

BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0957

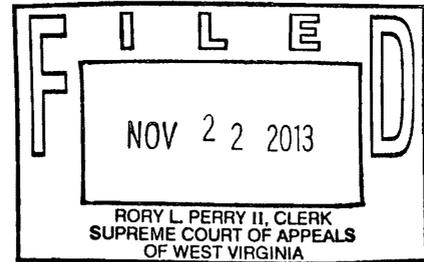
DON MASON and
BRENDA MASON

Petitioners,

v.

RAYMOND RICHARD SMITH, MARIA CATALANO,
JEREMY D. CASTO, AND JERAD D. CASTO,
ROBERT M. FLETCHER, THE POCA
VALLEY BANK, INC., SUNRISE ATLANTIC, LLC,
and HARPAGON MO, LLC

Respondents



PETITIONER'S BRIEF

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I. ASSIGNMENTS OF ERROR

- A. THE CIRCUIT COMMITTED REVERSIBLE ERROR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENTS WHERE QUESTIONS OF MATERIAL FACT EXISTED AS TO THE RESPONDENTS KNOWLEDGE OF THE IMPENDING TAX SALE.**
- B. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN GRANTING SUMMARY JUDGMENT FOR THE RESPONDENTS WHERE THE MASON'S PROVED THAT THEY WERE BONA FIDE PURCHASERS OF THE SUBJECT REAL PROPERTY BY CLEAR, CONVINCING AND UNCHALLENGED EVIDENCE.**

II. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

This civil action was filed on April 7, 2011 in the Circuit Court of Kanawha County. This was five years after the sale of the subject property. The case was consolidated with *Smith v. Catalano, et al*, on December 27, 2011. On February 3, 2012, the Respondents filed a motion for summary judgment. By order entered July 23, 2013, the circuit court through Judge Carrie Webster granted the Respondent's motion for summary judgment.

2. STATEMENT OF FACTS

The subject property in this case was sold at tax sale on November 14, 2006. See AR, p. 66. The Respondents made no effort to redeem this property until nearly five years after the tax sale. See AR, p. 1. The respondents' excuse was unbelievably that they had no notice of the tax sale.

As background, before the subject property was sold at a tax sale, the respondents allegedly sold the property to Raymond Smith but no deed was ever recorded.

The Catalano's readily admit that no deed giving notice of sale of the subject property to Mr. Smith was recorded with the Kanawha County Clerk's office. AR, pp. 2-3. The failure of the Catalano's to record this deed prevented the Mason's and previous owners of the property, Sunrise Atlantic, LLC and Harpagon MO, LLC from discovering any defect in the title existed.

Further, Anna Maria Catalano has testified to the aforementioned point and to being on notice of the sale of the subject property for failure to pay taxes:

- Q. Okay. Well, do you know now as you sit here that this property has been sold for delinquent taxes?
- A. Yes.
- Q. Do you recall ever getting a certified mailing or any type of notice from anybody about this property being sold for taxes?
- A. I recall getting notices from the tax department, the sheriff's office.
- Q. Kanawha County Sheriff's office?
- A. Yes.
- Q. Now do you recall whether that notification was before or after the property had been sold for taxes?
- A. Before.
- Q. Okay. And did you do anything as a result of receiving that notice?
- A. I called the sheriff's tax department and told them that I did not own the property, that I had sold the property.
- Q. Did you tell them who you sold it to?
- A. No.
- Q. Okay, And did they respond in any fashion?
- A. They told me that it usually takes a few months, several months to get deeds transferred.
- Q. Okay.

- A. And that was the end of the conversation.
Q. That was it. Did you receive communication after that?
A. Yes.
Q. Okay, Who did you receive that from?
A. I received additional tax tickets after that.
Q. You received additional tax tickets to pay the taxes after that?
A. Yes.

See Catalano deposition at AR p.142

Ms. Catalano further testified:

- Q. All the taxes on the property had they all been paid and were they current when you sold the property to Mr. Smith?
A. 2005 wasn't paid.
Q. Did you know that when you sold the property? Well, I assume you knew that when you sold to Mr. Smith.
A. No, it was just something that I didn't think about when I sold the property because I was -
Q. Maybe I'm wrong. I assumed you had received the tax tickets for 2005 taxes, hadn't you?
A. Yes.
Q. But you didn't pay them, correct?
A. Right.
Q. Why did you not pay them?
A. At the time all the money was going to my son and his -
Q. The first half of the 2005 would have been due in September 2005; is that correct? So was your son having problems in September 2005?
A. No.
Q. Did you tell anyone at the bank that the taxes hadn't been paid for 2005?
A. No.

See Catalano deposition at AR p. 143.

Ms. Catalano knew that the property was going to be "sold for taxes" that she had not paid tax on the property, that she hid this fact from the bank and Mr. Smith,

and that she was still receiving notices for payment of property taxes but hid this information from Mr. Smith.

- Q. I may have asked you this, but you never told Mr. Smith that the property was going to be sold for taxes, did you?
- A. No.
- Q. Why not?
- A. I thought that the deed would be transferred.
- Q. You didn't think that Mr. Smith would want to know that it was going to be sold for taxes?
- A. I just didn't do it. I just didn't tell him.

See Catalano deposition at AR p. 143.

It is undisputed that Poca Valley Bank had notice of the tax sale on January 29, 2008 and failed to act. See AR, p. 69. It is clear that Ms. Catalano was put on notice of the 2005 tax sale due to her own knowledge of her failure to pay the 2005 taxes, her failure to inform Mr. Smith of her failure to pay such taxes, and Ms. Catalano's receipt of notice of the tax sale.

Sunrise Atlantic purchased the subject property at a tax sale on April 9, 2008 and received a deed which Sunrise Atlantic duly recorded. There was no indication in the County Clerk's deed books that any other than the Catalano's and Poca Valley Bank owned the property.

Harpagon obtained a quitclaim deed from Sunrise on May 16, 2008. See AR, p. 23

Harpagon then sold the property via special warranty deed to the Masons for Thirty-Two Thousand Dollars (\$32,000.00), valuable consideration on June 13, 2008. See AR, pp. 24-25.

III. SUMMARY OF ARGUMENT

The Respondents in this case did not attempt to redeem the property until more than three years after the delivery of the tax deed.

The circuit court held that because the Catalano's submitted affidavits that they did not receive notice of the right to redeem, that they were entitled to redeem the property. The circuit court made this finding despite the affidavits being in direct conflict with the sworn testimony of Ms. Catalano that she did have notice of the tax sale. The circuit court also made this ruling despite undisputed evidence that the property owner, Poca Valley Bank, signed a green card accepting notice to redeem more than three years before the suit was filed.

These facts created a question of material fact as to notice of the respondents which should have prevented the court from granting summary judgment.

The Masons are *bona fide* purchasers of the property, but the court held despite Poca Valley Bank, an owner of the property according to public records at the time of the Masons purchase, having received notice to redeem that there were suspicious circumstances about the property which nullified the Mason's being *bona fide* purchasers. Such a finding by the Circuit Court placed it in the shoes properly filled by a jury to determine questions of material fact.

The circuit court erred by failing to recognize questions of material fact and by making improper determinations on the questions of material fact which are reserved for the jury.

For these reasons, the Masons request that this Court reverse the July 23, 2013 order of the circuit court and remand the case for trial.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case should be set for Rule 20 argument because it is a case involving issues of fundamental public importance. This case deals with fundamental rights of possession of real property in our state and the respondent's use of the courts for an improper taking of property from a bona fide purchaser.

V. ARGUMENT

1. STANDARD OF REVIEW

"A circuit court's entry of summary judgment is reviewed *de novo*." Syl. pt. 1. *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (W.Va. 1994). Thus, in undertaking a *de novo* review, this Court applies the same standard for granting summary judgment that is applied by the circuit court. That standard is as follows:

"A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.' Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963)." Syllabus Point 1, *Andrick v. Town of Buchannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992).

"The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syllabus Point 3, *Painter, supra*.

In considering a motion for summary judgment, the Court is to view all facts and inferences in the light most favorable to the nonmovant. *Miller v. City Hosp., Inc.*, 197 W.Va. 403, 475 S.E.2d 495 (W.Va. 1996).

2. ASSIGNMENTS OF ERROR

A. THE CIRCUIT COMMITTED REVERSIBLE ERROR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENTS WHERE QUESTIONS OF MATERIAL FACT EXISTED AS TO THE RESPONDENTS KNOWLEDGE OF THE IMPENDING TAX SALE.

It should be noted that the court issued its order granting summary judgment because the court chose to weigh the evidence and determine the truth of the matter as to the Respondent's notice of the tax delinquency and tax sale of the subject property. The court's finding truth in Ms. Catalano's affidavit is misplaced because it contradicts her prior testimony as noted in the facts section of this brief.

In order for the Respondents to redeem the subject property they must prove that they had no notice of the tax sale.

The circuit court found,

"The Catalanos have affirmed under oath in their affidavits filed with this Court that they have not received any notice of the right to redeem the property from sale as required by West Virginia Code §11A-3-22, and had not actual or other knowledge that any other party had been provided with or served with any Notice to Redeem the Property from sale."

See AR, p.321.

The question of material fact as to notice by the Respondents is one for the jury where there is conflicting evidence on the issue. The Catalano's submitted sworn

affidavits in conflict with direct testimony to claim that they had no notice of the impending sale. The affidavit of Ms. Catalano was clearly a sham affidavit.

“To defeat summary judgment an affidavit that directly contradicts prior deposition testimony is generally insufficient to create a genuine issue of fact for trial, unless the contradiction is adequately explained. To determine whether the witness’s explanation for the contradictory affidavit is adequate, the circuit court should examine: (1) Whether the deposition afforded the opportunity for direct and cross-examination of the witness; (2) whether the witness had access to pertinent evidence or information prior to or at the time of his or her deposition, or whether the affidavit was based upon newly discovered evidence not known or available at the time of the deposition; and (3) whether the earlier deposition testimony reflects confusion, lack of recollection or other legitimate lack of clarity that the affidavit justifiably attempts to explain” Syl. P. 4, *Kiser v. Caudhill*, 215 W.Va. 403, 599 S.E.2d 826 (2004)

Calhoun v. Traylor, 218 W.Va. 154(2005)

Ms. Catalano stated that she knew the taxes for 2005 had not been paid on the property and that she got notices of the tax sale from the sheriff’s office, yet she did not act. Clearly, Ms. Catalano cannot meet her burden to give her affidavit credence.

West Virginia Code §11A-4-4 dictates the requirements of one to set aside a deed when one entitled to notice is not notified.

(a) If any person entitled to be notified under the provisions of section twenty-two or fifty-five, article three of this chapter is not served with the notice as therein required, and does not have actual knowledge that such notice has been given to others in time to protect his interests by redeeming the property, he, his heirs and assigns, may, before the expiration of three years following the delivery of the deed, institute a civil action to set aside the deed. No deed shall be set aside under the provisions of this section until payment has been made or tendered to the purchaser,

or his heirs or assigns, of 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.

(emphasis added)

Ms. Catalano has admitted having notice of the tax sale and Poca Valley Bank signed the green card that accompanies the notice to redeem. See AR p. 69.

The Respondent's cite the case *Rollyson v. Jordan*, 518 S.E. 2d 368 (W.Va. 1999) in their motion for summary judgment but fail to acknowledge that the lien holder, Poca Valley Bank, received notice and failed to act. It is a farce in light of the evidence that no one knew of the tax sale.

Rollyson held,

The persons entitled to notice to redeem in conjunction with a purchaser's application for a tax deed, pursuant to W. Va. Code § 11A-3-19(a)(1) (1994) (Repl. Vol. 1995) are those persons who are permitted to redeem the real property subject to a tax lien or liens, as contemplated by W. Va. Code 11A-3-2(a) (1995)(repl. Vol. 1995) which persons include "the owner" of such property and "any other person who was entitled to pay the taxes" thereon.

The Catalanos and Poca Valley Bank were "owners" of the subject property and both had actual knowledge of this tax sale and failed to timely act.

This Court recently addressed this code section in *Wells Fargo*, in which it quoted the above language and later stated that:

This Court examined the Mennonite decision in *Lilly v. Duke*, 180 W. Va. 228, 376 S.E.2d 122 (1988), and concluded that parties of record should be provided notice by mail or other means as certain to ensure that such a party would receive actual notice. 180 W. Va. at 231, 376 S.E.2d at 125.

This holding in *Lilly* did not overrule the three-year statute of limitations [now found in W. Va. Code § 11A-4-4] approved of in *Shaffer*, rather it prescribed the due process rights of those who have an interest of record in property sold at a tax sale.

Wells Fargo Bank, N .A. v. UP Ventures II, LLC, 223 W. Va. 407, 412-13, 675 S.E.2d 883, 888-89 (2009). Thus, because the Respondents had actual notice of the tax sale more than three years before instituting a suit to redeem, she is barred from filing suit to overturn the tax deed and redeem the property.

This Court has also held that when notice of a sale is placed in the mail a rebuttable presumption of receipt is established. *Dunn v. Watson*, 336 S.E.2d 305, Syl. Pt. 4 (W.Va. 2002). In this case the notice to redeem was sent by first class letters and certified letters. See AR, p. 67. The Court further explained,

It is a well-established principle of law that “a letter properly addressed, stamped and mailed is presumed to have been duly delivered to the addressee.” Strong, John W. McCormick on *Evidence* §343 (5th ed. 1999) *Id.* at 308.

We note that for this Court to adopt any rule, other than the one herein enunciated to the effect that mailing by certified mail establishes a rebuttable presumption of receipt of notice, could result in much uncertainty and potentially allow great mischief. There is really no other rule this Court could fashion which would avoid those problems in a meaningful and practical way, keeping in mind the fact that these disputes often involve the rights of innocent bona fide purchasers.

The Catalano’s cannot hide from accepting certified mail addressed to the proper address or feign receipt of notice sent by first class mail and then turn around and claim no notice. Poca Valley Bank, an owner of this property signed the green card and did

not act. This is the case before this Court and clearly questions of material fact about notice remain.

For these reasons, the Petitioner requests that he Court reverse the Circuit Court's order and remand this case for a trial on the merits.

B. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN GRANTING SUMMARY JUDGMENT FOR THE RESPONDENTS WHERE THE MASON'S PROVED THAT THEY WERE BONA FIDE PURCHASERS OF THE SUBJECT REAL PROPERTY BY CLEAR, CONVINCING AND UNCHALLENGED EVIDENCE.

Bona Fide Purchaser

Don and Brenda Mason are *bona fide* purchasers of the property. As a result of *bona fide* purchaser status, the property may not be redeemed.

A *bona fide* purchaser is a party who has purchased property for value without notice of any defects in the title of the seller. One who pays valuable consideration, has no notice of outstanding rights of others, and acts in good faith is a *bona fide* purchaser. See Black's Law Dictionary.

The West Virginia Supreme Court analyzed the *bona fide* purchaser statute in great depth in *Wolfe v. Alpizar*, 637 S.E.2d 623 (W.Va. 2006).

[6]We begin by noting that W.Va. Code § 40-1-9 (1963) (Repl.Vol.2004), provides:

Every such contract, every deed conveying any such estate or term, and every deed of gift, or trust deed or mortgage, conveying real estate shall be void, as to creditors, and subsequent purchasers for valuable consideration without notice, until and except from the time that it is duly admitted to record in the

county wherein the property embraced in such contract, deed, trust deed or mortgage may be.

“The purpose of the statute is to protect a *bona fide* purchaser of land against creditors of the grantor, and against other persons to whom the grantor might have undertaken to execute title papers pertaining to the land embraced in the recorded instrument.” *Bank of Marlinton v. McLaughlin*, 121 W.Va. 41, 44, 1 S.E.2d 251, 253 (1939).

A bona fide purchaser of land is “ ‘one who purchases for a valuable consideration, paid or parted with, without notice of any suspicious circumstances to put him upon inquiry.’ ” *Stickley v. Thorn*, 87 W.Va. 673, 678, 106 S.E. 240, 242 (1921) (internal citations omitted). See also Syl. pt.2, in part, *Hupp v. Parkersburg Mill Co.*, 83 W.Va. 490, 98 S.E. 518 (1919) (“[T]he possession under the unrecorded deed is apparently consistent with that of the grantor having record title to all of the land on which there is such concurrent possession at different places, wherefore a purchaser from him is under no duty to prosecute his inquiry as to the title beyond the record and the possession by the holder of the recorded title.”); *Simpson v. Edmiston*, 23 W.Va. 675, 680 (1884) (“[A] bona fide purchaser is one who buys an apparently good title without notice of anything calculated to impair or affect it[.]”); Black’s Law Dictionary 1271 (8th ed.1999) (defining a “bona fide purchaser” as “[o]ne who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”). As previously held by this Court, and more recently reiterated, “ ‘[a] bona fide purchaser is one who actually purchases in good faith.’ Syl. pt. 1, *Kyger v. Depue*, 6 W.Va. 288 (1873).” *Subcarrier Communications, Inc. v. Nield*, 218 W.Va. 292, 300, 624 S.E.2d 729, 737 (2005)

The circuit court found,

“The Catalanos contend that it is apparent from a review of the Tax Deed that the sale is defective in that the attachments to the same demonstrate that none of them received actual notice of the right to redeem the property from sale.”

See AR, p. 322

It is clear that the Masons gave valuable consideration for the subject property when they paid Thirty-Two Thousand (\$32,000.00) for it. There was no deed recorded by the Catalano's or Smith's at the County Clerk's office to give notice to of suspicious circumstance to the Masons that Smith had purchased the property and Poca Valley Bank undeniably received notice to redeem but did not act timely. See AR pp. 2-3.

The undisputed fact that the Catalano's, Poca Valley Bank and Smith failed to record the deed from their alleged transaction prohibited the Masons from having notice of a defect in the title of the subject property. Because the Masons are *bona fide* purchasers of this property, the Catalano's and Smith have no claim to the property.

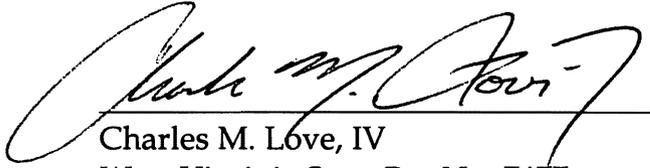
The circuit court erred in finding that the Masons were not *bona fide* purchasers of the property because it made a factual finding that the respondents did not have actual knowledge despite evidence to the contrary. Poca Valley Bank, the lienholder, unquestionably had notice to redeem and did not timely act. The circuit court held that the Masons were not *bona fide* purchasers. These factual discrepancies at the very least create a question of material fact which the court cannot appropriately decide, but did so anyway.

VI. CONCLUSION

For these reasons, the Mason's respectfully request that the Court reverse the July 23, 2013, order of the circuit court and remand the case for trial on the merits.

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BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 13-0957

DON MASON and
BRENDA MASON

Defendants and Cross Claimants Below,
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v.

RAYMOND RICHARD SMITH, A. MARIA CATALANO,
JEREMY D. CASTO, AND JERAD D. CASTO,

Plaintiffs Below;

MARIA CATALANO, ROBERT M. FLETCHER, THE POCA
VALLEY BANK, INC., SUNRISE ATLANTIC, LLC, AND
HARPAGON MO, LLC

Defendants Below, Respondents

CERTIFICATE OF SERVICE

I, Charles M. Love, IV, counsel for Don Mason and Brenda Mason, do hereby
certify that true and exact copies of the foregoing "Petitioner's Brief" and "Joint
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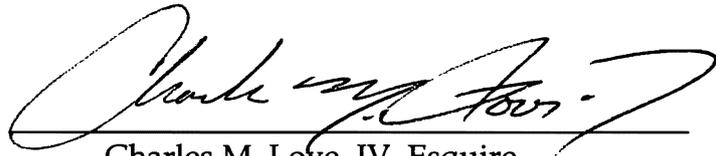
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in envelopes properly addressed, stamped and deposited in the regular course of the
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A handwritten signature in black ink, appearing to read "Charles M. Love, IV". The signature is fluid and cursive, with a large loop at the end.

Charles M. Love, IV, Esquire
West Virginia State Bar No. 7477