

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

MZRP, LLC,
Plaintiff Below, Appellee

v. Case No. 35692 (Wayne County, 07-C-073)

HUNTINGTON REALTY CORPORATION,
Defendant Below, Appellant

FILED

March 10, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

The Appellant, Huntington Realty Corporation (“Huntington Realty”), appeals an order of the Circuit Court of Wayne County. In its order, the circuit court granted summary judgment to the Appellee, MZRP, LLC (“MZRP”), in its civil action to quiet title to a 100-acre tract of land. Having carefully considered the parties’ arguments, and reviewed the record before us, we reverse the circuit court and remand the case with directions.

I. Discussion

In 2004, MZRP’s assignor purchased a 100-acre tract of real estate at a tax sale conducted by the Wayne County Deputy Commissioner of Delinquent and Non-Entered Lands (“Deputy Commissioner”) and was subsequently deeded the land. Following recordation of the deed, MZRP filed a civil action in the Circuit Court of Wayne County to quiet title to the 100-acre tract of land. Named as defendants in that action were Logan

Cannel Coal Company (“Logan Cannel”), Huntington Realty Company, and Henry Copley (“Mr. Copley”).¹

The appeal before us involves a 100-acre tract of land located in Wayne County, West Virginia. To aid in our discussion, we briefly note the 100-acre tract’s “title” history as follows:

Logan Cannel, 1893-present:

The record before us shows that Logan Cannel was conveyed a 100-acre tract of land in a deed dated January 20, 1893, and recorded at the Wayne County Clerk’s Office in Deed Book 37 at page 199. A review of this deed shows it to have a full metes and bounds description of the property.

In 1934, the Wayne County Assessor’s land books contain an entry for Logan Cannel Coal Company (misspelled Candle) for a parcel containing 100 acres, Moses Fork, 12 Pole, Lincoln District. In 1935, the Wayne County land books again listed the 100-acre tract with the identical description in the name of the owner, Logan Cannel Coal Company. However, this land book entry was crossed out in pen and the notation “transferred to Huntington Realty Corp” was inserted. A reciprocal entry was made placing the parcel in the name of

¹Jackson Building & Loan Association was also named as a defendant to assure that a deed of trust conveyed to it by Logan Cannel was not for the same 100-acre tract of land at issue in this Appeal. There is no evidence in the record that Jackson Building & Loan Association ever acquired an interest or lien in the subject property.

Huntington Realty. The property was never again entered on the land books in the name of the owner, Logan Cannel Coal Company.

There is no evidence before this Court that a deed was ever recorded reflecting the noted “transfer” to Huntington Realty. There is also *no* evidence that Logan Cannel ever conveyed the property to another party, notwithstanding that Logan Cannel was dissolved by court order on July 14, 1934.²

²The fact that a corporation has dissolved does not divest the corporation of its assets, including real property. *W.Va. Code*, 31D-14-1405(b)(1) [2002]. *W.Va. Code*, 31D-14-1405 [2002], also specifically provides that a dissolved corporation continues its existence to wind up corporate affairs, distribute property among its shareholders and to liquidate its assets. In *Krebs v. Morgantown Bridge & Improvement Company*, 141 W.Va. 83, 93-94, 87 S.E.2d 609, 614-615 (1955), we discussed the predecessor statute of *W.Va. Code*, 31D-14-1405, where we explained that:

Code, 31-1-83, provides for the effect of dissolution or expiration of a corporation as follows: ‘When a corporation shall expire or be dissolved as prescribed in this article, its property and assets shall be subject to the payment of the corporate obligations and the expenses of winding up its affairs, and the surplus, if any, to distribution among the stockholders according to their respective rights.’ And more specifically Section 83 provides further that: ‘That board of directors and the executive officers in office at the date of such expiration or dissolution, and their successors in office, . . .; and they and their successors in office may cause suits to be brought, conducted, prosecuted or defended, *the real and personal property of the corporation to be conveyed or transferred under the common seal or otherwise, further assurances of previous conveyances to be made, and all lawful acts to be done, in the corporate name, in like manner and with like effect as before such dissolution or expiration*; but so far only as shall be necessary or proper to do and perform every act and thing which should have been or should be done and performed by the corporation, and for collecting the debts and claims due to the corporation, converting its property and assets into money, prosecuting, defending and protecting its rights, enforcing all claims in its favor, and paying over and distributing its property and assets, or the proceeds thereof, to those entitled thereto.’ (Emphasis in original.).

Huntington Realty, 1935-1948:

Beginning in 1935, Logan Cannel's "100 acres, Moses Fork, 12 Pole, Lincoln District" was mistakenly assessed on the land books in the name of Huntington Realty. This erroneous entry continued until 1949. From 1940 to 1949, the Huntington Realty entry had a notation that the land was forfeited to the State for tax delinquency. Although the land books assessed the 100-acre tract in the name of Huntington Realty during this period, there is no evidence that Huntington Realty ever acquired a good, marketable, record title to the 100-acre tract of land.

Henry Copley, 1948-2005:

In 1948, the Deputy Commissioner of Forfeited and Delinquent Land for Wayne County sold the 100-acre tract to Mr. Copley at a tax sale caused by Huntington Realty's "tax delinquency."³ The deed to Mr. Copley describes the property as "100 acres fee, Moses Fork, Lincoln District, Wayne County, West Virginia." After the tax sale purchase by Mr.

³To be clear, the 1934 land book entry in the name of Logan Cannel and the erroneous 1935 entry of the land in the name of Huntington Realty describes the land as "100 acres, Moses Fork, 12 Pole, Lincoln District." While the record does not provide a reason, it is clear that the words "12 Pole" were dropped from subsequent land book descriptions for this same tract of land. There is no evidence in the record of each year's land book description after 1950; however, the words "12 Pole" were not included in the subsequent sale description and tax sale deed to MZRP.

Copley, the 100-acre tract was assessed and entered on the land books in his name from 1950 until 2005.⁴

It is clear that the 100-acre tract of land purchased by Mr. Copley at the 1948 tax sale is the same 100-acre tract of land conveyed to Logan Cannel in 1893. This conclusion is clear because of the erroneous 1935 land book entry where “Logan Cannel Coal Company” was crossed out and the notation “transferred to Huntington Realty Corp” erroneously inserted. It was this same 100-acre tract of land that went delinquent in the name of Huntington Realty and was sold to Mr. Copley in 1948.

Mr. Copley did not get a good, marketable or record title from the Huntington Realty tax sale because Huntington Realty never had title to the property. As we explain below, the deed to Henry Copley was void and the actual owner of the property remained Logan Cannel Coal Company.

MZRP:

On August 17, 2004, MZRP’s assignor purchased the 100-acre tract at a tax sale conducted by the Wayne County Deputy Commissioner for Delinquent and Non-Entered Lands. The Deputy Commissioner listed the property for sale in Tax Certificate No. 504432,

⁴The record shows that land was sold to the State in 1952 for a 1950 tax delinquency in Mr. Copley’s name. However, the property was apparently redeemed as the land was again assessed in Mr. Copley’s name from 1952 through 2005 and there is no evidence of a delinquency when the land was sold for delinquent taxes 57 years later standing in the name of Logan Cannel.

described therein as: “100 Fee Moses Fork, Lincoln District.” The tax sale deed to MZRP reveals that the reason for the tax sale was that the tract was delinquent for taxes in the name of Logan Cannel from 1935 to 2003.

It is clear that the 100-acre tract described in Tax Certificate No. 504432, and the Deed to MZRP following the tax sale, is the same real property that had previously been assessed on the land books in the name of Logan Cannel, Huntington Realty and Henry Copley.

* * * * *

With this brief background having been established, we turn to MZRP’s suit to quiet title to the 100-acre tract of land. In its suit, MZRP requested that the circuit court declare that it has good title to the metes and bounds description contained in the deed to Logan Cannel Coal Company dated January 20, 1893, and recorded in Deed Book 37, page 199, because it is the same property it purchased from the Deputy Commissioner at the 2004 tax sale. In West Virginia, a suit to quiet the title to a tax deed is authorized by *W.Va. Code*, 11A-3-62(b). However, before a court can enter an order removing any cloud on the title, the moving party, in this case MZRP, must prove a clear, legal and equitable title to the land. *Flynn Coal & Lumber Company v. FM White Lumber Corporation*, 110 W.Va. 262, 157 S.E. 588 (1931).

The evidence conclusively proves that the 100-acre tract of land sold to MZRP at the tax sale is the same property conveyed to Logan Cannel in 1893. It is also the same 100-acre tract of land that had previously been erroneously listed as having been “transferred” to Huntington Realty in 1935 and it is the same 100-acre tract of land purchased at the 1948 tax sale by Mr. Copley.

It is clear from the record before us that Logan Cannel never conveyed the property to another party and was the record owner at the time of the tax sale to MZRP in 2004. It is also clear from the record that after 1934, the 100-acre tract of land was never assessed for taxes in the name of the property’s true owner, Logan Cannel. Instead, taxes for the property were erroneously assessed in the name of Huntington Realty from 1935-1948, went delinquent during that period, and then the property was sold at a 1948 tax sale to Mr. Copley.

From 1948 through 2005, taxes for the property were erroneously assessed in the name of Mr. Copley. With the single exception of a delinquency in 1950, the record indicates that Mr. Copley timely paid the taxes assessed on Logan Cannel’s 100-acre tract for the entire 56-57 year period that Logan Cannel’s 100-acre tract was erroneously assessed in his name. This conclusion is supported by MZRP’s title examiner’s affidavit that this land book entry continued to be entered on the land books in the name of Henry Copley from 1950 to 1951, briefly interrupted by the delinquency noted above, but then again listed in the land books from 1952-2005. From 1952, there is no evidence that the land books reflect that the

100-acre tract appearing in the name of Henry Copley went delinquent, was sold for taxes or was forfeited to the State for non-entry.

The Deputy Commissioner's tax deed to MZRP referenced that Logan Cannel's property was being sold for tax delinquencies from 1935 to 2004. Mr. Copley paid the taxes on the property subsequent to his 1948 purchase. We further note that, to the extent a delinquency existed on Logan Cannel's property from 1935 to 1948 – the years *preceding* Mr. Copley's 1948 tax sale purchase – those delinquencies were absolved by the 1948 tax sale. In other words, the 1948 tax sale to Mr. Copley satisfied any outstanding tax delinquencies that existed on Logan Cannel's 100-acre tract at the time of the 1948 tax sale.

Accordingly, we find that a tax delinquency did not exist on Logan Cannel's "100 acres, Moses Fork, Lincoln District" property, for the 1935 to 2003 period, at the time of the Deputy Commissioner's tax sale to MZRP in 2004. Mr. Copley's payment of the assessed taxes on Logan Cannel's 100-acre tract, for all of the years the property was erroneously listed in his name, defeats MZRP's ability to prove "a clear, legal and equitable title to the land." *Flynn Coal & Lumber Company v. FM White Lumber Corporation, supra*.

We are guided in this conclusion by the Legislature's 1994 amendments of the law relating to tax sales of real property. In response to the constitutional issues that this Court identified in *Lilly v. Duke*, 180 W.Va. 228, 376 S.E.2d 122 (1988), the Legislature enacted *W.Va. Code*, 11A-3-73, which prevents real property, under the circumstances described above (where a tax is erroneously assessed in the name of a non-owner, but paid

nonetheless), from coming under the control of the State Auditor because of a tax delinquency and being sold at a tax sale by a Deputy Commissioner. *W.Va. Code*, 11A-3-73, provides in relevant part that:

In view of the large number of . . . tracts of land . . . which are entered on the land books by descriptions, . . . , or name of owner . . . which are erroneous or deficient in various particulars . . . ; and the uncertainty which exists as to whether the payment of taxes thereon prevents the land intended to be assessed from having been forfeited for non-entry *or* be subject to the authority and control of the Auditor . . . ; . . . , the Legislature . . . hereby does, release all taxes and charges . . . considered to be . . . unpaid . . . for each year that the taxes charged thereon under such entry have been paid . . . provided the identity of the land intended by such entry can be ascertained. All . . . lands which are subject to the authority and control of the Auditor because of such entry for any such year is hereby released and granted to the owner of such land in all cases where the identity of the land intended by such entry can be ascertained Such identity may be ascertained by any available evidence . . . including . . . tracing back prior years land book entries and valuations . . . , notations on the land books . . . and all pertinent evidence not within the foregoing classes. (Emphasis added).

The Legislature further provided in the last sentence of Section 73 that “[t]he provisions of this section . . . shall be liberally construed for the relief of landowners.” It does not provide relief for “tax sale” purchasers. *See, Mingo County Redevelopment Authority v. Greene*, 207 W.Va. 486, 534 S.E.2d 40 (2000). It is clear that *W.Va. Code*, 11A-3-73, does not allow a Deputy Commissioner’s tax sale of real property under the circumstances reflected in the record before us, i.e., where land has been erroneously assessed under the name of a non-owner, but the assessment nonetheless paid.

Mr. Copley's 1948 tax sale purchase of the 100-acre tract satisfied any tax delinquency that existed on the 100-acre tract prior to the 1948 tax sale. Mr. Copley paid the taxes assessed on the 100-acre tract through the date of the Deputy Commissioner's 2004 tax sale to MZRP, making the taxes owed on Logan Cannel's 100-acre tract of land not delinquent. Therefore, the tax deed granted to MZRP is void. While *W.Va. Code*, 11A-4-1, *et seq.*, enacted a three-year statute of limitations on voidable deeds created by procedural irregularities, there is no statute of limitations regarding void deeds. "Once void, always void." *Leslie Equipment Company v. Wood Resources Company*, 224 W.Va. 530, 543, 687 S.E.2d 109, 122 (2009)(Ketchum, J., concurring).

Even if Mr. Copley had not paid the taxes on Logan Cannel's 100-acre tract, the tax deed to MZRP is still void. The evidence in the record demonstrates that the Deputy Commissioner sold the property to MZRP for delinquent taxes listed in the name of Logan Cannel from 1935 to 2005. However, the parties agree that the 100-acre tract was not listed on the land books in Logan Cannel's name after 1935. The distinction between a tax sale for non-entry on the land books and a sale for delinquent taxes listed in the name of a landowner is fundamental.

MZRP's own title examiner's affidavit proves this point, noting that the basis of the 2004 tax sale of the 100-acre tract was *for delinquent taxes*, for the years 1935 to 2003, listed in the *name of Logan Cannel Coal Company*. However, from 1935 to 2003, there was no entry assessed on the land books in the name of Logan Cannel. The taxes could not be

delinquent standing in the name of Logan Cannel because the taxes were not assessed on the land books in the name of Logan Cannel.

In the case before us, we have a situation where a piece of property was erroneously assessed under a name other than the property's owner, yet the assessed tax was paid. The deed to MZRP is void. Accordingly, upon remand the circuit court shall order that the assessor correct future land books by removing the land book entry for the 100-acre tract of land from the name of MZRP and putting it in the name of Logan Cannel. In addition to correcting the land books, the circuit court's order voiding the deed to MZRP should be recorded in the Office of the Clerk of the Wayne County Commission and indexed with proper reference to MZRP's void tax deed.

A final issue we address is Mr. Copley's application for an erroneous tax assessment in 2005. After the 2004 tax sale to MZRP by the Deputy Commissioner, Henry Copley applied to the County Commission for a tax refund contending the property was erroneously assessed in his name. *See W.Va. Code*, 11-3-27, and *State ex rel. Prosecuting Attorney of Kanawha County v. Bayer Corporation*, 223 W.Va. 146, 672 S.E.2d 282 (2008).

Mr. Copley, who paid the taxes for over 50 years, suddenly contended that the 100-acre tract assessed in his name did not even exist. Thereafter, on December 27, 2005, the County Commission ordered that the property did not exist. This proceeding and the County Commission's order are not relevant to the present case to clear the title to the 100-acre tract. The tax sale was in 2004 before Mr. Copley applied for a refund and the County Commission

ruled that the land did not exist. The circuit court correctly ruled that the land does exist, and that it had been erroneously assessed in the name of Huntington Realty and Henry Copley. We agree that the land does exist and that the record owner of the property was Logan Cannel at the time of the tax sale.

II. Conclusion

For the reasons set forth herein, we reverse the circuit court and remand this matter for entry of an order voiding MZRP's tax deed. The circuit court's order shall also direct the assessor to correct the future land book entries by assessing the 100-acre tract in the name of the property's owner of record, Logan Cannel Coal Company.⁵ Further, the circuit court's order shall direct that the order be recorded in the office of the Clerk of the Wayne County Commission and indexed referencing MZRP's void deed.

Reversed and Remanded

⁵We note that the circuit court may appoint a receiver or custodian for Logan Cannel pursuant to *W.Va. Code*, 31D-14-1432, for the purpose of wrapping-up Logan Cannel's unfinished business by selling the 100-acre tract and disposing of the proceeds in accordance with the provisions of *W.Va. Code*, 31D-14-1405 and *W.Va. Code*, 31D-14-1440. *See also* n.2, *supra*.

Issued: March 10, 2011

Concurred in by:

Chief Justice Margaret L. Workman

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Thomas E. McHugh