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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

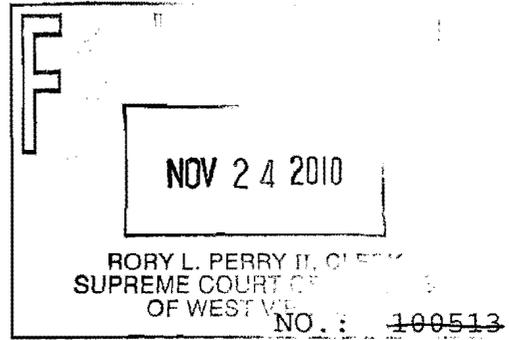
HUNTINGTON REALTY CORPORATION,

Appellant,

v.

MZRP, LLC,

Appellee.



(Civil Action No. 07-C-73
Circuit Court of Wayne County)

BRIEF OF APPELLEE

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KIND OF PROCEEDING AND NATURE OF RULING
IN THE CIRCUIT COURT OF WAYNE COUNTY, WEST VIRGINIA

Appellee, MZRP, LLC, hereinafter MZRP, filed suit against Logan Cannel Coal Company, Jackson Building and Loan Association, Huntington Realty Corporation, and Henry Copley on March 28, 2007 in the Circuit Court of Wayne County, West Virginia to quiet title to a tract of real property in Wayne County, West Virginia which was purchased at auction . The appellant, Huntington Realty Corporation, was the only defendant to file an answer in response to the complaint.

MZRP filed a Motion for Default Judgment against Logan Cannel Coal Company, Jackson Building and Loan Association, and Henry Copley and a Motion for Summary Judgment against appellant, Huntington Realty Corporation, on December 10, 2008. An Order of Default Judgment was entered by the lower court against Logan Cannel Coal Company, Jackson Building and Loan Association, and Henry Copley on April 1, 2009 and a Revised Order of Default Judgment was entered on April 24, 2009.

Following a hearing on the Motion for Summary Judgment held on March 10, 2009, the lower court issued an Opinion Letter dated April 1, 2009 wherein the lower court addressed the issues raised at the hearing and directed counsel for MZRP to draft an order consistent with the Opinion Letter. The lower court

entered an Order of Summary Judgment in favor of the appellee, MZRP, on September 9, 2009.¹

Prior to the entry of the Order of Summary Judgment, Huntington Realty Corporation served a Motion for Reconsideration of the Court's Opinion Letter of April 1, 2009 on counsel for MZRP on August 31, 2009. According to the docket sheet obtained from the Wayne County Circuit Clerk, this motion was not docketed. (A copy of the docket sheet is attached hereto as Exhibit B.) Then, appellant served its Motion for the Amendment of Judgment or In the Alternative Relief from Judgment on September 23, 2009 and filed the same on September 25, 2009 requesting the lower court to reconsider the order entered September 9, 2009. Following a hearing on this motion held on November 23, 2009, the lower court denied appellant's motion via an order entered December 15, 2009.

STATEMENT OF THE FACTS OF THE CASE

On August 17, 2004, Angela Bruce, Deputy Commissioner of Delinquent and Nonentered Lands of Wayne County, West Virginia, ("Deputy Commissioner") auctioned, pursuant to W. Va.

¹ Pursuant to the Administrative Order entered by the Circuit Court of Wayne County, West Virginia on October 12, 2005, and recorded in Administrative Order Book 3 at Page 332, the Clerk of the court is not required to transmit copies of orders that are entered by the court "unless entry of the order is accompanied by copies of the order transmitted and addressed and stamped envelopes for each copy to be transmitted" are supplied by litigants or counsel. A copy of this Administrative Order is attached hereto as Exhibit A. Counsel for MZRP submitted copies of the Order of Summary Judgment and addressed, stamped envelopes with the first class postage rate of \$0.42, which was the appropriate postage rate for first class mail at the time, when the order was submitted to the court.

Code § 11A-3-45, and Mitzi Williams purchased Tax Certificate No. 504432 which is the tax lien on that certain tract referred to in the records of the Deputy Commissioner as 100 Acres Fee, Moses Fork, Wayne County, West Virginia ("100 Acre Tract"). (Complaint To Quiet Title, ¶ 8.)

In compliance with W. Va. Code § 11A-3-52, Mitzi Williams (1) prepared and delivered to the Deputy Commissioner a list of those to be served with Notice of the Right to Redeem the 100 Acre Tract, (2) requested the Deputy Commissioner to prepare and serve the Notice as provided in W. Va. Codes §§ 11-A-3-54 and 11-A-3-55, and (3) deposited with the Deputy Commissioner a sum sufficient to cover the costs of preparing and serving the Notice. (Id. at ¶ 13.) Based upon a review of the real estate records, Ms. Williams determined that the only entity entitled to Notice to Redeem the 100 Acre Tract was Logan Cannel Coal Company, which was dissolved in 1934 by court decree. The address of Logan Cannel Coal Company was unknown and could not be discovered by due diligence. In compliance with W. Va. Code § 11A-3-55, the Deputy Commissioner caused Notice of Redemption to Logan Cannel Coal Company, which contained the metes and bounds real estate description, to be published in a newspaper of general circulation in Wayne County from November 5, 2004 through November 19, 2004. (Id. at ¶ 14.) Thereafter, Mitzi Williams

assigned her interest in Tax Certificate No. 504432 to MZRP by written assignment dated December 23, 2004. (Id. at ¶ 15.)

In accordance with W. Va. Code § 11A-3-59, no redemption of the 100 Acre Tract having occurred within the time required by statute, the Deputy Commissioner conveyed the 100 Acre Tract to MZRP by Deed dated January 12, 2005 and of record in Office of the Clerk of the County Commission of Wayne County, West Virginia in Deed Book 636, at page 844. (Id. at ¶ 16.) MZRP instituted this action to quiet title to the 100 Acre Tract. As part of the process, MZRP employed Bruce A. Toney, Esq. to perform a title examination of the 100 Acre Tract and render his professional opinion regarding the same.

Based upon this examination, there is one listing of Logan Cannel Coal Company in the Grantee Indices of the Office of the Clerk of the County Commission of Wayne County, West Virginia and this listing refers to the deed by which the 100 acre parcel was conveyed to Logan Cannel Coal Company by S. S. Vinson, and others, by the deed dated January 20, 1893, of record in Deed Book 37, at page 199. (Affidavit of Bruce A. Toney appended to the Motion for Summary Judgment as Exhibit A, ¶ 2). There exists no record in the aforesaid Clerk's Office of any conveyance of, any lien or encumbrance upon or any non-fee interest in the 100 Acre Tract from the time of its conveyance to Logan Cannel Coal

Company to the time of the purchase by Mitzi Williams of tax lien evidenced by Tax Certificate No. 504432. (Id. at ¶ 7.)

Logan Cannel Coal Company executed a Deed of Trust in favor of R. P. Asbury and H. L. Carney, trustees, for the benefit of Jackson Building & Loan Association, dated December 3, 1927, encumbering 13 parcels of real estate in Logan, Mingo and Wayne Counties ("13 Parcels"), which did **not** include the 100 Acre Tract, to secure a certain indebtedness, which Deed of Trust is of record in the aforesaid Clerk's Office in Trust Deed Book 22 at page 149. (Id. at ¶ 6.)

Under authority granted in the Deed of Trust, H. L. Carney, trustee, conveyed the 13 Parcels to Jackson Building & Loan Association by deed dated October 28, 1932 and of record in the Office of the Clerk of the County Commission of Wayne County in Deed Book 180 at page 169. However, the property conveyed by that deed did **not** include the 100 Acre Tract. (Id. at ¶ 7.)

Jackson Building & Loan Association conveyed the 13 Parcels to Huntington Realty Corporation by deed dated August 7, 1934 and of record in the Office of the Clerk of the County Commission of Wayne County in Deed Book 180 at page 171. However, the property conveyed by the deed referred to in this paragraph did **not** include the 100 Acre Tract. (Id. at ¶ 8.) There are no entries reflecting any outconveyance by Logan Cannel of the 100 Acre Tract. (Id. at ¶ 7.)

For reasons unknown, the real estate taxes on the 100 Acre Tract were assessed erroneously in the name of Huntington Realty Corporation from 1936 through 1940, even though Huntington Realty Corporation never owned nor had any interest in the 100 Acre Tract. (Id. at ¶¶ 12, 13, and 14.)

Huntington Realty Corporation did not pay the 1940 real estate taxes assessed on the 100 Acre Tract, and the 100 Acre Tract was purported to have been sold for delinquent taxes and to have been conveyed to Henry Copley by deed dated December 20, 1948 and of record in the Clerk's Office in Deed Book 253 at page 153. (Id. at ¶ 9.) However, Henry Copley took no interest in the 100 Acre Tract by that deed and never owned or had any interest in the 100 Acre Tract. (Id. at ¶ 14f.) The real property taxes on the 100 Acre Tract were assessed erroneously in the name of Henry Copley through 2005. (Id. at ¶ 13.) Henry Copley was exonerated from the assessment of real estate taxes on the 100 Acre Tract by Certificate of Erroneous Assessment entered by the County Commission of Wayne County, West Virginia, and dated December 27, 2005. (See Exoneration Certificate appended to the Complaint as Exhibit K.) A delinquent assessment in the name of Henry Copley and described as 100 Acres Fee, Moses Fork was dismissed by the Assessor of Wayne County on 27 February, 2006. (Aff. of Toney at ¶ 11.)

ASSIGNMENT OF ERROR

The Circuit Court of Wayne County, West Virginia committed no error when it granted summary judgment in favor of MZRP.

STANDARD OF REVIEW

A de novo standard of review is utilized when reviewing a lower court's entry of summary judgment. Syllabus Point 1, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994). Likewise, the standard of review applicable to an appeal from a motion to alter or amend a judgment pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to the Supreme Court of Appeals is filed. Wickland v. American Travellers Life Ins. Co., 204 W. Va. 430, 513 S.E.2d 657 (1998), Thompson v. Branches-Domestic Violence Shelter of Huntington, Inc., 207 W. Va. 479, 534 S.E.2d 33 (2000), cert. denied, 531 U.S. 1055, 121 S.Ct. 663, 148 L. Ed. 2d 565 (2000), Alden v. Harpers Ferry Police Civ. Serv. Comm'n, 209 W. Va. 83, 543 S.E.2d 364 (2001).

The standard of review for a Rule 60(b) motion or a motion to vacate a judgment is addressed to the sound discretion of the court and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such

discretion. Fernandez v. Fernandez, 624 S.E.2d 777, 218 W.Va. 340 (2005); Rose v. Thomas Memorial Hosp. Foundation, Inc., 541 S.E.2d 1, 208 W.Va. 406 (2000).

DISCUSSION

I. APPELLANT FAILED TO TIMELY FILE THE MOTION TO ALTER OR AMEND THE ORDER OF SUMMARY JUDGMENT AND THEREFORE, THE TIME ALLOWED FOR APPEAL EXPIRED PRIOR TO APPELLANT'S FILING OF THIS APPEAL.

For the sake of review, appellant submitted a Motion for Reconsideration of the Court's Opinion Letter of April 1, 2009 on counsel for MZRP on August 31, 2009, hereinafter "Motion Regarding Opinion Letter". This motion could not be considered a Rule 59(e) motion as it was drafted and served prior to the entry of a final judgment in the lower court. Then, appellant filed a Motion for the Amendment of Judgment or in the Alternative Relief from Judgment, hereinafter "Motion for Reconsideration", on September 25, 2009 requesting the lower court to reconsider the order entered September 9, 2009 - sixteen days after the entry of the final judgment in this matter. It is important to note that the appellant did not state in this motion that the motion was being filed pursuant to Rule 59(e) of the Rules of Civil Procedure or in any way cite the same.

Pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure, a "motion to alter or amend the judgment shall

be filed not later than 10 days after the entry of the judgment." When a party filing a motion for reconsideration does not indicate under which Rule of Civil Procedure it is filing the motion, the motion will be considered to be either a motion to alter or amend a judgment or a motion for relief from a judgment order; if the motion is filed within ten days of the circuit court's entry of judgment, the motion is treated as a motion to alter or amend, but if the motion is filed outside the ten-day limit, it can only be addressed as one for relief from a judgment order. Burton v. Burton, 672 S.E.2d 327, 223 W.Va. 191 (2008). This Court held that "a motion served more than ten days after a final judgment is a Rule 60(b) motion." Savage v. Booth, 196 W.Va. 65, 68 n. 5, 468 S.E.2d 318, 321 n. 5 (1996). See also Syl. pt. 2, Powderidge Unit Owners Ass'n v. Highland Props., Ltd., 196 W.Va. 692, 474 S.E.2d 872 (1996) ("When a party filing a motion for reconsideration does not indicate under which West Virginia Rule of Civil Procedure it is filing the motion, the motion will be considered to be either a Rule 59(e) motion to alter or amend a judgment or a Rule 60(b) motion for relief from a judgment order. If the motion is filed within ten days of the circuit court's entry of judgment, the motion is treated as a motion to alter or amend under Rule 59(e). If the motion is filed outside the ten-day limit, it can only be addressed under Rule 60(b).").

The Order of Summary Judgment was entered on September 9, 2009. Appellant filed the Motion for Reconsideration on September 25, 2009 - sixteen days after the entry of final judgment in the lower court. As such, the Motion for Reconsideration must be a considered a Rule 60(b) motion. Further, a Rule 60(b) motion does not stop the running of the appeal period. Toler v. Shelton, 157 W.Va. 778, 784, 204 S.E.2d 85, 89 (1974) ("A motion which would otherwise qualify as a Rule 59(e) motion that is not filed and served within ten days of the entry of judgment is a Rule 60(b) motion regardless of how styled and does not toll the four month appeal period for appeal to this court."), *abrogated on other grounds by* Walker v. Doe, 210 W.Va. 490, 558 S.E.2d 290 (2001). Footnote 13, Hatfield v. Painter, 222 W. Va. 622, 671 S.E.2d 453 (2008). ("A motion which would otherwise qualify as a Rule 59(e) motion that is not filed and served within ten days of the entry of judgment is a Rule 60(b) motion regardless of how styled and does not toll the four month appeal period for appeal to this court."), *abrogated on other grounds by* Walker v. Doe, 210 W.Va. 490, 558 S.E.2d 290 (2001). Footnote 13, Hatfield v. Painter, 222 W. Va. 622, 671 S.E.2d 453 (2008). As such, the four month time period for an appeal of a final judgment began running on September 9, 2009 and expired on January 9, 2010. The Petition for Appeal was filed April 14, 2010 over seven months after the lower court's entry of the Order

of Summary Judgment. For this reason, this Court should not disturb the lower court's entry of summary judgment in favor of MZRP and should dismiss the Petition for Appeal.

II. APPELLANT FAILED TO ALLEGE THE NECESSARY ELEMENTS REQUIRED OF A RULE 60(b) MOTION IN THE MOTION FOR RECONSIDERATION AND FAILED TO PROVE THAT THE LOWER COURT ABUSED ITS DISCRETION DENYING THE SAME.

In the alternative, this Court should entertain the Petition for Appeal as an appeal only of the Motion for Reconsideration as a Rule 60(b) motion. In the instant case, the Motion for Reconsideration was filed on September 25, 2009 and the lower court issued an order denying this motion on December 15, 2009. When considering the Motion for Reconsideration, this Court has held that "[a]n appeal of the denial of a Rule 60(b) motion ... brings to consideration for review only the order of denial itself and not the substance supporting the underlying judgment nor the final judgment order." Toler v. Shelton, 157 W.Va. 778, 784, 204 S.E.2d 85, 89 (1974) (internal citations omitted). See also Syl. pt. 3, Lieving v. Hadley, 188 W.Va. 197, 423 S.E.2d 600 (1992).

Rule 60(b) states as follows:

"the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence which by due

diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

In the Motion for Reconsideration, appellant alleges that lower court did not consider its Motion Regarding Opinion Letter. The appellant does not reassert the issues listed in the Motion Regarding Opinion Letter in the Motion for Reconsideration, but takes issue with (1) the lower court's entry of the Order of Summary Judgment drafted by counsel for appellee, MZRP, as directed by the lower court and (2) appellant's alleged failure to receive a copy of the entered Order of Summary Judgment in a timely manner.

As for the entry of the Order of Summary Judgment, appellant had an opportunity to address issues related to the Motion for Summary Judgment at the hearing regarding the same held on March 25, 2009. After the hearing, the lower court drafted the Opinion Letter dated April 1, 2009 and directed counsel for the appellee to submit an order consistent with the same. As for the receipt of a copy of the entered order by U.S.

mail, Rule 77(d) of the West Virginia Rules of Civil Procedure states that "[l]ack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorized the court to relieve a party for failure to appeal with the time allowed." So, in essence, the issue as to whether appellant received a copy of the entered Order of Summary Judgment earlier than it did is immaterial. Appellant was on notice by the receipt of the Opinion Letter dated April 1, 2009 that an Order for Summary Judgment would be submitted and entered.

Appellant failed to allege or provide support for a ruling that the lower court abused its discretion in the final order entered December 15, 2009 denying appellant's Motion for Reconsideration. For this reasons, this Court should deny the Petition for Appeal as an appeal of appellant's Motion for Reconsideration.

However, should this Court consider the Motion to Reconsider as bringing into issue all the items included in the Motion Regarding Opinion Letter, the Court should likewise deny the Petition for Appeal. In support of this position, consider the following:

In the Motion Regarding Opinion Letter, the appellant states that the lower court "did not consider a relevant piece of evidence that supports Huntington Realty's assertion that the certain 100 acre tract on Moses Fork ...does not exist." This is

simply false. Appellant refers to a finding of an erroneous assessment ruling made by the Wayne County Commission. The lower court did indeed consider this so-called evidence. Appellee supplied the lower court with a copy of the Erroneous Assessment (Improper) certificate as Exhibit K to the Complaint which initiated this civil action. After considering this document and appellant's assertions regarding the same, the lower court stated in paragraph two of page two of the Court's Opinion Letter dated April 1, 2009 that "it would be impossible for one not to realize that the 100 Acres that went delinquent in the name of Logan Cannel Coal Company is the same 100 Acres sold by the Deputy Commission of Delinquent and Non-entered Lands to MZRP, LLC." It is clear that the lower court received this evidence, considered the evidence, and made a ruling regarding the same.

In the Petition for Appeal, appellant failed to allege or provide support for a ruling that the lower court abused its discretion in the final order entered December 15, 2009 denying appellant's Motion for Reconsideration. For these reasons, this Court should deny the Petition for Appeal.

III. IN THE ALTERNATIVE, APPELLANT FAILED TO MEET HIS BURDEN OF DEMONSTRATING THE EXISTENCE OF A GENUINE ISSUE OF MATERIAL FACT WHICH WOULD PRECLUDE SUMMARY JUDGMENT IN FAVOR OF MZRP.

This Court repeatedly has explained:

Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

Syllabus Point 4, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994). See, e.g., Legg v. Rashid, 222 W. Va. 169, 663 S.E.2d 623 (2008); Toth v. Bd. of Parks & Recreation Comm'rs, 215 W. Va. 51, 593 S.E.2d 576 (2003); Harbaugh v. Coffinbarger, 209 W. Va. 57, 543 S.E.2d 338 (2000); Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995).

The Court also has been clear as to the burden imposed upon the party opposing summary judgment:

If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.

Syllabus Point 3, Williams v. Precision Coil, Inc., *supra*. See also Reed v. Orme, 221 W. Va. 337, 655 S.E.2d 83 (2007); Powderidge Unit Owners Ass'n v. Highland Properties, Ltd., 196 W. Va. 692, 474 S.E.2d 872 (1996).

In the instant case, MZRP appropriately established that there was no genuine issue of material fact and, based upon

the applicable law, it was entitled to judgment. Appellant alleges that the lower court should have considered the fact that the appellee paid \$55.00 for Tax Certificate No. 504432 which was purchased by Mitzi Williams. Without supplying any legal support for this assertion other than so-called "public policy" concerns, the appellant would have this Court overturn the lower court's decision based upon the fact that the tax certificate was sold at public auction with multiple bidders present and appellant is of the opinion that more should have been realized from the sale of the tax certificate. Other than the allegation that appellant was entitled to Notice of the Right to Redeem which is addressed in the following section, appellant did not allege any failure by the appellee to comply with the statutes surrounding the auction of Tax Certificate No. 504432. Appellant, Huntington Realty Corporation, had the burden to demonstrate that a genuine issue of fact did exist for trial to move forward. The Circuit Court properly found appellant failed to meet this burden and an Order of Summary Judgment was entered.

IV. NEITHER THE WAYNE COUNTY COMMISSION NOR THE LOWER COURT DETERMINED THAT THE 100 ACRE TRACT MOSES FORK OWNED BY LOGAN CANNEL COAL WAS NON-EXISTENT.

Huntington Realty Corporation mistakenly asserts that the lower court held that the 100 Acre Tract did not exist and

then in direct contradiction, the lower court filed an Order of Summary Judgment stating that title to the 100 Acre Tract quieted in the appellee, MZRP. At best, appellant mischaracterizes statements made by the lower court and takes them out of context. As is more fully discussed in Section VI below, a tax assessment for 100 Acres Fee, Moses Fork was entered in the land books in the name of Henry Copley following a tax sale of real property which was erroneously assessed to Huntington Realty Corporation, appellant herein. The lower court simply acknowledged the finding of the Wayne County Commission regarding this tax assessment against Henry Copley finding that a 100 Acres Fee, Moses Fork held by Huntington Realty Corporation did not exist. The lower court did not hold that the 100 Acre Tract is not the tract of real property which was conveyed by S.S. Vinson to Logan Cannel Coal Company.

Appellant mistakenly asserts that the alleged non-existence of the 100 Acre Tract owned by Logan Cannel Coal was determined by the Wayne County Commission. Appellant cites the order of the Wayne County Commission dated December 27, 2005 relating to a tax assessment for 100 acres of real property in the name of Henry Copley. The facts surrounding this issue were described in the Complaint which initiated this action and were covered briefly in the Statement of Facts on pages 4 and 5 herein.

They are reproduced here for convenience of the Court as follows:

1. Jackson Building & Loan Association conveyed thirteen parcels or real property to Huntington Realty Corporation by deed dated August 7, 1934, and of record in the Office of the Clerk of the Wayne County Commission in Deed Book No. 180 at page 171. It is important to note that the 100 Acre Tract owned by Logan Cannel Coal was not described in or conveyed by this deed.

2. The real estate taxes for the 100 Acre Tract were assessed in the name of Logan Cannel Company through 1935.

3. For reasons unknown, the tax assessor of Wayne County began assessing the real estate taxes on the 100 Acre Tract in the name of Huntington Realty Corporation for the years 1936 through 1940.

4. Huntington Realty Corporation did not pay the 1940 real estate taxes assessed on the 100 Acre Tract and the 100 Acre Tract was sold for delinquent taxes and was conveyed to Henry Copley by deed dated the 20th day of December, 1948, and of record in the Office of the Clerk of the Wayne County Commission in Deed Book No. 253 at page 153.

5. The real property taxes on the 100 Acre Tract were mistakenly assessed in the name of Henry Copley through 1950 when it was sold to the state for delinquent real property taxes.

6. Tax Certificate No. 50-4498 in the name of Henry Copley and described as 100 Fee Moses Fork was dismissed by the

Wayne County Tax Assessor on the 27th day of February, 2006 based upon the fact that the described property was not conveyed in the original deed to Jackson Building & Loan Association and as such, the taxed real estate did not and does not exist.

The determination of the Wayne County Commission did not address the issue of the "non-existence" of the 100 Acre Tract owned by Logan Cannel Coal Company. Rather, the order that was entered was based upon the fact that (1) real property taxes were erroneously assessed to the appellant, Huntington Realty Corporation, on a 100 Acre Tract Moses Fork, (2) there is no deed of record in the Office of the Clerk of the County Commission of Wayne County, West Virginia which would support such an assessment, and (3) as such, real property taxes assessed to Defendant's successor-in-interest via tax deed were likewise erroneous. The order made no mention of any real property owned by or real property taxes owed by Logan Cannel Coal Company.

V. THE 100 ACRE TRACT CONVEYED TO LOGAN CANNEL COAL BY S.S. VINSON, ET AL., IN 1893 IS THE SAME 100 ACRE TRACT SOLD TO THE APPELLEE, MZRP.

Appellant alleges that the 100 Acres Fee, Moses Fork, which was purchased by the appellee, is not the same real property that was conveyed to Logan Cannel in 1893. Appellant raised this issue at the hearing on the Motion for Summary Judgment and in the

Motion for Reconsideration and in this appeal. The lower court addressed this issue in paragraph two of page two of the Court's Opinion Letter dated April 1, 2009, stating "it would be impossible for one not to realize that the 100 Acres that went delinquent in the name of Logan Cannel Coal Company is the same 100 Acres sold by the Deputy Commission of Delinquent and Non-entered Lands to MZRP, LLC."

Appellant mistakenly asserts in the Fact Section of the Brief of Appellant that the One Hundred Acres Fee, Moses Fork was first assessed in 1895. The One Hundred Acres Fee, Moses Fork was first assessed in the name of Logan Cannel Coal Company in 1894. A copy of the pertinent pages of the 1894 Land Book for Lincoln District, Wayne County are attached hereto as Exhibit C. The 100 Acres Fee, Moses Fork assessment in the name of Logan Cannel Coal Company is clearly shown. It is important to note that the following line lists an assessment in the name of Logan Cannel Coal Company for 50 Acres Minerals, Turkey Creek. Again, it is important to note that the deed dated January 20, 1893, of record in Deed Book 37, at page 199 by which S. S. Vinson, and others conveyed the 100 acres to Logan Cannel Coal Company conveyed also a mineral interest in 50 acres on Turkey Creek to Logan Cannel Coal Company.

Appellant's argument that the 100 Acres Fee Moses Fork covered by Tax Certificate No. 504432 is not the same 100 acres conveyed by S. S. Vinson, and others, to Logan Cannel Coal Company is simply

erroneous and is not supported by a single piece of evidence presented at trial nor in this appeal.

Appellant again claims that the description contained in the tax assessment (i.e. 100 Acres Fee, Moses Fork, Wayne County, West Virginia) in the name of Logan Cannel Coal is in error and this error is so egregious as to render the assessment and the subsequent tax sale to appellee void. Appellant again cites Syllabus Point 4, Bailey v. Baker, 68 S.E.2d 74 (W.Va. 1951) as supporting its position. The lower court held and appellee reasserts that the facts of the instant case are easily distinguishable from those in Bailey. In Bailey, the tax assessment, which was found to be erroneous and therefore void, was for Lot 182 when in actuality the property was Lots 1 and 2. There was no Lot 182. In the instant case, the assessment was for 100 Acres Fee, Moses Fork. The assessment was against Logan Cannel Coal Company and Logan Cannel Coal did indeed own a 100 acre parcel of real estate which is an uncontroverted fact. Even if the appellant were able to prove, which it did not, that the 100 Acre Tract has no relation to a place known as Moses Fork, this Court held in Matheny v. Jackson, 83 W. Va. 553, 98 S.E. 620, (1919) that a misdescription of a lot does not void a tax sale. So, even if appellant could prove that the inclusion of the words of "Moses Fork" was an error, the lower court's ruling should not be disturbed.

Appellant asserts that the "description in a deed should contain information from which a surveyor could locate it on a map." Notably, appellant did not cite any precedent for this assertion as none exists.

In the alternative, Appellant argues that this Court should overturn the lower court and find that the description contained in the tax deed was so vague as to render it void. This Court held in Thorn v. Phares, 35 W.Va. 771, 14 S.E. 399 (1891) that "the main object of a description of the land sold or conveyed, in a deed of conveyance, or in a contract of sale, is not in and of itself to identify the land sold,-that it rarely does or can do without helping evidence,-but to furnish the means of identification, and when this is done it is sufficient. That is certain which can thus be made certain." The fact is that the tax deed in the instant case, like many throughout the State of West Virginia, refers to the tax certificate which was sold by the State of West Virginia. One need only refer to Tax Certificate No. 504432 in the name of Logan Cannel Coal Company which will lead the searcher to the metes and bounds description contained in the deed of conveyance from S. S. Vinson, and others to Logan Cannel Coal Company dated January 20, 1893, of record in Deed Book 37, at page 199 in the Office of the Clerk of the County Commission of Wayne County, West Virginia. To hold that the tax deed from Angela Bruce, Deputy Commissioner to MZRP, LLC

dated January 12, 2005 and of record in Office of the Clerk of the County Commission of Wayne County, West Virginia in Deed Book 636, at page 844 to be void for vagueness would directly contradict this Court's holding on the subject of real estate descriptions as noted above and would have the unintended effect of rendering costless tax deeds throughout the State of West Virginia void.

VI. HUNTINGTON REALTY WAS NOT ENTITLED TO NOTICE OF THE RIGHT TO REDEEM.

Appellant asserts that the appellee was required by W.Va. Code §11A-3-52(a) ("Notice Statute") to provide notice of the right to redeem to Huntington Realty Corporation. The West Virginia Legislature declared the intent of the Chapter 11A, Article 3 in W.Va. Code §11A-3-1 to be among other things "(3) to secure adequate notice to owners of delinquent and nonentered property of the pending issuance of a tax deed."

Notably, the appellant never cites a reference to a document nor provides a copy of a document which indicates that the appellant actually had an ownership interest in or any type of lien on the 100 Acre Tract at the time of the tax sale.

Appellant suggests that the appellee is attempting to "have it both ways." Appellant, without citing a single statute or case to support its position, would have this Court overturn a real

estate tax sale on the basis of an erroneous tax assessment for 1940 through 1949 - a tax assessment which the appellant either neglected or refused to pay which resulted in a tax sale to Henry Copley. Appellant did not pay the erroneous assessment and is asserting that the erroneous assessment provided an "interest" in real property which would trigger the provisions of the Notice Statute and require the appellee to provide a Notice of Right to Redeem. That is having it both ways.

Further, appellant asserts that the lower court erred by enjoining it from making a claim of ownership in the 100 Acre Tract. Again, appellant did not allege nor produce a single document to prove that appellant had an ownership interest in or a lien on the 100 Acre Tract. Still, appellant claims the lower court should not have ruled to quiet title to the 100 Acre Tract in the appellee.

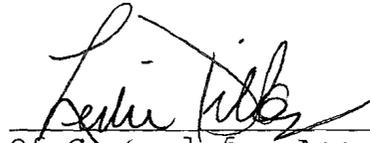
Appellee fully complied with the Notice Statute and moreover, went overboard by specifically noticing others which it was not required to do. Appellee chose to include the Huntington Realty Corporation in the action to quiet title and this choice was not based upon the provisions of the Notice Statute nor any requirement of the any tax sale statute or case law, but rather in an effort, to address all issues related to the erroneous tax assessments against Huntington Realty Corporation and the tax deed delivered to Henry Copley. Appellant is essentially asking this

Court to provide it a second opportunity to bid at a real estate tax sale without showing any legal support for this Court to overturn the sale.

RELIEF REQUESTED

The lower court correctly granted MZRP's Motion for Summary Judgment and, accordingly, MZRP respectfully requests that this Court affirm the lower court's ruling and deny the Petition for Appeal.

Respectfully submitted,



Of Counsel for Appellee,
MZRP, LLC

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W. Va. State Bar I.D. 2099

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Charleston, West Virginia 25328-2393
(304) 346-2391

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

HUNTINGTON REALTY CORPORATION,

Appellant,

v.

NO.: 100513
(Civil Action No. 07-C-73)
Circuit Court of Wayne County)

MZRP, LLC,

Appellee.

CERTIFICATE OF SERVICE

The undersigned, of counsel for respondent, MZRP, LLC, does hereby certify that the foregoing Response to Petition for Appeal was this day served upon the following by mailing a true copy of the same this date, postage prepaid, to:

Jim St. Clair, Esq.
c/o Huntington Realty Corporation
630 1/2 Seventh Avenue
Huntington, WV 25701
Counsel for Petitioner

Done this 24th day of November, 2010.



Of Counsel for Appellee, MZRP, LLC

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W. Va. State Bar I.D. 2099

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ADMINISTRATIVE ORDER

THU OCT 12 2005

AD ORDER
BOOK 3 PAGE 332

RE: DISTRIBUTION OF ORDERS ENTERED IN THE CIRCUIT COURT OF WAYNE COUNTY BY THE CLERK OF THIS COURT

WHEREAS, numerous orders are being presented to this Court for entry which provide that the Clerk of this Court provide copies of such order to the counsel of record.

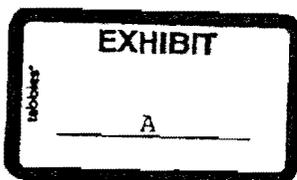
WHEREAS, the effect of such orders is that the Deputy Circuit Clerks are required to make copies and provide, type and furnish postage for envelopes, at the expenses of the taxpayers of Wayne County, only for the benefit of the litigants and their counsel; and

WHEREAS, it is the opinion of this Court that the litigants and/or their counsel should be responsible for the costs of transmitting copies of orders to litigants and counsel;

It is, therefore, **ORDERED** that effective the 4th day of October, 2005, the Clerk of this Court shall not be required to transmit copies of orders entered by the Court to the litigants or their counsel **UNLESS** upon entry of the order it is accompanied by the following:

1. Copies of the order to be transmitted, and
2. Addressed and stamped envelopes for each copy to be transmitted.

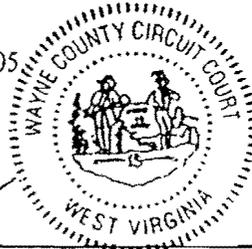
It is further **ORDERED** that in the event this Court, through inadvertence or mistake, should enter an order which requires the Clerk to transmit copies thereof, to parties and/or counsel which is not accompanied by copies and envelopes, as above required, such direction to the Clerk shall be disregarded by the Clerk of this Court.



BOOK 3
PAGE 332

It is further **ORDERED** that nothing herein shall apply to pro-se litigants or litigants who filed financial affidavits of inability to pay.

Dated this 6 day of October, 2005



ENTER: _____

A handwritten signature in black ink, appearing to read "Darrell Pratt".

HONORABLE DARRELL PRATT

A COPY TESTE

Milton J. Ferguson II Clerk
By [Signature] Deputy

BOOK 3
PAGE 333

Date: 04/23/2010

DOCKET SHEET

Page: 1

Action: CIVIL ACTION

Case No 07-C-073

Plaintiff

Defendant

LIMITED LI MZRP,LLC A WEST VIRGIN

LOGAN CANNEL COLA COMP
HUNTINGTON REALTY CORP

Attorney

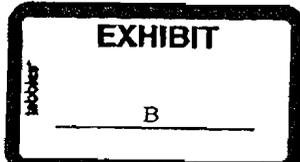
Attorney

LESLIE DILLON

JAMES W. ST.CLAIR

Case is Closed 09/09/2009

Date	Description	Book	Page
03/28/2007	COMPLAINT TO QUIET TITLE. EXHIBITS FILED		
	SUMMONS ISSUED AND SENT TO SEC OF STATE FOR SERVICE.		
04/02/2007	GREEN CARD RETURNED SIGNED BY KATHY THOMAS FOR WV SEC OF STATE 3-30-07		
05/07/2007	ORDER OF PUBLICATION ISSUED COPY TO ATTORNEY		
	AFFIDAVIT		
05/16/2007	HUNTINGTON REALTY CORP'S MOTION TO DISMISS FILED. NOTICE OF HEARING OF MOTION FILED SET ON JUNE 11, 2007. CERTIFICATE OF SERVICE FILED.		
06/11/2007	RETURN FROM SEC OF STATE ACCEPTED ON BEHALF OF HUN TINGTON REALTY CORP.		
06/26/2007	AGREEMENT TO EXTEND THE TIME TO ANSWER.		
04/28/2008	CERT OF SERVICE FOR PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS AND INTERROGATORIES TO DEF'S		
06/25/2008	CERT OF SERVICE FOR PLAINTIFF'S FIRST SSSSET OF IN TERROGATORIES REQUEST FOR PRODUCTION OF DOCUMENTS AND REQUESTS F OR ADMISSIONS		
06/27/2008	CERT OF SERVICE FOR DEF'S HUNTINGTON REALTY'S FIRS T SET OF DISCOVERY REQUESTS.		
12/10/2008	MOTION FOR PARTIAL DEFAULT JUDGMENT EXHIBIT FILED		
	ORDER FOR PARTIAL DEFAULT JUDGMENT SENT TO JUDGE PRATT FOR S		
12/10/2008	PLAINTIFF'S ANSWERS TO DEF'S FIRST SET OF INTERROG ATORIES AND RESPONSE FOR ADMISSIONS AND REQUEST FOR PRODUCTION OF DOCUMENTS.		
12/10/2008	MOTION FOR SUMMARY JUDGMENT MEMORANDUM OF LAW IN SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT.		
01/15/2009	PLAINTIFF'S NOTICE OF MOTION , MOTION FOR PARTIAL DEFAULT JUDGMENT, AND CERT OF SERVICE.		
01/20/2009	NOTICE OF MOTION MOTION FOR SUMMARY JUDGMENT MEMORANDUM OF LAW IN SUPPORT OF THE MOTION FOR SUMMARY JUDGM		
01/20/2009	CERT OF SERVICE FOR NOTICE OF MOTION, MOTION FOR S UMMARY JUDGMENT WITH ACCOMPANYING AFFIDAVIT, MEMORADUM OF LAW IN SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT:		
02/04/2009	NOTICE OF MOTION SET FOR FEB 25 2009 CERT OF SERVICE.		
	NOTICE OF MOTION		
02/20/2009	NOTICE OF MOTION FOR SUMMARY JUDGMENT		



HEARING SET FOR MARCH 10 2009 AQT 9:00 A.M.
CERT OF SERVICE.

Action: CIVIL ACTION

Case No 07-C-073

Plaintiff

Defendant

LIMITED LI MZRP,LLC A WEST VIRGIN

LOGAN CANNEL COLA COMP
HUNTINGTON REALTY CORP

Attorney

Attorney

LESLIE DILLON

JAMES W. ST.CLAIR

02/20/2009 NOTICE OF MOTION FOR SUMMARY JUDGMENT HEARING IS S
ET FOR MARCH 10 2009 AT 9:00 A.M.
CERT OF SERVICE.

02/27/2009 DEF HUNTINGTON REALTY'S RESPONSE TO PLAINTIFF'S MO
TION FOR SUMMARY JUDGMENT.
CERT OF SERVICE.

02/27/2009 DEF HUNTINGTON REALTY'S RESPONSE TO PLAINTIFF'S MO
TION FOR SUMMARY JUDGMENT AND DEF HUNTINGTON REALTY'S MOTION FOR
SUMMARY JUDGMENT.

04/01/2009 ORDER OF PARTIAL DEFAULT JUDGMENT FILED AND RECORD116 129
ED,AS TO JUDGMENT BY DEFAULT BE ENTERED AGAINST LOGAN CANNEL COA
L COMPANY,JACKSON BUILDING AND LOAN ASSOCIATION AND HENRY COPLEY

04/02/2009 OPINION LETTER FROM JUDGE PRATT TO ALL COUNSEL OF
RECORDED FILED.

04/24/2009 REVISED ORDER OF PARTIAL DEFAULT JUDGMENT FILED AN116 233
D RECORDED

09/09/2009 ORDER ENTERED 116 635

09/09/2009 ORDER ENTERED 116 635

09/25/2009 AWARD JUDGMENT IN FAVOR OF THE PLAINTIFF FOREVER ENJOIN
ING THE DEF. HUNTINGTON REALTYCORP FROM CLAIMING ANY ESTATE , RIG
NOTICE OF HEARING ON MOTION AND CERT OF SERVICE.

11/23/2009 HUNTINGTON REALTY'S MOTION FOR THE AMENDMENT OF JUDGMETN
OT TI THE ALTERNATIVE RELEIF FROM JUDGMENT.

12/15/2009 PLAINTIFF'S RSPONSE TO DEFENDANTS MOTION FOR RECO
NDISERATION. FILED.

02/26/2010 CERT. OF SERVICE. FILED. SERVED UPON HUNTINGTON REALTY
12/15/2009 FINAL ORDER DENYING DEFENDANT, HUNTINGTON REALTY'116 961
S MOTION TO AMEND;FOR RELIEF FROM JUDGMENT FOR RECONSIDERATION
J. STCLAIR, L. DILLON

02/26/2010 TRANSCRIPT FILED.

04/14/2010 PETITION OF APPEAL FILED.

04/19/2010 DOCKETING STATEMENT FILED

04/19/2010 GREEN CARD RETURNED SIGNED BY SEC OF STATE 4-16-10

