14-0432

**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA**

2014 MAR 20 PM 4:03

**MARK E. DAVIS,**
**TAMMY L. DAVIS,**
**Plaintiffs,**

**v.**

**CIVIL ACTION NO.: 08-C-1058**
**JUDGE CARRIE L. WEBSTER**

**MIKE RUTHERFORD, et al.**
**Defendants.**

**ORDER GRANTING HUNTINGTON NATIONAL**
**BANK'S SUMMARY JUDGMENT**

The Court has pending before it the MOTION OF HUNTINGTON NATIONAL BANK, N.A. FOR SUMMARY JUDGMENT and the RESPONSE OF DEFENDANTS REO AMERICA INCORPORATED AND REBUILD AMERICA INC., TO HUNTINGTON NATIONAL BANK'S MOTION FOR SUMMARY JUDGMENT properly notified and argued before the Court on April 19, 2013 and October 3, 2013. The Court also has pending before it before it the ORDER DENYING HUNTINGTON NATIONAL BANK'S MOTION FOR SUMMARY JUDGMENT, OBJECTION OF REBUILD AMERICA, INC. TO DEFENDANT HUNTINGTON NATIONAL BANK'S PROPOSED ORDER GRANTING SUMMARY JUDGMENT and REPLY OF THE HUNTINGTON NATIONAL BANK, N.A. TO REBUILD AMERICA, INC.'S OBJECTION TO THE ENTRY OF SUMMARY JUDGMENT AND MOTION THAT EVIDENCE FROM THE CHIEF TAX DEPUTY BE RULED INADMISSIBLE, which were heard by the Court on January 27, 2014. The Court having hearing the arguments and representations of counsel, having reviewed the record contained herein, having determined that the exhibits attached to the supporting briefs filed in this civil action are authentic and admissible pursuant to W.Va. R. Evid. 104, 801, 803, 804, 901 and 902, hereby grants Summary Judgment in favor of Huntington National Bank as it relates to the issue of bankruptcy pending before the Court.

The Court makes the following **findings of fact:**

1. The Plaintiffs, Mark E. Davis and Tammy L. Davis (who represent themselves pro se in this Civil Action), acquired property located at 51 Woodbridge Drive, Charleston, West Virginia 25311 (the "Property"). The Deed by which the Plaintiffs acquired title to the Property is dated July 10, 2003, and of record in Deed Book 2580 at Page 571 in the Office of the Clerk of the County Commission of Kanawha County, West Virginia. A true copy of the Deed is attached as Exhibit 1 to the Motion for Summary Judgment of the Huntington National Bank, N.A., (the

"Bank's Summary Judgment Motion"). Rebuild agrees to these factual assertions. Response of the Defendants, Reo America Incorporated and Rebuild America, Inc., to Huntington National Bank, N.A.'s Motion for Summary Judgment, served and filed on or about April 12, 2013 ("Rebuild's Response"), ¶ a., at p. 1.

2. The Property was subject to a Deed of Trust in favor of Huntington Bank, N.A., a true copy is attached as Exhibit 2 to the Bank's Summary Judgment Motion. The Bank is listed as a creditor with a lien on the Property as shown in the Bankruptcy Petition and Schedules (Schedules A and D) and on the Statement of Affairs, Question 3, and on the Debtor's Statement of Intentions, true copies of which are attached as Exhibits 3, 4 and 5 to the Bank's Summary Judgment Motion. Rebuild agrees that these Exhibits are authentic. Rebuild's Response, ¶ d at p. 2.

3. Real property taxes on the Property were not paid for the tax year 2005. The Kanawha County Sheriff began the process of enforcing payment of the tax lien pursuant to W.Va. Code Sec. 11A-2-1 et seq.

4. The first Notice of the Sale required by W. Va. Code, § 11A-2-13 was published as a Class 1-0 advertisement on May 11, 2006. Rebuild agrees with this factual assertion as made in Allen Bleigh's deposition at p. 47, and a true copy of the published Notice is attached as Exhibit 2 to Rebuild's Response. Rebuild's Response, ¶ c at p. 2. Allen Bleigh is the Chief Tax Deputy for the Kanawha County Sheriff. Allen Bleigh's Deposition, p. 9; Allen Bleigh's Affidavit (Exhibit 13 to the Bank's Motion), ¶ 1; Rebuild's Response, ¶ a at p. 2.

5. The Plaintiffs filed a Chapter 7 Bankruptcy Petition in the Bankruptcy Court for the Southern District of West Virginia on July 12, 2006 (Case No. 06-20398). As aforesaid, true copies of the Petition, the mailing matrix, the Schedules of Assets and Liabilities, and the Statement of Affairs are attached respectively as Exhibits 3, 4 and 5 of the Bank's Summary Judgment Motion, and Rebuild agrees that these exhibits are authentic. Rebuild's Response, ¶ d at p. 2.

6. The second Notice of Sale required by W.Va. Code, §11A-3-2(b) to be published, was published on September 13, 2006. Rebuild agrees with this factual assertion made in Allen Bleigh's deposition, p. 46; Rebuild's Response, ¶ e at p. 2. A true copy of the second published Notice of Sale is attached as Exhibit 3 to Rebuild's Response.

7. On October 13, 2006, notice of tax sale as required by W. Va. Code, § 11A-3-2(b) to be served on the Plaintiff-owners of the Property was mailed to 929 Chappell Road, Charleston, West Virginia, the former residence of the Plaintiffs as asserted in Allen Bleigh's Deposition, p. 26; Affidavit, ¶¶ 8 and 9. The certified mail notice was returned to sender as unable to forward on October 21, 2006. A true copy of the certified mailing card is attached to the Bank's Summary Judgment Motion as Exhibit 9, and to Allen Bleigh's Deposition as Exhibit 1. Rebuild agrees with these factual assertions. Rebuild's Response, ¶ f at p. 2.

8. A letter, dated October 16, 2006, from Sheriff's Department was filed with the Bankruptcy Court on October 17, 2006. The letter requested that the Sheriff receive notice of hearings and proceedings in the Bankruptcy case. A true copy of the letter is attached as Exhibit 17 to the Bank's Summary Judgment Motion, and as Exhibit 5 to Allen Bleigh's Deposition. Deposition, Allen Bleigh, pp. 48-49.

9. On October 17, 2006, the Bankruptcy Court entered its Discharge Order. Rebuild agrees with this factual assertion. Rebuild's Response, ¶ g at p. 2. A true copy of the Discharge Order is attached as Exhibit 4 to Rebuild's Response.

10. On November 14, 2006, the Sheriff conducted the sale and sold the tax lien to "U.S. Bank. Cust. Sass Muni, V DTR". A true copy of the Certificate of Sale is attached as Exhibit 7 to the Bank's Summary Judgment Motion. Pursuant to W. Va. Code, § 11A-3-15, the Certificate of Sale was assigned to Rebuild. A true copy of the Assignment is attached as Exhibit 8 to Rebuild's Response. These facts are admitted by Rebuild. Rebuild's Response, ¶¶ h and k, pp. 2 and 3.

11. On April 14, 2008, the Property was conveyed by the Clerk of the County Commission of Kanawha County to Rebuild by Deed of record in the Clerk's Office in Book 2718, at page 710. Rebuild's Response, ¶ j at p. 3. A true copy of the Deed is attached as Exhibit 9 to Rebuild's Response.

Based upon the foregoing undisputed **findings of facts**, the Court does hereby make the following **conclusions of law**:

**1. This Court Has Concurrent Jurisdiction to Determine If the Automatic Stay Applies, But Only the Bankruptcy Court May Annul the Automatic Stay.**

Federal Courts have jurisdiction over bankruptcy "core proceedings". 28 U.S.C. §§ 157 and 1334. "Core proceedings include . . . motions to terminate, annul, or modify the automatic stay". 28 U.S.C. § 157(b)(2)(G).

In the present case, the Circuit Court of Kanawha County is not being asked to "terminate, annul, or modify the automatic stay". Further, this Court is not being asked to sanction Rebuild and REO for violating the automatic stay as this would be a matter under the exclusive jurisdiction of the federal courts. In re Halas, 239 B.R. 784, 792 (Bankr. N.D. Ill. 1999). Rather, this Court is only being asked to recognize the effect of the automatic stay, including that actions that violate the stay are void. Here, the Circuit Court of Kanawha County has concurrent jurisdiction.

> Not surprisingly, courts have uniformly held that when a party seeks to commence or continue proceedings in one court against a debtor or property that is protected by the stay automatically imposed upon the filing of a bankruptcy petition, the non-bankruptcy court properly responds to the filing by determining whether the automatic stay applies to (i.e., stays) the proceedings.

Chao v. Hospital Staffing Services, Inc., 270 F.3d 374, 384 (6th Cir. 2001).

> Non-bankruptcy forums in both the state and federal systems have jurisdiction to at least initially determine whether pending litigation is stayed pursuant to Section 362.
>
> . . .
>
> The bankruptcy court from which the automatic stay originated nonetheless has the final say.
>
> . . .
>
> Thus, the federal courts must have the final word on 'the scope and applicability of the automatic stay' with a given course of conduct so as to prevent an inadvertent state-court modification of a federal injunction under Section 362(d). . .

In re Mid-City Parking, Inc., 332 B.R. 798, 803-04 (Bankr. N. D. Ill. 2005) (citations omitted).

Rebuild and REO suggest that this Court, the Circuit Court of Kanawha County, has the power to retroactively annul the stay. This is incorrect because only the federal courts have jurisdiction over a "core proceeding" requesting an annulment of the automatic stay. In re Formisano, 148 B. R. 217, 224 (Bankr. D. N.J. 1992); In re Gruntz, 202 F.3d 1074, 1081 (9th Cir. 2000). Any motion to annul the stay must be brought in the Bankruptcy Court. The case of Bascom Corporation v. Chase Manhattan Bank cited by Rebuild and REO in their Memorandum is consistent with the above-described concurrent jurisdictional scheme that a state court may decide whether the stay is in effect, but that the federal courts have the final say.

## 2. Actions Taken in Violation of the Automatic Stay are Void Ab Initio.

The automatic stay of Bankruptcy Code, § 362 is "extremely broad in scope". 3 Collier on Bankruptcy, ¶362.03. It prevents any action to enforce pre-petition claims against a bankruptcy debtor, the debtor's property, or property of a bankruptcy estate.[1] Bankruptcy Code, § 362(a)(1) - (6).

> Section 362 provides for an automatic stay upon the filing of a bankruptcy petition under any chapter of the Bankruptcy Code. Section 362 provides for a broad stay of litigation, lien enforcement and other actions, judicial or otherwise, that are attempts to enforce or collect prepetition claims. It also stays a wide range of actions that would affect or interfere with property of the estate, property of the debtor or property in the custody of the estate.

3 Collier on Bankruptcy, ¶ 362.01.

The automatic stay applies to tax sales. "Critically, 11 U.S.C. § 362(a) automatically stayed the tax sale proceedings." In re Pierce, 91 Fed. Appx. 927, 929 (5th Cir. 2004). "The sale of debtors' real property for the non-payment of delinquent taxes is the exact type of creditor action section 362(a) stays". In re Young, 14 B.R. 809, 811 (Bankr. N.D. Ill. 1981).

Under the majority view, and the view followed by the Bankruptcy Court in this District, actions taken in violation of the stay are void ab initio. "In the view of this Court, the clear weight of authority favors treating violations of the automatic stay as void is a matter of law. . . . Accordingly, the court follows the majority of circuits in holding that violations of the automatic stay are void as a matter of law." In re Ellison, 385 B.R. 158, 164-65 (Bankr. S.D.W.Va. 2008). When a tax sale is conducted in violation of the automatic stay, it is null and without legal effect. In re Pierce, 91 Fed.Appx. 927, 929 (5th Cir. 2004). "The stay created by section 362(a) is an automatic statutory stay and acts taken in violation of the stay are void ab initio regardless of notice." In re Young, 14 B.R. 809, 811 (Bankr. N.D. Ill. 1981).

It is undisputed that during the pendency of the Plaintiffs' Bankruptcy and prior to the entry of discharge on October 17, 2006, and while the Bankruptcy automatic stay was in effect, the Sheriff, as part of a proceeding to enforce a tax claim, published a Notice of Sale on September 13, 2006, and mailed a Notice of Tax Sale to the

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[1] Rebuild and REO assert in their Memorandum that because the Debtors, Mr. and Mrs. Davis, exempted the real estate in question, that it was no longer property of the bankruptcy estate entitled to the protection of the automatic stay. However, they cite no case law in support of this proposition, and Bankruptcy Code, § 362 clearly provides that the stay prevents the assertion of claims against the debtor and property of the debtor in addition to property of the estate. Bankruptcy Code, § 362(a)(1) - (6).

Plaintiffs on October 13, 2006. These actions to enforce a pre-bankruptcy claim were in clear violation of the automatic stay. "By having the property posted for Sheriff's sale, Mr. Beckett [the creditor's attorney], was in violation of the stay and in contempt of court." In re Demp, 23 B.R. 239, 240 (Bankr. E.D. Pa. 1982) (brackets added). Similarly, sending a notice directing the clerk to publish a notice of judicial sale is in violation of the automatic stay. In re Franklin Mortgage & Investment Co., Inc., 143 B.R. 295, 303 (Bankr. D.C. 1992). "Advertising for foreclosure is clearly the sort of creditor action that is stayed by Sections 362(a)(1), (3), (4), and (5) . . . and 'actions taken in violation of the automatic stay are void and without effect'." In re Ring, 178 B.R. 570, 574-75 (Bankr. S.D. Ga. 1995), quoting, Borg-Warner Acceptance Corp. v. Hall, 685 F.2d 1306, 1308 (11th Cir. 1982).

Failure to give notice is not a "mere 'irregularity in the proceedings' but a total omission of a mandatory step" in the tax sale proceedings and is a jurisdictional defect that cannot be cured. Gates v. Morris, 123 W.Va. 6, 10-12, 13 S.E.2d 473, 475-76 (1941). As noted by the Supreme Court in its Decision: "The owner cannot be deprived of his land by sale thereof for taxes unless the procedure prescribed by the statute, strictly construed, is substantially complied with." Supreme Court Decision, p. 17, quoting, Syl. Pt. 1, Koontz v. Ball, 96 W.Va. 117, 122 S.E. 461 (1924). Subsequent amendments to the curative provisions of the statute do not alter the rule set forth in Gates v. Morris. Shaffer v. Mareve Oil Corp., 157 W.Va. 816, 823-24, 204 S.E.2d 404, 408-09 (1974).

If the automatic stay of Bankruptcy Code § 362 was violated, then the publications required by W.Va. Code, §§ 11A-2-13 and 11A-3-2, and the certified letter notice to the landowner required by § 11A-3-2(b) are void ab initio, and therefore, they never occurred. If they never occurred, mandatory steps were omitted and the notice to redeem cannot cure the jurisdictional defect. The notice to redeem may satisfy Due Process but it cannot recreate that which the law deems to be void ab initio or cure jurisdiction defects. Actions in violation of the automatic stay are void as a matter of law. Ellison v. IRS, 835 B.R. 158, 164-65 (Bankr. S.D. W.Va 2008).

Rebuild does not cite any legal authority holding that publishing and mailing a Notice of Tax Sale is not violative of the automatic stay. Instead, Rebuild attempts to analogize the publishing of a Notice of Sale to a Notice of Continuance of a Sale. Clearly, a Notice of Sale is a part of a debt collection proceeding where the Notice of Continuance is not. Rather, a Notice of Continuance is an act of suspension and evidences an intention not to proceed with a sale to enforce a claim.

Failure to give proper legal notice is not a "mere 'irregularity in the proceedings' but a total omission of a mandatory step" in the tax sale proceedings and is a jurisdictional defect that cannot be cured. Gates v. Morris, 123 W.Va. 6, 10-12, 13 S.E.2d 473, 475-76 (1941). As noted by the Supreme Court in its Decision in this case: "The owner cannot be deprived of his land by sale thereof for taxes unless the procedure prescribed by the statute, strictly construed, is substantially complied with." Rebuild Am., Inc. v. Davis, 229 W.Va. 86, 94, 726 S.E.2d 396, 404 (2012), quoting, Syl. Pt. 1, Koontz v. Ball, 96 W.Va. 117, 122 S.E. 461 (1924). Subsequent amendments to the curative provisions of the statute do not alter the rule set forth in Gates v. Morris. Shaffer v. Mareve Oil Corp., 157 W.Va. 816, 823-24, 204 S.E.2d 404, 408-09 (1974).

In summary, (i) the Notices of Sale were a necessary and integral step in the sale process, (ii) the Notices are void as a matter of law and of no legal effect, (iii) the failure to give proper legal Notice is a jurisdictional defect, and (iv) therefore, the sale must be set aside as jurisdictionally defective.

In accordance with the above **findings of facts** and **conclusions of law**, the Court does hereby **ORDER** and **ADJUDGE** as follows:

a) The Court grants the Bank's Motion pursuant to W.Va. R. Evid. 104, 801, 803, 804, 901 and 902, and orders that the Exhibits attached to the Bank's Summary Judgment Order and the Exhibits to Rebuild's Response as referenced above are authentic and admissible.

b) The Motion for Summary Judgment filed on behalf of the Bank as it pertains to the bankruptcy issues now pending before the Court is hereby granted.

c) The Bank holds a valid and enforceable Credit Line Deed of Trust on the property.

d) That the April 14, 2008, Deed be, and it hereby is, declared null and void upon the Plaintiffs or Huntington National Bank or any other party paying in full to Rebuild America within 30 days the amount which would have been required for redemption, together with any taxes which have been paid on the property since delivery of the deed, with interest at the rate of twelve percent per annum. Rebuild America shall be required to provide to Huntington National Bank a written itemization of all fees, costs, expenses and/or interest it believes it is entitled to within ten (10) days of the date of this Order, which itemization will specify who the proceeds are to be made payable to and where the proceeds are to be sent.

e) Rebuild America, the Plaintiffs and/or Huntington National Bank shall jointly or, if they so desire, separately, notify the court in writing on or before 30 days from the date of entry of this ORDER, with respect to that which transpires under paragraph d) above. The court will receive on that same date a motion for entry of final judgment from any or all parties, with response, if any, to be filed ten (10) days thereafter.

f) Rebuild agrees to the findings of fact 1 through 11, and to the authenticity of the Exhibits referred to in the findings of fact. Rebuild objects to the conclusions of law **and to the decision to void the tax deed**, based on the arguments Rebuild has asserted in its briefs and in Court, and Rebuild's objections are noted and preserved.

g) Upon the expiration of the timeframes set forth in e) above or the finalization of any proceedings relating thereto this civil action shall be **dismissed with prejudice** and shall be removed from the docket of this Court.

h) The Clerk is hereby directed to send a certified or conformed copy of this Order to the Plaintiffs and Counsel of record.

Entered: 3/20/14

**CARRIE L. WEBSTER, JUDGE**

Submitted by:

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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 21st DAY OF March, 2014
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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**WEST VIRGINIA SUPREME COURT OF APPEALS**

**MARK E. DAVIS and**
**TAMMY L. DAVIS,**

**Plaintiffs,**

**v.** **Civil Action No. 08-C-1058**
**Judge Webster**

**MIKE RUTHERFORD, et al.**

**Defendants.**

**CERTIFICATE OF SERVICE**

I, James W. Lane, Jr., counsel for Rebuild America, Inc. and REO America, Inc., do hereby certify that on the 21st day of April, 2014, the foregoing Notice of Appeal was served upon the following counsel of record via U.S. Mail:

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