

No. 14-0281

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14-0281

MARK E. DAVIS,

Petitioner,

v.

REBUILD AMERICA, INC., and REO AMERICA, INC.,

Respondents.

BRIEF OF PETITIONER

MARK E. DAVIS

Mark E. Davis (*pro se*)

51 Woodbridge Drive

Charleston, WV 25311-1135

(304) 767-4521

I. ASSIGNMENTS OF ERROR

A. Respondent REO/Rebuild failed to properly serve notice of hearing upon pro se Petitioner in accordance with the W. Va. Rules of Civil Procedure.

On or about Thursday, January 16, 2014, Respondent mailed to the Petitioner a Notice of Hearing on a single, sole motion (Exhibit 1). The date of the hearing was Monday, January 27, 2014. Excluding the date of service, that is, January 16, 2014, eleven (11) consecutive calendar days expired between the said mailing and the hearing. According to Rule 6(d)(1)(A) of the W.Va. Rules of Civil Procedure,

(d) For motions — affidavits. — (1) Service; motion. — Unless a different period is set by these rules or by the court, a written motion (other than one which may be heard *ex parte*), notice of the hearing on the motion, and any supporting brief or affidavits shall be served as follows:

(A) at least 9 days before the time set for the hearing, if served by mail,

The Rules, however, address more specific guidelines regarding time deadlines for service requirements fewer than eleven (11) days:

(a) Computation. — In computing any period of time prescribed or allowed by these rules, by the local rules of any court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday. When the period of time prescribed or allowed is fewer than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

Two (2) intermediate Saturdays and two (2) intermediate Sundays were included, for a total of four (4) excludable days, in the eleven (11) days (again, excluding the date of service) that transpired between the Respondent's mailing of said Notice of Hearing mailed on January 16, 2014, and the actual date of hearing on January 27, 2014.

Petitioner, therefore, was afforded only seven (7) days notice of said hearing, which violates the nine (9) days minimum service of notice required by the Rules. Petitioner contends, therefore, that the Respondent failed to provide proper notice of the hearing held January 27, 2014, and that Petitioner's due process rights were violated thereby. Petitioner, for relief, asks this appellate Court to find that the Petitioner did not receive proper notice of said hearing, that Petitioner's due process rights were violated by said improper notice, and that any and all actions taken or made by the trial court against Petitioner at said hearing shall be overturned and vacated.

B. The Circuit Court erred in permitting ten (10) issues to be raised at the January 27, 2014, hearing that were not noticed in or on the Respondent's Notice of Hearing dated January 16, 2014.

On a prior appeal in this very case, the Supreme Court of Appeals of West Virginia addressed the issue of Huntington Bank's June 24, 2010, Hearing Notice, which Rebuild America, Inc., the Respondent in this present appeal, argued that it was not properly noticed—the same argument being

made herein by the pro se Petitioner Mark Davis. In its “III. Discussion section,” the Supreme Court referred to this notice as “inadequate” and one resulting in an “unfair hearing”:

There are four issues raised by this appeal. First, we discuss Huntington Bank’s inadequate hearing notice, which resulted in an unfair hearing.

Rebuild America, Inc. v. Davis, 726 S.E.2d 396, 229 W.Va. 86 (2012).

The Supreme Court stated, in its subsection titled “A. Sufficiency of Huntington Bank’s June 24 Hearing Notice” that

Rebuild/REO contend that they went to the June 24 hearing believing the only issue to be addressed involved the Davises’ bankruptcy. However, at the hearing, Huntington Bank asserted that the tax deed should be set aside because the Davises were not properly served with the statutory notice that a tax lien on their property would be sold at public auction. Rebuild/REO argues that they were not prepared to address whether the Davises had been properly served with notice of the tax lien sale because that issue was not set forth in Huntington Bank’s hearing notice or memorandum of law. Rebuild/REO point out that Huntington Bank’s memorandum of law, listed in the hearing notice, did not address the failure to serve the tax lien services. Instead, the memorandum focused on the single issue of bankruptcy.

Rebuild America, Inc. v. Davis, 726 S.E.2d 396, 229 W.Va. 86 (2012).

Further, in finding that Rebuild/REO, then Petitioner, was not properly noticed, the Supreme Court further stated:

Reviewing the June 24 hearing transcript, we note that counsel for Huntington Bank—when responding to Rebuild/REO’s arguments—informed the trial court that he “initially set [the hearing] for a status conference.” He later discussed the nature of the hearing with Rebuild/REO’s counsel, and told counsel that the

issues in the case were “so ripe” and “around for so long,” that he was just going to go ahead and “notice it up, and . . . *bring a motion* on for hearing, what’s before the court and not just a status conference.” However, Huntington Bank did not file a written motion stating the grounds for the motion, or the relief being sought, as required by Rule 7(b) of the West Virginia Rules of Civil Procedure.

Rebuild America, Inc. v. Davis, 726 S.E.2d 396, 229 W.Va. 86 (2012).

In this present appeal, the pro se Petitioner similarly contends that Defendant Rebuild/REO and the trial court both violated Rule 7. The Respondent’s notice of the January 27, 2014, hearing reads as follows:

PLEASE TAKE NOTICE that Defendant, Rebuild America, Inc., by counsel, will bring on for hearing on January 27, 2014, at 1:30 p.m., in the Honorable Judge Webster’s Courtroom at the Kanawha County Judicial Building, 111 Court Street, Charleston, West Virginia 25301 the **“Motion for Authority to Protect Property from Damage”**. [sic]

Upon review of the written transcript of the hearing held January 27, 2014 (Exhibit 2), it is clear from numerous references that multiple issues, all but one issue not noticed properly, were raised at said hearing.

First, on page 5 of said transcript, lines 17-23, the trial court stated:

THE COURT: Well, although this is the only thing that I think that is noticed, there are a couple matters that I’m going to address after this,....

Petitioner contends that from the very beginning of the hearing, the trial court violated the Rules of Civil Procedure by admitting plainly that she had knowledge that only one (1) issue had been noticed for the hearing, the “*Motion*

for Authority to Protect Property from Damage,” but that she would also “address” “a couple matters” in addition to the sole issue noticed.

Almost immediately thereafter, page 6, lines 4-6, the trial court appears to be unclear about the content of the Respondent’s notice of hearing dated January 16, 2014, and raised a second issue, a Respondent’s *Motion to Compel,*” not properly before the Court on the date of hearing, January 27, 2014:

THE COURT: . . . Since then, I don’t know if it was in this motion, but it might have been in the Motion to Compel....

Thirdly, on page 9, lines 7-11, the trial court indicated that she would address yet even more issues, not properly noticed, at the January 27, 2014:

THE COURT: Well, I’ve just about had it with the Plaintiff [Mark Davis] above and beyond everything else, and that’s some of the things I’m going to address today. I think he’s playing games. Probably this is deliberate.

On page 12, lines 19-20, the trial court grants the Respondent Rebuild/REO’s “Motion for Authority to Protect Property from Damage”:

THE COURT: Right. Well I’m going to grant the motion.

And this is where the hearing should have ended, after the trial court addressed the single issued noticed for the hearing--“Motion for Authority to Protect Property from Damage”. However, the trial court continues the hearing by stating that she is going to “do” a “couple of things,” while suggesting that she would not “take up anything that wasn’t noticed.”:

THE COURT: Then, there's a couple of things I'm just going to go ahead and do. I going to take up anything that wasn't noticed, other than what I have heard previously, but I will depending on how this plays out....

And so Judge Webster proceeded to do exactly as she said, to address issues not noticed:

1. "Well, although this is the only thing that I think that is noticed, there are a couple matters that I'm going to address after this,...."
2. "Well, I've just about had it with the Plaintiff [Mark Davis] above and beyond everything else, and that's some of the things I'm going to address today."
3. "Then, there's a couple of things I'm just going to go ahead and do."

First, the trial court addressed the issue of depositions, page 13, lines 20-22, which issue was not noticed in the Respondent Rebuild/REO's notice of hearing dated January 16, 2014:

THE COURT: . . . I mean, I have had him in front of me, Mr. Davis, in April when I said he had to submit himself to deposition.

Second, page 13, line 23—page 14, line 3, the trial court addressed the issue of a Motion to Compel filed by the Respondent Rebuild/REO, which issue was not noticed for the January 27, 2014, hearing:

THE COURT: . . . I just reviewed as part of the documents that are pending right now and have been submitted, indicates this second Motion to Compel has been filed since that time, right?

Thirdly, page 14, lines 6-8, the trial court addressed a third issue not noticed:

THE COURT: . . . I know and it's not noticed, that there's a Motion for Default Judgment, well, and really, you have sought a sanction.

Judge Webster goes on to address yet a fourth issue not noticed, the issue of sanctions against the pro se Petitioner:

THE COURT: . . . I'm not prepared to—well, if I was going to substantively take up default judgment, I would need to notice that because that is the most severe sanction I could impose, but I am going to impose sanctions. It's probably futile because I'm going to pose that he pay or be assessed attorney fees....(page 14, lines 17-23).

Judge Webster continues and admits that the issue she has just addressed, and ruled on, was not noticed for the hearing:

THE COURT: I mean, you'll need to obviously put him on notice of that, but I'll note that it was not noticed for hearing today....(page 15, lines 18-20)

Judge Webster goes on to immediately address a fifth and sixth issue not noticed, admitting the same all the while, page 16, lines 1-4:

THE COURT: . . . I know that there have been several other—well, the Motion to Dismiss or the Alternative Motion for Default Judgment, that's not noticed today.

Finally, Judge Webster addresses yet two (2) other issues not noticed, a seventh and eighth issue:

THE COURT: . . . The pending Motion for Summary Judgment and, of course, as part of that the objections of Rebuild to Huntington National Bank's proposed order, there was a Motion for Determination that the Kanawha County Sheriff's Department's

procedures are preempted by federal bankruptcy laws....(page 16, lines 5-10)

As if addressing eight (8) issues not noticed, the trial court stated:

THE COURT: Well, I don't know if I read it, but I knew I wasn't taking it up today. (page 17, lines 6-7)

Again, from page 19, lines 1-5, notice the exchange between Huntington Bank counsel Mr. Hereford and Judge Webster:

MR. HEREFORD: And I know that's not before the Court. I'm trying to make sure—

THE COURT: Right, but I think I'm probably ready to rule on this matter from the bench today, but I'm going to have a couple of questions.

Then, after a discussion between Mr. Hereford and Judge Webster regarding the Supreme Court's previous 2012 decision in an appeal of this case, counsel for Huntington Bank raises a ninth (9th) issue not noticed on Respondent Rebuild/REO's January 16, 2014, Notice of Hearing, and the trial court allows it to be addressed in a hearing noticed for a single issue, a "Motion for Authority to Protect Property from Damage".:

MR. HEREFORD: But in April of 2013 you said try to stipulate to some facts. If you can get the facts stipulated, submit your own orders. So we submitted our own orders, Rio [sic] Rebuild refiled raising some other types of issues of new concerns, so that was what the reply was in January to that stating is that there aren't any really new issues. There aren't really any new issues of fact, as far as we are concerned and I still think that this is ripe for a motion for summary judgment as it pertains to the bankruptcy.

THE COURT: I mean, you all have made that argument. That's for sure.

MR. HEREFORD: Yes, ma'am.

THE COURT: I mean, I'll take it up, too. Go ahead.

Even one of the attorneys for REO/Rebuild, at this point, already having had his "Motion for Authority to Protect Property from Damage" granted, as noticed, and having a motion for sanctions, not noticed, granted at the same hearing noticed for a single issue, suggests that the hearing is now gone too far seeing as how the trial court is about to rule on the ninth (9th) issue addressed at the January 27, 2014, hearing—that being, the granting of summary judgment in favor of Huntington Bank:

MR. HANNA: --I only came prepared today to address the motion with respect to permission to access the property [51 Woodbridge Drive], but there are some preemption issues that are associated with the cause of action at issue in this case, and what can and cannot be relied upon. (page 27, line 22—page 27, line 3)

Again, on page 33, lines 2-7, Judge Webster, after taking up herself, or allowing nine (9) issues not noticed to be addressed, discussed, and, some, acted upon, in addition to the single issue noticed, and adopting Mr. Hereford's agricultural nomenclature, stated:

THE COURT: And that's what I wanted to be sure because I did not—because today I'm not taking up anything that's not noticed. I don't want to have an issue of inadequate notice, but certainly I could right now hand you all an order today on my ruling on summary judgment. I mean, it is ripe.

Notice the following exchange between Judge Webster and Mr. Hereford, an admission of a violation of the Rules by the former:

THE COURT: Yeah, but I'm saying that I don't want there to be any argument—

MR. HEREFORD: Yes.

THE COURT: --today that, you know, we are having an oral argument on something that wasn't properly noticed.

Again, from page 57, lines 20-23—page 58, lines 1-4 of the transcript of the January 27, 2014, hearing, counsel for REO/Rebuild complains again that issues not noticed had been raised at the hearing:

MR. HANNA: Your Honor, with all due respect, I feel like I gotten a little bit underhanded here because others are more prepared than some are today to address other issues associated with this case. If there are legitimate issues that still remain that you would like to hear, I'd like to have the opportunity for a full-blown hearing on that with notice so that we can prepare. We didn't even bring our complete file with us today, Your Honor.

Then the trial court grants yet another motion, one not noticed in the Respondent REO/Rebuild's notice of hearing dated January 16, 2014:

THE COURT: I'm going to grant the Motion for Summary Judgment on this narrow issue. (page 60, lines 19-20)

Finally, after the trial court allowed nine (9) issues not noticed to be addressed, and ruled on three (3) motions, even at the objection of Respondent REO/Rebuild's counsel after receiving two (2) favorable rulings, Judge Webster takes up yet a tenth (10) issue not noticed—to whom, Huntington Bank or REO/Rebuild, the Petitioner should be making line-of-credit loan payments:

THE COURT: Well, I thought so, but I read this and it doesn't—it says the motion of Rebuild and Rio [sic] to require Plaintiffs to make fair rental payments upon terms that shall permit the Davis' [sic] to use their home without interruption regardless of the outcome of this lawsuit is denied. That's what was being pulled out of my order. I thought so, too, although, this won't look good if it goes up to the [West Virginia Supreme] Court [of Appeals]. (page 67, lines 10-18)

Yet, again, counsel for Respondent REO/Rebuild appears concerned that issues, other than the single issue noticed, have been raised, addressed, orally argued, and, some, acted upon by the trial court:

MR. HANNA: Your Honor, if I may, the ruling today, which frankly, I wasn't anticipating—(page 68, lines 15-16)

Also, at this point, counsel for the Sheriff and Clerk appears uneasy at what has transpired in the hearing held January 27, 2014. He stated:

MR. ROSE: Your Honor, may I enquire on whether or not your rulings today can be deemed to be preliminary and subject to a properly noticed hearing for perhaps the entry of the order so that we do not have an issue to take up that while this was noticed on Mr. Hanna's motion to protect the property—(page 71, lines 14-19)

C. The Circuit Court awarding Respondent's attorney's fees of \$2,693.83 at the January 27, 2014, which issue was not noticed in or on the Respondent's Notice of Hearing dated January 16, 2014, and for which amount of money no itemized list of dates, hours (or units thereof), or specific attorney work product was ever submitted.

No itemized list of attorney work product costs were ever submitted, served upon the pro se Petitioner, or made part of the record in this lawsuit;

the sole document that the trial court relied upon to grant monetary sanctions against the pro se Petitioner was a partial-page affidavit signed by one William J. Hanna, a newly added attorney representing Respondent REO/Rebuild. Notice the statements made by the same William J. Hanna who swore by affidavit about the preciseness—to the penny—of the costs he sought and was awarded at a January 27, 2014, hearing, which notice thereof made no mention of a motion for sanctions against the pro se Petitioner:

MR. HANNA: I only came prepared today to address the motion with respect to permission to access the property....(page 26, lines 22-24)

MR. HANNA: And I'll submit a separate order, Your Honor, based upon the Court's ruling today finding the Davis' [sic] in contempt and granting the sanctions on—(page 71, lines 9-12)

MR. HANNA: Your Honor, if I may. I'm new to this game because I wasn't around the first go around when all of this transpired....(page 25, lines 22-24)

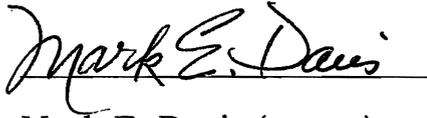
II. CONCLUSION

WHEREFORE, the pro se Petitioner respectfully asks this Supreme Court to find that the Notice of Hearing filed by Respondent REO/Rebuild was not timely served upon Petitioner in accordance with the computation formula set forth in the West Virginia Rules of Civil Procedure, and that the Respondent—and the trial court, and counsel representing other named parties—raised, were allowed to make oral arguments on, and received favorable rulings on issues not properly noticed. As a consequence, the pro se Petitioner was denied a fair hearing when Respondent REO/Rebuild, the trial court judge,

Huntington Bank, and counsel for the Sheriff and Clerk, introduced new issues without notice at the January 27, 2-14, hearing. Even the official transcript itself is captioned singularly “MOTION FOR AUTHORITY TO PROTECT PROPERTY FROM DAMAGE.” To have a fair hearing, the Petitioner was entitled to a proper hearing notice, a proper motion seeking relief on all issues raised at the hearing except the Motion to Protect the Property from Damage. See *McDougal v. McCommon*, 193 W.Va. 229, 237, 455 S.E.2d 788, 796 (“one of the purposes of the . . . Rules of Civil Procedure is to eliminate surprise. Trial by ambush is not contemplated by the Rules of Civil Procedure[.]”).

MARK E. DAVIS

Pro Se

A handwritten signature in black ink that reads "Mark E. Davis". The signature is written in a cursive style and is positioned above a horizontal line.

Mark E. Davis (pro se)

51 Woodbridge Drive

Charleston, WV 25311-1135