

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

Case No. 22-ICA-243

**FROM THE CIRCUIT COURT OF MARSHALL COUNTY,
WEST VIRGINIA
SECOND JUDICIAL CIRCUIT
CASE NO. 22-P-30(C)**

Jay Folse,
Plaintiff Below, Petitioner

vs.

G. Russell Rollyson Jr.
and
John McCuskey Jr.
Defendants Below, Respondents

APPEAL BRIEF OF PETITIONER JAY FOLSE

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ASSIGNMENTS OF ERROR

- 1: **THE CIRCUIT COURT ERRED IN GRANTING RESPONDENTS' MOTION TO DISMISS WITH PREJUDICE.**

STATEMENT OF THE CASE

On October 29, 2021, Petitioner Folsie (hereinafter "Folsie") purchased a tax lien (Certificate No. 252922, described as "*LOT 37 Crawford ADD, CAMERON CORP district*") at a State Auditor's tax sale and the sale was approved by the Respondents on November 1, 2021, with a letter instructing Folsie to fill out and return the notice to redeem forms in order to complete the sale (AR 2, 9). Folsie directed Respondents to serve the Notice to Redeem upon the owner of the property, Stanley Lahew (AR 2, 9). Mr. Lahew was served with the notice (AR 9) on January 31, 2022 (AR 38). The notice informed Mr. Lahew that he had **until March 23, 2022 to redeem the property** (AR 31). March 23, 2022 came and went without Mr. Lahew redeeming the property and Respondents did not issue the tax deed at that time or at any time thereafter.

On May 17, 2022 - more than six (6) months after Folsie purchased the tax lien certificate and three and one half (3.5) months after service was made on Mr. Lahew **and nearly two (2) months after the deadline for Mr. Lahew to redeem the property had passed** - Stanley Lahew filed a quit claim deed transferring his ownership of the property to the City of Cameron (AR 3, 26).

On May 24, 2022, Respondent Rollyson sent Folsie a letter (AR 23) stating that Folsie's purchase of the property was being set aside because Mr. Lahew had signed the quit claim deed to the City of Cameron (AR 9). Respondents directed the Sheriff of Marshall County to refund the money Folsie had spent to purchase the tax lien (AR 10).

On or about July 5, 2022, Folse filed a **PETITION TO COMPEL ISSUANCE OF A TAX DEED** (AR 2) in the Marshall County Circuit Court and Respondent moved the Court to dismiss the Petition filed by Folse (AR 7). On August 8, 2022, Folse filed a **RESPONSE TO MOTION TO DISMISS** (AR 41). Respondents filed a Reply to Folse's Response to the Motion to Dismiss on or about September 9, 2022 (AR 48).

On or about October 13, 2022, the Circuit Court of Marshall County filed an **ORDER GRANTING RESPONDENTS' MOTION TO DISMISS** (AR 55).

The Circuit Court's Order explicitly found that: (1) the Auditor's Office had not refused to perform any required statutory duty (AR 56, 58); (2) the tax lien was merged when the City of Cameron purchased the property (AR 56, 58, 59); (3) any dispute regarding the property is between Folse and the City of Cameron (AR 56); (4) no additional damages are contemplated by *W.V. Code § 11A-3-60* (AR 58); (5) there is no right to a jury trial (AR 58); (6) there is no right to discovery (AR 58); and (7) no additional remedies or claims exist outside the statutory framework (AR 58).

Petitioner Folse appeals from that **ORDER**.

SUMMARY OF ARGUMENT

Folse asserts that his purchase of the tax lien on the property holds priority over the purchase of the property by the City of Cameron from the property owner by quit claim deed because Folse purchased the tax lien months prior to the purchase of the property by the City of Cameron.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner Folse does not believe that Oral Argument is necessary in this matter and believes that this case is appropriate for Memorandum Decision.

STANDARD OF REVIEW

In *Young v. State*, 241 W.Va. 489, 826 S.E.2d 346 (2019), this Court stated the applicable standard of review:

... we have held that “[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review.

Additionally, this Court stated in *Savarese v. Allstate Ins. Co.*, 223 W.Va. 119, 672 S.E.2d 255 (2008):

In general, this Court will apply a de novo standard of review to a circuit court's order granting a motion to dismiss.

ARGUMENT

1: THE CIRCUIT COURT ERRED IN GRANTING RESPONDENTS’ MOTION TO DISMISS WITH PREJUDICE.

Respondents claim in their motion to dismiss that “*When the City of Cameron purchased the property the tax lien sale was voided.*” That claim fails as discussed below.

Respondents claim that *EB Dorev Holdings, Inc. v. W.Va. Dep’t of Admin.*, 760 S.E.2d 875 (W. Va. 2014) supports Respondents’ position that the quit claim deed executed by the property owner transferring the property to the City of Cameron extinguishes or merges the tax lien into the City’s ownership. *EB Dorev* was addressing the doctrine of merger, which was described in *Truist Bank v. Putillion*, CIVIL ACTION NO. 2:18-cv-01384 (S.D.W. Va. May. 7, 2020) as “*a security interest is a lesser property right than outright ownership, and a person cannot logically own property and simultaneously have a security interest in that same property.*”

First, there is a significant difference between the factual situation in *EB Dorev* and the factual situation in this case. In *EB Dorev*, the WVDOA filed a Complaint and a Petition for Writ

of Mandamus seeking to prevent the issuance of the tax deeds to EB Dorev **BEFORE** the redemption deadline had passed. In this case, the redemption deadline passed nearly two (2) months before Stanley Lahew executed and filed the quit-claim deed transferring the property to the City of Cameron.

In this case, for whatever reason(s), Respondents chose not to issue the tax deed to Petitioner for nearly two (2) months after the redemption deadline had passed. During those nearly two (2) months, Petitioner was entitled to receive a tax deed for the property which he had purchased and which the property owner had not redeemed. Respondents' refusal to issue the tax deed for nearly two (2) months after the redemption deadline had passed constituted a refusal to perform a statutorily required duty.

Second, the ***EB Dorev*** holding is not controlling of this instant controversy and has little applicability. It appears from a search of Westlaw by Petitioner's Counsel that the doctrine of merger has rarely, if ever, been applied to factual situations related to tax liens prior to ***EB Dorev***. Notably, when the Respondents claimed in their Motion to Dismiss that "*The same rule of law applies to municipalities, such as the City of Cameron.*", Respondents offered no supporting authority to make such a claim - likely because there is little case law from West Virginia Courts of Appeals addressing such an issue.

Importantly, the tax lien and the property in this case are not owned by the same entity. Petitioner asserts that this Court need not go into any deeper analysis of the situation than that fact to resolve the matter at issue in this appeal. The doctrine of merger only applies where the security interest and title to the property are the same entity.

Again, as noted above, in ***Truist Bank v. Putillion***, CIVIL ACTION NO. 2:18-cv-01384 (S.D.W. Va. May. 7, 2020), the District Court of the Southern District of West Virginia stated: "... *a security interest is a lesser property right than outright ownership, and a person cannot logically own property and simultaneously have a security interest in that same property.*"

In this case, the security interest of a tax lien is owed to the State and ownership of the property is held by the City of Cameron. They are two distinct entities. The controversy in *EB Dorev* involved the State being required to pay taxes on its own property. That nonsensical situation does not come into play here as the City of Cameron would be required to pay the property taxes to the State, not the State paying taxes to itself.

Although the *EB Dorev* Court did reason that the doctrine of merger applied to those specific facts, and relied on *Armstrong Corp. v. Martin*, 119 W. Va. 50, 192 S.E. 125 (W. Va. 1937) to make that conclusion, Justice Loughry, in a concurring opinion, called it a “*tortured analysis*”.

The *Armstrong* opinion which was relied on by the Court in *EB Dorev*, is distinguishable because *Armstrong’s* facts relate to a bankruptcy sale. This is an important distinction as the relevant law and duties placed on persons are different. In this case involving a State Auditor’s auction - even if the property was actually tax exempt - there still would be a duty of the former owner to pay property taxes.

As noted in *W.Va.Code § 11-3-1(c)*: “*The taxes upon all property shall be paid by those who are the owners thereof on the assessment date whether it be assessed to them or others.*”

The tax obligation of Mr. Lahew did not simply vaporize as a result of Mr. Lahew transferring the property to the City of Cameron by quit claim deed. According to *W.Va.Code § 11-3-1(c)*, the past due taxes still would be owed by the former owner, Mr. Lahew.

However, this analysis may not even be necessary as the property is not necessarily tax exempt, not just retroactively, but as it relates to the present. *WV Code §11-3-9(a)(3)* states:

All property, real and personal, described in this subsection, and to the extent limited by this section, is exempt from taxation...

Property belonging exclusively to any county, district, city, village or town in this state and used for public purposes.

The doctrine of merger would not apply to municipalities such as the City of Cameron based on *WV Code §11-3-9(a)(3)*. This is because that subsection makes it clear that the tax exempt status depends on whether or not the property is being used for a public purpose, not solely whether ownership is held by a municipality. If municipalities could simply claim that they do not need to pay state taxes on any property they own due to the doctrine of merger - as Respondent's argument implies - then it would render that subsection meaningless.

In essence, what occurred here is that the State Auditor's Office determined that the property is exempt from taxation and is used for a public purpose, apparently without direct evidence to establish that determination. Additionally, the State Auditor's Office is without authority to make that determination.

WV Code §11-1C-7, titled in part, "*Duties of county assessors*", states (emphasis added):

Except for property appraised by the State Tax Commissioner under section ten of this article and property appraised and assessed under article six of this chapter, **all assessors shall**, within three years of the approval of the **county** valuation plan required pursuant to this section, appraise all real and personal property in their jurisdiction at fair market value except for special valuation provided for farmland and managed timberland. They shall utilize the procedures and methodologies established by the Property Valuation Training and Procedures Commission and the valuation system established by the Tax Commissioner.

The County Assessor has the sole authority to assess real property with only specific exemptions which allow the State Auditor, State Tax Department, or Board of Public Works to do so. These exemptions are not specified in one place but at various code sections and include

valuations of property owned by railroads, public utilities, and industrial properties. The Respondents are not the County Assessor and fail to point to any relevant law which would indicate they can unilaterally void a tax sale. Even if the property is tax exempt and the taxes are inchoate, the decision to void the tax sale should have come from the County Assessor or Sheriff, not the Respondents.

Concerning Motions to Dismiss, this Court has stated in *J.F. Allen Corp. v. Sanitary Bd. of City of Charleston*, 237 W.Va. 777, 85 S.E.2d 627 (2016): “... [f]or purposes of the motion to dismiss, the complaint is construed in the light most favorable to the plaintiff, and its allegations are to be taken as true.”

If the allegations contained in the Petition filed by Folse were construed in the light most favorable to Folse and taken as true, then the Circuit Court should not have dismissed Folse’s Petition.

If Folse is successful in this appeal on the primary issue (i.e. that he complied with the requirements of *W.Va. Code § 11A-3-60* and Respondent should have issued the tax deeds), then Folse believes that he would be entitled to costs and attorney fees in the matter below and in this appeal.

Assuming Folse is successful in relation to the primary issue in this appeal, then Folse asserts that Respondents’ actions in refusing to issue the certificate of extension were willful and in bad faith. As a result, Folse believes that he would be entitled to both attorney fees and costs. Folse asks this Court to order the same in both this proceeding and in the case below.

Folse also asked for damages in his **PETITION** filed below. The Circuit Court found that *"... no additional "damages" are contemplated by W.Va. Code § 11A-3-60... No additional remedies or claims exist outside of the statutory framework."* Folse disagrees and would point out to this Court that there are legitimate damages related to the delays caused by the dismissal.

"It is well-established that government agencies and their officials have no immunity for ministerial acts." **West Virginia Bd. of Educ. v. Marple**, 236 W.Va. 654, 783 S.E.2d 75 (2015).

Folse asserts that the issuance of or denial of the issuance of a tax deed is a ministerial act. As such, then Respondents have no immunity related to their refusal to issue the tax deed to Folse (or any other person). Therefore, assuming that this Court rules in Folse's favor on the primary issue that Folse's purchase of the property held priority over the purchase of the property by the City of Cameron and that Respondents should thus have issued the tax deed sought by Folse, then Respondents would be liable for damages to Folse.

As the property Folse purchased at the State Auditor's auction previously sat vacant during the time period between Folse's purchase and the quit claim deed to the City of Cameron (and may still be sitting vacant), it was (perhaps is) likely deteriorating substantially. Many of the properties that Folse purchases are condemned or are in serious risk of deteriorating to the point of not being practical to remediate. Because of the delay in Folse receiving the tax deed which was caused by Respondents, the property may be in a more deteriorated condition and may even be demolished by the time this appeal is decided. As such, assuming that the Circuit Court was in error in dismissing Folse's PETITION, Folse will have suffered damage as a result of the actions of Respondents.

CONCLUSION

Wherefore, for all of the above reasons, Petitioner Jay Folse moves the Court to reverse the decision of the Trial Court and remand this matter with direction to the Circuit Court consistent with this Court's ruling.

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CERTIFICATE OF SERVICE

I, Robert W. Bright, hereby certify that I served a true copy of the foregoing **APPEAL BRIEF OF PETITIONER JAY FOLSE** and related **PETITIONERS' APPENDIX** upon the following persons by e-filing service on the 13th day of February, 2023:

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