13-0886

FILED

2013 JUL 11 AM 11:48

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

WEST VIRGINIA DEPARTMENT OF ADMINISTRATION,
REAL ESTATE DIVISION,

Plaintiff,

v.

Civil Action No. 12-MISC-186
Paul Zakaib, Jr., Judge

VERA MCCORMICK, individually and
in her capacity as CLERK OF THE COUNTY
COMMISSION OF KANAWHA COUNTY,

And

MIKE RUTHERFORD, individually and
in his capacity as SHERIFF OF KANAWHA COUNTY,

And

PHYLLIS GATSON, individually and
in her capacity as ASSESSOR OF KANAWHA COUNTY,

And

EB DOREV HOLDINGS, INC., a foreign corporation

Defendants.

AMENDED ORDER GRANTING
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

On January 28, 2013, came the Plaintiff, W.Va. Department of Administration, Real Estate Division, and came the Defendants, Vera McCormick, Mike Rutherford, and EB Dorev Holdings, Inc., all by their respective counsel, for hearing on the Motion for Summary Judgment filed by the W.Va. Department of Administration, Real Estate Division (hereinafter the "WVDOA"). The Court, having reviewed the file in this matter, including the motion and responses of the aforementioned parties, and having heard the arguments of counsel, now rules upon the WVDOA's Motion for Summary Judgment as follows.

Defendant Mike Rutherford, in his capacity as Sheriff of Kanawha County (hereinafter the "Sheriff"), and Defendant Vera McCormick in her capacity as Clerk of the County Commission of Kanawha County (hereinafter the "Clerk"), contend, in practical effect, that it is consistent with the applicable laws, Legislative intent, and the public interest, to sell public property owned by the State, with an apparent fair market value exceeding Five Million Dollars, i.e., $5,000,000.00, which property was and is physically occupied by certain State agencies, to a private entity, Defendant EB Dorev Holdings, Inc. (hereinafter "EB Dorev"), for a total sum less than Sixty Thousand Dollars, i.e., $60.000.00.

The WVDOA, an agency of the State of West Virginia, purchased the property at issue here in August and September of 2008. The August sale related to a building and parking areas located on Third Avenue in South Charleston and commonly referred to as the Plaza IV building. As recited in the Plaza IV Deed, the Plaza IV building was previously owned by South Park L.L.C. and by Knollwood Investments, L.L.C. The September sale related to a building located at 1409 Greenbrier Street in Charleston, commonly referred to as the Cornerstone building. As recited in the 1409 Greenbrier Deed, the property was previously owned by CRW Real Estate, L.L.C.

As shown by reference to the Settlement Statements for these transactions, property taxes on the Plaza IV property for calendar year 2008 were accounted for at the time of closing, and property taxes on the 1409 Greenbrier Street property for calendar years 2007 and 2008 were accounted for at the time of closing. Thus, no real estate taxes for any tax year up to and including the tax year of purchase, 2008, remained unpaid. Reference to the Settlement Statements indicates that, before adjustment, the sale price of the 1409 Greenbrier Street property was $1,930,000.00, and the sale price of the Plaza IV property was $3,300,000.00, thus indicating that the total value of the property at issue was $5,230,000.00.

In February of 2012, Johnson & Lopez, PLLC, the law firm that had handled the 2008 closings on the property on behalf of the WVDOA, was sent certain Notices to Redeem relating to substantial

portions of the Plaza IV property, as well as the 1409 Greenbrier Street property. These Notices indicated that the Sheriff had purportedly sold tax liens on certain substantial portions of the Plaza IV property and on the 1409 Greenbrier Street property, to EB Dorev in November of 2010, and that EB Dorev would be issued tax deeds for the property if the property were not redeemed through payment of a specified amount before April 1, 2012. The amount purportedly required to redeem the 1409 Greenbrier Street property was $25,931.71, and the amount purportedly required to redeem the two Plaza IV tax parcels was $31,087.22, yielding a total sum of $57,018.93 purportedly due for the property at issue.

Although there may be a dispute as to whether Sara B. Lopez, the attorney who had previously handled the closings for the WVDOA, subsequently communicated with the Sheriff, and the content of such communication, if any, the nature of any such communication is irrelevant to the matters now at issue. Ms. Lopez's actions had no relevance to the admitted efforts of the Sheriff to sell the property at issue for taxes. In response to the Sheriff's efforts, the WVDOA filed the instant action in order to stop the issuance of tax deeds and the purported conveyances of State-owned property by the Sheriff.

The Sheriff and the Clerk, referred to hereinafter, collectively, as the "County," admit that the property at issue is exempt from taxation as it is the property of the State. The relevant statute plainly and clearly states in pertinent part as follows:

> § 11-3-9. Property exempt from taxation.
>
> (a) **All property, real and personal, described in this subsection**, and to the extent limited by this section, **is exempt from taxation:**
>
> (1) Property belonging to the United States, other than property permitted by the United States to be taxed under state law;
>
> (2) **Property belonging exclusively to the state;**
>
> (3) Property belonging exclusively to any county, district, city, village or town in this State and used for public purposes;
>
> (4) Property located in this state belonging to any city, town, village, county or any other political subdivision of another state and used for public purposes[.]

W. Va. Code § 11-3-9 (emphasis added).

The County expressly admits that the property at issue was not subject to taxes for the calendar and tax year 2010, or for any year thereafter, but contends that either the prior owners or the State owed the 2009 taxes, despite the fact that the State owned the property at issue throughout calendar and tax year 2009. Thus, the County contends that property that is now exempt from taxation, and that has been exempt since September of 2008, based upon its ownership by the State, is nevertheless subject to taxation, and subject to sale for nonpayment of taxes, due to the attachment of a tax lien on July 1, 2008, at which time the property was not exempt from taxation.

EB Dorev contends that the property at issue was not exempt from taxes in 2009 on the grounds that WVDOA was not the only party with an interest in the property. Although EB Dorev does not fully explain this point, the Court notes that the only other "interest" that may have existed in 2009 was the interest represented by the tax liens now at issue. As the tax liens also belonged to the State, the Court concludes that the property at issue was exempt from taxation throughout calendar year 2009, even if EB Dorev's argument is otherwise presumed valid.

For tax purposes, the law expressly recognizes an "assessment year" and a "tax year."

> § 11-3-1. Time and basis of assessments; true and actual value; default; reassessment; special assessors; criminal penalty
>
> . . .
>
> (f) **For purposes of this chapter and chapter eleven-a of this code,** the following terms have the meanings ascribed to them in this section unless the context in which the term is used clearly indicates that a different meaning is intended by the Legislature:
>
> (1) **"Assessment date" means July 1 of the year preceding the** tax year.
>
> (2) **"Assessment year" means the twelve-month period that begins on the assessment date.**
>
> (3) **"Tax year" or "property tax year" means the next calendar year that begins after the assessment date.**

(4) "Taxpayer" means the owner and any other person in whose name the taxes on the subject property are lawfully assessed.

W. Va. Code § 11-3-1 (emphasis added).

Although these express definitions were not added to § 11-3-1 of the Code until 2010, the terminology at issue was in use and defined in identical fashion prior to that date. *See, e.g.,* W. Va. Code § 11-1C-2, effective 90 days after March 11, 2000 ("[D]efinitions in (f) and (g) of this section shall apply to tax years beginning on or after the first day of January, two thousand one."); W. Va. Code § 11-1C-11b, effective March 3, 1998 ("The provisions of this article shall apply to tax years beginning on or after the first day of January, one thousand nine hundred ninety-nine."); W. Va. Code § 11-21-24(a)(9), effective on July 1, 2008 ("Tax year" means the property tax calendar year following the July 1 assessment day."). Thus, the relevant law recognizes an assessment year in the form of a fiscal year that begins on July 1 and runs to the end of June of the following calendar year, and a tax year that is identical to the calendar year following the July 1 assessment day, running from January 1 to the end of December of the same calendar year. The County does not discuss the interplay of the staggered assessment year and tax year system that is incorporated in the Code, and essentially argues that a tax lien, once it has attached, must be paid. The County fails to note, however, that the value of a tax lien cannot be ascertained on the date it attaches.

While a tax lien attaches to real property as of July 1, the first day of the assessment year, the assessment process continues through the assessment year, until June of the following calendar year. Pursuant to W. Va. Code § 11-3-19, the assessor's property books must be turned over to the county commission by February 1 of the assessment year, and, pursuant to W. Va. Code § 11-3-24, the commission must begin meeting as a board of equalization and review by that date, completing the process of equalization and review by February 28 of the assessment year, prior to which a taxpayer may object to increases in valuation. Pursuant to W. Va. Code § 11-8-10a, (county levy), §11-8-12a

(board of education levy), and §11-8-14a (municipal levy), the levy rates are not set until the third Tuesday in April of the assessment year. Thereafter, the assessor applies the rates to the assessed values to determine the taxes owed on the property, delivering one copy of the land books to the sheriff by June 7 of the assessment year, and one copy of the land books to the clerk by July 1. W. Va. Code § 11-3-19. In practical terms, in order for a tax lien to be sold, the County must know: (1) the property's description, (2) the property's use, (3) the property's owner, (4) the property's value, and (5) the amount of tax due on the property. The first three can be determined as of July 1 of the assessment year, although, as was the case here, characteristics such as ownership may change prior to the first day of the tax year. The last two are only determined much later in the assessment year, after the tax year has begun.

The WVDOA argues that the statutory procedure followed by the County was subject to reasonable discretion as the Sheriff was and is authorized by statute to determine that a tax lien should not be sold for various good reasons.

> § 11A-3-7. Suspension from sale; amended delinquent lists; subsequent sale.
>
> (a) **Whenever it shall appear to the sheriff that** any real estate included in the list **has been previously conveyed by deed and no tax thereon is currently delinquent,** or that the tax lien thereon has been sold previously and not redeemed, or that **the tax lien thereon ought not to be sold for the amount stated therein, he shall suspend the sale thereof and report his reasons therefor to the county commission and to the Auditor.** If the commission finds that the tax lien on the real estate ought not to be sold, it shall so order; but if the commission finds that the tax lien on the real estate ought to be sold for the amount stated, or for a greater or less amount, it shall order the sheriff to include such real estate in his next September list, unless sooner redeemed.

W. Va. Code § 11A-3-7 (emphasis added). Although the County argues forcefully that, were the WVDOA to prevail, the various taxing units, other than the State, would suffer the loss of nearly sixty thousand dollars in tax revenue secured by the tax lien at issue, the County simply ignores the potential for the loss of over five-million-dollars-worth of public property to a private entity, in return for the relatively small sum to be paid to the taxing units.

Plaintiff WVDOA also argues that, pursuant to the principle of merger, when the State purchases title to property on which it holds a lien, the State's lesser right as a lienholder merges with its greater right as landowner, and the lien is extinguished. *Armstrong Products Corp. v. Martin*, 119 W.Va. 50, 51-52, 192 S.E. 125, 127 (1937). Thus, application of the principle of merger would preclude the tax sale at issue here, as no lien existed, as a matter of law, after the dates the properties were purchased by the WVDOA, and the County's purported sale of the tax liens to EB Dorev was ineffective.

Merger, in the context of a purported sale of State property for taxes, is discussed at greater length in *State v. Locke*, 219 P. 790 (N.M. 1923), a case that is cited and relied upon as supporting authority in the *Martin* decision.

> The object of taxing property is to produce the revenues with which to conduct the business of the state; **it is entirely inconsistent with our theory of government for the property of the state to be taxed, or sold for taxes,** in order to produce the money to be expended by the state. Such a procedure is but taking the money out of one pocket and putting it in the other. **Another consideration, which should not be overlooked, is that if public property, that is to say, property owned by the state, is to be burdened with a tax lien, the public might lose it entirely through oversight or carelessness of its agents in failing to pay the taxes when due, and allowing the same to be sold and the title pass to third parties.**

Locke, 219 P. at 792 (emphasis added). The concern emphasized by the *Locke* court is particularly relevant here, as both EB Dorev and the County effectively argue that it is consistent with the applicable laws to sell State property worth millions of dollars in order to obtain a tiny fraction of that amount for the taxing units, each emphasizing the need for school funding.

The County and EB Dorev do not address the doctrine of merger as an established general principle of property law, but attempt to distinguish the case law cited by the WVDOA by reference to various purportedly disparate facts, citing to foreign case law intended to support those distinctions. The facts relied upon by the County and EB Dorev in their arguments are not relevant to the issue raised by the WVDOA, and the foreign case law they cite is itself distinguishable, by reference to facts and foreign statutes, from the case at hand. The only relevant fact is that the State purchased real property to

which the State's tax lien had attached by operation of law and that fact is expressly admitted by the County. The County's only recourse is to show why, as a matter of law, the principle of merger should not be applied under the circumstances of this action.

The County and EB Dorev cite no dispositive fact or plainly contrary mandatory authority in their responses. The County simply relies upon statutory language that refers to the attachment of the State's tax lien on July 1 of each year, and refers to the County's delegated authority to take certain steps under the procedure prescribed by statute to collect the tax lien as may be necessary on a later date. For both the County and EB Dorev, once the tax lien attaches, the status of the taxed property in the coming tax year, is irrelevant. Thus, they contend that, although the real property at issue was owned by the State of West Virginia and was thus exempt from taxation throughout tax year 2009, the property was nevertheless subject to taxation in practical effect, as the attachment of the tax lien on July 1, 2008, by operation of law, was dispositive of the issue.

The County also argues that merger should not apply as it would deprive the County of its most potent means of demanding the payment of taxes, i.e., the threatened sale of tax liens and the loss of property through tax sale. The County presumes that this result would obtain for any entity whose property might be deemed exempt from taxes, i.e., the property of the United States government, property owned by any level of local government, and even private entities such as schools, colleges, churches, cemeteries, libraries, hospitals, and charities. The County fails to note, or to appreciate, that the principle of merger requires that the entity purchasing the property must first hold a tax lien on the property. As the tax liens at issue are the State's, merger may only be invoked when the State purchases property. Thus, the County's concerns that merger will deprive the County of a significant means of tax collection are baseless.

The County's stated concern that delinquent taxes unpaid over a period of years will remain unpaid whenever the State purchases property is contradicted by the WVDOA's action in regard to the

purchases at issue. The Court first notes that the County's concern would only be realistic were the County to routinely fail to do its part to collect taxes in a timely fashion, thus allowing years of delinquent taxes to go unpaid and to accumulate. In relation to the purchases actually at issue here, the taxes owed for the tax years 2007 and 2008 were paid at the time of closing. Thus, the County cannot deny that the WVDOA acted in a responsible and appropriate manner and ensured that taxes for the tax years preceding the State's ownership of the property were paid.

The County asserts that tax liability for tax year 2009 was and is properly assessed against the private entities who owned the property at issue on July 1, 2008, but suggests that those private entities might now be judgment-proof. The County does not contend that the tax lien sale at issue was a sham transaction, intended only to force the State to pay the allegedly outstanding tax debt, or that the County never intended to proceed with the actual transfer of the property to EB Dorev via tax deed. Thus, the County appears to contend that the State's property should be subject to sale for a tiny fraction of its apparent fair market value should that be necessary to obtain the taxes that will ultimately be transferred to the various taxing units, including the State itself. This Court's application of the principle of merger will serve only to prevent the loss of millions of dollars' worth of public property.

In addition to the principle of merger, as an alternative and independent basis for its Motion, the WVDOA argues that, to the extent that, pursuant to statute, a tax lien attaches to property on July 1 of each year, there is no reason to believe that such a lien should be recognized as valid and appropriate for sale at a tax auction, if the property encumbered by the lien is thereafter sold to the State. As previously noted by the Court, the value of the tax lien cannot be fully determined until late in the assessment year, well after the start of the tax year. In this case, the property taxes for tax years prior to 2009 were paid at closing, and the tax liens that attached on July 1, 2008, were liens for calendar year 2009 taxes.

Property purchased by the State after July 1, 2008, but before January 1, 2009, was rendered exempt from taxes from the date of purchase, and for all subsequent calendar years as long as it remains property of the State. As property purchased by the State after July 1, 2008, would be exempt from taxes in calendar and tax year 2009, the WVDOA argues that the tax liens that attached on July 1, 2008, must reasonably be deemed inchoate as of that date, and appropriate for later sale by the County only if subsequent events permit the liens to mature.

WVDOA argues that, pursuant to statute, given the staggered assessment year-tax year procedure, the taxes assessed in any assessment year are intended to apply to property for the tax year that begins with the start of the following calendar year. Thus, taxes assessed as of July 1, 2008, such as the taxes at issue here, were actually for the tax year 2009, which began on January 1, 2009. As the property was clearly exempt from taxation in tax year 2009, the statutory tax liens attaching on July 1, 2008, are properly viewed as inchoate. As of July 1, 2008, the liens might have matured into saleable tax liens that would be appropriate for sale, pursuant to the statutory procedure for the sale of tax liens, in 2010. However, upon the sale of the property at issue to the State, prior to tax year 2009, that possibility was eliminated and maturation of the tax liens was precluded.

EB Dorev takes note of the fact that the value of the lien cannot be determined until the taxes have been levied, but contends that the lien is nevertheless choate and perfected, suggesting that this is so by quoting the statutory language that indicates merely that a lien attaches on July 1. Similarly, the County contends that property that has been exempt from taxation since at least September of 2008, based upon its ownership by the State, is nevertheless subject to taxation for the tax year 2009, and subject to sale for nonpayment of 2009 taxes, due to the attachment of a tax lien on July 1, 2008, at which time the property was not exempt from taxation.

Thus, both EB Dorev and the County argue that the State's property was not, in effect, legally exempt from taxation in tax year 2009. The Court finds this result to be anomalous and plainly contrary

to the statutory language exempting State property from taxation. The Court therefore also finds that the attachment of the lien on July 1 cannot reasonably be deemed dispositive. Consistent with this finding, the Court further finds that the liens at issue were inchoate as of July 1, 2008, and that said inchoate liens did not mature into liens appropriate for sale by the County.

The property at issue in this action was purchased by the WVDOA in the second half of calendar year 2008. Although a tax lien for tax year 2009 attached by operation of law on July 1, 2008, the subsequent purchase of the property by the WVDOA in 2008 meant that the WVDOA, i.e., the State of West Virginia, owned the land prior to and throughout the calendar year, and tax year, 2009. As real property owned exclusively by the State is exempt from taxation, the property at issue was rendered exempt from 2009 taxes upon purchase by the WVDOA in 2008. Thus, the Court finds that the Sheriff should have recognized that the July 1, 2008, tax liens were based upon an assessment that was no longer accurate as of the dates that the property at issue was purchased by the State.

The property at issue was exempt from taxation as of the date that it was sold to the State and the deeds memorializing the State's ownership were recorded. The State's statutory tax liens, that had attached by operation of law as of July 1, 2008, were extinguished through merger with the State's larger right as titleholder on the dates of sale. In the alternative, the liens that attached on July 1, 2008, were inchoate and never matured into liens suitable for sale. The County's attempt to sell the tax liens at issue was legally ineffective, as the liens no longer existed as a matter of law, or, in the alternative, the liens never matured and, as a matter of law, the inchoate liens could not be sold.

ACCORDINGLY, for the foregoing reasons, the Court GRANTS the Plaintiff's Motion for Summary Judgment, and consistent therewith, GRANTS the Plaintiff's Petition for Writ of Mandamus seeking to compel the Sheriff, Clerk, and Assessor to comply with the applicable laws of the State of West Virginia relating to the matters discussed herein. The aforementioned Defendants are hereby ORDERED to comply with the laws pertaining to the assessment and levying of taxes on property purchased by the

State by recognizing the tax-exempt status of such property immediately upon the date of purchase as discussed herein. As the Court holds that the tax liens at issue were extinguished through merger upon purchase of the property at issue by the Plaintiff, W.Va. Department of Administration, Real Estate Division, in 2008, or, alternatively, that the tax liens at issue remained inchoate, the Court further holds that the attempt to sell the tax liens was ineffective and void as a matter of law, as no saleable tax liens existed at the relevant time. The Court therefore PERMANENTLY ENJOINS the Defendants from attempting to transfer the properties at issue by tax deed.

The objections of the Defendants aggrieved by this Order are noted and preserved.

This Order constitutes a final judgment as the same is defined in Rule 54(b) of the West Virginia Rules of Civil Procedure regarding decrees from which an appeal may lie. The Court finds that the judgment entered herein "completely dispose[s] of at least one substantive claim" as discussed in *Province v. Province*, 196 W.Va. 473, 479, n. 12, 473 S.E.2d 894 (1996), that there is no just reason to delay the entry of judgment, and the Court directs the entry of judgment.

The Clerk is directed to provide a certified copy of this Order to all counsel of record.

ENTERED this 11th day of July, 2013.

Paul Zakaib, Jr., Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, ss
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 15 DAY OF July 2013
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Prepared by:

Stephen L. Thompson (WVSB No. 3751)
Barth & Thompson
P. O. Box 129
Charleston, WV 25321
Telephone: (304) 342-7111
Facsimile: (304) 342-6215

CHART 6958 DOC#110

Approved for entry by:

John L. MacCorkle (WVSB No. 2286)
MacCorkle Lavender& Sweeney, PLLC
300 Summers Street, Suite 800
Charleston, WV 25301
Telephone: (304) 344-5600
Facsimile: (304) 344-8141

Richard D. Owen, Esq. (WVSB No. 2794)
Goodwin & Goodwin, LLP
300 Summers Street, Suite 1500
P. O. Box 2107
Charleston, WV 25328-2107
Telephone: (304)346-7000
Facsimile: (304) 344-9692

Hershel H. Rose, III, Esq.
Steven R. Broadwater, Esq
Rose Law Office
800 Summers Street, Suite 1440
Charleston, WV 25335
Telephone: (304) 342-5050
Facsimile: (304) 342-0045

Matthew J. Perry, Esq. (WVSB No. 8589)
Lamp, O'Dell, Bartram. Levy, Trautwein & Perry, PLLC
720 Fourth Avenue
P. O. Box 2488
Huntington, WV 25725-2488
Telephone: (304) 523-5400
Facsimile: (304) 523-5409

Stephen C. Sluss, Esq. WV Bar #6089
409 Virginia Street East
Charleston, WV 25301
Telephone: (304) 357-0250
Facsimile: (304) 357-0551