IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SUPREME COURT NO: 19-0011

REDDENFOX PROPERTIES, LLC, **PETITIONER/APPELLANT**

V.

WILLIAM MAZE and TERRY MAZE, **RESPONDENTS/APPELLEES**

APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

(2018-C-AP-15)

REPLY BRIEF OF APPELLANT

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ARGUMENT

Appellees respond to Appellant's initial brief with several arguments. First, Appellees argue in support of the trial court's finding that appellee did have sufficient notice of his right to redeem, notwithstanding the acceptance of the certified mailing to him by his spouse, who was also a member of his household.

Appellees also contend, for the first time, a failure to satisfy the provision of West Virginia Code 11A-3-55, which requires forwarding a copy of the Notice of the Right to Redeem by first-class mail addressed to "occupant" at the physical address of Class II property.

Additionally, appellees argue that the introduction of evidence regarding the purported mental disability of appellee, Terry Maze, was not error because it was not connected o the trial court's decision.

Appellant provides response to each of these arguments as follows:

I.

With reference to the contended lack of notice to appellee, William Maze, in a nutshell the argument can be distilled to the premise stated at page 15 of Appellees' brief. "As it relates to Mr. Maze, the circumstances are analogous to the situation in which the item is returned without a signature, since he did not sign for the item." (Appellees Brief at Page 15).

Appellees' premise however is flawed. First, and most importantly, those cases cited by Appellees do not involve situations where an item is returned simply because it was not signed for by the individual. The cases upon what Appellee reply have

invariably involved mailings which were returned as unfound, not known, not deliverable, or some other notation which made clear to the sender that the notice could not have been received because the mailing was undeliverable. In those instances in the face of clear and unequivocal indication that the notice could not have been seen by its intended recipient, the courts have required additional reasonable efforts. However, the circumstances in this case are not analogous because there was no clear unequivocal return placing the sender on notice that his notice could not be received by the intended recipient.

II.

For the first time on appeal, appellees raise the argument of the deficiency of appellant's processes in providing notice by asserting that the statute requires regular mail notice to "occupant" at the subject property address.

Appellees point to this Court's decision in Archuleta v. US Liens, LLC, 813 S.E. 2d. 761 (W.Va. 2018) in support of its position. Appellant would suggest that this point, that it raises for the first time on appeal before this court is dispositive and should result in affirmation of the Circuit Court's decision.

Appellant does not concede that there was no evidence before the circuit court that addressed whether or not this requirement had been satisfied. Mr. Porterfield testified that first class mail was sent and never returned. (App. 18). In his testimony additional reference was made to the company practice of sending first class mail.

(App. 31). Therefore, there does appear to be evidence in the record that the regular mail requirement was satisfied. [1]

A. Waiver

Such evidence notwithstanding, appellant asserts that the failure of the appellees to raise this issue before the circuit court effectively constitutes a waiver of that issue. Appellees did not raise the issue before the trial court and thus did not give the court the opportunity to make findings of any sort, or to decide the issue. "This court will not pass on a non jurisdictional question which has not been decided by the trial court in the first instance." Syl. Pt. 2. Sans v. Security Trust Company, 102 S.E.2d. 733 (W.Va. 1958). This principle has been repeated too many times to cite individually. Therefore, this court should not accept or address this issued raised by appellees at the 13th hour.

B. Remand is Appropriate Remedy

If the Court were to determine that it is appropriate to address the issue of the regular mailing to the "occupant", notwithstanding the fact that the issue was not raised before the circuit court, affirmation of the circuit court's decision should not be the remedy. Rather, the appropriate remedy would be to remand the matter to the circuit court for further proceedings to determine whether in fact the regular mailing to the occupant occurred. This approach would be appropriate in this instance for several reasons.

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[1] The record also contains documents from the State Auditor's office addressed to "occupant" with the Macon Street addressed noted. (App. 149, 155). These documents have a notation of "personal service" following the "occupant" heading. It is unclear as to whether this indicated the auditor attempted personal service on the occupant of the Macon Street location, or if it indication of the auditor's mailing to "occupant" in satisfaction of the statutory command. However, it is noteworthy that appellant did not request personal service on "occupant". Therefore, the auditor would have no reason to engage in an attempt at personal service.

First, there is no indication in the record whether the state auditor, consistent with the command in the statute, acted in accordance with that command. It would be appropriate to assume that given the statutory command, the auditor, as a matter of course issues a regular mail notice to "occupant". However, at this point it is not clear as to whether this requirement was, in fact, satisfied.

The importance of this uncertainty in the record before the court is heightened by the fact that petitioner appeared pro se in presenting his case.[2] Petitioner's appearance as pro se litigant placed upon the court an obligation to assist petitioner in navigating litigation. This court has recognized there is a constitutional right of self representation. Syl. Pt.1 Blair v. Maynard, 324 S.E.2d. 291 (W.Va. 1984). The Court in Blair also noted that this right required the trial court to make "reasonable accommodations" to assist a pro se litigant in negotiating the labyrinth of legal proceedings.

> When a litigant chooses to represent himself, it is the duty of the trial court to ensure fairness, allowing reasonable accommodations for the pro se litigant so long as no harm is done to an adverse party ... Most importantly, the trial court must "strive to ensure that no persons cause or defense is defeated solely by reason of unfamiliarity with the procedural or evidentiary rules."

Blair, 324 S.E.2d. at 396; Bego v. Bego, 350 S.E 2d. 701, 703-04 (W.Va. 1986).

Arguably included in such assistance would have been to ensure that each element or area of the claim was addressed. Clearly this did not occur as the court did not reference the issue in its findings.

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[2] As an additional impediment, Eric Porterfield, the individual appearing on behalf of petitioner is also visually impaired.

Contrary to the court's obligation to petitioner as a pro se litigant, petitioner requested the attendance of Russell Rollyson, from the State Auditor's office who was unavailable on that date to provide testimony because he was on vacation. (App. 23). Mr. Porterfield indicated to the court that he had subpoenaed Mr. Rollyson. (App. 24). Such testimony could have answered the question as to the issue of whether regular mail was sent to the "occupant" at the property address. The court's response to petitioner's request to accommodate the submission of testimony from Mr. Rollyson was: "well, we're having a trial. If Mr. Rolston is unavailable, then I'll – if somebody for Mr. Porterfield wants to get him here, I'll take that up when you get to it." (APP. 24).

The trial court's lack of assistance and refusal to accommodate the procurement of Mr. Rollyson's testimony is further highlighted by the fact that the pro se litigant appeared unaware, or at least unsure, the matter was going to be tried on the day the bench trial commenced. "I guess my question is, your honor, we ask for summary judgment today or are we having a trial today?" (App. 8).

The sum of these conditions would clearly indicate that if this Court has concerns as to the satisfaction of the statutory requirement for regular mailing to "occupant" the proper response would be remand to the circuit for further evidence and findings on the issue.

III.

Appellees contend that the issue of the purported mental disability of appellee Terry Maze is irrelevant and mooted by the trial court's resolution of the case upon the issue of notice to William Maze. However, in rendering its decision the trial court made specific findings to the effect that Mrs. Maze was operating under a disability at times relevant to the matter. (App. 121). The trial court then used this finding to negate the possibility that William Maze received notice of the right to redeem. (App. 121). These findings are crucial to trial court's central finding that William Maze did not receive sufficient notice of his right to redeem. Any suggestion that the issue of Terry Maze's alleged mental disability was not material to the trial court's decision is plainly unsupported by the record.

Appellees suggest that Mr. Maze's testimony as to the issue was proper under Rule 701 as non-expert opinion testimony. However, the testimony in question clearly exceeds the boundaries of the rule. Rule 701 allows non-expert opinion testimony under certain conditions. First the opinion must be "rationally based on the witnesses perception and helpful to clearly understanding the witnesses testimony or to determining a fact in issue. However, the opinion cannot be based on "scientific, technical, or other specialized knowledge" that falls within the scope of Rule 702, which deals with expert witnesses. W.V.R.Evid. 701. There can be no argument that an opinion that an individual is operating under a mental disability, is within the realm of expert testimony, governed by Rule 702.

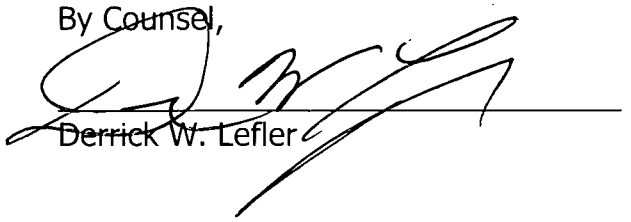
Furthermore, the testimony of Mr. Maze that his wife suffered a mental disability due to her being prescribed narcotic medication is seriously called into question by his acknowledgement of her long history of withholding information from him such as the foreclosure of the mortgage years earlier, and the wrongful detainer suit following the auditor's sale, both during periods where the allegedly disabling condition was not present. (App. 64, 65, 79, 83, & 88).

Given Ms. Maze's history, and Mr. Maze's knowledge of the same, the question must be asked as to where the risk for that behavior should fall. Appellant suggest the appropriate answer returns to the assertion in appellant's initial brief that the appropriate inquiry does not rely on receipt of actual notice, but rather the absence of indication that notice could not have been received after service by means recognized in the statute.

CONCLUSION

For the reasons set forth herein, Appellant respectfully requests, for the reasons stated herein that his appeal be granted and decision below be set aside, or in the alternative, that the matter be remanded to the circuit court with instructions for further proceedings.

REDDENFOX PROPERTIES, LLC,
By Counsel,



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