

FILED

2018 SEP 20 PM 3:07

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

REDDEN PROPERTIES, LLC,

Plaintiff/Appellee,

V.

**Case No. 18-C-AP 15
(King, Judge)**

**TERRY MAZE
WILLIAM MAZE**

Defendants/Appellants.

ORDER

Hon. Charles E. King took up the matter for trial on June 25, 2018. The plaintiff, Redden Properties, LLC, appeared by Eric Porterfield, member; and the defendants, Terry Maze and William Maze appeared in person and by counsel. The matter before the Court was the defendants appeal of the judgment entered in favor of the plaintiff on January 26, 2018, and the counterclaim filed by the defendants against the plaintiff. The Court heard the testimony of Eric Porterfield, Terry Maze and William Maze during the proceedings of June 25, 2018, and June 26, 2018. The matter was tried before the Court without a jury.

Upon the completion of the evidence the Court considered the various pleadings, the evidence presented and supplemental memoranda provided following the conclusion of the trial. The Court makes the following findings of fact:

1. The defendants, Terry Maze and William Maze, acquired their interests in the real

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estate located at 2925 Macon Street, South Charleston, West Virginia, by deed dated January 29, 2014, from the West Virginia Housing Development Fund, and of record in the Office of the Clerk of the Kanawha County Commission in Deed Book 2868, at page 938.

2. The defendants received no tax notices from approximately 2014 until the present due to an anomaly that occurred as a result of a deed of trust foreclosure that had occurred with respect to the property in about 2013.

3. The defendants received no actual notice of the delinquent status of those taxes from 2014 until after the delinquent tax sale which is the subject of this suit.

4. On July 20, 2017, the plaintiff, Redden Properties, LLC, purchased the tax lien on 2925 Macon Street at a deputy commissioner delinquent land sale. (Redden Properties, LLC, previously purchased the tax lien on 2925 Macon Street at a deputy commissioner delinquent land sale for a previous year for the amount of \$5,000, but the plaintiff failed to cause notice of the right to redeem in a timely manner and lost the benefit of its purchase.)

5. Thereafter, the plaintiff requested the West Virginia State Auditor's Office to provide notice of its purchase of a deputy commissioner tax lien sale relating to the property to the defendants.

7. In making that request, the plaintiffs indicated a desire to have the notice sent by certified mail to each party defendant; however, the plaintiff affirmatively requested that the notice to redeem not be published in a newspaper.

8. The notice was not published in a newspaper.

9. The certified mail return receipt demonstrates that the defendant Terry Maze

signed for both of the two notices of the right to redeem the real estate which had been sent to Terry Maze and William Maze, respectively.

10. Defendant, Terry Maze did not at any time prior to the institution of this suit provide William Maze with notice of the content of such item.

11. Defendant, William Maze, did not sign the certified mail return receipt and had no knowledge of the existence of such certified mail item at any time prior to the institution of the plaintiff's suit to obtain possession of the real estate.

12. William Maze was never provided with actual notice of his right to redeem the real estate from the deputy commissioner's sale.

13. On December 14, 2017, a deed to the real estate from R. Russell Rollyson, Jr., to Reddenfoxx Properties, LLC, was recorded in the Office of the Clerk of the Kanawha County Commission, in Deed Book 2988, at page 439.

14. On January 4, 2018, the plaintiff instituted an unlawful detainer action in the Kanawha County Magistrate Court seeking the removal of the defendants from the real estate.

15. Defendant, William Maze, was not provided with notice of the Magistrate Court unlawful detainer action at any time prior to the entry of the judgment in the matter.

16. Defendant, Terry Maze, was operating under a mental disability at the time that the notices of right to redeem were delivered to her by certified mail. The condition of Terry Maze's mind prevented her from bringing the information to the attention of her husband, William Maze, even after she was made aware of it with the filing of the unlawful detainer action.

17. The plaintiff failed to place William Maze on actual notice of the relevant tax

sale.

18. The onus was and remains upon the plaintiff, as a tax sale purchaser, to assure that the defendant, William Maze, received due process notice of his right to redeem the real estate from the deputy commissioner tax sale, all pursuant to federal and West Virginia law.

19. The onus was and remains on the plaintiff to discharge the various due process obligations guaranteed to the defendant, William Maze, in order to provide for a constitutionally valid sale. The plaintiff was a statutorily substituted party under West Virginia law required to discharge such obligations.

20. The plaintiff was required to provide notice reasonably calculated under all the circumstances to apprise the defendant, William Maze, of the pendency of the tax sale and of his right to redeem the real estate.

21. The plaintiff is charged with knowledge that only one of the defendants had received notice of the pendency of the tax sale after the receipt by the West Virginia State Auditor of certified mail receipts signed by only one individual.

22. After the certified mail receipts were returned with only one name shown demonstrating the receipt of the certified mail item; and after the certified mail receipts were returned demonstrating that the two certified mail receipts in fact contained the same signature (of Terry Maze), the circumstance was analogous (with respect to William Maze) to the circumstance in which a certified mail notice of sale is returned marked "undeliverable"; "not at this address"; "not known"; "unable to forward"; "not know"; or "unclaimed" or similar notation.

23. In O'Neal v. Wisen, United States District Court for the Southern District of West

Virginia, Civil Action No. 5:16-cv-08597, it was held as follows:

The West Virginia Supreme Court of Appeals has likewise concluded that "certified mail envelopes returned 'not deliverable as addressed' or 'unclaimed' constituted insufficient notice to the [property owners] of the right to redeem the property from the tax sale." *Mason v. Smith*, 760 S.E.2d 487, 494 (W. Va. 2014). The Fourth Circuit similarly held that "[w]hen a party required to give notice *knows* that a mailed notice has, for some reason, failed to inform a person holding a property interest of the impending deprivation, the notice does not pass constitutional muster." *Plemons v. Gale*, 396 F.3d 569, 573 (4th Cir. 2005). Moreover, both the Fourth Circuit and the United States Supreme Court have emphasized that "a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation," rejecting any argument that the taxpayer's own negligence in failing to pay taxes, ignoring earlier tax notices, or failing to update his or her address negates the right to receive constitutionally sufficient notice. *Id.* at 574; *Jones*, 547 U.S. at 232 (quoting *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 799 (1983)). Applying the West Virginia statutory scheme, the Fourth Circuit held that "reasonable diligence required [the tax purchaser] to search all publicly available county records once the prompt return of the mailings made clear that its initial examination of the title...had not netted the [owners'] correct address." *Plemons*, 396 F.3d at 578 (but concluding that summary judgment was inappropriate, because the record did not reveal whether such a search would have produced an address.)

at page 9.

24. After the return of the certified mail return receipts demonstrating that William Maze had not been served with the notice of the right to redeem, the plaintiff (to meet the State of West Virginia's federal and state due process obligations to the defendant, William Maze), therefore, had to take additional steps to place William Maze on notice of the sale and the opportunity to take remedial action.

25. The due process obligations of the plaintiff required the plaintiff to provide to William Maze "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." *Jones v. Flowers*, 547 U.S. 220 (2006).

26. The plaintiff was required to "utilize methods or means that anyone honestly seeking to actually effectuate the notice would reasonably employ." *Jones v. Flowers*, 547 U.S. 220 (2006).

27. After the certified mail receipts were returned with only one name shown demonstrating the receipt of the certified mail item; and after the certified mail receipts were returned demonstrating that the two certified mail receipts in fact contained the same signature (of Terry Maze), the plaintiff took no additional action to place William Maze on notice of the sale.

28. The law contemplates that the plaintiff would take additional action after the State and/or the purchaser learns that only one of the two individuals entitled to notice had received notice.

29. The plaintiff took no additional action, namely, no notice by regular mail, no notice by publication, no notice by personal service, and no notice by the Secretary of State.

30. The State Auditor's Office Notice to Redeem Form relating to the subject transaction reflects that the plaintiff was afforded the opportunity by the West Virginia State Auditor to exercise the option in July 2017, to provide notice by each of the following: notice by regular mail, notice by publication, notice by personal service, and notice by the Secretary of State.

31. The plaintiff expressly declined to provide notice to William Maze by any of these means, as demonstrated on documents made exhibits to the plaintiff's deed referenced above.

32. Further, after the return of the certified mail receipts which demonstrated that

William Maze had not been served, the plaintiff did not avail himself of the opportunity to place William Maze on notice of the right to redeem by any of the above-mentioned options. 33. The plaintiff, therefore (by declining to originally exercise any of the alternative means of delivery after being charged with knowledge that the certified mail to William Maze had not been actually received by William Maze), assumed the risk that William Maze would not receive, and/or that a third party might sign for, the certified mail notice attempted to be delivered to him.

34. The plaintiff as a tax sale purchaser from the State of West Virginia was obligated to discharge the due process obligations on behalf of the State of West Virginia and failed to effectively do so with respect to the interests of William Maze.

35. The plaintiff failed to exercise reasonably diligent efforts to provide notice of his intention to acquire such title to the defendant, William Maze, in light of the existence of signatures on the return receipt cards for certified mail indicating that the two documents were signed by one individual.

36. Reasonably diligent efforts to provide notice to the Defendants would require the Plaintiff to investigate the circumstances of the signing of the certified mail, particularly in light of the Plaintiff's original election to decline to publish the notice in a newspaper, to decline to affix the notice on the front door of the residence; and/or to decline to cause the notice to be personally served on each party.

37. Under all the circumstances presented, reasonably diligent efforts would have resulted in William Maze being placed upon actual notice of the delinquency, the sale and the request for a deed.

38. This action is brought within three years of the delivery of the deed, making it

timely to set aside the deed pursuant to West Virginia Code, §11A-4-4.

35. Defendant, William Maze, is entitled to a judgment setting aside the deed pursuant to the provisions of West Virginia Code, §11A-4-4 and the holding in *Plemons v. Gale*, 396 F.3rd. 569 and in *Jones v. Flowers*, 547 U.S. 220, subject to the defendant, William Maze, meeting the requirements of West Virginia Code, §11A-4-4, for the tender of the amounts which would have been required for redemption.

36. The Court has on deposit with the Clerk of Court funds in the amount of \$5,097.88, which represents the accrued total due from the defendants/appellants to the plaintiff/appellee with interest to the date of June 25, 2018, the date of trial of this matter. The Court finds the defendant, William Maze, shall further deliver to the Clerk of this Court the sum of \$5,000 equal to the amount lost by the plaintiff on the previous attempted deputy commissioner purchase, all for a total of \$10,097.88 for eventual delivery to the plaintiff by separate order.

It is therefore ORDERED that the tax deed recorded in the Office of the Clerk of the Kanawha County Commission, in Deed Book 2988, at page 439 shall be set aside, if within thirty days of the entry of this Order the defendant, William Maze, deposits the sum of \$5,000 with the Clerk of this Court, which the Clerk is hereby Ordered to accept. If the defendant, William Maze, fails to deposit the sum of \$5,000 with the Clerk within thirty days of the entry of this Order then the defendants' request for relief shall be dismissed with prejudice.

The Court notes the plaintiffs/appellee's objection to the Court's ruling.

The Clerk shall cause a certified copy of this Order to be mailed to the pro se party; counsel of record; and to the Clerk of the Kanawha County Commission for

party; counsel of record; and to the Clerk of the Kanawha County Commission for recording in such office and indexing in the name of the parties to this action.

All of which is so ORDERED.

This is a final order.

Enter: 10-10-18

Charles E. King
Charles E. King, Circuit Judge

Prepared by counsel for Defendants/Appellants:

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STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 12 DAY OF October 2018.
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

10-10-18
Derrick Lefler
Kan. Cty Clerk
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