

11-0490

IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

MIKE HARPER, and  
THE ESTATE OF LOIS HARPER,

Plaintiffs,

v.

MARQUIS DEVELOPMENT, LLC  
a West Virginia Limited Liability Company,  
and GAVIN SMITH, an individual,

- Defendants.

CIVIL ACTION NO. 08-C-235

FILED  
CIRCUIT COURT  
MINGO COUNTY, WV  
2010 OCT 21 A 10:35  
ASST. CLERK  
MINGO COUNTY CLERK

**ORDER GRANTING SUMMARY JUDGMENT AND DECLARING THAT GAVIN SMITH IS THE OWNER OF THE REAL ESTATE DESIGNATED AS PART OF LOT 9 IN ELLIS HEIGHTS SUBDIVISION, IN STAFFORD DISTRICT, MINGO COUNTY**

This matter came on for hearing on August 5, 2010 pursuant to the Defendant, Gavin Smith's Motion for Summary Judgment and Motion for Substitution of the Estate of Lois Harper as a party. Plaintiffs appeared through counsel, Cecil Varney; Jerry Lyall appeared on behalf of Marquis Development, LLC; and James R. Fox appeared on behalf of Gavin Smith.

The Motion for Summary Judgment was previously addressed at a hearing on March 24, 2010. The Court granted plaintiffs additional time to file supplemental pleadings and present any evidence demonstrating genuine issues of fact or legal defenses to the request for summary judgment, including any defects in the tax sale. Plaintiffs were also given additional time to respond to the Motion for Summary Judgment filed by the Defendant Marquis Development, LLC.

Plaintiff Lois Harper died on April 3, 2010. A notice of death was filed by Plaintiffs' counsel pursuant to Rule 25 of the West Virginia Rules of Civil Procedure, which prompted Defendant Gavin Smith's motion pursuant to Rule 25(a) for the substitution of the Estate of Lois Harper as a party plaintiff. The Court FINDS that the substitution is proper and necessary and

accordingly, hereby ORDERS that the Estate of Lois Harper be substituted as a party plaintiff in this civil action and that this Order shall be binding upon the Estate of Lois Harper. The style of this case shall also be amended to include the Estate of Lois Harper.

This case involves a dispute over the ownership of a parcel of real estate located in Stafford District of Mingo County and designated as part of Lot 9 in Ellis Heights Subdivision. The property was purchased at a tax sale by Marquis Development, LLC and subsequently sold to Gavin Smith.

Lois Harper and her son, Mike Harper filed this action, claiming that they are the owners and asked the Court to determine the proper owner.

The Court has carefully considered the motions for summary judgment, Plaintiffs' response to Defendant Smith's motion, and the evidence and argument presented by counsel at the hearings on this matter. Based upon careful consideration of the entire circumstances, the Court makes the following findings of fact and conclusions of law.

1. Rule 56 of the West Virginia Rules of Civil Procedure requires the Court to render summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.

2. 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 non-moving 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.

Jochum v. Waste Management of WV, Inc., 224 W.Va. 44, 680 S.E.2d, 59 (2009); and Coleman Estate, ex. rel. Coleman v. RM Logging, Inc., 222 W.Va. 357, 664 S.E.2d 698 (2008).

3. The Plaintiffs filed a response to Defendant Smith's motion for summary judgment, but did not file a written response to the motion for summary judgment filed by Marquis Development, LLC. Plaintiffs' response to Defendant Smith's motion does not include any documents, depositions, affidavits or other evidence demonstrating any material issues of fact or defects in the tax sale.

4. The real estate at issue was purchased by Amos Harper and Lois Harper on January 24, 1974, as reflected in the Deed recorded in the Office of the Clerk of the Mingo County Commission in Deed Book 206 at page 574. Amos Harper died in 2002. Their son, Mike Harper, has never owned the property.

5. Amos Harper and Lois Harper obtained a loan on their real estate through TMS Mortgage, Inc., d/b/a The Money Store on September 9, 1997. The Harpers defaulted on their loan and the property was sold at a foreclosure sale at the Mingo County Courthouse on July 10, 2001.

6. Lois Harper admitted in her deposition that she received notice that her loan was in default and that her property would be sold at a foreclosure sale. Ms. Harper admitted speaking with the banks' attorney and receiving letters dated May 16, 2001 and June 18, 2001 advising of their default and the intent to sell the property at a foreclosure sale. Ms. Harper also admitted having knowledge of the date, time and location of the foreclosure sale at the Mingo County Courthouse.

7. Despite being aware of the foreclosure sale, Lois Harper did not attend the sale or attempt to bid on the property. The property was purchased by the Bank of New York as

reflected in the Deed recorded in Deed Book 384 at page 96. The property was also assessed and taxed under the name of the new owner, the Bank of New York.

8. The Harpers did not file any action to have the foreclosure sale set aside or nullified by any Court. The Harpers also failed to have any corrective deed or order prepared and filed in the Mingo County Clerk's office, which would have provided notice of their potential ownership.

9. Prior to the foreclosure sale, the real estate was assessed under Amos Harper and continued to be assessed in his name through 2002. The property was also subject to a homestead exemption. Owners of real estate must be provided annual tax tickets reflecting the assessed value and applicable taxes, even if the property is subject to the homestead exemption. Lois Harper acknowledges receiving tax tickets prior to the foreclosure, but did not receive any after 2002.

10. The real estate was assessed and taxed under the name of the new owner, the Bank of New York from 2003 through 2006. Despite not receiving tax tickets and having knowledge of the foreclosure, the Harpers failed to take any steps to have themselves identified as the proper owner.

11. Lois Harper and Amos Harper did not attempt to have the foreclosure deed set aside, did not inform the Sheriff or Assessor of any discrepancy, and did not attempt to have the property assessed in their names. Additionally, the Harpers did not take any steps to inform potential purchasers or title examiners of their potential ownership claim.

12. The records in the Mingo County Courthouse do not contain any information to alert anyone of the Harpers' claim. Plaintiffs did not file any documents or records asserting their claim of ownership and as a result, Defendants were unaware of the claim.

13. Lois Harper did not file an action to quiet title and did not file any notices, deeds or other documents among the county land records to alert potential purchasers of her claim of ownership.

14. The Bank of New York failed to pay the real estate property taxes and the property became delinquent. Notice of the delinquency was provided to the proper parties, and the real estate was ultimately sold for delinquent taxes.

15. The real estate taxes were delinquent from 2003 through 2006. The Deputy Commissioner of Delinquent and Non Entered Lands of Mingo County conducted a sale on October 9, 2007.

16. The Defendant Marquis Development, LLC was the successful bidder on the property at the tax sale. After proper notice, expiration of the time to redeem the property as provided by law, and satisfaction of all requirements for confirmation of the tax sale, a Deed was delivered to Marquis Development on January 18, 2008.

17. Marquis Development and Gavin Smith did not have notice or any knowledge of the ownership claim by Lois Harper. A title search performed by Marquis Development did not disclose or identify any adverse claims or ownership of the Harpers. Nothing in the land records at the courthouse would alert Marquis Development or Gavin Smith of any claim of ownership by Lois Harper. In fact, the records reflect that the Harpers lost the property in the foreclosure sale.

18. Gavin Smith acted as a reasonably prudent purchaser and had an attorney perform a title examination prior to his purchase. The title examination confirmed good and marketable ownership by Marquis Development, LLC and did not identify any adverse claims asserted by the Harpers.

19. A bona fide purchaser is one who purchases for a valuable consideration, paid or parted with, without notice of any suspicious circumstances to put him on inquiry. Wolfe v. Alpizer, 219 W.Va. 525 637 S.E.2d 623 (2006). The Court in Wolfe reiterated that where a person “buys an apparently good title without notice of anything calculated to impair or affect it, he is a bona fide purchaser.” The Court defined a bona fide purchaser as:

“One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects and/or infirmities, claims or equities against the seller’s title.”

“One who has in good faith paid valuable consideration for property, without notice of prior adverse claims.”

Id. at 530, 628.

20. The Defendants are bona fide purchasers. Marquis Development, LLC purchased the property at a tax sale. The owner of record, the Bank of New York, became delinquent and had ample opportunity to redeem the property. Marquis Development, LLC had a title search performed which did not expose any adverse claims.

21. Gavin Smith learned that the property had been sold at a tax sale and contacted the purchaser. He did not know the identity of the delinquent tax payer and was unaware of who previously owned the property. In order to insure proper ownership and a clear title without any encumbrances, Mr. Smith hired a lawyer to search the title. After being assured that the title was clear and that Marquis Development owned the property, Mr. Smith made the purchase. He paid valuable consideration, \$25,000, for a small parcel of property.

22. Defendants were not aware of Lois Harper’s claim, and Plaintiffs have failed to demonstrate either actual or constructive notice of any potential defects. The undisputed testimony demonstrates that Gavin Smith and Marquis Development were unaware of Lois

Harper and Mike Harper, prior to the sale to Mr. Smith. These circumstances certainly meet the standards set forth in Wolfe and numerous prior to decisions. Furthermore, the purpose of recording ownership in the County Clerk's Office and maintaining the property in the land records kept by the County Clerk and Assessor is to put people on notice of any ownership or encumbrances.

23. Gavin Smith and his attorney appropriately relied on these records, and Mr. Smith was bona fide in relying on the undisputable conclusion that Marquis Development had clear and marketable title. Accordingly, the Court FINDS that Gavin Smith is a bona fide purchaser.

24. The Court has also considered Plaintiffs' argument that Marquis Development could not be a bona fide purchaser because the property was sold at a tax sale. This argument is without merit. Contrary to Plaintiff's argument, the decisions in Simpson v. Edmiston 23 W.Va. 675 (1884) and Subcarrier Communications Inc. v. Nield, 218 W.Va. 292, 624 S.E.2d 729 (2005) do not stand for the proposition that a purchaser at a tax sale cannot be a bona fide purchaser. These decisions simply recognize that a purchaser is on notice of any defects in the title or tax sale, as reflected in the land records. In this particular case, Plaintiffs have not demonstrated any defects in the tax sale, and the land records do not reflect any adverse claims. Furthermore, the facts in the Subcarrier case are much different and distinguishable from those addressed by the Harpers. In Subcarrier, a sheriff conducted a tax sale, and a corporation which he owned, purchased the property. This violated West Virginia Code §11A-3-6(a) which prohibits the sheriff from purchasing property sold for taxes. Consequently, a defect existed and subsequent purchasers had notice of the defect and could not be bona fide purchasers. That decision does not alter the Court's analysis or decision in this case.

Accordingly, the Court hereby ORDERS that Gavin Smith is the true and lawful owner of the real estate designated as Lot 9, Ellis Heights Subdivision, Stafford District, in Mingo County, West Virginia as set forth in his Deed recorded in Deed Book 418 at page 233. The Court further ORDERS that the claims of Mike Harper, Lois Harper, and the Estate of Lois Harper are hereby dismissed with prejudice and that the Plaintiffs shall have sixty (60) days from the date of this Order to vacate the premises and remove all of their personal property from this real estate. If Plaintiffs fail to vacate the premises or remove their personal property within sixty (60) days of this Order, than the Sheriff of Mingo County shall remove the Plaintiffs and their personal property. Gavin Smith shall be entitled to possession and control of the property within sixty (60) days of this Order, or upon Plaintiffs' vacation of the premises, whichever is sooner.

The Court further ORDERS that a certified copy of this Order be filed among the land records in the Office of the Clerk of the Mingo County Commission confirming that Gavin Smith is the owner of this real estate free and clear of any liens and encumbrances as asserted by the plaintiffs in this action.

The Clerk is directed to remove this case from the active docket and to send certified copies of this Order to counsel of record.

Enter this 20<sup>th</sup> day of October, 2010.

Robert G. Chafin  
Honorable Judge Robert G. Chafin

Prepared by:

James R. Fox  
James R. Fox, WV Bar No. 5752  
FOX LAW OFFICE, PLLC  
3359 Teays Valley Road  
Hurricane, W. V. 25526  
Counsel for Defendant Gavin Smith

A COPY TESTE  
Grant Reese  
CLERK OF COURT, MINGO COUNTY, W.VA.