entitled to notice and that constructive notice is only permissible following the exercise of due

diligence". *Plemons I* at 385. Since all of the mailed notices had been returned unclaimed, the lien holder knew that actual notice had not been received, the Court held that a reasonably diligent party would make further inquiry in hopes of finding the intended recipient's correct address, and noted that the lien holder could have simply opened the local telephone directory and called the property owner. *Id.* at 389-390.

The Fourth Circuit Court of Appeals disagreed and vacated the district court holding, remanding the case with a different interpretation of what constitutes "reasonable diligence" in the face of a returned, unclaimed notice of the right to redeem. Essentially, the Fourth Circuit instructed the lower court that the requirement for reasonable diligence was satisfied by the lien holder examining or re-examining all the available public records when the initial mailings have been promptly returned as undeliverable. *Plemons II*, 396 F.3d at 578. The court of appeals instructed the district court to determine whether the lien holder had re-examined the public records to ascertain a better address for the property owner. *Id.* The court of appeals added that the district court should determine whether or not such a re-examination would have produced a better address for the property owner. *Id.*

On remand (*Plemons III*), the district court determined that the lien holder had not conducted a re-examination of the public records, *Plemons III*, 298 F.Supp.2d at 828, but also determined that such an examination would have been fruitless in producing a better address for the property owner. *Id.* As a result, the district court entered judgment in favor of the lien holder and upheld the tax deed. *Id.*

Again, *Plemons I*, *II*, and *III* all dealt with the sufficiency of the efforts to notify the property owner of it his or her right to redeem the property following the tax sale. The holding, however, indicates that the Sheriff, notifying Mr. and Mrs. Davis of the tax sale by certified mail,

which was returned as unclaimed and undeliverable, satisfied the requirements of due process because the Sheriff was relying upon the public records for the Davis' last known address. The public records indicate that the deed for the subject property was mailed Petitioners at the address used by the sheriff, which indicates that Mr. and Mrs. Davis continued to reside at the addresses used by the Sheriff for at least some period of time after they purchased the subject property. Petitioners have not alleged that a re-examination of the public records would have produced a better address for subsequent notice of the tax sale.

Here, it is undisputed that the Sheriff twice properly published notice of the tax sale and sent a notice of the tax sale by certified mail to the owners of the property at their last known address. The Clerk also successfully gave notice to the owners of the property, and significantly, the holder of the note and deed of trust on that property, by certified mail of the opportunity to redeem the property prior to the conveyance of the tax deed by the Clerk to the purchaser of the tax lien. Any failure by the Sheriff to re-examine the public records after the notice of the sale of the tax lien, which re-examination would have once again produced the Chappell Road address, would have not, in and of itself, constituted a denial of due process to the property owners and the bank, and the successful notification of the property owner and the bank of the right to redeem, cured any omission in the notice of the tax sale.

2. **IF THE STAY ISSUED BY THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA PURSUANT TO §362 OF THE BANKRUPTCY CODE WAS IN EFFECT AT THE TIME THE SHERIFF OR THE CLERK TOOK ANY ACTION IN ASSOCIATION WITH THE SALE OF THE WOODBRIDGE ROAD PROPERTY, NEITHER THE SHERIFF NOR THE CLERK SHOULD HAVE OR, UPON NOTICE, WOULD HAVE, PROCEEDED WITH THE SALE OF THAT PROPERTY UNTIL SUCH STAY HAD BEEN LIFTED.**

Upon receipt of a notice from United States Bankruptcy Court that he has been scheduled as a creditor of the owner of property with delinquent taxes located in Kanawha County, the

Kanawha County Sheriff routinely notes on the list of delinquent lands, required to be prepared pursuant to W. Va. Code §11A-3-2, that the owners of the delinquent lands have filed for bankruptcy protection and that these lands are not to be sold pursuant to the provisions of West Virginia Code §11A-3-1 *et seq.* without further review and action by the Sheriff.

The Kanawha County Sheriff was not scheduled as a creditor by the respondents, Mark E. Davis and Tammy L. Davis, for the delinquent land owned by them located at 51 Woodridge Dr., Charleston, WV 25311. As a result, the list of delinquent lands of the Sheriff was not documented to indicate the bankruptcy. The Court below also found that “[t]he Plaintiffs represented to the Court that they were advised by the Sheriff’s Department on more than one occasion that because of the bankruptcy the property should not have been sold at the tax sale on November 14, 2006”, Status Conference Order, ¶ 6 and Affidavit, H. Allen Bleigh, ¶ 10. The Complaint originally filed by Mr. and Mrs. Davis also stated that “[o]n June 2, 2008, Plaintiffs spoke with Sheriffs Chief Tax Deputy who did reaffirm that said real property should not have been sold on November 14, 2006, because of bankruptcy protection afforded Plaintiffs’. Complaint”. Complaint, ¶ 11.

Whether such informal telephone conversations placed that Sheriff on notice of the bankruptcy filing or not, if the United States Bankruptcy Court issued a stay of all collection actions by creditors pursuant to Section 362 of the United States bankruptcy code, and such stay applied to collection actions related to the unpaid property taxes on the Woodbridge Road property, then the Sheriff and the clerk would not have proceeded with the tax sale or the conveyance of the tax deed. If it is determined that a Section 362 stay was in effect on the property owned by Mr. and Mrs. Davis, then any further action to sell the Woodbridge Road property should have been suspended.

## VI. CONCLUSION

The notice provided to the property owners and the bank, while not perfect, was in accordance with the requirements of W. Va. Code §11A-3-2 and, when viewed together with the notice of the right to redeem, was adequate to give notice to the property owners and the bank of the opportunity to redeem the property.

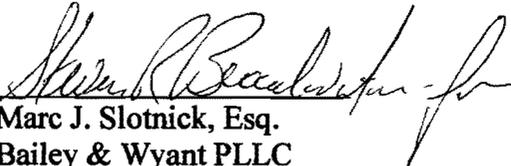
Had the Sheriff and the Clerk been aware that a Section 362 stay been entered by the United States Bankruptcy Court, neither official would have proceeded with the sale of the Woodbridge Road property.

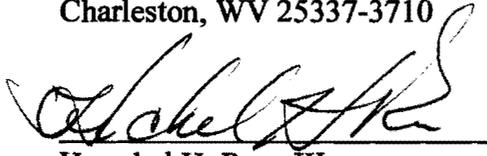
**Respectfully submitted,**

**THE HONORABLE MIKE RUTHERFORD,  
SHERIFF OF KANAWHA COUNTY**

**THE HONORABLE VERA J. MCCORMICK,  
CLERK OF THE KANAWHA COUNTY COMMISSION**

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**Defendants**

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**CERTIFICATE OF SERVICE**

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I, Herschel H. Rose III, hereby certify that on April 4, 2011, I caused to be served a copy of the foregoing "*Response to Petition for Appeal on behalf of Respondents the Honorable Mike Rutherford, Sheriff of Kanawha County and the Honorable Vera J. McCormick, Clerk of the Kanawha County Commission*" by mailing a true and exact copy thereof to:

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