

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 11-0490

MIKE HARPER and THE ESTATE OF  
LOIS HARPER,

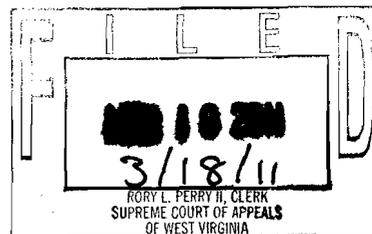
Petitioners/Plaintiffs,

v.

Mingo County Civil Action No.: 08-C-239

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

Respondents/Defendants.



**RESPONSE OF GAVIN SMITH TO PETITION FOR APPEAL**

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## RESPONSE OF GAVIN SMITH TO PETITION FOR APPEAL

Gavin Smith by his counsel, James R. Fox and Fox Law Office, PLLC, submits the following response to the Petition for Appeal filed by Mike Harper and Lois Harper (hereinafter "Plaintiffs").

### I. STATEMENT OF THE CASE

This case involves a dispute over the ownership of a small parcel of real estate located in Mingo County. The property was purchased at a tax sale by Marquis Development, LLC on January 18, 2008, and subsequently sold to Gavin Smith. The Bank of New York had owned the property for several years, but failed to pay the taxes from 2003 through 2006.

The Defendants (Marquis and Smith) learned, after delivery of the deed to Gavin Smith, that Lois Harper and her son Mike Harper were claiming ownership. In reality, Mike Harper has never owned the property. His parents, Lois and Amos Harper owned the property until the bank foreclosure sale on July 10, 2001. The tax sale occurred 7 years later, on January 18, 2008.

The foreclosure resulted from the Harpers' default on a loan with TMS Mortgage, Inc. d/b/a The Money Store. By the time of the foreclosure, the Harpers had already moved to Huntington. Amos Harper died in 2002. Their house in Mingo County that had been foreclosed upon has been dilapidated and falling down for years. Lois Harper continued to live in Cabell County until her death in 2010.<sup>1</sup>

Lois Harper admitted in her deposition that she was fully aware that the lienholder intended to foreclose and ultimately, sold the property. She admitted receiving letters on May

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<sup>1</sup> See Testimony of Lois Harper, Exhibit A, pp. 11-14. Plaintiffs have not filed a Docketing Statement or assembled an Appendix. As a result, Respondent/Defendant has attached copies of records dispositive to the issues presented.

16, 2001 and June 18, 2001 advising of the default and intent to sell, and more importantly knew that the foreclosure sale occurred on July 10, 2001.<sup>2</sup>

Despite being fully aware of the foreclosure, she and her husband did not attempt to bid on the property. They filed bankruptcy after the sale, but they did not attempt to set aside the sale or take any other steps to have the property conveyed back to them. In fact, neither the Harpers nor their attorney raised the issue with the bankruptcy court or took any steps to correct the records in the Mingo County Clerk's Office to alert potential purchasers that they owned the property.<sup>3</sup>

The County Clerk's records unequivocally demonstrate that the Harpers lost this property in a foreclosure sale in 2001, that the subsequent owner, the Bank of New York, failed to pay the taxes for several years, and it was sold as delinquent. The property was not even assessed under Lois and Amos Harper after 2002.<sup>4</sup> It was assessed under the Bank of New York. Any purchaser or title examiner would logically conclude that the Harpers did not own the property seven years later, in 2008.

The Circuit Court concluded that Gavin Smith was a bona fide purchaser without notice of the purported claims of Plaintiffs. This conclusion was based upon the land records at the County Courthouse and undisputed testimony of Gavin Smith, Lois Harper and other parties. The testimony of all parties consistently recognized that Gavin Smith simply learned that Marquis had purchased the property, and that he was completely unaware of the Plaintiffs.<sup>5</sup> The admissions of Lois Harper were also compelling in favor of summary judgment.

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<sup>2</sup> See Exhibit A, pp. 55-56.

<sup>3</sup> See Exhibit A, pp. 65-66.

<sup>4</sup> See Exhibit B.

<sup>5</sup> See Gavin Smith Testimony, Exhibit C, pp 18-19.

The Circuit Court gave Plaintiffs several opportunities to present evidence supporting their claim and negating summary judgment. However, Plaintiffs failed to do so. In fact, the Court specifically noted that:

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.

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.<sup>6</sup>

## **II. SUMMARY OF ARGUMENT**

The Order granting summary judgment is completely appropriate and consistent with the undisputed facts. The land records and admissions of Plaintiffs clearly and unequivocally demonstrate that they do not own the land. Title examinations were performed by competent attorneys, and nothing in the records would suggest that Plaintiffs own the property. The attorneys concluded that the Bank of New York was the owner of record and that the tax sale was proper due to the Bank's failure to pay taxes.

Plaintiffs did not offer a single document or any testimony negating summary judgment. They have also failed to demonstrate that the Circuit Court's conclusions are clearly erroneous as

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<sup>6</sup> See Order Granting Summary Judgment, Exhibit D.

required by Butler v. Price, 212 W.Va. 450, 574 S.E.2d 782. Accordingly, the Petition should be denied.

### **III. ASSIGNMENTS OF ERROR**

Plaintiffs claim that the Circuit Court made the following errors: (1) notice of the tax sale was not provided to Mike Harper and the Bank of New York; (2) The Bank of New York did not obtain title to the property; and (3) Gavin Smith is not a bona fide purchaser. These arguments are without merit and should be rejected by the Court.

The most important and indeed, the dispositive question is whether or not Gavin Smith is a bona fide purchaser. Since he is a bona fide purchaser, as determined by the Court, the other issues are moot.

### **IV. STATEMENT REGARDING ORAL ARGUMENT**

Oral argument is not necessary because Plaintiffs have not raised any justiciable issues.

### **V. ARGUMENT**

- A. Gavin Smith is a bona fide purchaser, for valuable consideration, without any notice of the ownership claim being asserted by Lois Harper. Therefore, he is the owner of the property at issue.**

Gavin Smith's role in the purchase is undisputed. Mr. Smith paid a significant sum, \$25,000 for less than an acre of land in Gilbert. His testimony clarifies his lack of knowledge and status as a bona fide purchaser. Lois Harper did not challenge this fact. She did not live in the house at the time of the sale, and she admitted that she did not do anything to put anyone on notice of her potential claim.

“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 law has been clear for decades that a bona fide purchaser, like Gavin Smith, who had no way of knowing about Lois Harper’s claim, and who paid substantial consideration to the company which the County’s land records showed actually owned the land, is entitled to keep the property.

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 in 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.

The Circuit Court carefully considered these circumstances and found based upon on the clear precedent in Wolfe:

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.

The Court also rejected Plaintiffs' claim that the tax sale precluded Defendants from being bona fide purchasers. The Court stated:

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.

Based upon the great deference afforded the lower court under the *de novo* standard of review, plus the fact that Plaintiffs have absolutely failed to demonstrate that these findings are

clearly erroneous, Plaintiffs' claim is not sustainable. Gavin Smith is a bona fide purchaser and the petition should be denied.

**B. Mike Harper and Lois Harper were not entitled to notice of the tax sale or the right to redeem the property.**

Mike Harper has never owned this real estate. In fact, he has never claimed to be an owner or to have any interest in the property. His parents owned the property from 1974 through July 10, 2001. By the time of the foreclosure, they had already moved from Mingo County to Cabell County. Her husband, Amos Harper, died in 2002, and Mrs. Harper continued to live in Cabell County until her death in 2010.

Mike Harper claims to have lived on the property; however, being a tenant does not entitle him to notice of a right to redeem someone else's property. He lacked standing to challenge the foreclosure in 2001 or the tax sale in 2008. He also cannot challenge the subsequent sale to Gavin Smith.

The law is clear. The right to redeem (or challenge the sale) is limited to the owner or lienholder. West Virginia Code §11A-3-23(a) clarifies that "the owner of, or any other person who was entitled to pay taxes on, any real estate for which a tax lien on the real estate was purchased by an individual, may redeem at any time before a tax deed is issued for the real estate." Lienholders who are authorized to pay taxes are also entitled to notice of the right to redeem. See e.g., Rollyson v. Jordan, 205 W.Va. 368, 518 S.E.2d 372 (1999).

Mike Harper was not an owner or lienholder. Thus, he lacks standing and is not entitled to notice. Furthermore, the land records clearly establish that the Bank of New York became owner in 2001. The property was taxed in its name and became delinquent. The bank was the

only entity entitled to notice. Lois Harper was not listed as the owner and accordingly, was not entitled to notice.

**C. The Bank of New York received notice of the right to redeem; and, even if notice was improper, Plaintiffs lack standing to challenge lack of notice.**

It is elementary that Lois Harper and her son cannot challenge the sufficiency of the notice provided to the Bank of New York. Plaintiffs lack standing to do so. They are not qualified as representatives of this entity and do not have any connection with the Bank of New York. Plaintiffs simply cannot assert the rights of someone else. The validity of Plaintiffs' claim must be confined to whether or not they owned the real estate at the time of the tax sale. The facts are undisputable. They did not own the property. It had already been foreclosed upon and sold 7 years earlier.

Furthermore, the Bank of New York (the only entity entitled to notice) has not challenged the tax sale or claimed lack of notice. The reason is obvious. It had notice and chose not to redeem the property. Notice was sent to the name and address listed with the County Clerk, Assessor and Sheriff. As admitted by Plaintiffs in their Petition, the certified mailing was accepted by its representative. The Circuit Court specifically addressed the notice issue and found:

The Bank of New York failed to pay the real estate 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.

....

After proper notice, expiration of the right 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.

Plaintiffs have not offered any evidence to establish that these conclusions were clearly erroneous.

**D. The Bank of New York purchased the real estate on July 10, 2001 and received a deed from the trustee who conducted the foreclosure. Accordingly, it was in fact the owner when the taxes became delinquent.**

The convoluted argument made by Plaintiffs fails to demonstrate any defect in ownership. The Circuit Court found as follows:

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.

Plaintiffs also admit that the foreclosure sale occurred prior to their bankruptcy. The sale occurred on July 10, 2001. The deed was dated July 16, 2001. Plaintiffs filed for bankruptcy on July 19, 2001. In addition to filing after the foreclosure, Plaintiffs did not make any attempts to address this matter with the bankruptcy court or the Circuit Court of Mingo County. Lois Harper

admitted that she did not even discuss those circumstances with her bankruptcy attorney and that they did not raise the issue in the bankruptcy proceeding. No attempts were made to set aside the deed or reverse the foreclosure.<sup>7</sup>

In addition to not addressing these issues with the bankruptcy Court in 2001, Plaintiffs did not offer any pleadings, orders, deeds or legal precedent to support its claim in these proceedings. They also failed to produce any documents or proof that the Defendants were aware of any claims. As a result, the Circuit Court found:

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.

Plaintiffs have not provided any evidence to demonstrate that these findings are clearly erroneous. Furthermore, this issue cannot alter Gavin Smith's status as a bona fide purchaser. Therefore, the petition should be denied.

## VI. CONCLUSION

The findings of fact and legal conclusions made by the Court are well reasoned and based upon uncontroverted testimony and documentary evidence. The evidence is overwhelming and conclusively demonstrates that Gavin Smith is a bona fide purchaser. The Plaintiffs lost their property in 2001. They did not challenge the foreclosure, and they have not offered any proof of

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<sup>7</sup> Lois Harper testimony, Exhibit A, pp. 66-67.

ownership or any legal basis for their claim. Gavin Smith's purchase in 2008 was bona fide, and he is the owner.

Therefore, this Court should deny the Petition.

Respectfully submitted,

**GAVIN SMITH**

By counsel,

  
\_\_\_\_\_  
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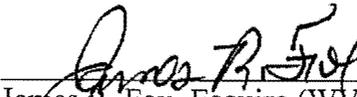
Respondents/Defendants.

**CERTIFICATE OF SERVICE**

The undersigned, counsel for the Respondent/Defendant, Gavin Smith, does hereby certify that on the 18<sup>th</sup> day of March, 2011 the foregoing **RESPONSE OF GAVIN SMITH TO PETITION FOR APPEAL** has been served upon counsel of record via United States Mail.:

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**EXHIBITS**

**ON**

**FILE IN THE**

**CLERK'S OFFICE**