

15-0364

IN THE CIRCUIT COURT OF MCDOWELL COUNTY, WEST VIRGINIA

~~ALBIN LITTELL, individually, and as~~ ~~PLAINTIFF,~~
TRUSTEE OF THE LITTELL COAL INTEREST TRUST,

v.

Civil Action No.: 08-C-178
Rudolph J. Murensky, II
Chief Judge

STEVE MULLINS and
DONALD HICKS, Clerk of the County Commission
Of McDowell County, West Virginia,

DEFENDANTS.

FINAL ORDER

On March 25, 2013, came Plaintiff Albin Littell, individually, and as trustee of the Littell Coal Interest Trust (considered as one and the same) by counsel, Derrick W. Lefler, Esq.; Defendant Steve Mullins, in person and by counsel, Philip A. LaCaria, Esq.; and Defendant Donald Hicks, McDowell County Clerk, in person and by counsel, Edward J. Kornish, McDowell County Prosecuting Attorney, upon the matters set forth in the Plaintiff's Complaint and Amended Complaint. The Court heard testimony and accepted evidence.

PROCEEDINGS

A bench trial was conducted in this case. This Court heard testimony from Plaintiff Albin Littell; Defendant Donald Hicks, McDowell County Clerk; Defendant Steve Mullins; Charles Hart, Secretary/Treasurer of Hall Mining Company; and Leann Evans, from the McDowell County Assessor's Office. In addition to accepting Plaintiff's Exhibits 1-10 as evidence, the Court and the parties jointly examined land books for several years for Big Creek District, McDowell County.

FACTS

This action involves a dispute over the ownership of undivided interests in two parcels located in Big Creek District, McDowell County, West Virginia: (1) Parcel 7 on Tax Map 386

and (2) Parcel 5 on Tax Map 366. The two parcels, totaling 643 acres, were taxed by a single tax ticket assessed in the name of Hall Mining Company until 1999. After 1999, the parcels were separated into multiple tax tickets.¹ Undivided interests in Parcel 7 were assessed to the Nancy Doonan Estate, Hall Mining Company, and Judith Wadosky. Undivided interests in Parcel 5 were assessed to Hall Mining Company and Judith Wadosky. Parcel 5 and Parcel 7 were combined in one 643 acre entry for the undivided interest of the W. F. Harman heirs. No entry for an interest in Parcel 5 appeared in the Nancy Doonan Estate.

On November 16, 2004, Defendant Steve Mullins purchased an undivided interest in Parcel 7 at a tax sale conducted by the Sheriff of McDowell County, West Virginia. That interest was in the name of “Nancy Doonan Est,” indicating that it belonged to the estate of Nancy Doonan. This interest is owned by the Littell Coal Interest Trust (the Trust), having been created by the heirs of Nancy Doonan (Letticia Louise Littell and Letticia’s son, Albin Littell).

Nancy Doonan died a resident of Arizona. At some point, she inherited property interests in various parcels of land in McDowell County, West Virginia. The exact date of Ms. Doonan’s death is unclear, but Plaintiff submitted, as a post-trial exhibit, a copy of the Last Will and Testament and codicils of Nancy Doonan, which were probated in Arizona on January 27, 1989. The only child of Nancy Doonan listed in the aforesaid will and codicils is Letticia Louise Littell. The will and codicils probated in Arizona created a trust for her residuary estate. This trust is not the Littell Coal Interest Trust. In accordance with Nancy Doonan’s will, the original trust terminated, and its principal—which included the subject interests—was distributed in equal shares to Lettitia Louise Littell and Albin Littell when Albin Littell turned thirty.

¹ This is not the first time that the parcels have been subject to litigation. In 2003, the Supreme Court of Appeals of West Virginia addressed both of these parcels and their various owners in a matter unrelated to the instant action. See *Energy Development Corp. v. Moss*, 591 S.E.2d 135, 138 n.4 (W. Va. 2003).

In 1999, Leticia Louise Littell and her son, Albin Littell, created the Littell Coal Interest Trust with the subject property interests as its principal. The two named themselves as the beneficiaries and Albin Littell as the trustee. Although Nancy Doonan's will was probated in Arizona, it was never recorded in McDowell County. Also, no ancillary estate was ever probated in McDowell County, West Virginia. Albin Littell and his mother have never recorded any deeds, wills, or other instruments in the McDowell County Clerk's Office

Albin Littell relied on his accountant, Dennis Reidy, to keep track of the Trust's real property taxes. Mr. Reidy paid the Trust's real property taxes regarding Parcel 7 through the year 2002. The taxes were not paid for 2003 and, as stated earlier, the Nancy Doonan Estate interest in Parcel 7 was sold to Steve Mullins in November, 2004.

Mr. Mullins was required by law to provide a list of any persons holding an interest in his purchase to the County Clerk, in order for those persons to be provided with a notice to redeem. After the purchase, Mr. Mullins performed that search: (1) he reviewed the Lien Index; (2) he checked the Grantor and Grantee Indexes for any deeds; (3) he checked the Sheriff's Office to determine if there had been a change of address as to the tax ticket on the subject property; (4) he checked the Assessor's Office, where he found other fractional interests—including Hall Mining Company—in the parcel, but none related to the Nancy Doonan Estate's interest; and finally, (5) he checked the land books for the parcel, where no heirs to Nancy Doonan were mentioned.

Mr. Mullins's title search returned no additional information concerning the Trust. The only address available to the County Clerk was a listing for the "Nancy Doonan Est." at 6035 E. Grant Rd., Tucson, AZ 85712. After concluding his search, Mr. Mullins submitted a statement to the Clerk which simply stated "No Known Heirs," which was an accurate statement.

On February 16, 2006, the Clerk sent a Notice to Redeem to the "Nancy Doonan Est," 6035 E. Grant Rd., Tucson, AZ 85712, the only known address. This is the same address where prior tax tickets were delivered and subsequently paid. The notice was returned with the notation "ANK" (Addressee Not Known). On three consecutive weeks between February 8 and February 22, 2006, the Clerk published a notice of the right to redeem in the *Welch News* and the *Industrial News*, newspapers of general circulation for McDowell County, West Virginia. On April 26, 2006, the Clerk executed a deed conveying the Nancy Doonan Estate's undivided interest in Parcel 7 to Steve Mullins. The deed was recorded in the McDowell County Clerk's Office.

In 2012, the County Clerk executed a "corrective deed" presented to him by Steve Mullins, allegedly correcting errors in the April 2006 deed. Mr. Mullins believed that he had purchased undivided interests in both Parcel 7 and Parcel 5. The deed stated as much. Parcel 5 was not identified at the November 2004 sale. Although the Trust owns an undivided interest in Parcel 5, Parcel 5 was never separately assessed to Nancy Doonan, her estate or the Trust.

Hall Mining Company, W.F. Harman heirs, Judith Wadosky, and possibly others, own interests in both Parcel 7 and Parcel 5. There has never been any indication that taxes have been delinquent on Parcel 5. Charlie Hart testified that he is responsible for paying tax tickets for Hall Mining Company's undivided interests. He further testified that he never received any notification that taxes for Hall Mining's undivided interest in either Parcel 5 or Parcel 7 were delinquent. He testified that he would have informed Mr. Littell of any delinquent taxes on the Trust's undivided interest in Parcel 7 had he been notified of any delinquency.

Hall Mining Company is not the complaining party in this action.² Hall Mining Company is just one of many co-tenants of Parcel 5 and Parcel 7 with the Trust. Although Hall Mining's representative testified at trial in support of Mr. Littell and the Trust, it is not a party asserting a right to redeem property in this action. Hall Mining has not intervened in this action asserting any right to redeem property.

CONCLUSIONS

There are basically three issues the parties dispute in this matter. Two issues concern Parcel 7 (the 2006 Deed) and one issue concerns Parcel 5 (the 2012 Deed).

Concerning Parcel 7, the parties dispute (1) whether Mr. Mullins exercised reasonable efforts to provide the Trust with actual notice of its delinquent taxes, and (2) whether the Trust can set aside the 2006 deed because Hall Mining Company was not given notice of the Trust's delinquent taxes.

Concerning Parcel 5, the parties dispute the (3) legality of the 2012 deed executed by the Clerk.

- I. *The 2006 Deed to Steve Mullins for Parcel 7 will not be set aside because Defendants displayed reasonable efforts to provide notice to Plaintiff and should not have expected Hall Mining Company to provide notice to Plaintiff.*

Plaintiff contends that the 2006 deed was improperly obtained by Defendant Steve Mullins because Defendants failed to provide proper notice to Plaintiff and to Hall Mining Company.

² It is worth noting that Hall Mining Company has actually appeared before this Court as a party in a civil action concerning Parcels 5 and 7 in the past. *See C. Dale Harman v. Energy Development Corp.*, 04-C-29 (W. Va 8th Cir. Ct. filed Feb. 6, 2004). Interestingly enough, the Littell Coal Interest Trust also appeared as one of the many parties in that case. This indicates that, despite any alleged personal relationship between the two entities, the Trust and Hall Mining have different interests that at times may be at odds with each other. If Defendants here had reason to know of this prior action, they would not derive from it what Plaintiff here contends: notice to Hall Mining equates to notice to the Trust.

- a. *Defendants displayed reasonable efforts to find and provide actual notice to Plaintiff, and any additional efforts to find Plaintiff would have been impracticable.*

The law imposes a duty on each real property owner to enter his land on the state's land books. W. Va. Const. art. 13, § 6; W. Va. Code 11A-3-1. This is to ensure that the state's legitimate need for tax revenues is satisfied. *See* John W. Fisher, II, *Delinquent and Non-entered Lands and Due Process*, 115 W. Va. L. Rev. 43, 78-79 (2012). Plaintiff's interest in Parcel 7 was sold to Mr. Mullins at a Sheriff's sale as a result of Plaintiff's failure to comply with Plaintiff's duty as a real property owner. W. Va. Code § 11A-3-19 sets forth the procedural obligations a purchaser at a Sheriff's sale must meet before a deed may be secured. These obligations include the preparation of a "list of those to be served with notice to redeem" to the County Clerk. W. Va. Code § 11A-3-19(a)(1). The persons entitled to notice are those permitted to redeem the property subject to a tax lien, principally the owner and any other person entitled to pay taxes on the property. Syl. Pt. 4, *Rollyson v. Jordan*, 518 S.E.2d 372 (W. Va. 1999). Where the state and the purchaser at a Sheriff's sale fail to comply with the procedures of 11A-3-19, W. Va. Code § 11A-4-3 provides that a deed may be set aside.

An owner of real property is allowed to institute a civil action to set aside a deed obtained from a Sheriff's sale if the notice provided to the owner or to another in time to protect his interests is insufficient. W. Va. Code § 11A-4-4.

Due process requires where a party having an interest in the property can reasonably be identified from public records or otherwise, that such party be provided notice by mail or other means as certain to ensure actual notice. Syl. Pt. 1, *Lilly v. Duke*, 375 S.E.2d 122 (W.Va. 1988). Where mailed notice is returned to the sender, the Court must consider: (1) the purchaser's efforts to search the publicly available county records and (2) whether the recipient's proper address would have been ascertainable from such a search. *See Plemons v. Gale*, 396 F.3d 569,

577 (4th Cir. 2005). Also, additional reasonable steps must be taken to attempt to provide notice to the property owner, if it is practicable to do so. *See Jones v. Flowers*, 547 U.S. 220 (2006).

Mr. Mullins's search of the records in the McDowell County Courthouse could only have ascertained the address at 6035 E. Grant Rd., Tucson, AZ 85712. There is no evidence of a recorded deed to Nancy Doonan (the Court believes her interest in the subject property may have been by intestate succession) with a mailing address for the disputed property. After the death of Nancy Doonan, Letticia Louise Littell and her son created the Littell Coal Interest Trust in 1999 in Arizona. But, the Trust document was never recorded in the McDowell County Clerk's Office.

There is no deed to the heirs (Plaintiff), from the Nancy Doonan Estate of record in the McDowell County Clerk's Office. There is no listing of heirs of record in the McDowell County Clerk's Office for Nancy Doonan. Steve Mullins checked both the Grantor and Grantee Index for a deed. He checked the Trust Deed Index and the Judgment Lien Index. He found no records there. Mr. Mullins also checked the records in the Assessor's Office and the Sheriff's Office and only found the address where the tax tickets had been successfully mailed and taxes paid for the prior three years: 6035 E. Grant Rd., Tucson, AZ 85712. This was the only available address out of the McDowell County records.

Finding no heirs in his search, Mr. Mullins submitted a statement to the County Clerk which simply said "No Known Heirs."³ Despite the efforts of Mr. Mullins and the County Clerk, the only address for a possible heir that could be found was the previously mentioned Tucson address. Notice sent to that address was returned not only unclaimed, but with the notation

³ Plaintiff argues that because the list only contained the statement "No known heirs" and did not include the co-tenants of Parcel 7, that the requirements of W. Va. Code § 11A-3-19 were not fulfilled and the deed must be set aside according to W. Va. Code § 11A-4-3. Whether or not certain other parties should have been included in that list is irrelevant here. Mr. Mullins performed his search, and he provided a list as a result of that search. If any of those parties think they should have been included in the list in order to purchase the property, W. Va. Code § 11A-4-4 provides them with relief.

“ANK” for addressee unknown. The mail got to where it was supposed to be sent, but Plaintiff was not there. Whoever was there did not know him or know of him.⁴ Any additional mailings to that address would not have reached Plaintiff. Defendants would have had no reason to follow up at that address. *See Plemons*, 396 F.3d at 577 (due process does not require further investigation at an address where it can be reasonably assumed that the investigation will be unsuccessful).⁵ Afterwards, Defendant Donald Hicks published a notice to redeem the interest in two local newspapers of general circulation.

Plaintiff argues that there was other information in the Sheriff’s Office that Mr. Mullins could have used to find Plaintiff. Principally, Plaintiff believes Mr. Mullins could have looked for a check Plaintiff sent to the McDowell County Sheriff’s Office to pay the tax back in 2003. *See Pl.’s Ex. 7*. The Sheriff’s Office does not make copies of nor does it make note of the addresses on the thousands of checks it receives, and there would have been no reason to suspect that the name and address on the check, which related to the Trust or to Plaintiff, would have revealed the heirs to the Nancy Doonan estate. Further, anything past the typical means of finding a property owner’s address through the County records is unduly burdensome to the searcher, especially where a taxpayer is obligated by statute to keep his address updated with the state.⁶ *See Flowers*, 547 U.S. at 235-236. There was nothing in the records in the McDowell

⁴ *See* United States Postal Service, Appendix I, Product Tracking System Scan Event Codes https://about.usps.com/publications/pub97/pub97_i.htm

⁵ The facts of this case are distinguishable from *Jones v. Flowers*, where notice by certified mail did not satisfy due process because the certified mail was returned unsigned. *See* 547 U.S. 220, 234-235. Here, the occupant of the Arizona address informed the mail carrier that the listed addressee was not at the address, and that addressee could not be found.

⁶ In *Flowers*, the United States Supreme Court held that any open ended search, such as a search through the phonebook or even one through other government records like income tax rolls was impracticable. And in that case, the parties all lived in Arkansas. Here, they are completely across the country from each other. If the searches in *Flowers* are considered impracticable, surely Plaintiff’s suggestion that Mr. Mullins should have asked around the other absentee landowners for Mr. Littell’s address or searched for checks with the address in the Sheriff’s Office is also impracticable. *See Flowers*, 547 U.S. at 222.

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County Courthouse that indicated a change of address, nor was there any practicable way at the McDowell County Courthouse for Mr. Mullins to find any other address for Plaintiff.

~~Plaintiff contends that Hall Mining Company would have informed him of the delinquent taxes had it been provided notice. The McDowell County records only indicated that Hall Mining was one of several co-tenants with Plaintiff concerning Parcel 7. Thus, as only co-tenants and not joint tenants with right of survivorship, Plaintiff and Hall Mining do not share privity of estate. There is nothing else from the record indicates that Defendants should have known that Plaintiff and Hall Mining Company enjoyed any special relationship that would lead to such notice. Reasonable efforts to notify a property owner of a tax sale do not require contact with another entity absent evidence showing that a special relationship between that entity and the delinquent owner exists, and that the entity will likely be expected to provide notice to the owner. *Plemons*, 396 F.3d at 577. Thus, reasonable efforts would not require Defendants contacting Hall Mining Company, or any of the several co-tenants of Parcel 7, in order to ascertain Plaintiff's correct address.~~

Steve Mullins provided the Clerk what he could ascertain from his search. Afterward, both Defendants did all that they could reasonably do to provide actual notice to the Plaintiff. Thus, this Court **FINDS** that the Defendants complied with their procedural obligations under the W. Va. Code § 11A-3-19, and that Mr. Mullins's search of the McDowell County records and subsequent efforts by both Defendants would not reasonably or practicably have revealed Plaintiff's proper address.

b. *Any lack of notice to Hall Mining Company does not give Plaintiff cause to set aside the Deed to Parcel 7 because Hall Mining is not a party to this action claiming a right to purchase the disputed interests and Defendants could not have expected Hall Mining to notify Plaintiff.*

Plaintiff argues that the deed to Steve Mullins pertaining to Parcel 7 should be set aside because Hall Mining Company was not given proper notice by Defendants. As the record and previous actions relating to the subject property have shown, the Trust and Hall Mining are separate entities with separate undivided interests, assessed separately. This Court cannot equate the two. Thus, this Court must address notice to Hall Mining in either of two ways: (1) as a party entitled to notice to redeem for itself the property in question, or (2) as an entity reasonably expected to protect the property in question on behalf of the Trust. Hall Mining is not entitled to notice either way. Hall Mining is not the complaining party in the instant case, and so it is not trying to redeem property for itself. And nothing from the record or evidence provided by the parties would actually have led Defendants to expect that actual notice to Plaintiff would occur after contact with Hall Mining.

As stated earlier, W. Va. Code § 11A-3-19 sets forth procedural obligations a purchaser at a Sheriff's sale must meet before a deed may be secured. Those obligations include the preparation of a "list of those to be served with notice to redeem" to the County Clerk. W. Va. Code § 11A-3-19(a)(1). As also stated earlier, Mr. Mullins fulfilled those procedural obligations.

An owner of real property is allowed to institute a civil action to set aside a deed obtained from a Sheriff's sale if the notice provided to the owner or to others in time to protect his interests is insufficient. *See* W. Va. Code § 11A-4-4. No title acquired at a Sheriff's sale will be set aside absent a "showing by clear and convincing evidence" that a purchaser failed to "exercise reasonably diligent efforts to provide notice of his intention to acquire such title to the *complaining party* or his predecessors in title." W. Va. Code § 11A-4-4(b) (emphasis added). In

other words, relief will not be granted for insufficient service of process unless the aggrieved party sues. Hall Mining Company is not the complaining party in the instant action, and Hall Mining is not electing to assert a right to redeem property in this action. Thus, it can be assumed that Hall Mining has no interest in redeeming the disputed property from Mr. Mullins.

As the Court stated earlier, Mr. Mullins displayed reasonably diligent efforts to provide notice to Plaintiff. Plaintiff contends that Hall Mining would have notified him if it had been provided with notice. But, as stated earlier, Mr. Mullins could not have reasonably ascertained that Hall Mining and Plaintiff are closely affiliated from his search of the McDowell County records. *See Plemons* 396 F.3d at 577. Additionally, the evidence does not suggest that Hall Mining was a predecessor in title to Plaintiff. It suggests that at some time in the late 1990's Hall Mining and Plaintiff decided that they did not want their undivided interests in Parcel 7 assessed together. Thus, the undivided interests became assessed separately, to be paid separately. This separation infers that the two did not wish to be closely associated together. If they had, the split might never have occurred.

The Court **FINDS** that Defendants showed reasonably diligent efforts to notify the complaining party of the right to redeem the property in question. Plaintiff, as trustee of the Littell Coal Interest Trust, failed to do the most basic of tasks required by landowners in West Virginia: he did not record the Trust's undivided interests—or any instrument related to the undivided interests—in the County's records. As a result, Defendants could not locate Plaintiff, and they had no reason to suspect that Hall Mining Company or any other non-complaining entity listed in the McDowell County records enjoyed a special relationship that would have led to Plaintiff's whereabouts upon further inquiry. Nor would Defendants have had reason to

believe that notice to any entity such as Hall Mining would equate to notice to Plaintiff or the Trust. Thus, this Court will not set aside the deed regarding the interest in Parcel 7 of Map 386.

~~For the above reasons, it is hereby ORDERED that the deed dated April 26, 2006, of~~
record in the McDowell County Clerk's Office in Deed Book 502 at Page 559, relating to Parcel 7 of Map 386, will not be set aside, and will remain in full force and effect.

II. The 2012 Deed to Steve Mullins for Parcel 5 will be set aside because the taxes were never delinquent on that property.

It is clear that whatever interests Nancy Doonan or Plaintiff may have had in Parcel 5 of Map 366 are assessed and taxed separately from Parcel 7. Parcel 7, not Parcel 5, was the subject of the Sheriff's sale. For some reason, the McDowell County Clerk executed a deed to Steve Mullins conveying Parcel 5 to him. No notice was sent to the Nancy Doonan Estate, and any conveyance of any interest in Parcel 5 has failed to comply with the statutory requirements of West Virginia Code § 11A-3-1. Taxes on this parcel of property were paid and thus not delinquent.

The Court **FINDS** that the act of the Assessor of McDowell County in changing the land book listing for Parcel 5 of Map 366 to assess an interest in the name of Steve Mullins was improper and of no legal effect.

In reality, the real property records in the McDowell County Clerk's office fail to show that the Littell Coal Interest Trust nor Albin Littell have any interest in the two disputed parcels. The Court is of the opinion that Plaintiffs' case could have been dismissed for lack of standing, but the Court felt obligated to settle this matter on the merits because Leticia Louise Littell (creator and a beneficiary of the Littell Coal Interest Trust) would be the owner of the subject interest by intestate succession and was responsible for the creation of a separate land book entry for her interest in Parcel 7, Map 386, on the land books for Big Creek District.

Therefore, it is hereby **ORDERED** that the corrective deed dated February 3, 2012, and of record in Deed Book 559 at Page 169, relating to Parcel 5, is hereby set aside and is null and void.

It is the **FINDING** of this court that Defendant Steve Mullins is the owner of an undivided interest in Parcel 7, Map 386, purchased at a tax sale on November 16, 2004 and obtained by a deed dated April 26, 2006, recorded in the McDowell County Clerk's Office. It is the further **FINDING** of this court that Steve Mullins does not own any interest in Parcel 5, Map 366.

The Defendant, Steve Mullins is **ORDERED** to account for, and surrender to Plaintiff, funds paid on its behalf, or for its benefit, by any third party, including but not limited to any leaseholder with rights relating to that parcel identified as Parcel 5, Map 366. Any such funds relating to Parcel 7, Map 386, are released to Steve Mullins.

The Clerk of this Court is directed to deliver a certified copy of this Order to the McDowell County Clerk, who is hereby **ORDERED** to record said certified copy in the Deed Books in the County Clerk's Office of McDowell County, West Virginia. Parcel 7, Map 386, of the Assessor's Tax Map for Big Creek District, shall be indexed in the name of "Littell Coal Interest Trust" in the Grantor Index and in the name of "Steve Mullins" in the Grantee Index. Parcel 5, Map 366, of the Assessor's Tax Map for Big Creek District, shall be indexed in the name of "Steve Mullins" in the Grantor Index and in the name of "Littell Coal Interest Trust" in the Grantee Index.

The Clerk of this Court is further directed to deliver a certified copy of this Order to the Assessor's Office for McDowell County, who shall amend the Land Book for Big Creek District to show that Defendant Steve Mullins is the owner of the undivided interest in Parcel 7, Map

386, that he purchased at the November 16, 2004 tax sale and is described in a deed dated April 26, 2006, of record in the McDowell County Clerk's Office. It is further **ORDERED** that Steve Mullins's ownership of an undivided interest in Parcel 5, Map 366, be removed from the Land Book for Big Creek District.

The Clerk of this Court is directed to remove this case from the trial docket of this Court, and to send an attested copy of this Order to Derrick W. Lefler, Esq., Gibson, Lefler & Associates, 1345 Mercer Street, Princeton, WV 24740; Philip A. LaCaria, Esq., 88 McDowell Street, P.O. Box 739, Welch, WV 24801; Edward J. Kornish, McDowell County Prosecuting Attorney; and Donald Hicks, County Clerk of McDowell County.

ENTER this 25th day of March, 2015.


RUDOLPH J. MURENSKY, II, CHIEF JUDGE

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FRANCINE SPENCER CLERK
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