

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**John W. Parker,
Defendant Below, Petitioner**

vs) **No. 13-0428** (Jackson County 12-C-40)

**Brent D. Sayre, Plaintiff Below, Respondent
and Marc J. Slotnick,
Defendant Below, Respondent**

FILED

November 22, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner John W. Parker, by counsel Marvin W. Masters and Charles M. Love, IV, appeals the order of the Circuit Court of Jackson County, entered March 21, 2013, that granted summary judgment in favor of Respondent Brent D. Sayre in Respondent Sayre's breach of contract action against petitioner and Respondent Marc J. Slotnick. Petitioner was the purchaser of real property at a foreclosure sale. However, in the order on appeal, the circuit court rescinded petitioner's deed and awarded the property to Respondent Sayre who was the other bidder at the foreclosure sale. Respondent Slotnick, an attorney who served as the trustee at the sale, does not make an appearance herein.¹ Respondent Sayre, by counsel Leah A. Chappell, filed a response in support of the circuit court's order. Petitioner filed a reply.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

This case arises from a February 22, 2012, foreclosure sale of a 130-acre property in Jackson County known as the "Click Farm" or "Garrett Farm." In 1993, Charles and Alma Garrett² executed a deed of trust for the property which provided that, upon default of the principle obligation, a trustee shall "sell the real estate herein described and herein conveyed at public auction *for cash* to the highest bidder at the front door of the Courthouse . . . after first having published notice of the time, place and *terms of sale* . . ." (Emphasis added.)

¹Respondent Slotnick did bring his own separate appeal against Respondent Sayre. *See Marc J. Slotnick v. Brent D. Sayre*, No. 13-0404 (W.Va. Supreme Court, November 22, 2013) (memorandum decision).

²Charles and Alma Garrett were not parties to Respondent Sayre's action for breach of contract.

In 2007, Respondent Slotnick (hereinafter “the trustee”) was named a trustee of the property. At the same time, petitioner was assigned the beneficial interest in the lien on the property. Thereafter, the Garretts defaulted on their note; the amount due on the note was \$101,000.

Following the Garretts’ default, and at petitioner’s request, the trustee placed a notice of sale in a local newspaper which said, in part: “TERMS OF SALE: *CASH ONLY*. PAYABLE IN FULL AT TIME OF SALE[.]” (Emphasis added. Capitalization in the original.) The notice also reserved the right of the trustee to reject any and all bids.

Respondent Sayre (hereinafter “respondent”) attended the February 22, 2012, foreclosure sale with his attorney. In the minutes before the sale, respondent’s attorney spoke with the trustee to inquire about the note being foreclosed. During that conversation, respondent’s attorney asked the trustee whether he would accept a bank check as payment for the property. The trustee replied, “No, you have to have cash. You have to have green backs.” Respondent claims that this was the first time he was notified that payment was to be made in U.S. currency. In response, respondent informed the trustee that he had a line of credit from a local bank and could pay for the property with a bank check within five or ten minutes after the sale.

The trustee began the sale by informing those present that the only acceptable payment was U.S. currency and that payment was to be delivered “at the instant” the sale was “knocked down.” Petitioner bid \$103,000 for the property. On respondent’s behalf, respondent’s attorney bid \$103,100. Petitioner then displayed a sealed garbage bag to the crowd that allegedly contained \$225,000 in U.S. currency; thereafter, petitioner bid \$105,000. Respondent’s attorney responded with a \$105,100 bid on behalf of his client. Respondent’s \$105,100 bid was the highest bid. However, the trustee rejected it because respondent could not pay instantly in U.S. currency. There being no further bids, the trustee awarded the property to petitioner.

Following the foreclosure sale, the trustee executed a special warranty deed that conveyed the property to petitioner. Of the \$105,000 paid by petitioner for the property, the trustee received \$5,000 toward his attorney’s fees for the instant case and was reimbursed for the costs of the sale. Petitioner received the remainder.

On March 12, 2012, respondent filed the instant action against petitioner and the trustee claiming breach of fiduciary duty and breach of contract. Respondent sought the equitable remedy of specific performance, i.e., a deed to the property in exchange for \$105,100. Petitioner responded with a motion to dismiss respondent’s lawsuit. By order entered May 14, 2012, the circuit court dismissed respondent’s claim for breach of fiduciary duty. Thereafter, both sides filed motions for summary judgment on the breach of contract claim, which the circuit court denied.

The trial on respondent’s breach of contract claim commenced on February 5, 2013. At the close of respondent’s case-in-chief, the circuit court denied petitioner’s motion for judgment as a matter of law. Thereafter, petitioner and the trustee admitted that their evidence was the same as respondent’s (with the exception of the evidence provided by respondent’s expert). The circuit court then found that there were no factual issues in dispute and granted summary

judgment in favor of respondent. The circuit court also rescinded petitioner's deed for the subject property and ordered that respondent was entitled to specific performance. Following the circuit court's ruling, petitioner and the trustee proffered their testimony.

The circuit court's ruling was memorialized in a "Judgment Order" entered March 21, 2013. In the order, the circuit court found that (1) the first time any bidder knew that "cash only" meant "U.S. currency" was at the foreclosure sale; (2) petitioner had been the trustee's client for many years before the sale; (3) petitioner was the only bidder who brought U.S. currency to the sale; and (4) respondent did have a line of credit sufficient to meet his bid of \$105,100, and a teller was on-call ready to deliver, within minutes, payment by bank check. The circuit court then concluded that (1) the trustee had a duty to maximize the price for the property; (2) payment by U.S. currency was not required by the deed of trust or announced in the notice of sale; (3) payment by U.S. currency at the "instant" the sale was "knocked down" was not commercially reasonable; (4) petitioner and the trustee colluded to ensure that only petitioner could submit a conforming bid; and (5) the foreclosure sale was conducted in violation of the terms of the deed of trust and Chapter 38, Article One of the West Virginia Code.

On appeal to this Court, petitioner challenges the circuit court's award of summary judgment in favor of respondent.

Pursuant to Rule 56(c) of the West Virginia Rules of Civil Procedure, summary judgment should be awarded "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Thus, "[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." Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963). We accord a plenary review to the circuit court's order granting summary judgment: "[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 (1994). Finally, in considering a motion for summary judgment, we review all facts and inferences in the light most favorable to the nonmoving party. *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59-60, 459 S.E.2d 329, 336-37 (1995).

With these standards in mind, we review petitioner's assignments of error. Petitioner's first assignment of error is that the circuit court erred in finding that a contract was formed between the trustee and respondent at the foreclosure sale because the trustee and respondent never mutually assented to the type of consideration for the property (i.e., U.S. currency versus a bank check).

The circuit court did not err in granting summary judgment in favor of respondent because a contract was clearly formed between the trustee and respondent. The record on appeal shows that the trustee made an offer by publishing the notice of sale of the subject property, and by holding the foreclosure sale. The record also clearly shows that respondent accepted the offer by placing the highest bid, which he would have been able to pay in full within minutes after the sale was "knocked down." In Syllabus Point One of *First National Bank of Gallipolis v. Marietta*

Manufacturing Co., 151 W.Va. 636, 153 S.E.2d 172 (1967), we defined a contract as an offer and an acceptance supported by consideration.

Petitioner next argues that the term “cash” as found in the deed and the notice of sale meant “U.S. currency” only. West Virginia Code § 38-1-5 provides that the “sale [of a trust lien deed] shall be made upon such terms as are mentioned in such deed.” Here, the deed required only that payment be made “in cash.” Thus, neither the deed of trust nor the notice of sale required payment in “U.S. currency.” Moreover, respondent presents no legal authority that “cash” is defined in the law as meaning only “U.S. currency.” The trial court properly relied on accepted legal authority, including *Black’s Law Dictionary*,³ in determining that “cash” may be defined as U.S. currency *and* many other things, including bank checks. Although petitioner cites to American Jurisprudence and other legal sources for the definition of “cash,” none of these sources have been adopted in West Virginia’s jurisprudence.

Petitioner also argues that the circuit court erred in finding that respondent had a line of credit available on the date of the foreclosure sale because the record contains evidence to the contrary. We disagree. The record on appeal supports the circuit court’s findings. At trial, an employee from respondent’s bank offered uncontested testimony that, on the date of the sale, respondent had a line of credit of at least \$105,100; a bank teller from respondent’s bank was ready to deliver a bank check to the trustee on respondent’s behalf immediately after the sale; and respondent’s line of credit was not withdrawn until after the sale at respondent’s request.

Petitioner’s second assignment of error is that the circuit court impermissibly applied Chapter Thirty-Eight, Article One of the West Virginia Code to extend protections to a bidder at a foreclosure sale when the intent of that Article is to protect only debtors and creditors. Respondent counters that petitioner’s rendering of the bidder as a nonentity overlooks the importance of the bidder in the foreclosure sale process, and that without a healthy pool of bidders, the interests of both creditors and debtors will fail.

Although petitioner raises this assignment of error, he fails to support it. For example, he fails to cite to any particular section in Chapter Thirty-Eight, Article One, and fails to state how that Article protects debtors or creditors or excludes protection for purchasers. Instead, petitioner merely restates the same arguments he made for his first assignment of error, which we have rejected. “On an appeal to this Court the appellant bears the burden of showing that there was error in the proceedings below resulting in the judgment of which he complains, all presumptions being in favor of the correctness of the proceedings and judgment in and of the trial court.” Syl. Pt. 2, *Perdue v. Coiner*, 156 W.Va. 467, 194 S.E.2d 657 (1973). Because petitioner fails to meet this burden, we cannot say that the circuit court erred.

³In the order on appeal, the circuit court said: “‘Cash’ is, however, defined in *Black’s Law Dictionary* (8th Edition) as ‘money or the equivalent; usually ready money. Currency and coins, negotiable checks, and balances in bank accounts.’ *Black’s Law Dictionary* is recognized by State and Federal Courts as an authoritative source for definitions of words commonly found in statutes and case law. *See, e.g., Arneault v. Arneault*, 639 S.E.2d 720 (W.Va. 2006).” (Boldface letters in original.)

Upon a careful review of the parties' briefs and the record on appeal, and in light of the standard requiring this Court to view all facts and inferences in the light most favorable to the non-moving party, we conclude that the circuit court correctly found no genuine issue as to any material fact and that respondent was entitled to a judgment as a matter of law. We hereby adopt and incorporate the circuit court's well-reasoned findings and conclusions as to the assignments of error raised in this appeal. The Clerk is directed to attach a copy of the circuit court's order to this memorandum decision.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: November 22, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin
Justice Robin Jean Davis
Justice Menis E. Ketchum
Justice Allen H. Loughry II

DISSENTING:

Justice Margaret L. Workman

IN THE CIRCUIT COURT OF JACKSON COUNTY, WEST VIRGINIA

BRENT D. SAYRE,

Plaintiff

vs.

CIVIL ACTION NO. 12-C-40
Judge Thomas C. Evans, III

MARC J. SLOTNICK, Esq., Trustee
and JOHN W. PARKER,

Defendants

JUDGMENT ORDER

On February 5, 2013 came the Plaintiff, Brent D. Sayre, in person and by counsel, Leah R. Chappell, Esq., came also the Defendant Marc J. Slotnick, Esq., Trustee, in person and by counsel Josef Horter, Esq., and came also the Defendant John W. Parker in person and by counsel Charles D. Love, IV. This matter came on for jury trial on February 5, 2013 as scheduled by prior Order of the Court.

Whereupon, an advisory jury was selected and sworn to hear the instant case, the parties proceeded to present their evidence. On February 6, 2013, the Plaintiff rested his case in chief. The Defendant then moved for judgment as a matter of law, which motion was denied.

At that time, the Defendants conceded that their evidence did not contradict that of the witnesses for the Plaintiff (excluding the expert witness, Dallas Kayser).

The parties did agree that the remedy sought by the Plaintiff in this case was purely equitable, for which neither Plaintiff nor Defendants had the right to trial by jury.

Inasmuch as no factual issues existed in this case, the court dismissed the Advisory Jury.

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Based on the evidence presented and the Court's determination of the applicable law in this case, and the Court's determination that no genuine issues of fact exist for the jury's consideration and that the Plaintiff was entitled to the relief sought by the Complaint. The Court discharged the jury and entered judgment in favor of the Plaintiff for specific performance, making the following findings of fact and conclusions of law:

Findings of Fact

From the clear, convincing and uncontradicted evidence, the court finds the following facts:

1. The Defendant, Marc J. Slotnick, Esq., (hereafter "Slotnick") is an attorney licensed to practice law in the State of West Virginia. The Defendant John W. Parker (hereafter "Parker") is a resident of Kanawha County, West Virginia.

The real property which is the subject of this action is 130 acres located in Washington District, Jackson County, West Virginia and is known alternatively as the "Click Farm" or the "Garrett Farm".

2. The Plaintiff is a Jackson County resident. The debtor named in the Deed of Trust, Charles R. Garrett, is not a party to this proceeding.

3. Charles R. Garrett and Alma A. Garrett executed a Deed of Trust dated May 17, 1993, and recorded in the Office of the Jackson County Clerk in Trust Deed Book 251 at page 22, which Deed of Trust is secured by the real estate which is the subject of this action, more fully described therein. A true copy of said Deed of Trust was admitted as Plaintiff's Exhibit 3. The Deed of Trust requires that, upon default in the payment of the principal obligation thereby secured, the Trustee shall "**sell the real estate herein**

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described and hereby conveyed at public auction for cash to the highest bidder at the front door of the Courthouse of Jackson County, West Virginia. (emphasis added).

4. By Substitution of Trustee dated June 19, 2007 and recorded in the Office of the Jackson County Clerk at Lien Book 508 at page 708, Marc J. Slotnick or Victor Mullins were named substitute Trustees of the said Deed of Trust. Said Substitution of Trustee was admitted as Plaintiff's Exhibit 4.

5. By Assignment dated June 19, 2007 and recorded in the Office of the Jackson County Clerk at Assignment Book 508, page 706, the beneficial interest in the lien effected by Plaintiff's Exhibit 3 and the promissory note secured thereby were assigned to Defendant Parker.

The amount due and owing on the said promissory note on February 22, 2012 was \$101,000. Said Assignment was admitted as Plaintiff's Exhibit 5.

At a time not otherwise specified during the evidence, the debtors defaulted on the note for which the subject property was pledged as security.

6. On February 22, 2012, the Defendant Slotnick conducted a foreclosure sale at the steps of the Jackson County courthouse of the real property described in Plaintiff's Exhibit 3, pursuant to Notice of Sale placed in The Jackson Herald and admitted herein as Plaintiff's Exhibit 1. Said advertisement provided as follows: "TERMS OF SALE: CASH ONLY. PAYABLE IN FULL AT TIME OF SALE" (emphasis original). The Notice of Sale further provided that the Trustee reserved the right "to reject any and all bids."

7. The Plaintiff, Brent Sayre, personally attended the sale with his agent, Ripley attorney Robert D. Fisher. Just prior to the commencement of the sale, attorney Fisher

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informed the Defendant Slotnick that the Plaintiff possessed a line of credit from Farm Credit of the Virginias and would cause a bank check in the amount of the Plaintiff's final bid to be delivered to the Trustee within ten (10) minutes of the conclusion of the sale.

8. The Defendant Slotnick, acting in his capacity as Substitute Trustee, and immediately prior to commencement of the foreclosure sale, announced to those assembled that the only payment that would be accepted from bidders was U.S. currency and that payment had to be delivered at the instant the sale was "knocked down".

These limitations on the conditions of sale are not set forth in the Deed of Trust nor were these limitations set forth in Slotnick's Notice of Sale under the subject Trust Deed. The first notice anyone (except Mr. Parker, of course) had that "cash" meant U. S. currency only was at the time of the sale.

9. The Defendant Parker was, on the date of sale, and had been for years the client of Defendant Slotnick. The Defendant Slotnick testified that his decision to limit bids to only those bidders who brought sufficient United States currency to the sale and were prepared to hand it over to Slotnick at the time of the sale.

As might be imagined, only the Defendant Parker brought United States currency to the public sale under the subject deed of trust.

10. The Defendant Slotnick claims that any person interested in bidding on the subject property was free to contact Mr. Slotnick prior to the sale to clarify the nature of the payment which would be required. The Plaintiff did not make any such contact.

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11. When the sale commenced, the Defendant Parker tendered the first bid of \$103,000,¹ followed by attorney Fisher, acting on behalf of Plaintiff Brent Sayre, tendering a bid of \$103,100.

The Defendant John Parker then walked a short distance to his vehicle and returned to the front steps of the courthouse with a black plastic garbage bag which he displayed unopened to the assembled crowd. The Defendant Parker then bid \$105,000. The Plaintiff, through Mr. Fisher, tendered the high bid of One Hundred Five Thousand One Hundred Dollars (\$105,100.00).

No other bids were made by anyone. Mr. Parker never displayed the contents of the black plastic bag at the sale.

Defendant Slotnick rejected Plaintiff's bid, because Plaintiff did not bring \$105,100 in United States currency to the public sale.

12. Because no other bids were recognized by Defendant Slotnick, the property was "knocked down" to the remaining bidder, the Defendant John Parker in the sum of \$105,000.

At the close of the sale, the Defendant Slotnick and the Defendant Parker walked to United Bank, located on the opposite street corner from the courthouse. They then deposited into Defendant Slotnick's trust account \$105,000 in U.S. currency produced by the Defendant Parker. This money was subsequently redistributed by Mr. Slotnick as follows: \$5,000 retained by Mr. Slotnick toward his attorney fees in the instant matter with the consent of Mr. Parker; costs of sale in an unspecified amount paid to Mr.

¹ The Defendant Slotnick confirmed that he had determined prior to sale that the minimum bid he could accept was \$103,000, which represented the debt due the Defendant Parker of \$101,000 plus costs associated with sale.

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Slotnick; and the remainder repaid to Mr. Parker to satisfy the indebtedness secured by the trust deed, admitted into evidence as Plaintiff's Exhibit 3.

13. The Defendant Slotnick executed a Trustee's Special Warranty Deed conveying the subject property to the Defendant Parker on February 22, 2012. Said Deed was recorded in the Office of the Jackson County Clerk in Deed Book 421 at page 567 on February 23, 2012. A copy thereof was admitted as Plaintiff's Exhibit 2.

14. It was established by the evidence that Plaintiff Brent Sayre, on the day of sale, did have a line of credit with Farm Credit of the Virginias sufficient to meet his bid of \$105,100.

15. Defendants produced no evidence to challenge Plaintiff's assertion in the evidence that a cashiers or certified check from a reliable financial institution for his bid was in fact available to be delivered to Defendant Slotnick on the day of sale, in fact, within minutes of the sale.²

16. The Court finds credible the testimony of the Plaintiff's expert witnesses, C. Dallas Kayser, Esq. and Robert Tebay, III, Esq., to the effect that, by custom in the State of West Virginia, the requirement of "cash" at a foreclosure sale does not limit the a prospective purchaser to bringing only sometimes large amounts of U. S. currency to the public sale. Rather, the custom is to accept any readily negotiable form of payment, including cashier's checks and bank checks. However, the Court has determined that

² The Plaintiff presented uncontradicted evidence in the testimony of Teresa Karst, branch manager of the Ripley office of Farm Credit of the Virginias, that he had a line of credit available to him from Farm Credit in an amount which equaled or exceeded his bid of \$105,100. Further, Ms. Karst testified that, on the morning of February 22, 2012, she was waiting for the Plaintiff to telephone her and inform her whether he was the high bidder on the subject property. If so, Ms. Karst would then print off a bank check, backed by the Plaintiff's line of credit, in the amount of the high bid and deliver the same to the Trustee at the Jackson County Courthouse. No evidence was offered to suggest that Farm Credit is not a credible financial institution or an institution whose bank checks are in any way unreliable.

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the question of what is meant by "cash," in the context of foreclosure proceedings, is a question of law to be determined by the Court.

The Defendants proffered the testimony of the Defendants Slotnick and Parker, and tendered the deposition of expert witness Stephen Thompson, Esq. Upon consideration of the same, the Court finds that the facts of this case are virtually uncontested on all material matters.

Conclusions of Law

A. The Defendants Parker and Slotnick insist that the term "cash," as it appears in the Deed of Trust and Notice of Sale, means only U.S. currency. Further, the Defendants Parker and Slotnick claim that as Trustee, Defendant Slotnick was entitled to demand payment in U.S. currency at the instant of sale. These two conditions of sale, imposed by the Defendants jointly, guaranteed that the Defendant Parker was the only person at the sale who offered a "conforming bid" and further guaranteed that all other prospective bidders were excluded.

The Defendants Slotnick and Parker further argue that the Trustee's reservation in the Notice of Sale of the right "*to reject any and all bids,*" on its face, gives the Trustee the discretion to declare the Plaintiff's bid - - or any other bid for that matter - - to be nonconforming.

The court rejects the Defendants' argument that the term "cash" as used in the subject Deed of Trust is limited to United States currency only.

W. Va. Code 38-1-5 "Terms of sale" provides as follows regarding sales pursuant to Vendor's and Trust Deed Liens and applies to the instant sale:

"Such sale shall be made upon such terms as are mentioned in such deed . . ."

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The terms of the subject Deed of Trust provide that the Trustee must "sell the real estate herein described and hereby conveyed at public auction for cash to the highest bidder at the front door of the Courthouse of Jackson County, West Virginia."

The Deed of Trust includes no further reference to, or definition of, "cash".

"Cash" is, however, defined *Black's Law Dictionary* (8th Edition) as

"[m]oney or the equivalent; usually ready money. Currency and coins, negotiable checks, and balances in bank accounts."

Black's Law Dictionary is recognized by State and Federal Courts as an authoritative source for the definitions of words commonly found in statutes and case law. *See, e.g., Arneault v. Arneault*, 639 S.E.2d 720 (W.Va. 2006). This dictionary definition of the term "cash" is also consistent with custom and usage in the State of West Virginia relating to sales under Deeds of Trust. Thus, the term "cash" is not limited by definition nor custom and usage, to United States currency.

B. Defendants' object to the court's finding of fact that the Trustee and Mr. Parker colluded with one another to depress the amount of money bid for the subject property and, equally important, to facilitate Parker being the only person with the practical ability to submit a "conforming" bid at the public sale.

To "collude" is to conspire, to plot, to scheme, or to connive. *See Merriam-Webster Online Dictionary.*

This is exactly what occurred between Defendant Slotnick, the Trustee and Parker, the beneficial owner of the deed of trust.

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It was admitted by the Defendant Slotnick that he announced at the time of the commencement of the public sale the additional terms that only United States currency paid at the exact time the property was knocked-down to the highest bidder would be acceptable, and that this was done to comply with the direction of Defendant Parker.

The Defendant Slotnick, as Trustee of a Deed of Trust, has a fiduciary duty to protect the interests of the borrower and to obtain the highest possible price, while following the express requirements of the Deed of Trust and applicable West Virginia law. "It is . . . the duty of a trustee in a deed of trust to look to the interests of the trust debtor as well as to those of the creditor and the trustee, who is the agent of both parties, is bound to act impartially between them . . . [a] trustee must always act impartially, and as far as possible for the advantage of all parties interested in the sale, and use reasonable efforts to obtain the best price he can." **Lucas v. Fairbanks Capital Corp.**, 618 S.E.2d 488 (W.Va. 2005) (internal citations omitted). This duty was violated by this Trustee.

John Parker's interest in this real estate was limited to collection of the amounts due under the promissory note secured by the Deed of Trust. He had no interest in the subject real estate. **See Minor v. Pursglove Coal Mining Co.**, 118 W.Va. 170, 176, 189 S.E. 297, 299 (1936), where the court recognized that, "[t]he trust creditor has no estate in, or right of possession to, the trust property by virtue of the deed of trust. He has merely a chose in action secured by the trust, which may be enforced only by sale of the property." These same principles are the basis for the hold of the court in **State ex rel. Watson v. White**, 185 W.Va. 487, 408 S.E.2d 66 (1991).

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The fact is that in law Parker had no "preference" in regard to purchasing the subject real estate at the deed of trust foreclosure sale. Again, his interest was merely to secure the payment of the promissory note, which he owned, secured by the subject deed of trust.

Here, however, defendant Slotnick colluded with Parker to give Parker a preference to which he was not entitled. This was done in breach of the fiduciary duty of defendant Slotnick to obtain the best and highest bid for the subject real estate.

To reiterate, the conditions announced at the sale, were not contained in the Notice of Sale.

W. Va. Code 38-1-4 "Notice of sale" provides that

"[e]very notice of sale by a trustee under a trust deed shall show the following particulars: (a) The time and place of sale; (b) the names of the parties to the deed under which it will be made; (c) the date of the deed; (d) the office and book in which it is recorded; (e) the quantity and description of the land or other property or both conveyed thereby; and (f) the terms of sale."

The purpose of the Notice of Sale is to "secure bidders by informing the public of the nature and condition of the property to be sold, and of the time, place and terms of sale so as to prevent a sacrifice of the property". *Russell vs. Webster Springs National Bank*, 164 W.Va. 708, 265 S.E.2d 762 (1980).

By artificially restricting bidders to those who brought a sack full of currency to the sale, Defendant Slotnick added terms not contained in the Deed of Trust. This he had no right to do.

C. The Plaintiff's suit seeks rescission of the Special Warranty Deed executed by the Trustee on February 22, 2012 and recorded on February 23, 2012, and further

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seeks specific performance of the Trustee's duty to convey the subject property to the highest and best bidder, namely the Plaintiff.

The authority of any Trustee named in a Deed of Trust to sell the property described therein at public sale flows from the express terms of the Deed of Trust and from statutes prescribing the rights and duties of such Trustees. West Virginia Code 38-1-5 requires that the terms of sale advertised by the Trustee be consistent with the terms of the Deed of Trust. The Deed of Trust required the property be sold upon foreclosure "*for cash to the highest bidder at the front door of the Courthouse of Jackson County, West Virginia.*" The Deed of Trust does not require that the bid be paid the instant the sale is completed, nor does the Court find such a requirement to be commercially reasonable.

A Trustee conducting a foreclosure sale pursuant to a Deed of Trust is under a duty to obtain the highest possible price. The terms of sale imposed by the Defendant Slotnick at the request of his client, Defendant Parker, guaranteed that the only eligible bidder would be Defendant Parker. The requirement that bids be paid in U.S. currency at the instant the sale was "knocked down" is inconsistent with the terms of the Deed of Trust and discouraged the goal of obtaining the highest possible by excluding all bidders except Defendant Parker.

The Defendants urge this Court to find that the creditor whose interests are protected by the Deed of Trust may specify the form of payment as a term of sale, and in support thereof, cite **Lallance vs. Fisher**, 29 W.Va. 512, 2 S.E. 775 (1897), in which the creditor demanded payment in "gold" or "silver". However, the Court finds that the facts of Lallance are largely inapplicable to the case at bar. Insofar as Lallance may be

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found to apply to the instant case, the Court notes that the high bidder in Lallance was permitted twelve to 24 hours to convert his payment into the form required by the creditor. Further, when Lallance was decided, West Virginia Code 38-1-1, et. seq. did not exist. Said code section has been amended at least three (3) times since Lallance was decided, and with each revision the Legislature has failed to grant Trustees the latitude in setting terms of sale suggested by the Defendants herein.

The Court finds that the foreclosure sale conducted on February 22, 2012, in which the Trustee, Defendant Slotnick, rejected the Plaintiff's high bid of \$105,100, was a collusive sale conducted in violation of the terms of the Deed of Trust and the statutes made and provided by the Legislature for conducting sales under Trust Deeds.

While Trustees are generally empowered to reject bids which are, upon their face, invalid, this power is not unlimited and the Defendant Slotnick had no basis upon which to reject the bid of the Plaintiff other than the direction of his client and creditor under the Deed of Trust, Defendant Parker.

The Defendant Slotnick had a fiduciary duty to maximize the price obtained for the subject property and, as such, had a duty to accept the Plaintiff's bid of \$105,100. The Defendant Parker enjoyed no special status as a bidder at the February 22, 2012 sale; the Plaintiff and the Defendant Parker enjoyed the same interests in the subject sale, but for the Defendant Parker's right to be paid the sums due on the note secured by the Deed of Trust.

The Court is satisfied that the Defendants colluded to impose artificial terms on the sale, those being the requirement of U.S. currency payable at the instant the sale

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was "knocked down", in order to preclude a genuine sale conducted in accordance with the fiduciary duties of a Trustee as set forth in Lucas vs. Fairbanks.

The Plaintiff's bid complied with the lawful terms of the Deed of Trust from which the Trustee's authority to sell the property flowed. The Plaintiff had the ability to pay cash, i.e. a bank check from Farm Credit, within a commercially reasonable time after the conclusion of the sale. The Defendant Slotnick's advertisement of the subject property for sale upon certain terms and conditions constituted an offer for sale which was accepted by the Plaintiff when he tendered a bid of One Hundred Five Thousand One Hundred Dollars (\$105,100) which he was capable of fulfilling with a bank check from Farm Credit of the Virginias deliverable within minutes of the close of the sale.

The Defendant Slotnick breached his duty to accept the Plaintiff's high bid and to convey the subject property to the Plaintiff upon tender of the Plaintiff's payment when he unilaterally modified the terms of the sale to insure the success of the Defendant Parker's bid.

As the high bidder at the foreclosure sale, the Plaintiff is entitled to the appropriate equitable remedy, that being specific performance of the contract made at this public sale by reason of Plaintiff's highest and best bid for the advertised property.

JUDGMENT ORDER

It is therefore ORDERED that Plaintiff is granted judgment against the Defendants in the form of rescission of the Special Warranty Deed made by Defendant Slotnick to Defendant Parker, as described in the evidence, and specific performance of

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the contract made between Defendant Slotnick and Plaintiff, that being the right to purchase the subject real property for the sum of One Hundred Five Thousand One Hundred Dollars (\$105,100.00).

The Defendant Parker's Special Warranty Deed executed, acknowledged and delivered by the Defendant Slotnick and recorded in the Office of the Jackson County Clerk on February 23, 2012 at Deed Book 421 at page 567 on February 23, 2012 shall be and is hereby ORDERED rescinded and held for naught.

Within 30 days of the entry of this Order, the Defendant Slotnick shall, in his capacity as Trustee under the Deed of Trust admitted herein as Plaintiff's Exhibit 3, execute, acknowledge and deliver a good and sufficient corrective Special Warranty Deed granting and conveying the property which is the subject of this action to the Plaintiff, Brent D. Sayre, as of February 22, 2012. The Plaintiff shall tender his full payment of \$105,100 to the Defendant Slotnick at a closing to be conducted in the offices of Bailey & Wyant, PLLC, in Charleston, West Virginia, forthwith following the entry of this order.

A memorandum order may be presented for entry and subsequent recordation in the Office of the Clerk of the County Commission of Jackson County, W. Va.

The Defendants' objections to all adverse rulings contained herein are preserved.

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The Clerk shall mail an attested copy of this Order to counsel of record.

This is a final order. The Clerk shall dismiss this action from the active docket. This action shall, however, remain active to enforce the terms and conditions of this order.

All of which is ORDERED, accordingly.

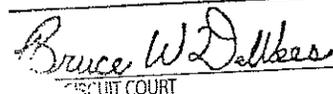
ENTERED: March 21, 2013



Thomas C. Evans, III, Circuit Judge

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ENTERED THE 21st DAY OF
March 2013
ORDER BOOK 110 PAGE
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CLERK CIRCUIT COURT

A TRUE COPY, CERTIFIED THIS THE

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