

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

**MARK E. DAVIS,
TAMMY DAVIS,**

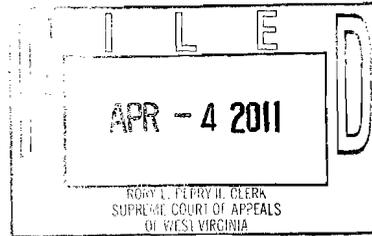
Plaintiffs,

v.

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

Defendants.

Appeal No.: 11 7592
**(Appeal from Civil Action No. 08-C-1058;
Kanawha County Circuit Court)**



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I. POINTS AND AUTHORITIES RELIED UPON

A. CASES

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II. KIND OF PROCEEDING; STATEMENT OF THE FACTS

The present action was commenced by the Plaintiffs, pro se, on June 2, 2008, when they filed a Civil Complaint requesting that a November 14, 2006, tax sale of their residence, 51 Woodridge Drive, Charleston, West Virginia (the "property"), be set aside.

The Plaintiffs' Complaint asserts that the property should not have been sold because of the Plaintiffs' Chapter 7 Bankruptcy filing. "On June 2, 2008, Plaintiffs spoke with Sheriff's Chief Tax Deputy who did reaffirm that said real property should not have been sold on November 14, 2006, because of bankruptcy protection afforded Plaintiffs". Complaint, ¶ 11.

The Complaint also states as follows:

Plaintiffs' seven-year-old child is disabled, and eviction would create immediate and severe physical and psychological hardship on a child with autism, heavy metal poisoning, and severe and profound food allergies. (The single-family dwelling at 51 Woodbridge Drive was built specifically for said child with products with no or minimal chemical additives.)

Complaint, Wherefore clause, ¶ 3.

As a result of a status conference and hearing held before Irene C. Berger, Judge of the Circuit Court of Kanawha County, on November 24, 2008, the Court entered a "Status Conference Order" on January 9, 2009, that found, among other things, the following:

4. It is the Plaintiff's and Huntington's position that as a matter of federal law the bankruptcy enjoined or stayed any creditors (including the Kanawha County Sheriff and Clerk) from exercising rights or remedies to enforce liens against the Plaintiffs as provided under 11 U.S.C. 362 of the United States Code.

5. It is the Plaintiff's and Huntington's position that the Defendant Sheriff and Clerk were precluded as a matter of law from providing notice required by State Law (either by personal service, certified mail or advertisement) that this property was to be sold at the tax sale without first obtaining specific relief from the automatic stay or injunction from the Bankruptcy Court in the Southern District of West Virginia.

6. The Plaintiffs represented to the Court that they were advised by the Sheriff's Department on more than one occasion that because of the bankruptcy the property should not have been sold at the tax sale on November 14, 2006.

7. The relief sought by the Plaintiffs is to set aside the tax sale and to restore legal title in the property to the Plaintiffs.

8. The Court finds that no pleadings are pending before the Court objecting to that relief sought by the Plaintiffs. However, Counsel for the Defendants, Rebuild and REO, objected in open Court to the Court granting that relief sought by the Plaintiffs.

Status Conference Order, p. 2, ¶¶ 4-8. As a result of these findings, this Court ordered as follows.

a. The Defendants, Rebuild and REO, will be allowed to file additional pleadings within thirty (30) days of the entry of the Order objecting to that relief sought by the Plaintiffs. Any pleadings filed in objection shall be supported by memorandums of law.

b. Upon the filing of any pleadings in objection to Rebuild and REO, all other parties shall within thirty (30) days be entitled to file pleadings in response, which pleadings shall include supporting memorandums of law.

c. In the event the Court determines that the objection of Rebuild and REO are without merit, the Plaintiffs, Huntington, the Clerk and the Sheriff will be allowed to file motions with the Court seeking reimbursement for fees and costs incurred in this litigation from Rebuild and REO.

Status Conference Order, p. 2, ¶¶ a - c.

Instead of filing an additional pleading in accordance with the Status Conference Order, the Defendants, Rebuild America, Inc. ("Rebuild") and REO America, Inc. ("REO"), filed a Notice of Removal on February 4, 2009, with the Federal District Court. This Notice of Removal asserted that Rebuild and REO first became aware of the federal bankruptcy issues supporting federal question jurisdiction and their right to remove the case to the District Court when they reviewed the Circuit Court's January 9, 2009, Status Conference Order.

On August 8, 2009, the case was remanded back to the Circuit Court pursuant to a Memorandum Opinion and Order of Judge Joseph R. Goodwin, Chief Judge of the United States District Court for the Southern District of West Virginia. Judge Goodwin held that the removal was improper and granted an award of attorney fees under 28 U.S.C. § 1447(c), because Rebuild and REO lacked "an objectively reasonable basis for seeking removal".

On September 1, 2009, Rebuild and REO filed and served a Memorandum objecting to the Plaintiffs' request that the tax sale be set aside. The Bank filed a Brief in support of its Response to the Memorandum of REO and Rebuild on or about September 24, 2009.

Attached as Exhibit B to the Bank's Response is the Affidavit of H. Allen Bleigh, the Chief Tax Deputy for the Sheriff of Kanawha County, West Virginia, acknowledging that because of the Bankruptcy filing of the Plaintiffs, Mr. and Mrs. Davis, the Sheriff's Department

should not have sold the Davis's property at a tax sale in November of 2006, and that the Notice of Sale was not delivered to the Plaintiffs.

Mr. Bleigh's Affidavit states that the tax sale of the Plaintiffs residence should not have been conducted by the Sheriff because of the filing of the Plaintiffs' bankruptcy petition. Affidavit, H. Allen Bleigh, ¶¶ 4, 5 and 6. Mr. Bleigh's Affidavit also states that the Notice of Sale was not sent to the Plaintiffs' proper address and that there was no indication that the Notice was forwarded or ever received by the Plaintiffs. Affidavit, H. Allen Bleigh, ¶¶ 7, 8 and 9.

On June 24, 2010, Carrie L. Webster, Judge of the Circuit Court of Kanawha County, West Virginia, heard argument from the parties in support of their respective positions, and subsequently entered an Order on September 13, 2010, that nullified the tax sale deed, provided for the reimbursement of \$7,272.52 to Rebuild for the payment of taxes and expenditures incurred in purchasing the property, and denied the Motion of Rebuild and REO for entry of an Order requiring the Plaintiffs to pay their mortgage payments into the Court's registry.

Thereafter, on September 23, 2010, Rebuild and REO filed a Motion to Reconsider. The Motion to Reconsider asserts that Rebuild and REO were surprised by the issue of whether the Plaintiffs were given proper notice of the tax sale despite the earlier filed Affidavit of Mr. Bleigh in which the lack of notice to the Plaintiff was prominently discussed. The Motion to Reconsider was denied by the Circuit Court by Order entered on November 4, 2010.¹

¹ Note that Rule 1 of the Revised Rules of Appellate Procedure provides that the Revised Rules apply to Orders entered on or after December 1, 2010, and therefore, the former Rules apply to this appeal.

III. SUMMARY OF ARGUMENT

1. The tax sale of the Plaintiffs' property was properly set aside because the tax sale proceedings violated the automatic stay of Bankruptcy Code, § 362(a) and are void ab initio.

2. The Circuit Court has concurrent jurisdiction to determine if the automatic stay applies, but only the bankruptcy court may annul the automatic stay. Therefore, if the stay is to be annulled retroactively in order to revive the tax sale proceedings, Rebuild and REO should have sought such relief from the Bankruptcy Court.

3. The Affidavit of the Chief Tax Deputy for the Sheriff of Kanawha County shows that Notice was not properly given to the Plaintiffs.

IV. ARGUMENT

A. Actions Taken in Violation of the Automatic Stay Are Void Ab Initio

The automatic stay of Bankruptcy Code, § 362 is "extremely broad in scope". 3 Collier on Bankruptcy, ¶ 362.03. It prevents any action to enforce pre-petition claims against a bankruptcy debtor, the debtor's property, or property of a bankruptcy estate.² Bankruptcy Code, § 362(a)(1) - (6).

Section 362 provides for an automatic stay upon the filing of a bankruptcy petition under any chapter of the Bankruptcy Code. Section 362 provides for a broad stay of litigation, lien enforcement and other actions, judicial or otherwise, that are attempts to enforce or collect prepetition claims. It also stays a

² Rebuild and REO assert in their Petition that because the Debtors, Mr. and Mrs. Davis, exempted the real estate in question, that it was no longer property of the bankruptcy estate entitled to the protection of the automatic stay. However, they cite no case law in support of this proposition, and Bankruptcy Code, § 362 clearly provides that the stay prevents the assertion of claims against the debtor and property of the debtor in addition to property of the estate. Bankruptcy Code, § 362(a)(1) - (6).

wide range of actions that would affect or interfere with property of the estate, property of the debtor or property in the custody of the estate.

3 Collier on Bankruptcy, ¶ 362.01.

The automatic stay applies to tax sales. "Critically, 11 U.S.C. § 362(a) automatically stayed the tax sale proceedings." In re Pierce, 91 Fed. Appx. 927, 929 (5th Cir. 2004). "The sale of debtors' real property for the non-payment of delinquent taxes is the exact type of creditor action section 362(a) stays". In re Young, 14 B.R. 809, 811 (Bankr. N.D. Ill. 1981).

Under the majority view, and the view followed by the Bankruptcy Court in this District, actions taken in violation of the stay are void ab initio. "In the view of this Court, the clear weight of authority favors treating violations of the automatic stay as void is a matter of law. . . . Accordingly, the Court follows the majority of circuits in holding that violations of the automatic stay are void as a matter of law." In re Ellison, 385 B.R. 158, 164-65 (Bankr. S.D.W.Va. 2008). When a tax sale is conducted in violation of the automatic stay, it is "null and without legal effect." In re Pierce, 91 Fed.Appx. 927, 929 (5th Cir. 2004). "The stay created by section 362(a) is an automatic statutory stay and acts taken in violation of the stay are void ab initio regardless of notice." In re Young, 14 B.R. 809, 811 (Bankr. N.D. Ill. 1981).

Rebuild and REO argue that actions taken after a bankruptcy filing to preserve a public foreclosure sale do not violate the automatic stay of § 362. Petition, pp. 15-16. In support of this argument, Rebuild and REO cite a string of cases that hold that publishing a notice of "postponement" of a mortgage "foreclosure sale" after a bankruptcy filing is not in violation of the automatic stay. Taylor v. Slick, 178 F.3d 698, 701-03 (3d Cir. 1999) ("postponement" notice of a "foreclosure sale" does not violate § 362(a)); In re Peters, 101 F.3d 618, 619 (9th Cir. 1996)

("postponement" of "foreclosure sale" does not violate stay); In re De Jesus Saez, 721 F.2d 848, 851 (1st Cir. 1983) (foreclosure sale after dismissal does not violate § 362(a)); First Nat'l Bank v. Roach (In re Roach), 660 F.2d 1316, 1318 (9th Cir. 1981) ("Postponement notices . . . do not violate 11 U.S.C. § 362"); Worthy v. World Wife Fin. Servs., Inc., 347 F.Supp.2d 502, 509 (E.D. Mich. 2004), aff'd, 192 Fed. Appx. 369 (6th Cir. 2006) ("postponement" of "foreclosure auction" does not violate § 362(a)); In re Barry, 201 B.R. 820, 823 (C.D. Cal. 1996) (creditor may "postpone a foreclosure sale . . . without violating the automatic stay"); Zeoli v. RIHT Mortgage Corp., 148 B.R. 698, 701 (D. N. H. 1993) ("postponement of a foreclosure sale is . . . not prohibited by § 362(a)(1)"); In re Fine, 285 B.R. 700, 702 (Bankr. D. Minn. 2002) ("postponement of a foreclosure sale is . . . not prohibited by § 362"); In re Heron Pond, LLC, 258 B.R. 529, 530 (Bankr. D. Mass. 2001) ("single continuance of a foreclosure sale . . . is not a violation of the automatic stay"); Atlas Mach. & Iron Works, Inc. v. Bethlehem Steel Corp. (In re Atlas Mach. & Iron Works, Inc.), 239 B.R. 322, 332 (Bankr. E.D. Va. 1998) ("postponements of the foreclosure sales . . . are not in violation of the automatic stay").

None of these cases cited by Rebuild and REO hold that proceedings to enforce tax claims against a bankruptcy debtor are not stayed. That is, the cases cited by Rebuild and REO have nothing to do with the present case involving a tax sale. More importantly, the present case does not involve a mere "postponement" of a tax sale.

The facts of the present case show that the proceedings, including publication of the sale notices, which are a prerequisite to the actual sale, occurred in violation of the automatic stay. "By having the property posted for Sheriff Sale, Mr. Beckett [the creditor's attorney], was in violation of the stay and in contempt of court". In re Demp, 23 B.R. 239, 239 (Bankr. E.D. Pa.

1982) (brackets added). Similarly, sending a notice directing the clerk to publish a notice of judicial sale is in violation of the automatic stay. In re Franklin Mortgage & Investment Co., Inc., 143 B.R. 295, 303 (Bankr. D.C. 1992). "Advertising for foreclosure is clearly the sort of creditor action that is stayed by Sections 362(a)(1), (3), (4), and (5) . . . and 'actions taken in violation of the automatic stay are void and without effect'." In re Ring, 178 B.R. 570, 574-75 (Bankr. S.D. Ga. 1995), quoting, Borg-Warner Acceptance Corp. v. Hall, 685 F.2d 1306, 1308 (11th Cir. 1982).

Significantly, in the present case, the Affidavit of the Sheriff's Chief Tax Deputy acknowledges that because of the Plaintiffs' bankruptcy filing, the tax sale proceedings should have ceased and the sale should not have occurred.

**B. The Circuit Court Had Concurrent Jurisdiction to Determine
If the Automatic Stay Applies, But Only the
Bankruptcy Court May Annul the Automatic Stay**

The Petitioners argue that even if the sale was in violation of the automatic stay, a Court can retroactively annul the stay. Petition, pp. 20-21. However, this argument is without merit because the Circuit Court is without jurisdiction to annul the stay.

Federal Courts have jurisdiction over bankruptcy "core proceedings". 28 U.S.C. §§ 157 and 1334. "Core proceedings include . . . motions to terminate, annul, or modify the automatic stay". 28 U.S.C. § 157(b)(2)(G).

In the present case, the Circuit Court of Kanawha County was not asked to "terminate, annul, or modify the automatic stay". Further, the Circuit Court was not asked to sanction Rebuild and REO for violating the automatic stay as this would be a matter under the exclusive jurisdiction of the federal courts. In re Halas, 239 B.R. 784, 792 (Bankr. N.D. Ill. 1999). Rather,

the Court only recognized the effect of the automatic stay, including that actions that violate the stay are void. For this, the Circuit Court of Kanawha County has concurrent jurisdiction with the Federal Bankruptcy Court.

Not surprisingly, courts have uniformly held that when a party seeks to commence or continue proceedings in one court against a debtor or property that is protected by the stay automatically imposed upon the filing of a bankruptcy petition, the non-bankruptcy court properly responds to the filing by determining whether the automatic stay applies to (i.e., stays) the proceedings.

Chao v. Hospital Staffing Services, Inc., 270 F.3d 374, 384 (6th Cir. 2001).

Nonbankruptcy forums in both the state and federal systems have jurisdiction to at least initially determine whether pending litigation is stayed pursuant to Section 362.

. . .

The bankruptcy court from which the automatic stay originated nonetheless has the final say.

. . .

Thus, the federal courts must have the final word on 'the scope and applicability of the automatic stay' with respect to a given course of conduct so as to prevent an inadvertent state-court modification of a federal injunction under Section 362(d). . .

In re Mid-City Parking, Inc., 332 B.R. 798, 803-04 (Bankr. N. D. Ill. 2005) (citations omitted).

Rebuild and REO suggest that the Circuit Court of Kanawha County had the power to retroactively annul the stay. This is incorrect because only the federal courts have jurisdiction over a "core proceeding" under 28 U.S.C. § 157(b)(2)(G), requesting an annulment of the automatic stay. In re Formisano, 148 B. R. 217, 224 (Bankr. D. N.J. 1992); In re Gruntz, 202 F.3d 1074, 1081 (9th Cir. 2000). Clearly, any motion to annul the stay must be brought in the Bankruptcy Court.

If Rebuild and REO wanted the automatic stay annulled, thereby validating the tax sale, they should have gone to the Federal Bankruptcy Court. However, given that the Federal District Court³ was unreceptive to their arguments and that acts violating the stay are clearly void in this District, it appears unlikely that such relief would be available in a Federal forum.

The case of Bascom Corporation v. Chase Manhattan Bank, cited by Rebuild and REO in their Petition, is consistent with the above-described concurrent jurisdictional scheme that a State Court may decide whether the stay is in effect, but that the Federal Courts have the final say.

The lower State Court in Bascom ruled that the mortgagee, Chase Manhattan Bank ("Chase"), by not filing its motion to set aside the tax sale within a reasonable time, waived its right to have tax sale of property belonging to the Debtor, Fannie Askew, set aside. Bascom Corp. v. Chase Manhattan Bank, 832 A.2d 956 (App. Div. 2003), cert. denied, 841 A.2d 91 (1991) (N.J. 2004), cert. denied, 542 U.S. 938 (2004). In addition, the lower court did not consider Chase's arguments that the sale procedures violated the automatic stay because "Chase could seek any remedy to which it might be entitled by reason thereof in the Bankruptcy Court." Bascom, 832 A.2d at 959. The appellate court agreed, but it also ruled that while an interlocutory order setting a redemption period entered when the stay was in effect was void ab initio, the order authorizing the sale entered after the stay expired was not void. Bascom, 832 A.2d at 960-61.

³ Federal District Courts have jurisdiction over bankruptcy cases pursuant to 28 U.S.C. § 1334. Bankruptcy cases are referred by District Courts to Bankruptcy Courts pursuant to 28 U.S.C. §157(a).

Consistent with the jurisdictional scheme that the federal courts have the final say on stay issues, Chase subsequently filed a motion in the Bankruptcy Court seeking to have the sale set aside as void because it was in violation of the stay. In re Askew, 312 B.R. 274 (Bankr. D. N.J. 2004). Bascom Corporation, the successful bidder at the tax sale, objected and requested that the stay be annulled. The Bankruptcy Court agreed to retroactively annul the stay with respect to the interlocutory order entered while the stay was in effect, thereby eliminating any issue as to whether the void interlocutory order caused the subsequent final order approving the sale to also be void. In re Askew, 312 B.R. at 281-83.

The Bankruptcy Court centered its ruling on two main factors. First, the Court found that the Debtor, Ms. Fannie Askew, was not interested in protecting the property from the tax sale. The Court noted that the Debtor had filed three bankruptcy petitions all of which were dismissed because of the Debtor's failure to file the required paperwork, that the Debtor had a "negative equity in excess of \$37,000.00 . . . in the property", and that due to the Debtor's lack of interest in defending the tax foreclosure proceeding, "[i]t is reasonable for this Court to conclude that the property was not necessary to any 'effective reorganization' of this Debtor, thereby satisfying Section 362(d)(2)(B)", which provides for relief from stay with respect to property that is not necessary to a debtor's effective reorganization. In re Askew, 312 B.R. at 282. Second, the Bankruptcy Court agreed with the state court that Chase sat on its rights to the extent of having "unclean hands". In re Askew, 312 B.R. at 282-83.

In the present case, the Debtors, Mr. and Mrs. Davis, have equity in their house and their strong interest in protecting their house is evidenced by the fact that they filed the Complaint instituting the present action. Further, if Rebuild and REO wished to obtain relief from the stay,

they were free to file a motion with the Bankruptcy Court seeking an annulment of the stay with respect to the tax sale proceedings. However, as discussed above, based upon the factors required for a retroactive annulment and the District Court's remand of the case to the Kanawha County Circuit Court, it is unlikely that such a motion would have been granted.

Realizing their dilemma, Rebuild and REO presented complicated bankruptcy law issues to the Circuit Court, and, in turn, to this Court. Rather than burdening the State Court system, Rebuild and REO should have asked the Court with the appropriate jurisdiction, the Bankruptcy Court, to decide the bankruptcy law issues relating to the automatic stay.

**C. The Notice Issue was Properly Argued by the Parties
and Decided By the Circuit Court**

The Appellant's Brief argues that the issue of lack of notice was not properly raised below, and was wrongly decided by the Circuit Court. These arguments are without merit.

1. The Notice Issue was Properly Raised and Argued by the Parties

The notice issue is the subject of the Affidavit of Mr. Bleigh, the Chief Tax Deputy, that was attached to the Bank's Response filed on September 24, 2009, nine months prior to the June 24, 2010 hearing before Judge Webster that resulted in the September 13, 2010 Order that is subject to the present Petition. Therefore, Rebuild and REO could hardly have been surprised by an issue for which they had prior notice of nine months.

In addition, the notice issue was the subject of the Appellee's Motion to Reconsider and the Bank's Brief in Response that fully discusses the notice issue. Therefore, the notice issue was clearly raised and adequately argued to the Circuit Court. "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all

respects as if they have been raised in the pleadings." W. Va. R. Civ. P. 15(b). The Appellants have not been prejudiced because any harm caused by the alleged surprise was alleviated by the contents of the Motion to Reconsider and the Bank's Response.

2. The Notice Issue Was Properly Decided by the Circuit Court

The notice issue was properly decided by the Circuit Court. First, the Petitioners' argument that W. Va. Code, § 11A-3-51, cures the notice defect is without merit, because notice irregularities are jurisdictional and cannot be cured. Failure to give notice is not a "mere 'irregularity in the proceedings,' but a total omission of a mandatory step" in the tax sale proceedings and is a jurisdictional defect that cannot be cured. Gates v. Morris, 123 W.Va. 6, 10-12, 13 S.E.2d 473, 475-76 (1941). Subsequent amendments to the curative provisions of the statute do not alter the rule set forth in Gates v. Morris. Shaffer v. Mareve Oil Corp., 157 W.Va. 816, 823-24, 204 S.E.2d 404, 408-09 (1974).

Second, the United States Supreme Court has set forth the requirements for adequate Due Process notice before the person's property may be taken. Constitutional due process notice requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). Under Mullane, and subsequent cases, Federal Courts have upheld a standard of reasonable diligence for giving notice.

[A] party charged with giving notice must be reasonably diligent in doing so. In the case of a tax sale of property, diligence requires that reasonable effort be made to identify and locate parties with an interest in the property. Once those parties are located, they must be provided notice of the impending sale using a method

reasonably calculated, under all of the circumstances, to actually inform them of the sale.

Plemons v. Gale, 396 F.3d 569, 574 (4th Cir. 2005). The rationale of the federal cases has been followed by the West Virginia Supreme Court of Appeals. Wells Fargo Bank, N.A. v. Fleet National Banks, 223 W. Va. 407, 411, 675 S.E.2d 883, 887 (2009).

The Affidavit of Mr. Bleigh clearly states that the notice of sale was sent to a former address of the Plaintiffs and was not forwarded to or received by the Plaintiffs at their correct address.

7. The Kanawha County Sheriff's Department did not send the notice of sale to the Plaintiffs at the property address.

8. Notices were sent to the Plaintiffs at 929 Chappell Road, Charleston, West Virginia 25304-2707, which is a prior address for the Plaintiffs, as shown on [the attached] Exhibit A.

9. There is no indication that these notices were ever forwarded to the Plaintiffs, nor is there any indication that the notices were ever received by either Plaintiff.

Affidavit, H. Allen Bleigh, ¶¶ 7, 8 and 9.

The Plaintiffs' residence, the property that was sold, was the "last known address" of the Plaintiffs and the address to where the notice of sale should have been sent. Where notice is returned as undeliverable, "reasonable efforts" are required to determine a more accurate address so as to insure actual notice is given to the landowner. "[I]t is, at the very least, reasonable to require examination (or re-examination) of all available public records when initial mailings have been promptly returned as undeliverable." Plemons v. Gale, 396 F.3d 569, 577 (4th Cir. 2005).

Sending notice to the Plaintiffs at the address of the property to be sold, the Plaintiffs' residential and "last known" address, would have satisfied the notice requirement. As it is, it is clear from Mr. Bleigh's Affidavit that the notice sent to the Plaintiff's former address was insufficient and that Notice was not forwarded or received by the Plaintiffs. The employee of the Sheriff charged with the proper conduct of tax sales unambiguously states that because of the Plaintiffs' bankruptcy and lack of proper notice, that the tax sale should not have been held.

10. The Kanawha County Sheriff's Department on at least one occasion advised the Plaintiff, Mark E. Davis, that the property should not have been sold at the tax sale in November of 2006.

11. For the foregoing reasons the sale of the property by the Kanawha County Sheriff's Department on November 14, 2006, should not have occurred and the sale should be set aside.

Affidavit, H. Allen Bleigh, ¶¶ 10 and 11.

The Circuit Court properly held that the Plaintiffs did not receive adequate notice of the sale and that the Plaintiffs' property should not have been sold.

D. The Motion of Rebuild and REO to Require the Plaintiffs to Pay Their Mortgage Payments Into the Court Registry Was Properly Denied

The Motion of Rebuild and REO for entry of an Order requiring the Plaintiffs to pay their mortgage payments into the Court registry was properly denied for three reasons.

First, the Circuit Court's Order voided the tax deed so there would be no reason for a provisional remedy that places monies in the Court registry.

Second, contrary to the Petitioners' argument, there is no evidence in the record that the Plaintiffs' Note obligation owing to the Bank was discharged in the Plaintiffs' bankruptcy filing. Further, the Plaintiffs' loss of their residence as a result of their failure to pay their tax

obligations does not automatically relieve the Plaintiffs of their obligation to pay upon the Promissory Note they executed in favor of the Bank.

Third, there is no legal basis supporting the proposition that if Rebuild and REO prevailed and maintained ownership of the property, that Rebuild and REO would by operation of law become payee under the Plaintiffs' Promissory Note owing to the Bank.

Rebuild and REO assert that if they prevail they are "committed" to conveying the property back to the Plaintiffs and financing the purchase price upon the terms and amounts set forth in the Note owing to the Bank. Appellants' Brief, p. 24. However, the Appellants' settlement offer to the Plaintiffs is totally irrelevant to the issues that were before the Court and settlement offers are inadmissible under W.Va. R. Evid. 408. That is, a party (Rebuild and REO) cannot require an opposing party (the Plaintiffs) to make payments into Court based upon an offer to compromise a disputed claim. This is especially so when the payments are owing to a third party (the Bank) under a legally enforceable Promissory Note.

E. The Circuit Court's Order Provides for the Reimbursement of Taxes and Expenditures to Rebuild and REO

The Appellants argue that the Circuit Court erred in not clearly specifying that the nullification of the tax sale deed is conditioned upon the reimbursement of taxes and expenditures paid by Rebuild and REO. This argument is misplaced. The Circuit Court's Order clearly requires the reimbursement to Rebuild and REO of \$7,272.52, the amount of taxes and expenditures paid by Rebuild and REO.

In summary, there is no reimbursement issue.

V. CONCLUSION

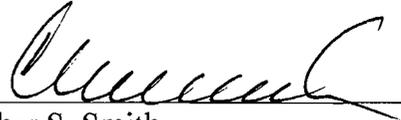
WHEREFORE, based upon the foregoing, the Appellee, Huntington National Bank, N.A., respectfully requests that the Court **AFFIRM** the Order of the Circuit Court of Kanawha County setting aside the tax sale and restoring the legal title in the property to the Plaintiffs, and Huntington National Bank respectfully requests such other and further action and this Court deems just and proper.

HUNTINGTON NATIONAL BANK, N.A.,

By Counsel



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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

MARK E. DAVIS,
TAMMY DAVIS,

Plaintiffs,

v.

Appeal No.: _____
(Appeal from Civil Action No. 08-C-1058;
Kanawha County Circuit Court)

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

Defendants.

CERTIFICATE OF SERVICE

I, Christopher S. Smith, hereby certify that on the 4th day of April, 2011, the foregoing **RESPONSE OF HUNTINGTON NATIONAL BANK, N.A.**, was served by United States first class mail, postage prepaid, on the following:

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