
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 35627

FOSTER FOUNDATION,

Petitioner,

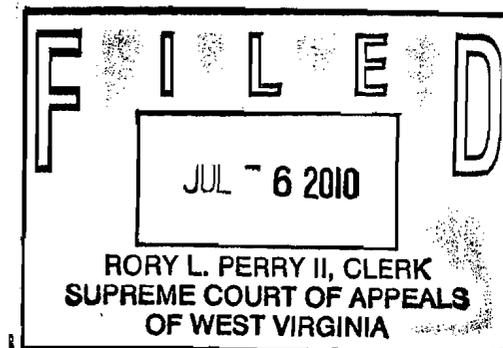
v.

GLEN B. GAINER III, in his capacity as
West Virginia State Auditor,

and

THE COURT OF CLAIMS OF THE STATE
OF WEST VIRGINIA,

Respondents.



BRIEF OF PETITIONER

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FROM THE COURT OF CLAIMS OF THE STATE OF WEST VIRGINIA

BRIEF OF PETITIONER

The Foster Foundation hereby files its Brief pursuant to this Court's Order dated June 2, 2010 granting Petitioner's Petition for Writ of Certiorari. *Official Record* provided by the Court of Claims of the State of West Virginia (hereinafter "OR") at pp. 359-360. Petitioner seeks relief from an opinion of the Court of Claims of the State of West Virginia which denied the Petitioner's claim seeking the return of \$457,386.79 in "certificate" fees collected by Glen B. Gainer, III in his capacity as West Virginia State Auditor ("State Auditor"), in violation of the statutory provisions that authorize the assessment and collection of such fees.

The West Virginia real property tax lien statutes have been fraught with due process concerns for decades arising from procedures for sale and redemption of delinquent properties.¹

¹ See Carla W. Tanner, Student Work, *Forfeited and Delinquent Lands: Resolving The Due Process Deficiencies*, 96 W. VA. L. REV. 251, 252 (1993) citing John W. Fisher, II, *Forfeited and Delinquent Lands – The Unresolved Constitutional Issue*, 89 W. VA. L. REV. 961 (1987).

This case presents yet another instance of concern arising from the State Auditor's failure to adhere to the current statutory scheme established by the West Virginia Legislature.

KIND OF PROCEEDING AND NATURE OF LOWER COURT'S RULING

The Court of Claims had before it a claim filed on December 6, 2007 by Foster Foundation against the State Auditor, asserting that the State Auditor had erroneously accrued interest and certificate fees on a contested tax assessment against the Foster Foundation. (OR at pp. 1-30). The Court of Claims ordered the parties to fully brief the issues and heard oral argument from both parties. On August 14, 2009, the Court of Claims issued an opinion denying the Foster Foundation's claims. (OR at pp. 341-351). The Foster Foundation duly and timely filed a Motion for Rehearing on September 11, 2009 (OR at pp. 352-356), and the Court of Claims denied the Motion for Rehearing by Order entered on October 15, 2009. (OR at pp. 357-358).

The statutory scheme established by the West Virginia Legislature for certification of delinquent tax liens to the State Auditor requires that a tax lien be included in a Sheriff's tax sale before certificate fees can be assessed with respect to that lien. *See W.Va. Code §§ 11A-3-8, -38, -39*. The parties do not dispute the fact that a Sheriff's tax sale did not occur and was never attempted with respect to the tax liens on Foster Foundation's property in issue. (OR at p. 113). Nonetheless, the State Auditor collected \$457,386.79 in "certificate" fees from the Foster Foundation that are unauthorized by statute or other law.

STATEMENT OF FACTS

The action below arose, in part, from the Respondent State Auditor's intervention in a tax collection action by the Cabell County Sheriff, and the State Auditor's subsequent imposition of \$457,386.79 in "certificate" fees upon the Foster Foundation. Foster Foundation is a 501(c)(3) nonprofit organization engaged in the operation of a continuous care retirement community for the

aged and is not conducted for private profit. Since 1923, Foster Foundation has been granted and maintained tax-exempt status under the Internal Revenue Code.

In 1998, Ottie Adkins, Assessor of Cabell County, West Virginia, asserted that Foster Foundation did not qualify for an exemption from ad valorem real property taxes. This decision negated a claimed exemption that had been continuously accepted for over 70 years. The Foster Foundation withheld payment of the contested tax pending the date of the Sheriff's tax sale, and followed the procedures for contesting the taxability of its property, which resulted in the filing of a Complaint against Assessor Ottie Adkins in the Circuit Court of Cabell County on or about March 26, 1998. In the Complaint, Foster Foundation asserted that Foster Foundation's homes for the elderly operated in West Virginia were exempt from ad valorem taxation (hereinafter the "Taxation Matter"). In apparent recognition of the potential validity of Foster Foundation's claim, the Cabell County Assessor and the State Tax Commissioner entered into an Agreed Order that held any potential Sheriff's tax sale in complete abeyance until resolution of the Taxation Matter. (OR at pp. 118-119). Neither the Sheriff, the State Tax Commissioner, nor any other affected individual or entity, ever requested that the Agreed Order be set aside or appealed the entry of the Agreed Order. The Agreed Order remained the law of the case throughout the pendency of the Taxation Matter. After the Taxation Matter had been on the Cabell County Circuit Court's docket for over six years, the Circuit Court agreed with Foster Foundation and on September 23, 2004 ruled that the two homes for the aged owned and operated by Foster Foundation were exempt from ad valorem taxation.

The Circuit Court's 2004 ruling upholding Foster Foundation's exemption was appealed by the Cabell County Assessor to this Court. After remand by this Court, the Cabell County Circuit Court reversed itself and on December 7, 2005 ruled that Foster Foundation was subject to ad valorem taxation pursuant to this Court's then recent decision in *Maplewood Community, Inc.*

v. Craig. 216 W. Va. 273, 607 S.E.2d 379 (2004).² Thereafter, Foster Foundation contacted the Cabell County Sheriff's office to inquire about payment of the then due and payable taxes. Foster Foundation was then informed that the Cabell County Sheriff's office did not have possession of the tax lien, could not accept payment and that the tax lien had been "certified" to the State Auditor as if a tax sale had occurred. The Foster Foundation was told that it should contact the Respondent State Auditor about payment. Foster Foundation was never provided a reason why the State Auditor was given responsibility for collecting the tax even though the property was never offered for sale at a Sheriff's tax sale. Foster Foundation contacted the State Auditor's office and was instructed to submit payment of the assessed taxes directly to that office, and was further advised that accrued interest of \$1,794,148.03, "certificate" fees of \$457,386.79, and publication fees of \$942.50 were being assessed. (*See OR at pp. 120-127*).

Thereafter, Foster Foundation inquired of the Respondent Auditor's office and the Cabell County Sheriff's office regarding the removal of the interest and certificate fees from the 1998 to 2005 tax bills. The Respondent Auditor's office informed Foster Foundation that only payment in full, including all interest and certificate fees, would be accepted. According to Respondent Auditor's tax bill, Foster Foundation was incurring over \$35,000 in fees and interest each month. If the fees had not been paid, Foster Foundation was faced with the prospect of an Auditor's sale which would have resulted in hundreds of seniors being at risk of losing their homes. Thus, on May 25, 2006, Foster Foundation paid, under protest, \$6,555,877.29 to the State Auditor's office to satisfy the ad valorem real property taxes, interest, publication fees and certificate fees for the parcels of real property owned by Foster Foundation in Cabell County. (*See OR at p. 12*). Of that

² On June 7, 2006, the West Virginia Supreme Court of Appeals declined to hear Claimant's appeal from the December 7, 2005 decision by Judge David M. Pancake.

amount, \$457,386.79 represents charges for certificate fees wrongfully charged by the Respondent State Auditor. (*See* OR at pp. 14-21).

On September 11, 2006, Foster Foundation instituted a civil action in the Circuit Court of Cabell County seeking a refund of the \$2,252,477.32 in interest, publication and certificate fees³ it paid to the Respondent on or about May 25, 2006. On November 27, 2006, the Respondent filed a Motion to Dismiss asserting that the Complaint failed to state a cause of action upon which relief could be granted, and that the Respondent was immune from suit as a state agency. On January 2, 2007, Foster Foundation filed its Response to the Respondent's Motion to Dismiss, asserting that it was entitled to relief from the State Auditor and that the State Auditor could not seek the protection of immunity because he had improperly inserted himself into the disposition of the Foster Foundation's ad valorem taxes. By Order of Judge David M. Pancake of the Circuit Court of Cabell County, the matter was transferred to the Circuit Court of Kanawha County on April 17, 2007.⁴

On September 13, 2007, Judge Paul Zakaib, Jr., Circuit Court of Kanawha County, entered an Order granting the State Auditor's Motion to Dismiss, stating that the proper venue for Foster Foundation to recover funds paid to the State Auditor is the Court of Claims. Foster Foundation filed the underlying action in the Court of Claims on December 6, 2007 to recover the funds collected by the State Auditor as interest and certificate fees.

The Court of Claims considered briefs and heard oral argument from both parties regarding the interest and certificate fees collected by the State Auditor. On August 14, 2009, the Court of Claims entered an opinion denying the Foster Foundation's claim. (*See* OR at pp. 341-351). The

³ That civil action sought \$457,386.79 in certificate fees, \$1,794,148.03 in interest, and \$942.50 in publication fees. *See* Certificates of Redemption of Lands collectively at OR pp. 14-21. Foster Foundation is not seeking to recover the aforementioned interest and publication fees in this petition.

⁴ Judge Pancake ruled that the Circuit Court of Kanawha County was the proper venue for the Foster Foundation's action.

Foster Foundation filed a Petition for Rehearing on September 11, 2009, based on the Court of Claims' failure to address the absence of statutory or other legal authority for the State Auditor to impose a "certificate fee" in the absence of a Sheriff's tax sale that must occur prior to certification. (See OR at pp. 352-356). The Court of Claims denied the Motion for Rehearing by Order entered on October 15, 2009. (See OR at pp. 357-358). It is from these rulings that the Foster Foundation seeks relief.

ASSIGNMENT OF ERROR

- I. **THE COURT OF CLAIMS ERRED IN HOLDING THAT THE STATE AUDITOR COULD COLLECT A CERTIFICATE FEE FROM THE RESPONDENT IN THE ABSENCE OF A SHERIFF'S TAX SALE THAT IS REQUIRED BY STATUTE.**

STANDARD OF REVIEW

This case solely presents questions of law and questions of law are reviewed *de novo*. Syl. Pt. 4, *Burgess v. Porterfield*, 469 S.E.2d 114 (W.Va. 1996).

DISCUSSION OF LAW AND ARGUMENT

The West Virginia legislature, pursuant to the authority granted to it by the West Virginia Constitution, has enacted a statutory method by which tax liens for delinquent ad valorem property taxes may be sold. This process is initiated by a Sheriff's tax sale. If a tax lien is offered but not sold at the Sheriff's sale, the tax lien may be "certified" to the State Auditor. That statutory structure only permits the State Auditor to receive tax liens, redeem those liens, and collect the "certificate" fees at issue after a Sheriff's tax sale of the tax lien is conducted without success. All parties agree that the tax liens in issue were never included in a Sheriff's tax sale. (OR at p. 113). In the absence of the requisite Sheriff's tax sale, the State Auditor acted *ultra vires* in charging a certificate fee to the Foster Foundation.

A. IN THE ABSENCE OF THE SHERIFF'S TAX SALE THAT IS REQUIRED BY STATUTE, THE STATE AUDITOR HAS NO LEGAL AUTHORITY TO COLLECT A CERTIFICATE FEE.

The error in the State Auditor's collection of a certificate fee in this case is clear from an analysis of the statutes that ultimately allow the collection of such fees. The statutes clearly reveal that, under the facts in this case, the State Auditor had no statutory or other legal authorization to redeem Foster Foundation's tax lien or collect the \$457,386.79 certificate fee from Foster Foundation.

West Virginia Code §11A-3-39(a) authorizes the State Auditor to collect a certificate fee after receiving "payment of the sum necessary to redeem" the delinquent property. Specifically, §11A-3-39(a) states:

"Upon payment of the sum necessary to redeem, the auditor shall execute a certificate of redemption in triplicate, which certificate shall specify the real estate redeemed, or the interest therein, as the case may be, together with any changes in respect thereto which were made in the land book and in the record of delinquent lands, shall specify the year or years for which payment was made, and shall state that it is a receipt for the money paid and a release of the state's lien against the real estate redeemed. The original certificate shall be retained in the files in the auditor's office, one copy shall be delivered to the person redeeming and the second copy shall be mailed by the auditor to the clerk of the county commission of the county in which the real estate is situated, who, after making any necessary changes in his record of delinquent lands, shall note the fact of redemption on such record, and shall record the certificate in a separate volume provided for the purpose. The fee for issuing the certificate of redemption shall be ten dollars or seven and one-half percent of the total taxes, interest and charges due, whichever is greater."

W.Va. Code §11A-3-39(a)(emphasis added). In this case, the State Auditor collected a certificate fee of \$457,386.79, which is the basis for this petition.

Although §11A-3-39 authorizes the collection of a fee *following* redemption of a delinquent property, the method for redeeming property is not addressed by that section. Rather,

the process of redemption is set forth in the preceding Code provision, §11A-3-38, which states in relevant part:

“(a) The owner of any real estate certified to the auditor pursuant to section eight of this article, or of any nonentered real estate subject to the authority of the auditor pursuant to section thirty-seven of this article, or any other person who was entitled to pay the taxes thereon, may redeem such real estate from the auditor at any time prior to the certification of such real estate to the deputy commissioner as provided in section forty-four of this article. Thereafter such real estate shall be subject to disposition pursuant to section forty-four of this article, and subsequent sections”

W.Va. Code §11A-3-38(a)(emphasis added).

The plain language of §11A-3-38(a)⁵ limits redemption to property that was “certified to the auditor pursuant to section eight of this article[.]” “Section eight of this article” refers to Code §11A-3-8, which states that:

“If no person present bids the amount of taxes, interest and charges due on any real estate offered for sale, the sheriff shall certify the real estate to the auditor for disposition pursuant to section forty-four of this article, subject, however, to the right of redemption provided by section thirty-eight of this article. The auditor shall prescribe the form by which the sheriff certifies the property.”

W.Va. Code §11A-3-8 (emphasis added).

The parties agree that the Cabell County Sheriff did not include the tax liens on the Foster Foundation’s property in any Sheriff’s tax sale. Consequently, the property was not “certified to the auditor pursuant to section eight” because “section eight” (§11A-3-8) requires that an unsuccessful Sheriff’s tax sale occur prior to certification and imposition of a certificate fee. Since the property was not certified “pursuant to section eight,” the assessment of a certificate fee was not appropriate in this case.

⁵ An exception exists under W.Va. Code § 11A-3-38(a) for “nonentered real estate,” which is inapplicable to this case.

In Chapter 11A, Article 3 of the West Virginia Code, the West Virginia Legislature chose to limit redemption of delinquent property by the State Auditor to instances where property was “certified to the auditor pursuant to section eight of this article,” and that clear, unambiguous language cannot be ignored. However, the Court of Claims did ignore that language in refusing to order that the State Auditor reimburse the \$457,386.79 in certificate fees charged to Foster Foundation. The State Auditor is not statutorily authorized to collect the associated certificate fee allowed by §11A-3-39(a) unless a Sheriff’s tax sale occurs “pursuant to section eight of this article.” *W.Va. Code §11A-3-38(a)*(emphasis added). Since no Sheriff’s tax sale was attempted in this case, the State Auditor has no legal authority for collecting a certificate fee of \$457,386.79 from Foster Foundation.

B. IN THE ABSENCE OF A SHERIFF’S TAX SALE, THE STATE AUDITOR SHOULD HAVE RETURNED THE PROPERTY TO THE CABELL COUNTY SHERIFF FOR A TAX SALE.

The Court of Claims mistakenly reasoned that “if the [Auditor] redemption provision only applied to offers for sale of property, then suspended property owners would not be able to redeem their land.” (OR at p. 348). This is simply not the case. Any suspended property that has not gone through a Sheriff’s tax sale but is thereafter transmitted to the Auditor should be *returned* by the State Auditor to the Sheriff of the respective county to be included in the next Sheriff’s tax sale. *See W. Va. Code § 11A-3-7(a)*.⁶ The property owner can then redeem the property from the Sheriff prior to the next sale. No certification fee is imposed upon a redemption from the Sheriff.

⁶ West Virginia Code Section 11A-3-7(a) states:

(a) Whenever it shall appear to the sheriff that any real estate included in the list has been previously conveyed by deed and no tax thereon is currently delinquent, or that the tax lien thereon has been sold previously and not redeemed, or that the tax lien thereon ought not to be sold for the amount stated therein, he shall suspend the sale thereof and report his reasons therefor to the county commission and to the auditor. If the commission finds that the tax lien on the real estate ought not to be sold, it shall so order; but if the commission finds that the tax lien on the real estate ought to be sold for the amount stated, or for a greater or less amount, it shall order the sheriff to include such real estate in his next September list, unless sooner redeemed.

In this case, the State Auditor has been unjustly enriched by collecting \$457,386.79 for an *ultra vires* redemption of tax liens on Foster Foundation's property that have never been the subject of a Sheriff's tax sale, and for certificate fees that are unauthorized by statute. Due to the Respondent's failure to comply with the unambiguous statutory requirements for redemption from the State Auditor, the payment made by the Foster Foundation must be treated as a redemption from the Sheriff and thus no certificate fee can be imposed. Both law and equity require that the Respondent return those funds collected as certificate fees to Foster Foundation.

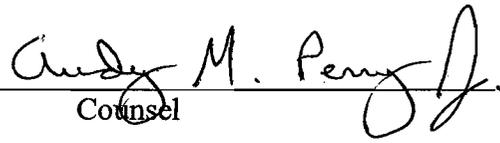
PRAYER FOR RELIEF

The statutory mechanism established by the West Virginia Legislature exists to protect the important rights at stake when the State acts to divest title to real property from its citizens. The statutory language at issue in this case clearly requires that a real property tax lien be included in an unsuccessful Sheriff's tax sale before the delinquent land can be certified to the State Auditor. In the absence of proper certification of the tax lien, the State Auditor is not authorized to collect the corresponding "certificate" fee. Therefore, the State Auditor should not have collected the \$457,386.79 in certificate fees from Foster Foundation.

WHEREFORE, the Foster Foundation respectfully requests that this Court FIND that a real property tax lien must be included, but unsuccessfully sold, at a Sheriff's tax sale, and certified by the Sheriff to the State Auditor prior to the Auditor's imposition of a certificate fee upon redemption, REVERSE the West Virginia Court of Claims, and ORDER that Court to enter judgment in favor of Foster Foundation; recommending to the West Virginia Legislature an appropriation in the amount of \$457,386.79 to reimburse Foster Foundation for the certificate fee that was wrongfully collected by the State Auditor; and such other relief that this Court may deem just and proper.

FOSTER FOUNDATION

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CERTIFICATE OF SERVICE

The undersigned attorney does hereby certify that on the 6th day of July, 2010, a true copy of the foregoing "*Brief of Petitioner*" was served upon the following by depositing the same, postage prepaid, in the United States Mail:

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