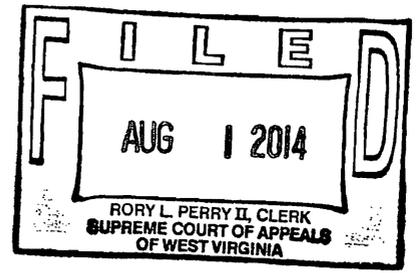


**BRIEF FILED
WITH MOTION**



No. 14-0432

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14-0432

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

Petitioners,

v.

MARK E. DAVIS, and TAMMY L. DAVIS, Plaintiffs Below;

MIKE RUTHERFORD, and VERA McCORMICK

Clerk, Defendants Below; and

HUNTINGTON NATIONAL BANK, N.A.,

Intervenor Below,

Respondents.

BRIEF OF PETITIONER

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

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I. ASSIGNMENTS OF ERROR

- A. The Circuit Court erred in finding that the Sheriff's notice of the tax lien sale, published on September 13, 2006 and mailed October 13, 2006, violated the automatic stay of bankruptcy.**
- 1. The Notices at issue did not violate the Bankruptcy Code's automatic stay (11 U.S.C. §362(a)), because the automatic stay did not apply the Sheriff's sale of the tax lien on the Davises' Real Property.**
 - 2. The Notices at issue qualify under a specific provision of the Bankruptcy Code that creates an exception to the automatic stay for transfers that cannot be avoided by a trustee under certain sections of the Bankruptcy Code.**
 - 3. The Notices at issue did not violate the Bankruptcy Code's automatic stay, because the stay has been defined by the great majority of bankruptcy courts to permit a creditor to give notices during a bankruptcy case of a creditor's sale, as long as (a) the creditor's sale process was commenced prior to the bankruptcy filing and (b) the sale itself occurs after the automatic stay terminates.**
- B. The Circuit Court erred in finding that the Tax Deed should be set aside, because even if the Sheriff's notices of the tax lien sale are invalid as a violation the bankruptcy stay, under West Virginia law the failure of the Sheriff's notices is not a valid basis to set aside a tax deed.**

II. STATEMENT OF THE CASE

This Appeal arises from the Circuit Court of Kanawha County's March 20, 2014, "Order Granting Huntington National Bank's Summary Judgment" ["March 20, 2014 Order"]. The March 20, 2014 Order declares a tax deed issued by the Clerk of the Kanawha County Commission to Rebuild America, Inc. ["Rebuild"] dated April 14, 2008 ["Tax Deed"] to be void, upon the payment to Rebuild by the Davises or Huntington National Bank of the redemption amount, plus interest, for unpaid real property taxes.

The issue presented to the Court on summary judgment was whether the bankruptcy case of Mark and Tammy Davis ["Davises"] stayed the Kanawha County Sheriff's preparations for the sale of the delinquent tax lien against the Davises' real property. More precisely, the issue was and is whether the automatic stay of bankruptcy, 11 U.S.C. §362, prohibits and voids the Sheriff's notice of the sale given pursuant to *W.Va. Code* § 11A-3-2, which notice was given while the automatic stay of bankruptcy was in place. Further, if the Sheriff's notice of the sale of the tax lien is determined to be void, a second issue is whether the Tax Deed issued fully seventeen (17) months thereafter is likewise void, notwithstanding the fact that Rebuild and the Kanawha County Clerk faithfully complied with *W.Va. Code* § 11A-3-21 [2010], *W.Va. Code* § 11A-3-22 [2010], and *W.Va. Code* § 11A-3-27 [2010].

Huntington National Bank's ["Bank's"] Motion for Summary Judgment filed February 13, 2013 and the Response of Defendants Rebuild America, Inc. and REO America Inc. to Huntington National Bank's Motion for Summary Judgment filed April 14, 2013 contain exhibits that document the dates and events of the Davises' bankruptcy case, the Kanawha County Sheriff's sale of the tax lien, and the Kanawha County Clerk's Tax Deed to Rebuild.

The uncontroverted facts before the Court are as follows:

- a. On July 11, 2003, Davises owned 51 Woodbridge Drive, Charleston, WV ("Real Property"). (A.R. 71-72)
- b. Plaintiffs failed to pay 2005 real property taxes on the Subject Real Property.
- c. On May 11, 2006, the Sheriff of Kanawha County advertised in the newspaper the notice of delinquency. (A.R. 179-183 and 184)
- d. July 12, 2006, Plaintiffs filed a petition under Chapter 7 of the United States Bankruptcy Code in the U.S. Bankruptcy Court for the Southern District of West Virginia, case no. 06-20398. (A.R. 80-123)
- e. September 13, 2006, the Sheriff published the second notice of delinquency in satisfaction of the legal requirement to publish delinquent real estate prior to sale, pursuant to *W.Va. Code* 11A-3-2(a). (A.R. 179-183 and 185)

- f. October 13, 2006, notices of delinquency and of the tax lien sale were mailed to the Davises at their last known address, pursuant to W.Va. Code 11A-3-2(b). The documents attached to Huntington's Brief, at Exhibit 9, contained the notices. (A.R. 179-183)
- g. On October 17, 2006, the Bankruptcy Court entered its discharge order discharging the Davises of debts. (A.R. 186)
- h. November 14, 2006, the Sheriff conducted the sale of the tax lien and sold the lien to U.S. Bank Cust. Sass Muni V DTR ("US Bank"). (A.R.124-125)
- i. December 28, 2007, U.S. Bank filed with the Clerk of Kanawha County Commission a list of all persons or entities to be served with Notice to Redeem, pursuant to W.Va. Code 11A-3-19. (A.R. 188)
- j. January, 25, 2008, the Clerk of the Kanawha County Commission prepared a Notice to Redeem. (A.R. 190-196)
- k. April 10, 2008, US Bank, as custodian, and Sass Muni V DTR, LLC, transferred all rights, title and interest in and to the tax certificate to Rebuild America, Inc. (A.R. 197-198)
- l. April 14, 2008, in the absence of payment of the redemption amount by any party, Defendant Clerk of Kanawha County Commission executed and delivered the Tax Deed, conveying the Subject Real Property to Rebuild America, Inc. (A.R. 199-213)

Based on the foregoing, the Circuit Court concluded that the Sheriff's publication of the notice of tax lien sale on September 13, 2006 and the Sheriff's mailing of the notice of tax lien sale on October 13, 2006, violated the automatic stay of bankruptcy. (A.R.6) The Court found that application of the bankruptcy stay "voids" the notices of the tax lien sale. *Id.* The Court concluded that the void notices of the tax lien sale are mandatory steps in the tax lien sale procedure under West Virginia Code, and that the Tax Deed must be set aside. (A.R. 6 and 7) It is from this Order that Rebuild now appeals.

III. SUMMARY OF ARGUMENT

The Order entered March 20, 2014, by the Circuit Court of Kanawha County must be overturned, based on application of bankruptcy law and of West Virginia law to the uncontroverted facts. First, the Circuit Court erred in its finding that the notices at issue

violated the automatic stay of bankruptcy. The notices do not violate the automatic stay of bankruptcy as it is defined at 11 U.S.C. §362(a). Further, the Bankruptcy Code specifically provides that certain creditor actions do not violate the automatic stay. One such action that is immune from the automatic stay, 11 U.S.C. §362(b)(24), is “any transfer that is not avoidable under section 544 and that is not avoidable under section 549”. See, 11 U.S.C. §362(b)(24). The Sheriff’s sale of the tax lien against the Davises’ real property falls under this exception to the automatic stay. Finally, bankruptcy courts have uniformly found that if a creditor has commenced a proceeding to enforce a lien before a debtor files bankruptcy, the creditor may take actions during the bankruptcy case to preserve the creditor’s proceeding, without violating the automatic stay. Based on this case law, the Sheriff’s notices at issue in this case did not violate the automatic stay.

Second, the Circuit Court erred in its finding that the Tax Deed must be set aside under West Virginia statutory law. Even if the notices at issue are void because they violated the bankruptcy stay, the failure of/voidance of/lack of the notices of the Sheriff’s sale of a tax lien is not a legal basis to set aside the Tax Deed. No section of the West Virginia Code authorizes the Circuit Court’s action. In a prior appeal in this case, the Supreme Court held that the Circuit Court should not have set aside the Tax Deed based upon *W.Va. Code*, 11A-3-2 [2007]. Accordingly, even if the notices at issue are determined to be in violation of the Bankruptcy Code, the failure of the notices is not a legal basis to set aside the Tax Deed.

IV. STATEMENT REGARDING ORAL ARGUMENT

Oral argument is necessary under Rule 18(a) of the West Virginia Rules of Appellate Procedure. The decisional process will be significantly aided by oral argument. While argument of Issue B involves application of settled law under Rule 19(a)(1), argument of Issue A, involves bankruptcy issues of first impression for this Court and would qualify

under Rule 20(a)(1) and the resolution of this case may have a more broad affect on title to real property other than simply the property at issue in this case.

V. ARGUMENT

A. **The Circuit Court erred in finding that the Sheriff's notices of the tax lien sale, published on September 13, 2006 and mailed October 13, 2006, violated the automatic stay of bankruptcy.**

1. **The Notices at issue did not violate the Bankruptcy Code's automatic stay (11 U.S.C. §362(a)), based on the statutory language establishing the stay.**

The Bankruptcy Code at 11 U.S.C. § 362(a) establishes an automatic stay that enjoins a party from creating, perfecting or enforcing a lien against property of the bankruptcy estate. See, 11 U.S.C. § 362(a). The notices at issue in this case related to the Sheriff's sale of the tax lien against the Real Property. The Sheriff's sale of the preexisting tax lien did not create, perfect or enforce the lien, and therefore did not violate the stay.

When the Davises filed their bankruptcy case in 2006, their rights in the Real Property were both determined and limited by applicable state law. *Butner v. United States*, 440 U.S. 48, 54, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979) ("Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law"). The tax lien at issue in this case was for 2005 year's taxes. Under West Virginia law, Kanawha County's tax lien for year 2005 property taxes was secured by a lien against the Real Property effective as of July 1, 2004. *W.Va. Code* § 11A-1-2. Therefore, the sale of the lien was not an act to "create" or "perfect" the lien – the lien existed prior to the Davises' bankruptcy filing.

The Sheriff's sale of the tax lien was not an act to "enforce" the lien. The Davises owned the Real Property before and after the tax lien sale. Their property rights were not affected by the sale. The sale of the tax lien was simply the sale of a lien to a third party. It

allowed Kanawha County to obtain a cash payment in exchange for its pre-existing tax lien, relieving the County from having to await payment at some undetermined time in the future.

Although not in the context of a transfer of a tax lien, in a widely-cited decision the Bankruptcy Court for the Middle District of Georgia discussed the reasoning for such a finding:

The Court finds that the automatic stay provisions of the Bankruptcy Code do not prohibit a creditor of a debtor from transferring any interest or claim it might have against the debtor's bankruptcy estate to a third party. Such a transfer merely substitutes the party that holds the interest or claim against the debtor's bankruptcy estate, and such transfer does not serve to increase or decrease the interest or claim the party asserts against the debtor's bankruptcy estate. The Court thus concludes that C & S Bank's transfer of its interest to Plaintiff under the bill of sale did not violate the automatic stay provisions of the Bankruptcy Code.

In re: Georgia Steel, Inc., 71 B.R. 903, 909 (Bankr. M.D. Ga. 1987). The sale of the tax lien is not a violation of the automatic stay, and the Debtor is not entitled to have the same set aside or vacated.

2. The Notices at issue qualify under a specific provision of the Bankruptcy Code that creates an exception to the automatic stay for transfers that cannot be avoided by a trustee under certain sections of the Bankruptcy Code.

The bankruptcy automatic stay is established at 11 U.S.C. §362(a). The Bankruptcy Code also provides for certain exceptions to the automatic stay, at 11 U.S.C. §362(b). One such exception applies to this case. It reads as follows:

(b) The filing of a petition under section 301, 301, or 303 of this title ... does not operate as a stay –
...;

(24) under subsection (a), of any transfer that is not avoidable under section 544 and that is not avoidable under section 549[.]

See, 11 U.S.C. §362(b)(24). All of the elements for this exception are satisfied in this case. Accordingly, the Sheriff's tax lien sale and the notices of the sale did not violate the automatic stay.

First, the sale by the Kanawha County Sheriff of the tax lien was a "transfer" as that term is defined in the bankruptcy code. Section 101(54)(D) defines the term "transfer" as "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with (i) property; or (ii) an interest in property". See, 11 U.S.C. §101(54). The Kanawha County Sheriff's sale of the tax lien qualifies under this definition of "transfer". See, *W.Va.* § 11A-3-5 ("the tax lien . . . shall be sold by the sheriff"). The Sheriff's sale is clearly "disposing of or parting with" property or an interest in property, and it is accordingly a "transfer" under the Bankruptcy Code definition.

Second, the sale of the tax lien was not avoidable under Section 544 or Section 549 of the Bankruptcy Code. Sections 544 and 549 empower the bankruptcy trustee to avoid certain transfers. See, 11 U.S.C. §§ 544 and 549. The avoidance powers are designed to increase the assets available for the bankruptcy estate and its creditors. If a debtor sells his property after filing for bankruptcy, the trustee can exercise Section 549 to bring the property back into the estate for the benefit of creditors. No reason exists, however, for the trustee to avoid the transfer of a lien from one creditor to another, because there is no benefit to the bankruptcy estate. As argued below, the technical language of the Bankruptcy Code sections do not permit the bankruptcy trustee to avoid the sale of the tax lien by the Sheriff to a tax lien purchaser. As a practical matter, it makes sense that a trustee does not have this power, because avoiding such transfers has no benefit for the bankruptcy estate.

Section 544 reads:

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor . . . that is voidable by –

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

...

(3) a bona fide purchase or real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

See, 11 U.S.C. § 544. The Sheriff's sale of the tax lien is not avoidable under Section 544(a) because the sale is not "a transfer of property of the debtor". *Id.* Kanawha County owned the tax lien. The Davises certainly did not own the tax lien. Therefore, the transfer of the tax lien was not a transfer of property of the debtor, and Section 544 does not apply.

In addition, Section 544 only applies to transfers that occur before the commencement of the bankruptcy case. *In re Troutman Enters., Inc.*, 356 B.R. 786 (6th Cir. BAP 2007); *In re Vallecito Glass, LLC*, 440 B.R. 457, 469 (Bankr. N.D.Tex. 2010) (§544 can only be used to avoid pre-petition transfers); *In re Howard*, 391 B.R. 511,516 (Bankr. N.D. Ga. 2008)(Section 544 deals with a trustee's rights at the time of commencement of the bankruptcy case); *In re Branam*, 247 B.R. 440 (Bankr.E.D.Tenn 2000); *In re Schneiderman*, 251 B.R. 757 (Bankr. E.D. Pa. 2000). In this case, the tax sale clearly occurred after the Davises filed their bankruptcy case, and accordingly Section 544 is not applicable to avoid the tax sale.

Section 549 reads:

(a) *Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate (1) that occurs after the commencement of the case; and (2)(A) that is authorized only under section 303(f) or 542(c) of this title; or (B) that is not authorized under this title or by the Court.*

See, 11 U.S.C. § 549. Section 549 is limited to transfers of “property of the estate”. Property of the estate is defined generally as all interests of the debtor in property as of the commencement of the case. See, 11 U.S.C. § 541. The Davises never had an interest in the tax lien. The tax lien was owned by Kanawha County. Accordingly, and obviously, the tax lien was not property of the bankruptcy estate. The sale of the tax lien did not transfer property of the estate. *In re Young*, 14 B.R. 809, 812 (Bankr. N.D.Ill. 1981). Therefore, the Sheriff’s sale of the tax lien was not avoidable under Section 549.

All of the prerequisites of Section 362(b)(24) are satisfied in this case. Therefore, the sale of the tax lien qualifies as an exception from the automatic stay and all events associated with the tax sale did not of the automatic stay.

3. **The Notices at issue did not violate the Bankruptcy Code’s automatic stay, because the stay has been defined by the great majority of bankruptcy courts to permit a creditor to give notices during a bankruptcy case of a creditor’s sale, as long as (a) the creditor’s sale process was commenced prior to the bankruptcy filing and (b) the sale itself occurs after the automatic stay terminates.**

The Circuit Court did not find that the tax lien sale itself violated the stay because the tax lien sale occurred on November 14, 2006, after the plaintiffs received their discharge from bankruptcy on October 17, 2006. The Sheriff commenced the sale procedure on May 11, 2006, prior to the Davises’ bankruptcy. Under these circumstances, the Sheriff was permitted, under bankruptcy law, to provide notices of the sale during the bankruptcy case without violating the automatic stay.

A large majority of cases have found that if a creditor has commenced foreclosure procedures before the debtors bankruptcy filing, the creditor may take actions, including giving notice of the sale, after the bankruptcy case is filed, if the actions are necessary to preserve the proceeding. Courts find that the purpose of the automatic stay is to preserve

the *status quo* between a debtor and creditor. To preserve the continuing validity of a foreclosure proceeding after a bankruptcy case is filed, a creditor may advertise and issue written notice of a sale.¹ The creditor can proceed with the foreclosure after the bankruptcy discharge because the discharge does not extinguish liens. See, e.g., *Johnson v. Home State Bank*, 501 U.S. 78, 83, 111 S.Ct. 2150, 2153, 115 L.Ed.2d 66 (1991)

In *In re Atlas Machine & Iron Works, Inc.*, 239 B.R. 322 (Bkrcty E.D.Va. 1998), a trustee under a deed of trust had scheduled a foreclosure sale upon real property owned by the debtor. *Id.* at 325. On the morning of the sale date, December 5, 2006, the debtor filed a bankruptcy petition. *Id.* The trustee appeared at the place and time set for the sale and announced that the sale would be conducted on December 19, 2006. *Id.* The trustee then published notice of the December 19, 2006 sale in a local newspaper. *Id.* The creditor attempted to obtain relief from the automatic stay, but had failed to accomplish stay relief by December 19, 2006. *Id.* The trustee continued the sale again to April 10, 1997. *Id.* at fn 1. The trustee announced the new sale date at the time and place set for the first continued sale, and the trustee published notice of the new sale date in the local newspaper. *Id.* Also, the trustee sent a letter announcing the new sale date to parties who had expressed an interest in the auction. *Id.* The Trustee then sold the property on April 10, 1997 because the automatic stay had expired.

The Court found no violation of 11 U.S.C. §362 even though while the automatic stay was in effect the trustee (a) attended scheduled foreclosure sales and announced a new

¹ See e.g., *Taylor v. Slick*, 178 F.3d 698 (3d Cir. 1999); *In re Peters*, 101 F.3d 618 (9th Cir. 1996); *In re De Jesus Saez*, 721 F.2d 848 (1st Cir. 1983); *First Nat'l Bank v. Roach*(*In re Roach*), 660 F.2d 1316 (9th Cir.1981); *Worthy v. World Wide Fin. Servs., Inc.*,347 F.Supp.2d 502, 508-09 (E.D.Mich. 2004), *aff'd*, 192 Fed.Appx. 369 (6th Cir. 2006); *In re Barry*, 201 B.R. 820 (C.D.Cal. 1996); *Zeoli v. RIHT Mortgage Corp.*, 148 B.R. 698, 701 (D.N.H. 1993); *In re Fine*, 285 B.R. 700, 702 (Bankr.D.Minn. 2002); *In re Heron Pond, LLC*, 258 B.R. 529, 530 (Bankr.D.Mass. 2001); *Atlas Mach. & Iron Works, Inc. v. Bethlehem Steel Corp.*(*In re Atlas Mach. & Iron Works, Inc.*), 239 B.R. 322, 329-333 (Bankr.E.D.Va. 1998).

sale date; (b) published notices of the sale; and (c) directed written notices of the sale to interested parties. The Court found that these acts merely preserved the prepetition status quo. *Id.* at 329-330. The Court stated that had the creditor not acted to preserve the foreclosure proceeding, the passage of time would have "entirely expunged the stayed foreclosure proceeding." *Id.*, at 331, *quoting* Zeoli v. RIHT Mortgage Corp., 148 B.R. 698 (D.N.H. 1993). The Court distinguished the facts before it from cases in which creditors first scheduled foreclosure sales after a bankruptcy cases had been filed. *Id.*, at 332, *citing* *In re Ring*, 178 B.R. 570, 574 (Bkrtyc. S.D.Ga. 1995); *In re Franklin Mortg. & Inv. Co., Inc.*, 143 B.R. 295 (Bkrtyc. D.C. 1992); *In re Demp*, 23 B.R. 239 (Bkrtyc. E.D.Pa. 1982). The Court found that the written communications from the trustee were not intended to maintain the continuing legal validity of the foreclosure process. *Atlas Machine*, at 332. The Court found that its holding was consistent with a majority of Courts that had considered the matter, including an unpublished decision from a court within the Fourth Circuit. *Id.*, *citing* *First Union Nat'l Bank v. Clayton*, 1998 U.S. Dist. LEXIS 4108 (M.D.N.C. Jan. 16, 1998).

The seminal case to establish that a creditor may take actions to preserve a foreclosure proceeding without violating the bankruptcy stay is *First Nat'l Bank v. Roach*(*In re Roach*), 660 F.2d 1316 (9th Cir.1981). In *In re Roach*, the Circuit Court stated:

The automatic stay does not necessarily prevent all activity outside the bankruptcy forum. See David v. Hooker, Ltd., 560 F.2d 412, 417-18 (9th Cir. 1977) (automatic stay under old bankruptcy act did not prevent trial judge in a separate case from requiring the debtor to comply with a discovery order issued prior to the filing of the insolvency petition).

Here, the Bank merely maintained the status quo, and did not harass, interfere or gain any advantage. This is consistent with the purpose of the automatic stay provision. See In re Decker, 465 F.2d 294, 297 (3d Cir. 1972) (stay provisions of old act were designed to maintain status quo).

In re Roach, 660 F.2d 1316, 1318-19 (9th Cir.1981).

In *In re Fine*, 285 B.R. 700, 702 (Bankr.D.Minn. 2002), the Bankruptcy Court addressed a similar fact pattern in which a creditor acted to preserve a foreclosure sale that had been scheduled pre-bankruptcy by taking action to continue the sale after bankruptcy had been filed. The Court stated that:

[The creditor's] only alternative was to cancel the sale completely, which would nullify its foreclosure action, requiring it to start all over again, losing at least six weeks and incurring significant additional cost. This would turn the automatic stay into a sword rather than a shield it is intended to be.

Id. at 702. In *Zeoli v. RIHT Mortgage Corp.*, 148 B.R. 698, 701 (D.N.H. 1993), a creditor that had scheduled foreclosure sale pre-bankruptcy rescheduled the sale during the bankruptcy case, announced the sale was continued to a new date, and sent notices to all persons who received notices of the original sale. *Id.* at 699. The Court held that these measures did not violate the automatic stay. *Id.* at 699-700. The Court stated:

Only two realistic choices were allowed RIHT (creditor) in this case, and a choice was unavoidable. Either RIHT could "act" to postpone the scheduled foreclosure sale to a date certain, preserving the status quo, or, it could have "acted" by taking no action, thereby suffering termination of the stayed foreclosure sale by operation of time and State law. By postponing, RIHT preserved the existing relationship between the parties, protected its legitimate interests, and imposed no burden on the debtor.

Id. at 701. The Court found that where a creditor simply takes action necessary to preserve the continuing validity of the sale, it is not harrasing or coercive, but simply an attempt to preserve the status quo. *Id.*

The present case is similar to those discussed above. The tax sale process was commenced months before the Davises filed bankruptcy. After the Davises filed bankruptcy, the Sheriff mailed and published notice of the tax lien sale. These acts were necessary to preserve the continuing validity of the tax lien sale procedure. The actual sale of the tax lien occurred after the bankruptcy discharge. Based upon the rulings in the cases

quoted and cited above, the written notice and the publication did not violate the automatic stay, but instead preserved the status quo that existed before the case was filed.

In certain respects, the facts in this case differ from those of the cases cited above, which involved foreclosures. To the extent the facts differ, the facts in the instant case more strongly warrant a finding that no violation of the automatic stay has occurred. First, this case involves the West Virginia tax lien sale procedure. The procedures to notify property owners of a delinquent account start in May and the publications and notices are all set by statute, and the process may only occur once per year. The West Virginia tax lien sale procedure encumbers a much longer period of time than a foreclosure sale, and if the process is terminated at any stage, then the matter can only be commenced again the following year. In foreclosures, creditors have more flexibility to begin the process anew, after the bankruptcy case is over. Second, in this case the sale only involved a tax lien. In foreclosures, the sale involves title to the real property. Accordingly, less harm is borne by the bankrupt property owner in this case than in a foreclosure case.

B. The Circuit Court erred in finding that the Tax Deed should be set aside, because even if the Sheriff's notices of the tax lien sale are void as a violation the bankruptcy stay, under West Virginia law the failure of the Sheriff's notices is not a valid basis to set aside a tax deed.

The Circuit Court's decision to set aside the Tax Deed ultimately rested on West Virginia state law. (A.R. 6-7) The Court reasoned that because the notices given by the Sheriff were "void"² there was a "jurisdictional defect" that required setting aside the Tax

² The Circuit Court determined that an act in violation of the automatic stay is "void". Federal courts are not in agreement. Some deem an act in violation of the stay to be "invalid". *Easley v. Pettibone Michigan Corp.*, 990 F.2d 905, 909 (6th Cir.1993). Other courts find acts in violation of the stay to be merely voidable. *Sikes v. Global Marine, Inc.*, 881 F.2d 176, 178-79 (5th Cir.1989). The Fourth Circuit has not decided the issue. See *Ellison v. Commissioner of Internal Revenue*, 385 B.R. 158, 164-65 (S.D.W.V. 2008) .

Deed pursuant to West Virginia state law. (A.R. 7) The Court's resort to West Virginia law was appropriate.³ The Circuit Court erred in the application of West Virginia law.

First, no statutory authority supports the Court's conclusion. Article 3 of West Virginia Code Chapter 11A governs the sale of tax liens, and Article 4 of the same Chapter provides remedies relating to tax sales. Article 4 contains nine specific instances in which a court can set aside a tax deed.⁴ See, *W.Va. Code* § 11A-4-1 et seq. In this case, the Circuit Court set aside the Tax Deed because the Kanawha County Sheriff's notices given pursuant to *W.Va. Code*, 11A-3-2(a) and (b) were deemed to be invalid. (A.R. 6) A sheriff's failure to comply with *W.Va. Code* 11A-3-2 is not a basis to set aside a tax deed under the West Virginia Code.

In the absence of a statutory basis to set aside the Tax Deed, the Circuit Court resorted to case law. On a prior appeal in this very case, however, the Supreme Court of Appeals of West Virginia examined and rejected the argument that the Tax Deed should be set aside due to the failure to comply with *W.Va. Code*, 11A-3-2(b). The Supreme Court

³ See, *Bascom Corporation v. Chase Manhattan Bank*, 363 N.J.Super. 334, 342-, 832 A.2d 956 (2003) (finding the state court is free to make its own determination as to the effect of a void event in the tax sale proceeding, and upholding a tax deed even though a step in the tax foreclosure procedure was void as a result of a violation of the automatic stay).

⁴ See, *W.Va. Code*, 11A-4-2 (when all taxes are paid before a sale, *W.Va. Code*, 11A-4-2); *W.Va. Code*, 11A-4-3(a) (when the clerk of the county commission delivers a deed to the purchaser after the time specified by 11A-3-27); *W.Va. Code*, 11A-4-3(a) (when a clerk of the county commission issues a deed to a purchaser not thereto entitled because of purchaser's failure to comply with 11A-3-19); *W.Va. Code*, 11A-4-3(a) (when a clerk of the county commission issues a deed to a purchaser not thereto entitled because prior to the delivery of the deed the property had been redeemed); *W.Va. Code*, 11A-4-3(a) (when the deputy commissioner delivered a deed to the purchaser after the time specified in 11A-3-59); *W.Va. Code*, 11A-4-3(a) (when a deputy commissioner issues a deed to a purchaser not thereto entitled because of purchaser's failure to comply with 11A-3-52); *W.Va. Code*, 11A-4-3(a) (when a deputy commissioner issues a deed to a purchaser not thereto entitled because prior to the delivery of the deed the property had been redeemed); *W.Va. Code*, 11A-4-4(a) (if a person entitled to be notified under the provisions of section 22 or 55, article three is not served with the notice as therein required and does not have actual knowledge that such notice has been given to others in time to protect his interests by redeeming the property); *W.Va. Code*, 11A-4-6 (if a person who was an infant or mentally incapacitated at the time of the tax deed subsequently redeems the real estate by paying to the purchaser, his heirs or assigns, before the expiration of one year after removal of the disability).

heeded the remedial statute which prescribes a finite number of well-defined circumstances in which a court can set aside a tax deed. See, *W.Va. Code*, 11A-4-1 et seq. The Supreme Court stated:

A tax deed is not invalidated on the basis that a person or entity failed to receive notice of the tax lien sale required by *W.Va. Code*, 11A-3-2 [2007], where it is proven that: (1) the subsequent redemption notice required by *W.Va. Code*, 11A-3-21 [2010], was served on all persons and entities entitled to notice, (2) service of the notice to redeem was perfected in the manner required by *W.Va. Code*, 11A-3-22 [2010], (3) the property was not redeemed within the time period set out in the redemption notice, and (4) a tax deed, meeting the requirements of *W.Va. Code*, 11A-3-27 [2010], was delivered to the tax lien purchaser or assignee thereof.

Rebuild America, Inc. v. Davis, (Syl.Pt.1) 726 S.E.2d 396, 229 W.Va. 86 (2012). The

Supreme Court stated:

We find that the trial court erred when it held that the failure to serve the Davises with the pre-sale tax delinquency/lien/sale notices constituted a basis for setting aside the tax deed. In a lawsuit filed under W.Va. Code, 11A-4-4, a tax deed may be set aside only upon a finding by a trial court that the notice to redeem required by W.Va. Code, 11A-3-21 [2010], was not properly served.

Rebuild America, Inc. v. Davis, 726 S.E.2d 396, 404, 229 W.Va. 86, 94 (2012).

The cases cited by the Circuit Court in support of its holding were decided in 1941 and 1974. *Gates v. Morris*, 123 W.Va. 6, 10-12, 13 S.E.2d 473, 475 (1941) and *Shaffer v. Mareve Oil Corp.*, 157 W.Va. 816, 823, 204 S.E.2d 404, 408 (1974). The cases do not rely on or even mention *W.Va. Code* § 11A-3-2. The cases relied upon by the Circuit Court addressed a prior version of the tax lien sale statutes, that the West Virginia legislature has

since amended.⁵ A close reading of the cases relied upon the Circuit Court reveals that the procedural defect in each, which warranted setting aside a tax deed, was the failure to provide today's equivalent of the notice to redeem. In each case, the property owner did not receive notice that a tax deed would be delivered conveying the real estate. *Gates v. Morris*, 13 S.E.2d at 476; *Shaffer v. Mareve*, 204 S.E.2d at 406. In *Shaffer*, the Court specifically found fault in the tax lien purchaser's failure under then *W.Va. Code § 11A-3-20* to search the records and provide the county clerk with an accurate list of owners of the property, and the Clerk's notice was served on the deceased owner by publication and no notice at all was served on heir. *Shaffer v. Mareve*, 204 S.E.2d at 406. These cases are precisely consistent with and support the Supreme Court's holding in *Rebuild America, Inc. v. Davis*, (Syl.Pt.1) 726 S.E.2d 396, 229 W.Va. 86 (2012).

Therefore, setting aside the Tax Deed defied the West Virginia Code, conflicted with this Court's holding in a prior appeal of this case, and is unsupported by legal authorities. Thus, the Circuit Court's decision must be vacated.

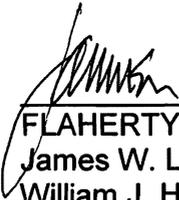
VI. CONCLUSION

WHEREFORE, for the reasons stated herein, Petitioner Rebuild America, Inc. and REO America, Inc., respectfully request that this Court reverse the Circuit Court's March 20, 2014 Order holding that the Tax Deed to Rebuild America, Inc. should be set aside.

⁵ The United States Supreme Court's opinion in *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983), addressed the constitutional rights of persons who hold an interest in property in the context of state tax sale procedures. 462 U.S. at 798-99, 103 S.Ct. 2706. In reaction to *Mennonite*, on July 1, 1994, the West Virginia Legislature re-enacted amended versions of Articles 3 and 4, Chapter 11A, for the purpose of bringing the state's notice provisions into compliance with *Mennonite*. See, *Plemons v. Gale*, 298 F.Supp 2d 380, 382 (S.D.W.V. 2004); Robert L. Shuman, *The Amended and Reenacted Delinquent and Nonentered Land Statutes-The Title Examination Ramifications*, 98 W. Va. L.Rev. 537, 540 (1996).

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

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 14-0432

Rebuild America, Inc, and
REO America, Inc.,
Defendants Below,

Petitioners,

v

Appeal from a final order of the
Circuit Court of Kanawha
County
(No. 08-C-1058)

Mark E. Davis, and Tammy L. Davis,
Plaintiffs Below; Mike Rutherford,
Vera McCormick, Clerk, Defendants Below;
and Huntington National Bank, N.A.,
Intervenor Below,

Respondents.

CERTIFICATE OF SERVICE

I, James W. Lane, Jr., do hereby certify that I served the foregoing **BRIEF OF PETITIONER REBUILD AMERICA, INC. and REO AMERICA, INC.** upon counsel of record this 1st day of August, 2014, by depositing a true copy thereof in the United States mail, postage prepaid, as follows:

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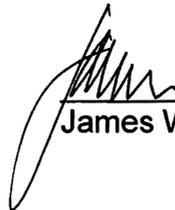
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