

FILED

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

2011 MAR -4 PM 4: 32

MARK E. DAVIS;
TAMMY L. DAVIS;

BOBBI S. CATSON, CLERK
KANAWHA CO. CIRCUIT COURT

Plaintiffs,

APPEAL NO. _____
(Appealed from Civil Action No.08-C-1058;
Circuit Court of Kanawha County)

MIKE RUTHERFORD, Sheriff;
VERA MCCORMICK, Clerk;
REBUILD AMERICA, INC.;
REO AMERICA, INCORPORATED;
HUNTINGTON NATIONAL BANK, N.A.;

Defendants.

PETITION FOR APPEAL

PARTIES:

MARK E. DAVIS
51 Woodbridge Drive
Charleston, West Virginia 25311

TAMMY L. DAVIS
51 Woodbridge Drive
Charleston, West Virginia 25311

MIKE RUTHERFORD, Sheriff
VERA MCCORMICK, Clerk

REO AMERICA, INCORPORATED
REBUILD AMERICA, INC.

COUNSEL:

Pro se

Pro se

MARC J. SLOTNICK, ESQ.
BAILEY & WYANT PLLC
P. O. Box 3710
Charleston, West Virginia 25337-3710

JAMES W. LANE, JR., ESQ.
LANE LAW OFFICE
205 Capitol Street, Suite 400
P. O. Box 11806

Charleston, West Virginia 25339

THE HUNTINGTON NATIONAL BANK

PHILIP B. HEREFORD, ESQ.
HEREFORD & RICCARDI PLLC
405 Capitol Street, Suite 306
Charleston, West Virginia 25301-1727

CHRISTOPHER S. SMITH, ESQ.
HOYER HOYER & SMITH PLLC
22 Capitol Street
Charleston, West Virginia 25301

**I. KIND OF PROCEEDING AND NATURE OF THE RULING IN
THE LOWER TRIBUNAL**

This is a Petition of Appeal of REO America, Incorporated and Rebuild America, Inc. (collectively “Petitioner” or “Rebuild”) from an Order of the Circuit Court of Kanawha County, West Virginia (“Circuit Court”), entered September 13, 2010, and also from an Order entered November 4, 2010 denying Petitioner’s Motion to Reconsider under Rule 59 of the West Virginia Rules of Civil Procedure. In the underlying Circuit Court action the Plaintiffs, Mark E. Davis and Tammy L. Davis, brought suit against Mike Rutherford, Sheriff of Kanawha County, Vera McCormick, Clerk of the Kanawha County Commission, Rebuild America, Inc. and REO America, Incorporated, to set aside a tax deed by which the Defendant Clerk conveyed real property to Rebuild America, Inc. as a result of the Davises’ failure to pay real property taxes for the year 2005. The Circuit Court awarded judgment for the Davises and set aside the tax deed.

The nature of the Circuit Court’s ruling is summary judgment. Though no motion for summary judgment had been filed in the case by any party, the Court relied on pleadings, an affidavit, and argument of counsel for its ruling, and therefore the ruling resembles summary judgment. The Circuit Court’s September 13, 2010 Order resulted from a hearing held June 24, 2010. Prior to the June 24, 2010 hearing, the Circuit Court had entered a Status Conference

Order on January 9, 2009. In the January 9, 2009 Order, the Court recited that the position of the Davises and Huntington Bank was that federal bankruptcy law stayed and enjoined the Defendant Sheriff and Clerk from providing notice of the sale of the tax lien, and therefore the tax deed is void. The Status Conference Order allowed Rebuild to file additional pleadings and supporting memoranda of law addressing the issue and the relief sought. Following an unsuccessful attempt to remove the action to federal court, Rebuild filed a memorandum addressing the bankruptcy issue described in the January 9, 2009 Status Conference Order. The Davises and Huntington Bank filed a responsive memorandum also addressing the bankruptcy issue. Accordingly, the only legal arguments that the parties had briefed in advance of the hearing were bankruptcy issues.

At the June 24, 2010 hearing, the Court considered the bankruptcy issues, which had been fully briefed. The Court commented from the bench that if her ruling relied upon the bankruptcy issues, then she would take the matter under advisement and seek additional input. But the Court determined that “I don’t think I need to go there”. Transcript, p. 79.

The Circuit Court Judge relied upon an argument based on state law that counsel for Huntington Bank presented orally at the hearing. Huntington Bank asserted that the tax deed should be set aside because the Sheriff incorrectly mailed a notice that gave notice of the tax delinquency and of the date of the sale of the tax lien against real property (the “Notice of Tax Delinquency”) to the Davises at an incorrect address. This argument had not been briefed. The Davises’ complaint does not allege that they did not receive a notice. Nevertheless, the Court considered the matter, and ruled that the tax deed should be set aside. The Court’s September 13, 2010 Order set aside the tax deed. The state law argument surprised counsel for Petitioner and counsel told the Court several times that he was not prepared to address the issue. Hearing

Transcript, pp. 15, 17, 18, 29, The Petitioner timely filed a Rule 59 Motion for the Court to reconsider, alter and amend its judgment and to consider additional evidence on the issue. The Court denied Rebuild's Rule 59 Motion to Reconsider without a hearing by order entered November 4, 2010.

II. STATEMENT OF FACTS

The following is a timeline of relevant facts that Petitioner set forth verbatim in its Legal Memorandum filed in Circuit Court. Huntington Bank disputed item e. in its written Brief filed September 25, 2009, see Brief, at page 4, footnote 1, and Huntington Bank's counsel, at the June 24, 2010 hearing, objected orally to item f. Transcript, p. 68. Otherwise, the parties in the case have not disputed the following facts or timeline.

- a. Plaintiffs failed to pay 2005 real property taxes on their property at 51 Woodbridge Drive, Charleston, WV ("Subject Real Property");
- b. May 11, 2006, the state law procedure of selling the tax lien against the Subject Real Property was initiated with publication of the notice of the sale of the tax lien scheduled to occur in November, 2006.
- c. July 12, 2006, Plaintiffs filed a petition under Chapter 7 of the United States Bankruptcy Code in the Southern District of West Virginia, case no. 06-20398. In their bankruptcy schedules and mailing matrix Plaintiffs did not list the Kanawha County real property taxes as a debt or a lien against the Plaintiffs' real property. The Plaintiffs did not list the Kanawha County Sheriff or Assessor as parties in interest. Also, the Subject Real Property is listed as "exempt" on their Schedule C list of property exempt from the bankruptcy estate.
- d. September 13, 2006, publication of the second notice of the public sale of the tax lien occurred with respect to the Subject Real Property;
- e. September 21, 2006 the Subject Real Property ceased to be property of the Plaintiffs' bankruptcy estate because no parties objected within 30 days of the meeting of creditors, held on August 21, 2006, to the Plaintiffs' exemption under 11 U.S.C. §522 of the Subject Real Property on Schedule C of the Plaintiffs' schedules. See *Taylor v. Freeland & Kronz*, 503 U.S. 638, 643, 112 S.Ct. 1644, 1648, 118 L.Ed.2d 288 (1992). On September 21, 2006, the extent to which 11 U.S.C. §362(a) protected "property of the

estate” ceased because the Subject Real Property was no longer property of the bankrupt estate. *See 11 U.S.C. §362(c)(1)*;

f. Prior to October 17, 2006, written notice of the auction of the tax lien against the Subject Real Property was mailed to the Plaintiffs;

g. On October 17, 2006, the Bankruptcy Court entered its discharge order. Accordingly, 11 U.S.C. §362(a) ceased to provide any protection to the Plaintiffs or their property. *See 11 U.S.C. §362(c)(2)(C)*;

h. November 14, 2006, at a time when 11 U.S.C. §362(a) offered no protection to the Subject Real Property or the Plaintiffs, the Sheriff conducted the sale of the tax lien and sold the lien to Rebuild/REO or their assignors;

i. January, 2008, a Notice to Redeem the tax lien was mailed by certified mail to Mark E. Davis (receipt signed), Tammy L. Davis (receipt signed), The Huntington National Bank (4 separate certified mailings to the Bank all receipts signed), and other lienholders. The Notice provided Plaintiffs and Huntington National Bank notification that the tax lien had been sold at the November 14, 2006 sale date, and that a deed would be issued to the tax lien purchaser unless a specified sum certain was paid to the Kanawha County Sheriff to redeem the property prior to March 31, 2008.

j. April 14, 2008, in the absence of payment of the redemption amount by any party, Defendant Clerk of Kanawha County Commission executed and delivered the Tax Deed.

In addition to the above recital of facts, taken verbatim from Petitioner’s Memorandum filed September 1, 2009, additional facts were before the Circuit Court. The affidavit of H. Allen Bleigh, Chief Tax Deputy of the Kanawha County Sheriff’s Department was attached to the September 25, 2009 Response of Huntington National Bank, in which Huntington Bank argued the tax deed should be set aside based on bankruptcy law. In it, Mr. Bleigh referred to Exhibit A to his affidavit as evidence that the Kanawha County Sheriff’s department did not send the notice of sale to the Davises at the property address. Instead, the notices were allegedly sent to 929 Chappell Road, Charleston WV. No exhibit was actually attached to the affidavit, however.

In its Motion to Reconsider, Petitioner attached public records indicating the Sheriff mailed the notice to the last known address for the Davises. The 2005 Kanawha County

Property Tax Records for the Subject Real Property provides the mailing address for the Davises as the Chappell Road address. Additionally, the deed by which the Davises acquired title to the Subject Real Property shows that the Davises acquired the Subject Real Property in July 2003. It also shows that the address to which the County Clerk returned the deed was to the Davises' address at 929 Chappell Road, Charleston, WV. Further, the discovery responses of Huntington Bank, attached to Rebuild's Motion to Reconsider, demonstrate that Huntington Bank did not disclose to Petitioner any basis under state law for setting aside the tax deed at issue.

III. ASSIGNMENTS OF ERROR

- A. THE CIRCUIT COURT ERRED AS A MATTER OF LAW BY DETERMINING THAT THE TAX DEED SHOULD BE DECLARED VOID AND SET ASIDE DUE TO IMPROPER NOTICE.
- B. THE CIRCUIT COURT ERRED AS A MATTER OF LAW BY DETERMINING THAT THE TAX DEED SHOULD BE DECLARED VOID AND SET ASIDE DUE TO PURSUANT TO BANKRUPTCY LAW.
- C. THE CIRCUIT COURT ERRED BY DENYING REBUILD'S MOTION TO REQUIRE PLAINTIFF'S MAKE PAYMENTS INTO COURT UPON TERMS THAT SHOULD PROTECT THE DAVISES' GOALS IN THIS CASE REGARDLESS OF THE OUTCOME OF THIS LAWSUIT.
- D. THE CIRCUIT COURT ERRED BY AVOIDING AND SETTING ASIDE THE TAX DEED WITHOUT FIRST REQUIRING PAYMENT OF THE REDEMPTION AMOUNT TO REBUILD.

IV. POINTS AND AUTHORITIES RELIED UPON, DISCUSSION OF THE LAW, RELIEF PRAYED FOR.

A. POINTS AND AUTHORITIES RELIED UPON.

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V. DISCUSSION OF THE LAW

A. THE CIRCUIT COURT ERRED AS A MATTER OF LAW BY DETERMINING THAT THE TAX DEED SHOULD BE DECLARED VOID AND SET ASIDE DUE TO IMPROPER NOTICE.

i. The Sheriff Complied With the West Virginia Code Because It Mailed the Notice of Tax Delinquency to the Davises at their Last Known Address

The Kanawha County Sheriff's Department complied fully with its duties under the West Virginia Statute respecting the sale of tax liens. West Virginia Code §11A-3-2 provides that the "Sheriff shall send a notice of the delinquency and the date of the sale by certified mail: (1) to the last known address of each person listed in the land books whose taxes are delinquent. . . ." The Court's factual findings simply do not support a conclusion that the Sheriff failed to send the notice to the Davises' "last known address" in accordance with the statute.

The findings that the Court relied upon to set aside the tax deed are that the Sheriff did not mail the Notice of Tax Delinquency to the Davises "at the property address". This is irrelevant. The issue is whether the Sheriff sent the notice to the "last known address" of the owner, not to the "property address" of the property being sold. There is no requirement in the statute that the Sheriff mail the Notice of Tax Delinquency to the property address. The Court applied the wrong legal standard under the applicable West Virginia statute. The Court's findings cannot serve as a legally valid reason for setting aside the tax deed.

The relevant evidence shows that the Sheriff complied with W.Va. Code §11A-3-2 and mailed the Notice of Tax Delinquency to the Davises at their "last known address." The evidence that Appellants filed with the Court in their Motion to Reconsider demonstrates that the Sheriff Department fulfilled its legal duty to provide Notice of Tax Delinquency to the Plaintiffs at their last known address. Attached as Exhibit 2 to Petitioner's Motion to Reconsider is a Kanawha County Property Tax Record regarding the Subject Property for Year 2005. The

Kanawha County Tax Record shows the Davises' address as 929 Chappell Road, Charleston, West Virginia. The Notice of Tax Delinquency was sent to the plaintiffs at 929 Chappell Road, Charleston, West Virginia. Also, the deed by which the Davises acquired title to the Subject Property was attached to Appellants' Motion to Reconsider. The deed was dated and recorded in July, 2003 and contains on its face the 929 Chappell Road address as the address for the Clerk to return the instrument to the Davises. It is apparent from the public records, therefore, that even after they acquired the Subject Property, the Davises continued to receive mail at the 929 Chappell Road address, and that was the last known address in the County tax records. Accordingly, the Sheriff mailed the notice of delinquency in compliance with West Virginia law.

- ii. Even if the Davises did not receive the Notice of Tax Delinquency, that is not a basis for setting aside the tax deed.

Even if the Sheriff did not mail the Notice of Tax Delinquency to the last known address, this failure is not legal grounds for setting aside a tax deed. West Virginia Code §11A-3-2 makes it clear that title to property bought at a tax sale cannot be invalidated based upon the failure of the landowner to receive Notice of Tax Delinquency. This section provides:

In no event shall failure to receive the mailed notice by the landowner or lienholder affect the validity of the title of the property conveyed if it is conveyed pursuant to section twenty-seven or fifty-nine of this article.

In this case, the real property was conveyed to Rebuild pursuant to W.Va. Code §11A-3-27, which requires that county clerk to deliver a deed to the tax lien purchaser if the real estate described in the Notice to Redeem is not redeemed. The Davises and Huntington Bank do not contest that they timely received the Notice to Redeem. Specifically, the Davises and Huntington Bank have not contested item i. in the timeline set forth above, which states that the Notice to Redeem was sent to and received by the Davises and Huntington Bank (at four addresses). Based upon the above-quoted statutory language, there is no legal authority to set

aside the tax deed based upon the argument that the Plaintiffs did not receive notice of the tax lien sale.

Furthermore, West Virginia Code §11A-3-31 provides that no irregularity, error or mistake with respect to any step in the procedure leading up to and including delivery of the tax deed by the Clerk shall invalidate the title acquired by the purchaser unless such irregularity, error or mistake is specifically set forth as a ground for instituting suit to set aside the tax, the sale or the deed. The failure of the property owner to receive Notice of Tax Delinquency is not a ground for instituting suit to set aside the deed pursuant to the above-referenced provisions. Moreover, the Notice in question was the notice that the taxes were delinquent and that the lien would be assigned from the government entity to a private entity, not the actual taking of the property, which happened seventeen (17) months later, and which occurred after the Davises and Huntington Bank received the Notice to Redeem. As quoted above from W.Va. Code §11A-3-2, failure of an owner to receive Notice of Tax Delinquency is explicitly not a ground for invalidating a tax deed. The specific statutes that serve as a basis for setting aside a tax deed follow:

- 1 §11A-3-6 provides that a county official (sheriff, clerk, assessor, or deputy) cannot be a purchaser.
- 2 §11A-4-2 provides that an owner can set aside a deed where taxes are paid before the tax lien is sold.
- 3 §11A-4-3 provides a right to set aside a tax deed exists when any of the following occur: the Clerk delivers the deed to the purchaser outside of the time limits; the purchaser does not undertake all of its responsibilities pursuant to 11A-3-19; or the property had been redeemed prior to the deed issuance.
- 4 §11A-4-4 provides that a person entitled to be notified under West Virginia Code § 11A-3-22 of his Notice to Redeem prior to the sale, can set aside a tax deed if the Notice to Redeem was not properly attempted to be delivered to him.
- 5 §11A-4-6 provides certain relief for owners of property who are infants and incompetents.

None of these statutes apply to this case.

iii. Due process is not implicated in the facts of this case.

In this case, the Davises and Huntington Bank received the Notice to Redeem. They were provided their constitutional rights before the property was conveyed to Petitioner. The Notice to Redeem is the final notice that the property will be deeded to the tax lien purchaser unless the taxes are timely redeemed. The tax lien purchaser is required to exercise due diligence to ascertain the addresses of the persons entitled to Notice to Redeem. W.Va. Code §11A-3-22. Due process also requires that diligent efforts be undertaken to discover a property owner's address in order to provide the property owner notice before property is forfeited for the failure to pay taxes. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Plemons v. Gale*, 396 F.3d 569, 574 (4th Cir. 2005); *Wells Fargo Bank, N.A. v. Fleet National Banks*, 223 W.Va. 407, 411, 675 S.E.2d 883, 887(2009). If the Notice to Redeem is not received by the persons with an interest in the property, then the tax lien purchaser is required to diligently search available records for the true address of the person entitled to notice to redeem. *Plemons v. Gale*, 382 F.Supp.2d 816, 828 (S.D.W.V. 2005). In this case, the Davises and Huntington Bank received Notice to Redeem.

The notice that the Davises and Huntington Bank complain about is the Notice of Tax Delinquency, which provides notice that the tax lien against the property will be assigned by the county to a private entity. It is not the notice that the property itself would be sold and forfeited. That explains why the applicable law only requires that it be sent to the owner's "last known address."

iv. Circuit Court Erred by Ruling on Huntington Bank's State Law Faulty Notice Argument Because it Had Not Been Asserted or Briefed Prior to the Hearing

The Davises' complaint does not assert that the tax deed should be set aside because they did not receive a notice that is required under state law. The only filings in the case in which Huntington Bank has stated its position is (a) the January 9, 2009 Status Conference Order, in which the Circuit Court described Huntington Bank's and the Davises' argument to set aside the tax deed, referred only to bankruptcy law, and (b) Huntington Bank's "Response. . ." and "Brief in Support of Response. . ." filed on September 25, 2009, in which Huntington Bank raises only bankruptcy arguments. Judge Goodwin's Order remanding the civil action from federal court to the Circuit Court declared that "the plaintiff's complaint indisputably arose under bankruptcy law." Prior to the June 24, 2010 hearing Petitioner had fully briefed the bankruptcy issue that had been described in the Circuit Court's January 9, 2009 Order. Huntington Bank had also briefed the bankruptcy issues. Petitioner was fully prepared to address the bankruptcy issues.

At the hearing counsel for Huntington Bank raised the issue that the tax deed should be set aside because the Sheriff had sent notices to the wrong address. Transcript, p. 6. Counsel for the Clerk and the Sheriff expressed his understanding that the issue before the Court was not whether the notice was sent to the right address, but instead that the notice was given during the pendency of the bankruptcy. Transcript, p. 30. Petitioner's counsel felt the same way and expressed that he was not prepared to address the issue whether the tax deed should be set aside under state law because a notice was not mailed correctly.

Petitioner had served discovery requests upon Huntington Bank seeking discovery of evidence of any failure of compliance with state law that would warrant setting aside the tax deed. In its response, submitted days prior to the June 24, 2010 hearing, Huntington Bank did not disclose any such evidence. Huntington Bank's Brief filed September 25, 2009 consistently referred to the Allen Bleigh affidavit, but only as support for setting aside the tax deed as a result

of bankruptcy law. The notice – the piece of paper – that was alleged to be incorrectly mailed, is not even part of the record.

The issue was not raised in the pleadings, and the Petitioner did not consent to the Court's consideration of it, expressly or impliedly, as would be required by Rule 15(b). The Court did not have available to it the correct legal standard or any legal standard in arriving at the conclusion that the tax deed should be set aside due to faulty notice, and the facts regarding this issue had not been developed.

B. THE CIRCUIT COURT ERRED AS A MATTER OF LAW BY DETERMINING THAT THE TAX DEED SHOULD BE DECLARED VOID AND SET ASIDE PURSUANT TO BANKRUPTCY LAW.

- i. Prevailing Bankruptcy Law Makes Clear that the Automatic Stay Did Not Stay or Prevent the Sheriff from Providing Notices of the Sale of the Tax Lien against Davises' Real Property Because the Tax Sale Procedure was Commenced Prior to the Davises' Bankruptcy Case and the Notice was Essential to Preserving the Legal Validity of the Tax Sale Process.

The Davises and Huntington Bank argue that while the Davises' Chapter 7 bankruptcy case was pending in the United States Bankruptcy Court for the Southern District of West Virginia, the automatic stay of 11 U.S.C. §362 stayed any creditors from exercising rights or remedies to enforce liens against the Davises' property. The Davises and Huntington Bank assert that the Defendant Sheriff and Clerk were precluded as a matter of law from providing Notice of Tax Delinquency, as is required by state law (either by personal service, certified mail or advertisement) without first obtaining specific relief from the automatic stay from the Bankruptcy Court. The events that occurred while the automatic stay was in effect were the newspaper publication of the public auction of the tax lien on September 13, 2006 ("d" in the

timeline above) and the Notice of Tax Delinquency mailed to the Davises on or before October 17, 2006 (“f” in the timeline above).

The automatic stay of 11 U.S.C. §362(a) is very broad, but it does not prohibit the activity that the Davises and Huntington Bank complain about. A large majority of cases that have addressed facts similar to those of this case find that if a creditor has already commenced procedures to conduct a public foreclosure sale before a bankruptcy case is filed, the creditor may take actions, including giving notice of the sale, after the bankruptcy case is filed, if the actions are necessary to preserve the proceeding. Courts find that the purpose of the automatic stay is to preserve the status quo between a debtor and creditor. To preserve the continuing validity of a foreclosure proceeding after a bankruptcy case is filed, a creditor may advertise and issue written notice of a sale, but the sale itself should be conducted only after the automatic stay has terminated. *See e.g., Taylor v. Slick*, 178 F.3d 698 (3d Cir. 1999); *In re Peters*, 101 F.3d 618 (9th Cir. 1996); *In re De Jesus Saez*, 721 F.2d 848 (1st Cir. 1983); *First Nat'l Bank v. Roach(In re Roach)*, 660 F.2d 1316 (9th Cir.1981); *Worthy v. World Wide Fin. Servs., Inc.*, 347 F.Supp.2d 502, 508-09 (E.D.Mich. 2004), *aff'd*, 192 Fed.Appx. 369 (6th Cir. 2006); *In re Barry*, 201 B.R. 820 (C.D.Cal. 1996); *Zeoli v. RIHT Mortgage Corp.*, 148 B.R. 698, 701 (D.N.H. 1993); *In re Fine*, 285 B.R. 700, 702 (Bankr.D.Minn. 2002); *In re Heron Pond, LLC*, 258 B.R. 529, 530 (Bankr.D.Mass. 2001); *Atlas Mach. & Iron Works, Inc. v. Bethlehem Steel Corp.(In re Atlas Mach. & Iron Works, Inc.)*, 239 B.R. 322, 329-333 (Bankr.E.D.Va. 1998).

The only published decision of a court within in the Fourth Circuit with similar facts is *In re Atlas Machine & Iron Works, Inc.*, 239 B.R. 322 (Bkrtcy E.D.Va. 1998), and that case supports Petitioner’s position in this case. In *Atlas Machine* a trustee under a deed of trust had scheduled a foreclosure sale upon real property owned by the debtor. *Atlas Machine*, at 325. On the

morning of the sale date, December 5, 2006, the debtor filed a bankruptcy petition. *Id.* The trustee did not conduct the foreclosure auction, but the trustee did appear at the place and time set for the sale and announced that the sale would be conducted on December 19, 2006. *Id.* The trustee also published notice of the December 19, 2006 sale in a local newspaper. *Id.* The creditor attempted to obtain relief from the automatic stay, but had failed to accomplish stay relief by December 19, 2006. *Id.* The trustee continued the sale again to April 10, 1997. *Id.* at fn 1. The trustee announced the new sale date at the time and place set for the first continued sale, and the trustee published notice of the new sale date in the local newspaper. *Id.* Also, the trustee sent a letter announcing the new sale date to parties who had expressed an interest in the auction. *Id.* The Trustee then sold the property on April 10, 1997 because the automatic stay had expired.

The Court found no violation of 11 U.S.C. §362 even though while the stay was in effect the trustee (a) attended scheduled foreclosure sales and announced continued sales to dates certain; (b) published notices of the continued sales; and (c) directed written notices of the continued sales to interested parties. The Court found that these acts merely preserved the prepetition status quo. *Id.* at 329-330. The Court stated that had the creditor not acted to preserve the foreclosure proceeding, the passage of time would have "entirely expunged the stayed foreclosure proceeding." *Id.*, at 331, quoting Zeoli v. RIHT Mortgage Corp., 148 B.R. 698 (D.N.H. 1993). The Court distinguished the facts before it from cases in which creditors first scheduled foreclosure sales after a bankruptcy cases had been filed. *Id.*, at 332, citing In re Ring, 178 B.R. 570, 574 (Bkrtcy. S.D.Ga. 1995); In re Franklin Mortg. & Inv. Co., Inc., 143 B.R. 295 (Bkrtcy. D.C. 1992); In re Demp, 23 B.R. 239 (Bkrtcy. E.D.Pa. 1982). The Court found that the written communications from the trustee were not intended to collect a prepetition debt or to

harass or coerce the debtor, and instead they were intended to maintain the continuing legal validity of the foreclosure process. Atlas Machine, at 332. The Court found that its holding was consistent with a majority of Courts that had considered the matter, including an unpublished decision from a court within the Fourth Circuit. Id., citing First Union Nat'l Bank v. Clayton, 1998 U.S. Dist. LEXIS 4108 (M.D.N.C. Jan. 16, 1998).

The seminal case to establish that a creditor may take actions to preserve a foreclosure proceeding without violating the bankruptcy stay is First Nat'l Bank v. Roach (*In re Roach*), 660 F.2d 1316 (9th Cir.1981). In *In re Roach*, a bank had initiated foreclosure under its deed of trust lien. On the date of the scheduled foreclosure sale the owner of the real estate filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code. The bank did not conduct the foreclosure sale, but instead it rescheduled the foreclosure sale several times during the bankruptcy case. Eventually, the bank obtained relief from the automatic stay and it proceeded to conduct the foreclosure sale that had been scheduled prior to the bankruptcy petition and rescheduled several times during the bankruptcy case. The debtor contended that the bank's publishing notices of a rescheduled foreclosure sale while the automatic stay was in effect violated the automatic stay. The Ninth Circuit held that in rescheduling the foreclosure sale and publishing notices of the rescheduled sale, the bank did not violate the automatic stay. The Circuit Court stated:

The purpose of the automatic stay is to give the debtor a breathing spell from his creditors, to stop all collection efforts, harassment and foreclosure actions. Notes of Committee on the Judiciary, Sen.Rep.No.989, 95th Cong., 2d Sess. 54, reprinted in (1978) U.S.Code Cong. & Ad.News 5787, 5840. The automatic stay also prevents piecemeal diminution of the debtor's estate. See Bohack Corp. v. Borden, Inc., 599 F.2d 1160, 1167 (2d Cir. 1979). The automatic stay does not necessarily prevent all activity outside the bankruptcy forum. See David v. Hooker, Ltd., 560 F.2d 412, 417-18 (9th Cir. 1977) (automatic stay under old bankruptcy act did not prevent trial judge in a separate case from requiring the debtor to comply with a discovery order issued prior to the filing of the insolvency petition).

Here, the Bank merely maintained the status quo, and did not harass, interfere or gain any advantage. This is consistent with the purpose of the automatic stay provision. See In re Decker, 465 F.2d 294, 297 (3d Cir. 1972) (stay provisions of old act were designed to maintain status quo).

In re Roach, 660 F.2d 1316, 1318-19 (9th Cir.1981). After *Roach*, a majority of courts have consistently found that a creditor may reschedule sales that have been stayed by a bankruptcy case, and that a creditor's actions to give proper notice of the rescheduled sale does not violate the stay.

In *In re Fine*, 285 B.R. 700, 702 (Bankr.D.Minn. 2002), the Bankruptcy Court addressed a similar fact pattern in which a creditor acted to preserve a foreclosure sale that had been scheduled pre-bankruptcy by taking action to continue the sale after bankruptcy had been filed.

The Court stated that:

[The creditor's] only alternative was to cancel the sale completely, which would nullify its foreclosure action, requiring it to start all over again, losing at least six weeks and incurring significant additional cost. This would turn the automatic stay into a sword rather than a shield it is intended to be.

Id. at 702.

In *Zeoli v. RIHT Mortgage Corp.*, 148 B.R. 698, 701 (D.N.H. 1993), a creditor that had scheduled and noticed a foreclosure sale pre-bankruptcy postponed the sale that was to occur while the automatic stay was in effect. The creditor announced at the time scheduled for the original sale that the sale would be postponed to a new date. The creditor also sent notices to all persons who received notices of the original sale. *Id.* at 699. The Court held that these measures did not violate the automatic stay. *Id.* at 699-700. The Court found that applicable state law (New Hampshire) mandated the action taken if the continuing validity of the foreclosure proceeding

was to be preserved. *Id.* Otherwise, the foreclosure proceeding would have been "terminated."

Id. The Court stated:

Only two realistic choices were allowed RIHT (creditor) in this case, and a choice was unavoidable. Either RIHT could "act" to postpone the scheduled foreclosure sale to a date certain, preserving the status quo, or, it could have "acted" by taking no action, thereby suffering termination of the stayed foreclosure sale by operation of time and State law. By postponing, RIHT preserved the existing relationship between the parties, protected its legitimate interests, and imposed no burden on the debtor.

Id. at 701. The Court found that where a creditor simply takes action necessary to preserve the continuing validity of the sale, it is not harrasing or coercive, but simply an attempt to preserve the status quo. *Id.*

The present case is similar to those discussed above. The tax sale process was commenced months before the Davises filed bankruptcy. After the Davises filed bankruptcy, the County official sent a written notice of the tax lien sale to the Davises. Also, notice of the public sale of the tax lien was published in a local newspaper. These acts were necessary to preserve the continuing validity of the tax lien sale procedure that had been instituted prior to the bankruptcy filing. The actual sale of the tax lien occurred after the automatic stay had terminated. Based upon the rulings in the cases quoted and cited above, the written notice and the publication did not violate the automatic stay, but instead preserved the status quo that existed before the case was filed.

In certain respects, the facts in the case before this Court differ from those of the cases cited above. To the extent the facts differ here, the facts more strongly warrant a finding that no violation of the automatic stay has occurred. First, this case involves the West Virginia tax lien sale procedure. The procedures to notify property owners of a delinquent account start in April

and the publications and notices are all set by statute, and the process may only occur once per year. Accordingly, the West Virginia tax lien sale procedure encumbers a much longer period of time than a foreclosure sale, and if the process is terminated at any stage, then the matter can only be commenced again the following year. The harm borne by the County if it is required to "terminate" the process is far greater in this case than in the cases discussed above, in which creditors had the flexibility to begin anew a one or two month process. Second, in this case the notices at issue only related to the assignment of the tax lien. Accordingly, less harm is borne by the bankrupt property owner in this case than in a foreclosure case because the property owner continued to have seventeen (17) months and additional notices to redeem the taxes before the deed to the property was signed by the Clerk. In fact, the Davises did not even list the taxes as a debt in their bankruptcy filing.

In summary, the acts that Davises complain of have been found by a majority of courts not to violate the automatic stay. Acts undertaken post-bankruptcy by a creditor to maintain and preserve a sale process commenced pre-petition do not violate the automatic stay.

- ii. Even if the notices given by the Sheriff violated the automatic stay, they are not necessarily void and of no force and effect.

Some courts hold that violations of the automatic stay are void. Other courts hold that stay violations are merely voidable. The Fourth Circuit has not decided the issue. *See Ellison v. Commissioner of Internal Revenue*, 385 B.R. 158, 164-65 (S.D.W.V. 2008). Furthermore, the same section of the Bankruptcy Code that establishes the automatic stay, 11 U.S.C. § 362, provides that the court can annul the stay retroactively, for cause. 11 U.S.C. § 362(d). Accordingly, even if the Sheriff's notice violated that automatic stay, the notices are not necessarily void.

Courts that address whether or not the stay should be annulled retroactively generally conduct an evaluation of the facts and circumstances and balance of the equities. *In re Fjeldsted*, 293 B.R. 12 (Bankruptcy Appellate Panel of the 9th Cir. 2003); *In re Formisano*, 148 B.R. 217 (Bkrcty.D.N.J. 1992). In this case, the facts are not developed fully. However, certain known facts favor annulling the automatic stay in order that the notices at issue are not deemed in violation of the stay. Petitioners did not know of the Davises' bankruptcy case. The Sheriff did not appear to know of the Davises' bankruptcy case when it sent the notice to the Davises and published the newspaper notice. In violation of the bankruptcy requirement that they list all of their debts and all liens against their property, the Davises did not list the delinquent real property taxes in their bankruptcy schedules. As a result, the Sheriff had no opportunity to seek to modify the stay to proceed with the tax lien sale. The sale of a tax lien does not result in a "scramble" for the debtor's assets, which the stay is meant to proscribe, because the only threat to the debtors at the time of the bankruptcy was the sale and assignment of the tax lien, not a sale of the real estate itself. *In re Formisano*, 148 B.R. 217 (Bkrcty.D.N.J. 1992). The Davises still had seventeen (17) months and additional notices to redeem the taxes.

- iii. Even if the notices given by the Sheriff are deemed to be void as a result of bankruptcy law, they nevertheless fulfilled their purpose under the W.Va. Code §11A-3-2 and are valid for purposes of the tax lien sale statute.

The Sheriff's sale of the tax lien occurred weeks after the automatic stay terminated. The tax deed from the Clerk to Petitioner occurred over a year after the automatic stay terminated. Accordingly, these events did not violate the automatic stay. One state court has said that even if an event leading up to a tax sale is "void" under bankruptcy law, the tax sale is unimpaired if the event nevertheless satisfied state law.

In Bascom Corporation v. Chase Manhattan Bank, 363 N.J.Super. 334, 832 A.2d 956 (2003), a state court in a tax foreclosure proceeding entered a preliminary order fixing the amount, time and place of redemption required under state law for the debtor to redeem the taxes and retain the property. *Id.* at 338. The order was properly served upon the property owner and the mortgage holder, neither of whom did anything in response. At the time the preliminary order was entered, the property owners were in a Chapter 13 bankruptcy case and subject to protection under the automatic stay. *Id.* at 339. Subsequently, and after the bankruptcy case was over and the automatic stay had ceased to exist, the state court entered a final order vesting title in the property to the tax lien purchaser. The mortgage holder, whose lien was divested by the state court order, attempted to undo the tax sale by asserting that the sale was void because the preliminary order of the court establishing the date and terms of redemption was void as a violation of the bankruptcy stay. *Id.* at 338-39.

On appeal, the New Jersey Superior Court noted that the final judgment of the tax foreclosure was entered after the Chapter 13 petition was dismissed and no stay was in effect. *Id.* at 342. The Court also found, however, that the interlocutory order fixing the terms of redemption was void. *Id.* The Court stated the issue before it:

Hence, as we view the issue, the question is not whether the final judgment is void ab initio but rather whether a void interlocutory order, as a matter of federal bankruptcy law, automatically vitiates the final judgment as well. We conclude that it does not, involves "an essential state interest" and "the power to ensure that security 'inheres in the very nature of [state] government.'" BFP v. Resolution Trust, 511 U.S. 531, 114 S.

Id.

The Court went on to state that:

Tax foreclosure law, affecting as it does, the security of title to real estate Ct. 1757, 1764-1765, 128 L.Ed.2d 556, 558 (1994). In our view, therefore, since foreclosure law is a matter uniquely within the state's competence, the state is free to make its own determination as to the effect of the entry of a void interlocutory order irrespective of the reason it is void.

Id. at 342. The Court then held that:

As a matter of state law, we recognize that the order fixing the terms of redemption is a necessary step in the processing of a tax foreclosure action. But we think it plain that the function of the order was entirely fulfilled. Both the property owner and the mortgagee were appropriately, accurately, and fully apprised of the amount, time and place for redemption.

Id.

The Bascom decision pragmatically confronts a truth that simply because bankruptcy law may deem an event or thing to be void does not change the fact that the event or thing actually exists and occurred. The argument applies to the facts before this Court. Although the written notice of the tax sale and also the publication of the tax sale may be deemed by this Court to be void or voidable, the state law purpose of the notices was accomplished. Therefore, the sale itself, which did not violate the automatic stay, can be affirmed as being in compliance with state law.

C. THE CIRCUIT COURT ERRED BY DENYING REBUILD'S MOTION TO REQUIRE PLAINTIFF'S MAKE PAYMENTS INTO COURT UPON TERMS THAT SHOULD PROTECT THE DAVISES' GOALS IN THIS CASE REGARDLESS OF THE OUTCOME OF THIS LAWSUIT.

Rebuild obtained a deed to title to the property at issue in this case from the Clerk.

While this action has been pending, on information and belief, the Davises have continued to make payments to Huntington Bank on their loan to Huntington Bank, even though that debt was in fact discharged by the Davises' bankruptcy filing.

Rebuild requested an order from the Circuit Court requiring the Davises pay the money that would be due on the Huntington Bank loan into Court. In that event, if the Davises and

Huntington Bank prevail in this case, then the moneys paid into the court would be payable to Huntington Bank in order to preserve that loan on a current basis. And if Petitioner prevails the funds could be paid to Petitioner. Petitioner committed to conveying the property at issue back to the Davises if it were to prevail in this case, and Petitioner would finance the sale of the property on the same terms and amount as the Davises owe to Huntington Bank. The Davises keep their property, regardless of who prevails on the merits. There is no just basis for the Davises to pay funds to Huntington Bank unless and until Huntington Bank should prevail in this case and its lien against the Subject Property is restored. Therefore Huntington Bank should be required to pay all collected funds since the tax deed into the Circuit Court Clerk until this matter has been adjudicated, and paid either to Huntington Bank or to Petitioners.

D. THE CIRCUIT COURT ERRED BY AVOIDING AND SETTING ASIDE THE TAX DEED WITHOUT FIRST REQUIRING PAYMENT TO PETITIONER OF THE REDEMPTION AMOUNT.

West Virginia Code §11A-4-4 provides that no deed shall be set aside until payment has been made or tendered to the purchaser (Petitioner), in the amount which would have been required for redemption together with any taxes which have been paid on the property since delivery of the deed, with interest at the rate of twelve percent per annum. West Virginia Code §11A-4-4(c) provides that upon a preliminary finding by the court that the deed will be set aside, such amounts shall be paid within one month of the entry thereof. Upon failure to pay the same within said period of time, the court shall upon request of the purchaser enter judgment dismissing the action with prejudice.

In this case the Court's September 13, 2010 Order deems to tax deed to be "void and set aside" even though the redemption amount had not been paid to Petitioner. It further provides

that “good and marketable title in the property is vested in and held by Plaintiffs” and “Huntington holds a valid and enforceable purchase money first deed of trust on the property.” Then it holds that Plaintiffs are statutorily required to reimburse Petitioner the total sum of \$7,272.52 for the payment of taxes and expenditures incurred in its purchase of the property.

At the hearing on June 24, 2010, Petitioner’s counsel specifically sought this protection. Transcript, p. 80. The Court appeared to agree with the relief. However, the September 13, 2010 Order does not provide Petitioner this statutory protection. No party has tendered to Petitioner the redemption amount.

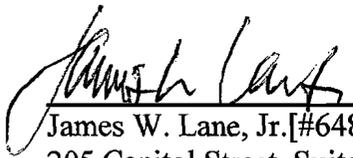
IV. RELIEF REQUESTED

Petitioner respectfully requests the following relief:

- a. An Order vacating the Circuit Court’s September 13, 2010 Order, specifically finding that the tax deed at issue is valid and the Petitioner has title to the Subject Real Property;
- b. An Order approving Rebuild’s Motion to Require Plaintiff’s to Make Payments into Court, and authorizing the Circuit Court to ensure that Petitioner and the Davises execute the documents necessary to give effect to the Motion, including a deed from Petitioner conveying the Subject Property to the Davises and a note and deed of trust from the Davises by which Petitioner shall obtain a valid lien against the Subject Property to secure a note that has the same balance and payment terms as the Huntington Bank note;
- c. Alternatively, an Order remanding the case to Circuit Court to adjudicate factual issues not yet fully developed; or

d. Alternatively, an Order remanding the case and requiring the payment to Petitioner of the redemption amount within 30 days, and otherwise directing the Circuit Court to dismiss the case.

Respectfully submitted,
**Rebuild America, Inc. and
REO America Inc.,**
By Counsel



James W. Lane, Jr. [#6483]
205 Capitol Street, Suite 400
P.O. Box 11806
Charleston, WV 25339
(304) 342-0081

Counsel for Rebuild America and REO America

FILED

CERTIFICATE OF SERVICE

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I, James W. Lane, Jr., counsel for Rebuild America, Inc. and REO America, Incorporated, do hereby certify that service of the **PETITION FOR APPEAL** and **DESIGNATION OF RECORD ON APPEAL** was made on this 4th day of March, 2011, by mailing a true copy thereof by U.S. Mail, with postage prepaid, to the following interested parties and counsel of record:

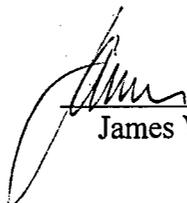
Mark E. and Tammy Davis
51 Woodbridge Drive
Charleston, WV 25311
Pro se

Marc J. Slotnick, Esq.
Bailey & Wyant PLLC
P. O. Box 3710
Charleston, WV 25337-3710
*Counsel for Mike Rutherford, Sheriff and
Vera McCormick, Clerk*

Philip B. Hereford, Esq.
Hereford & Riccardi PLLC
405 Capitol Street, Suite 306
Charleston, WV 25301-1727
Counsel for The Huntington National Bank

Christopher S. Smith, Esq.
Hoyer Hoyer & Smith PLLC
22 Capitol Street
Charleston, WV 25301
Counsel for The Huntington National Bank

O. Gay Elmore, Jr.
Elmore & Elmore
121 Summers Street
Charleston, WV 25301-2110
*Co-Counsel for Rebuild America, Inc. and
REO America, Incorporated*



James W. Lane, Jr.