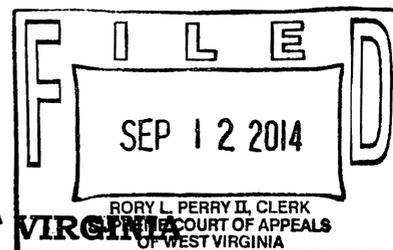


No. 14-0432



**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

No. 14-0432

**REBUILD AMERICA, INC, and REO AMERICA, INCORPORATED**

*Petitioners,*

**v.**

**MARK E. DAVIS, and TAMMY L. DAVIS, Plaintiffs Below:**

**MIKE RUTHERFORD and VERA McCORMICK,**

**Clerk, Defendants Below: and**

**HUNTINGTON NATIONAL BANK, N.A.,**

**Intervenor Below,**

*Respondents.*

**BRIEF OF RESPONDENT  
HUNTINGTON NATIONAL BANK, N.A.**

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## **II. KIND OF PROCEEDING; STATEMENT OF THE FACTS**

The following facts are not in dispute and are agreed to by the Petitioners, Rebuild America, Inc. ("Rebuild") and REO America, Inc. ("REO"), the Respondents, Mike Rutherford (the "Sheriff"), Vera McCormick (the "Clerk") and Huntington National Bank, N.A. ("Huntington"). They are cited verbatim from that ORDER GRANTING HUNTINGTON NATIONAL BANK'S SUMMARY JUDGMENT entered by the Honorable Carrie L. Webster in the Circuit Court of Kanawha County on March 20, 2014.

1. The Plaintiffs, Mark E. Davis and Tammy L. Davis (who represent themselves pro se in this Civil Action), acquired property located at 51 Woodbridge Drive, Charleston, West Virginia 25311 (the "Property"). The Deed by which the Plaintiffs acquired title to the Property is dated July 10, 2003, and of record in Deed Book 2580 at Page 571 in the Office of the Clerk of the County Commission of Kanawha County, West Virginia. A true copy of the Deed is attached as Exhibit 1 to the Motion for Summary Judgment of the Huntington National Bank, N.A., (the "Bank's Summary Judgment Motion"). Rebuild agrees to these factual assertions. Response of the Defendants, Reo America Incorporated and Rebuild America, Inc., to Huntington National Bank, N.A.'s Motion for Summary Judgment, served and filed on or about April 12, 2013 ("Rebuild's Response"), ¶ a., at p. 1.

2. The Property was subject to a Deed of Trust in favor of Huntington Bank, N.A., a true copy is attached as Exhibit 2 to the Bank's Summary Judgment Motion. The Bank is listed as a creditor with a lien on the Property as shown in the Bankruptcy Petition and Schedules (Schedules A and D) and on the Statement of Affairs, Question 3, and on the Debtor's Statement of Intentions, true copies of which are attached as Exhibits 3, 4 and 5 to the Bank's Summary Judgment Motion. Rebuild agrees that these Exhibits are authentic. Rebuild's Response, ¶ d at p. 2.

3. Real property taxes on the Property were not paid for the tax year 2005. The Kanawha County Sheriff began the process of enforcing payment of the tax lien pursuant to W.Va. Code Sec. 11A-2-1 et seq.

4. The first Notice of the Sale required by W. Va. Code, § 11A-2-13 was published as a Class 1-0 advertisement on May 11, 2006. Rebuild agrees with this factual assertion as made in Allen Bleigh's deposition at p. 47, and a true copy of the published Notice is attached as Exhibit 2 to Rebuild's Response. Rebuild's Response, ¶ c at p. 2. Allen Bleigh is the Chief Tax Deputy for the Kanawha County Sheriff. Allen Bleigh's Deposition, p. 9; Allen Bleigh's Affidavit (Exhibit 13 to the Bank's Motion), ¶ 1; Rebuild's Response, ¶ a at p. 2.

5. The Plaintiffs filed a Chapter 7 Bankruptcy Petition in the Bankruptcy Court for the Southern District of West Virginia on July 12, 2006 (Case No. 06-20398). As aforesaid, true copies of the Petition, the mailing matrix, the Schedules of Assets and Liabilities, and the Statement of Affairs are attached respectively as Exhibits 3, 4 and 5 of the Bank's Summary Judgment Motion, and Rebuild agrees that these exhibits are authentic. Rebuild's Response, ¶ d at p. 2.

6. The second Notice of Sale required by W.Va. Code, §11A-3-2(b) to be published, was published on September 13, 2006. Rebuild agrees with this factual assertion made in Allen Bleigh's deposition, p. 46; Rebuild's Response, ¶ e at p. 2. A true copy of the second published Notice of Sale is attached as Exhibit 3 to Rebuild's Response.

7. On October 13, 2006, notice of tax sale as required by W. Va. Code, § 11A-3-2(b) to be served on the Plaintiff-owners of the Property was mailed to 929 Chappell Road, Charleston, West Virginia, the former residence of the Plaintiffs as asserted in Allen Bleigh's Deposition, p. 26; Affidavit, ¶¶ 8 and 9. The certified mail notice was returned to sender as unable to forward on October 21, 2006. A true copy of the certified mailing card is attached to the Bank's Summary Judgment Motion as Exhibit 9, and to Allen Bleigh's Deposition as Exhibit 1. Rebuild agrees with these factual assertions. Rebuild's Response, ¶ f at p. 2.

8. A letter, dated October 16, 2006, from Sheriff's Department was filed with the Bankruptcy Court on October 17, 2006. The letter requested that the Sheriff receive notice of hearings and proceedings in the Bankruptcy case. A true copy of the letter is attached as Exhibit 17 to the Bank's Summary Judgment motion, and as Exhibit 5 to Allen Bleigh's Deposition. Deposition, Allen Bleigh, pp. 48-49.

9. On October 17, 2006, the Bankruptcy Court entered its Discharge Order. Rebuild agrees with this factual assertion. Rebuild's Response, ¶ g at p. 2. A true copy of the Discharge Order is attached as Exhibit 4 to Rebuild's Response.

10. On November 14, 2006, the Sheriff conducted the sale and sold the tax lien to "U.S. Bank. Cust. Sass Muni, V DTR". A true copy of the Certificate of Sale is attached as Exhibit 7 to the Bank's Summary Judgment Motion. Pursuant to W. Va. Code, § 11A-3-15, the Certificate of Sale was assigned to Rebuild. A true copy of the Assignment is attached as Exhibit 8 to Rebuild's Response. These facts are admitted by Rebuild. Rebuild's Response, ¶¶ h and k, pp. 2 and 3.

11. On April 14, 2008, the Property was conveyed by the Clerk of the County Commission of Kanawha County to Rebuild by Deed of record in the Clerk's Office in Book 2718, at page 710. Rebuild's Response, ¶ j at p. 3. A true copy of the Deed is attached as Exhibit 9 to Rebuild's Response.

On September 13, 2010 the Circuit Court of Kanawha County entered its first Order granting summary judgment. Reo and Rebuild took an appeal of the Circuit Court's Order. The Supreme Court issued its Decision on March 1, 2012, reversing and remanding the case to the Circuit Court. The Supreme Court reversed the Circuit Court's finding that the Davises' bankruptcy barred the Sheriff from selling the tax lien. The Supreme Court noted in its footnote on page 21 of its opinion that "Because the record and arguments before us are insufficiently developed to fully address the issue, we offer no opinion on the merits of any of the parties' arguments on the bankruptcy issue and leave that initial determination to be made by the trial court (supported by appropriate findings of fact and conclusions of law)". Further, on page 22 of its opinion the Supreme Court stated that "On remand, the trial court must address, among other issues before it: (1) whether the Davises' tax lien was discharged in bankruptcy, preventing sale of the tax lien, (2) the effect of the automatic stay issued in the Davises' bankruptcy case, ...".

The Circuit Court having developed appropriate findings of fact and conclusions of law needed to go no further than the bankruptcy issue alone in granting summary judgment a second time on March 20, 2014.

### III. SUMMARY OF ARGUMENT

A. Actions taken in violation of the automatic stay are void ab initio

B. The Circuit Court had concurrent jurisdiction to determine if the automatic stay applies, but only the Bankruptcy Court may annul the automatic stay.

C. A proceeding to enforce a tax claim is not an assignment of lien that is exempt from the automatic stay

D. The tax sale must be set aside because if the publications and pre-sale notices did not occur, mandatory steps were omitted that are jurisdictional and cannot be cured.

### IV. DISCUSSION OF LAW: ARGUMENT

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

The most compelling arguments supporting the Circuit Court's finding that actions taken in violation of the automatic stay are void ab initio are found in the Affidavit and testimony of H. Allen Bleigh, Chief Tax Deputy for the Sheriff of Kanawha County. Deputy Bleigh's Affidavit dated September 23, 2009, states the following:

H. Allen Bleigh, having been duly sworn, deposes and says the following:

1. He is the Chief Tax Deputy for the Sheriff of Kanawha County, West Virginia, and in this capacity is familiar with the November 14, 2006, Sheriff's tax sale of that property located at 51 Woodbridge Drive, Charleston, West Virginia 25311 (the "property").

2. The Plaintiffs failed to pay real property taxes on the property for the tax year 2005, and on May 11, 2006, the Sheriff's Department first published its notice of tax sale.

3. On July 12, 2006, the Plaintiffs filed a petition under Chapter 7 of the bankruptcy code in the Southern District of West Virginia (Case No. 06-20398).

4. It is the policy and procedure of the Kanawha County Sheriff to cease and stop any and all tax sales involving properties located in the county once a property owner has filed and obtained bankruptcy protection. Further, it is the policy and procedure of the Kanawha County Sheriff to place a special code on any properties owned by individuals in bankruptcy so as to prevent future tax sale proceedings.

5. The Kanawha County Sheriff's Department failed to properly code the property and continued to commence tax sale procedures after the Plaintiffs had filed bankruptcy.

6. The Kanawha County Sheriff's Department mistakenly failed to follow this procedure in relation to the Plaintiffs property after they filed bankruptcy.

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 Rd, Charleston, West Virginia 25304-2707, which is a prior address of 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.

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.

Further, the Affiant sayeth not.

The deposition of Allen Bleigh was taken on October 23, 2012. His position that the sale of the property should **not** have occurred remained unchanged.

Q You as recently as this morning have reviewed this Affidavit which has been marked as Exhibit Number 2, correct?

A Yes. Sir.

Q And this is an affidavit which was signed by you in – on September 3, 2009?

A Yes.

Q And you still stand by the information contained in this Affidavit, right?

A Yes, Sir.

Q I can rely upon all this information that you supplied back in 2009, correct?

A Yes, Sir.

Deposition, Allen Bleigh, pp. 65-66, Appendix Record 4- Exhibit 13.

Further, Deputy Bleigh testified that if the bankruptcy coding had been properly placed on the property, the sale would not have occurred.

Q If the bankruptcy coding had been placed on the Woodbridge property, 51 Woodbridge, the Sherriff's sale wouldn't have been held, correct, as pertains to that property?

A It shouldn't have been. It should have been suspended.

Q And that's what you told Mark Davis specifically, correct?

A Yes, yes.

Deposition, Allen Bleigh, p. 72, Appendix Record 4-Exhibit 14.

Q And if it had been properly coded with the bankruptcy, you wouldn't have had the Sheriff's sale, correct?

A Correct.

Q And this is what you told Mark Davis?

A Correct.

Deposition, Allen Bleigh, p. 76, Appendix Record 4-Exhibit 15.

The Sheriff had notice of the bankruptcy filing by the Davises. The Davises did not list the Sheriff as a creditor on their Bankruptcy Schedules of Liabilities or on the creditor mailing matrix. Appendix Record 4-Exhibits 4 and 6. However, the Sheriff knew about the Bankruptcy filing because on or before October 16, 2006, the Sheriff coded the Davises' former Chappel Road property with a "BR7" code on their tax account for 2005. Appendix Record 4-Exhibit 16. As a result, the sale publications and the certified mail notice required by the Statute were made for the

Woodbridge property. If the Woodbridge property were properly coded, the publications, notices and sale would not have occurred. Additionally, the Sheriff sent a letter to the Bankruptcy Court on October 16, 2006, requesting to be added to the mailing matrix to receive notice of the proceedings in the Davises bankruptcy case. Appendix Record 4-Exhibit 17.

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. 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 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. 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) cert. denied, 528 U.S. 1079 (2000) ("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 the 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 relating to the postponement of a foreclosure sale have nothing to do with the present case. The present case involves a tax sale. The present case does not involve a foreclosure sale. In addition, the present case does not involve the mere postponement of a foreclosure sale or a tax sale.

The facts of the present case show that the foreclosure 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, 293 (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. See, Appendix Record 4 - Exhibit 14.

**B. The Circuit Court Has Concurrent Jurisdiction to Determine  
If the Automatic Stay Applies, But Only the Bankruptcy  
Court May Annul the Automatic 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 is not being asked to "terminate, annul, or modify the automatic stay". Further, this Court is not being 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, this Court is only being asked to recognize the effect of the automatic stay, including that actions that violate the stay are void. Here, 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).

Non-bankruptcy 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 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 this Court, the Circuit Court of Kanawha County, has the power to retroactively annul the stay. This is incorrect because only the federal courts have jurisdiction over a "core proceeding" 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). Any motion to annul the stay must be brought in the Bankruptcy Court.

If Rebuild and REO want the automatic stay annulled, thereby validating the tax sale, they must go to the federal court. However, given that the federal court has not been receptive to hearing their arguments and that acts violating the stay are clearly void in this District, it appears likely that such relief will not be available in the federal forum.

The case of Bascom Corporation v. Chase Manhattan Bank cited by Rebuild and REO in their Memorandum 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.

**C. A Proceeding to Enforce a Tax Claim Is Not an Assignment of a Lien That Is Exempt from the Automatic Stay**

REO and Rebuild construct a legal argument that a transfer of a tax lien does not violate an automatic stay. They state: "[t]he transaction whereby the Kanawha County Sheriff sold the tax lien to U.S. Bank was one which merely transferred the tax lien to another." Response of REO and Rebuild to Huntington National Bank's Motion for Summary Judgment. Appendix Record 5 - page 4). Petitioners do not cite a case holding that the enforcement of a tax claim is not a violation of an automatic stay. Instead, the Defendants cite In re Georgia Steel, Inc., 71 B.R. 903, 909 (Bankr. N.D. Ga. 1987), that merely holds that a creditor may assign a claim in a bankruptcy case to a third party. Petitioners do not cite a case that says that following the statutory procedures to enforce a tax claim is not in violation of the automatic stay.

REO and Rebuild ignore the established law that an automatic stay applies to tax sales. "By having the property posted for Sheriff's 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, 240 (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).

REO and Rebuild also ignore the established precedent that a tax sale proceeding is not an assignment of a lien that is exempt from the automatic stay.

First, . . . counsel argues that the tax sale was not a violation of the automatic stay, but rather nothing more than a post-petition transfer of a pre-petition lien. He reasons that since the sale does not create, perfect or enforce the lien there can be no violation of the automatic stay.

This reasoning cannot stand up to the express language of section 362(a)(3), as such a transfer by the purchase of a tax certificate is an 'act to obtain possession of property of the estate or property from the estate or to exercise control over the property of the estate'.

In re Formisano, 148 B.R. 217, 221 (Bankr. N.J. 1992); In the matter of Isley, 104 B.R. 673, 679 (Bankr N.J. 1989).

Similarly, the Petitioners' argument that Bankruptcy Code, § 362(b)(24) exempts tax sale proceedings from the automatic stay is not supported by any case law and is based upon the Defendants' premise that the transfer of the tax lien is not a transfer of a bankruptcy debtor's property covered by Bankruptcy Code, § 549. Appendix Record 5- page 14. There is no legal authority for the proposition that tax sale proceedings are exempt from Bankruptcy Code, § 549. Nor is there any authority that tax sale proceedings are exempt from the automatic stay by reason of Bankruptcy Code, § 362(b)(24). Rather, the clear authority cited above holds that proceedings to enforce tax liens are subject to the automatic stay.

**D. The Tax Sale Must Be Set Aside Because If The Publications and Pre-Sale Notices Did Not Occur, Mandatory Steps Were Omitted That 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). As noted by the Supreme Court in its Decision: "The owner cannot be deprived of his land by sale thereof for taxes

unless the procedure prescribed by the statute, strictly construed, is substantially complied with." Supreme Court Decision, p. 17, quoting, Syl. Pt. 1, Koontz v. Ball, 96 W.Va. 117, 122 S.E. 461 (1924). 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).

If the automatic stay of Bankruptcy Code § 362 was violated, then the publications required by W.Va. Code, §§ 11A-2-13 and 11A-3-2, and the certified letter notice to the landowner required by § 11A-3-2(b) are void ab initio, and therefore, they never occurred. If they never occurred, mandatory steps were omitted and the notice to redeem cannot cure the jurisdictional defect. The notice to redeem may satisfy Due Process but it cannot recreate that which the law deems to be void ab initio or cure jurisdiction defects.

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.

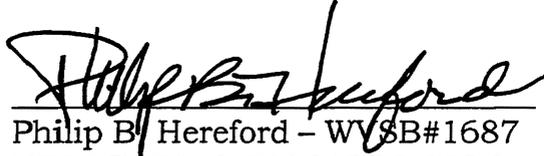
Affidavit, H. Allen Bleigh, ¶¶ 10 and 11.

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.

## **V. CONCLUSION**

The Kanawha County Sheriff's policy to stop tax sales when it determines the tax payer has filed bankruptcy is straight-forward and correct. The alternative policy for each of West Virginia's fifty-five (55) Sheriff Departments would be to determine if continuing with the tax sale was in violation of Section 362 of the Bankruptcy Code by trying to follow the Petitioners' convoluted legal reasoning. This would be a task beyond the abilities or resources of many of these departments. Of equal importance, is that without stay relief from the appropriate Bankruptcy Court, a tax sale is void ab initio – as though it never occurred. Accordingly, the Circuit Court's Order of March 20, 2014, granting summary judgment for a second time should be upheld.

**HUNTINGTON NATIONAL BANK, N.A.**  
By Counsel



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No. 14-0432

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

No. 14-0432

**REBUILD AMERICA, INC, and REO AMERICA, INCORPORATED**

*Petitioners,*

v.

**MARK E. DAVIS, and TAMMY L. DAVIS, Plaintiffs Below:  
MIKE RUTHERFORD and VERA McCORMICK,  
Clerk, Defendants Below: and  
HUNTINGTON NATIONAL BANK, N.A.,  
Intervenor Below,**

*Respondents.*

**CERTIFICATE OF SERVICE**

I, Philip B. Hereford, counsel for Huntington National Bank, N.A., do hereby certify that service of the foregoing **"BRIEF OF RESPONDENT HUNTINGTON NATIONAL BANK"**, was made this 12<sup>th</sup> day of September, 2014, upon counsel of record and the Respondents, Mark E. Davis and Tammy L. Davis by first class mail, postage prepaid, as follows:

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