

FILE COPY



IN THE SUPREME COURT OF APPEALS, WEST VIRGINIA

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DOCKET NO.: 20-0503
5/03

**T&C CONSTRUCTION SERVICES, LLC, a
West Virginia Corporation, and
THEODORE MILLER,
Respondent Below/Petitioner,**

V.

**CITY OF ST. ALBANS,
Petitioner Below/Respondent.**

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FROM FILE**

PETITIONERS' BRIEF

A handwritten signature in blue ink, appearing to read "Shawn D. Bayliss".

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I. THE KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER COURT

This case originated in the Municipal Court of St. Albans, Kanawha County, West Virginia (hereinafter “the City”), wherein the City fined the Petitioners for various violations of the municipal fire codes and building codes resulting in a judgment in the cumulative amount of One Hundred Ninety- Eight Thousand One Hundred Fifty Dollars (\$198,150.00). The City then filed an action in the Circuit Court of Kanawha County, West Virginia to convert the municipal court judgment to a decretal judgment, to take control of the subject property, to terminate tenancies and to sell the property to satisfy the judgment. The Circuit Court granted the City’s Motion and Ordered the Petitioner’s to cease and desist operating all residential premises, granted the City a decretal judgment in the requested amount and appointed the City’s counsel as special commissioner to conduct a sale of the Petitioners’ property. Petitioner hereby seeks the reversal and vacation of the Circuit Court’s Order.

II. ASSIGNMENTS OF ERROR

Petitioners aver that the Kanawha County Circuit Court did not have proper jurisdiction over this matter such that it committed error by granting the City’s Motion to convert the municipal court judgment to a decretal judgment and appointing a special commissioner to conduct a sale of said property to satisfy the same.

III. STATEMENT OF THE CASE

This case originated in the Municipal Court of St. Albans, Kanawha County, West Virginia (hereinafter “the City”), wherein the City fined the Petitioners for various violations of the municipal fire codes and building codes resulting in a judgment in the cumulative amount of One Hundred Ninety- Eight Thousand One Hundred Fifty Dollars (\$198,150.00).

The City then filed an action in the Circuit Court of Kanawha County, West Virginia to convert the municipal court judgment to a decretal judgment, to take control of the subject property, to terminate tenancies and to sell the property to satisfy the judgment. (AR2). The Circuit Court held a hearing on April 8, 2022, wherein no testimony was adduced, but rather the Court based all of its finding upon the proffer of parties' respective counsel (Transcript Pages 3 through 5). The Court approved both of the underlying municipal court orders dated August 24, 2021, which awarded the City \$81,250 for violations of the City of St. Albans Fire Code and \$116,900.00 for violations of the City of St. Albans Building Code and Zoning Laws. (AR16) and granted the City a decretal judgment for the same.

The Circuit Court also Ordered the Petitioners to cease and desist operating all residential premises, and appointed the City's counsel as special commissioner to conduct a sale of the Petitioners' property. (AR16) to satisfy said judgment. It is from The Circuit Court's May 15, 2022 order that the Petitioners now seek a reversal and vacation.

To that end, Petitioners assert that *West Virginia Code* § 38-3-9 provides that:

The lien of a judgment may be enforced in a court of equity after an execution or fieri facias thereon has been duly returned to the office of the court or to the justice from which it issued showing by the return thereon that no property could be found from which such execution could be made: Provided, That such lien may be enforced in equity without such return when an execution or fieri facias has not issued within two years from the date of the judgment. If it appears to such court that the rents and profits of the real estate subject to the lien will not satisfy the judgment in five years, the court may decree such real estate, or any part thereof, to be sold and the proceeds applied to the discharge of the judgment.

Accordingly, it is Petitioners' position that the Circuit Court of Kanawha County, West Virginia's Order is void from the start as it did not have proper jurisdiction to grant the same.

IV. SUMMARY OF ARGUMENT

The Circuit Court erred and by granting the City's Motion and Ordering the Petitioners to cease and desist operating all residential premises, granted the City a decretal judgment in the requested amount and appointed the City's counsel as special commissioner to conduct a sale of the Petitioners' property. (AR16). Pursuant to the City's own motion, they requested the Court to take certain action to convert and reduce the municipal court judgments to a decretal judgment. However, the Circuit Court exceeded its authority in granting a cease a desist order in the absence of any evidence to support the same, and in authorizing the City to execute upon said judgment by appointing a special commissioner to sell the Petitioner's Property.

To that end, Petitioners assert that *West Virginia Code* § 38-3-9 provides that:

The lien of a judgment may be enforced in a court of equity after an execution or fieri facias thereon has been duly returned to the office of the court or to the justice from which it issued showing by the return thereon that no property could be found from which such execution could be made: Provided, That such lien may be enforced in equity without such return when an execution or fieri facias has not issued within two years from the date of the judgment. If it appears to such court that the rents and profits of the real estate subject to the lien will not satisfy the judgment in five years, the court may decree such real estate, or any part thereof, to be sold and the proceeds applied to the discharge of the judgment.

Accordingly, this Court should accept the Petitioners' perfected appeal to determine whether such enumerated error(s) exist.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioners request that the Court permit them to present oral argument should the Court determine that issues should be addressed in said manner. If the Court determines that oral argument is not necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision. Otherwise, a memorandum decision overturning the circuit court's rulings below is appropriate pursuant to Rule 21 of the *Rules of Appellate Procedure*.

VII. ARGUMENT

A. Standard(s) of Review

Petitioners contest two (2) rulings made by the Kanawha County Circuit Court. The West Virginia Supreme Court of Appeals stated in Syllabus pt. 2 of *Jarvis v. Porterfield*, 370 S.E.2d 620, 179 W.Va. 525 (W. Va. 1988), that "In the exercise of appellate jurisdiction, this Court will reverse a trial court which exceeds its lawful jurisdiction."

The Court may accord plenary review to matters involving statutory interpretation: "Where 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." Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995). Accord Syl. pt. 1, *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (1995) ("Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to de novo review.")

Generally, when a circuit court's decision is under review, this Court applies a three-part standard of review:

In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review. Syllabus Point 2, *Walker v. West Virginia Ethics Comm'n*, 201 W.Va. 108, 492 S.E.2d 167 (1997). As the various errors raised by the plaintiff concern different principles of law, multiple standards of review apply to our consideration of those issues. Therefore the specific standards of review will be applied below in our discussion of the plaintiff's arguments. *Mey v. Pep Boys-Manny*, 228 W.Va. 48, 717 S.E.2d 235 (W. Va. 2011)

B. The Kanawha County Circuit Court did not have proper jurisdiction over this matter such that it committed error by granting the City's Motion to convert the municipal court judgment to a decretal judgment and appointing a special commissioner to conduct a sale of said property to satisfy the same.

As this Court is aware, *West Virginia Code* § 38-3-9 provides that:

The lien of a judgment may be enforced in a court of equity after an execution or fieri facias thereon has been duly returned to the office of the court or to the justice from which it issued showing by the return thereon that no property could be found from which such execution could be made: Provided, That such lien may be enforced in equity without such return when an execution or fieri facias has not issued within two years from the date of the judgment. If it appears to such court that the rents and profits of the real estate subject to the lien will not satisfy the judgment in five years, the court may decree such real estate, or any part thereof, to be sold and the proceeds applied to the discharge of the judgment.

In the matter of *Jarvis v. Porterfield*, 370 S.E.2d 620, 179 W.Va. 525 (W. Va. 1988), the Court stated in Syllabus Pt. 1, that, "In order to give a circuit court jurisdiction to entertain a judgment lien creditors' suit to subject the real estate of the judgment debtor to the lien of the judgment, it must appear that an execution was first issued directed to the sheriff of the county wherein the judgment debtor resides, if a resident of this state, and that such execution was returned 'no property found'." Syllabus, *Lewis v. Fisher*, 114 W.Va. 151, 171 S.E. 106 (1933).

In the instant matter, the Circuit Court exceeded its authority and entered an order granting an injunction without sufficient evidence to support the same. However, the greater foul is that the Circuit Court granted the City authority to execute upon a judgment, a judgment not yet recorded, by authorizing the appointment of special commission to undertake the sale of the Petitioners' property in violation of the procedures outlined in *West Virginia Code* § 38-3-9.

The West Virginia Supreme Court of Appeals has previously concluded that *West Virginia Code* § 38-3-9 creates two categories of creditors suits. The first category is composed of those suits conducted within two (2) years after the date of the judgment giving rise to the creditor's lien. The second category consists of those suits conducted more than two years after the date of the judgment giving rise to the judgment lien. *Jarvis v. Porterfield*, 370 S.E.2d 620, 179 W.Va. 525 (W. Va. 1988) and *Lewis v. Fisher*, 114 W.Va. 151, 171 S.E. 106 (1933).

This matter falls within the first category of suits, as the City's municipal court judgment was granted by Order dated August 24, 2021¹, a period of less than (8) months prior to the inception of the Circuit Court action.

¹ The St. Albans Municipal Court Order is not part of the record listed in the Official Court Docket Sheet.

In regard to first category actions, this Court has uniformly indicated that those conducted less than two years after the date of the judgment giving rise to the judgment lien, the issuance and return of an execution (a fieri facias) is a condition precedent to a circuit court's obtaining jurisdiction to enforce the judgment lien. *Cooper v. Mullenax*, 126 W.Va. 256, 28 S.E.2d 426 (1943); *United States Fidelity and Guaranty Co. v. Eary*, 116 W.Va. 477, 181 S.E. 817 (1935); *Lewis v. Fisher*, 114 W.Va. 151, 171 S.E. 106 (1933).

In the single syllabus of *Lewis v. Fisher*, supra, the rule is stated as follows:

In order to give a circuit court jurisdiction to entertain a judgment lien creditors' suit to subject the real estate of the judgment debtor to the lien of the judgment, it must appear that an execution was first issued directed to the sheriff of the county wherein the judgment debtor resides, if a resident of this state, and that such execution was returned "no property found".

The *Lewis* Court further opined that, "the purpose of this rule is to require the judgment creditor first to make a bona fide effort to obtain satisfaction of his debt by proceeding legally against the judgment debtor's personalty before allowing him to resort to the more drastic equitable remedy of forcing the sale of the judgment debtor's real estate.

Secondly, the rule also intended to provide a mechanism to notify the judgment debtor within two years after entry of the judgment that his land will be sold unless he satisfies the judgment." *Jarvis v. Porterfield*, 370 S.E.2d 620, 179 W.Va. 525 (W. Va. 1988)

The Circuit Court of Kanawha County, acted upon the City's motion to execute upon a judgment that was granted in the same order, without notice to all potential creditors, without sufficient evidence to support its injunction ruling, and without statutory authority/jurisdiction to act upon the same. No evidence was adduced regarding the process for any remedies available to rectify the purported underlying fire and building code violations such that there remains the unanswered question of possible rents and profits from said property that may possibly satisfy the judgment(s) otherwise.

The paltry record herein does not show that the City obtained an execution on their judgment nor that an execution was returned "no property found" prior to filing of its' circuit court action. Under such circumstances *West Virginia Code* § 38-3-9, as interpreted in *Jarvis v. Porterfield* and *Lewis v. Fisher*, clearly indicates that the Kanawha County Circuit Court was without jurisdiction to entertain the City's creditor's suit. Moreover, it is the exhaustion of the debtor's personal estate that gives jurisdiction to proceed against his land within two years from the date of the judgment. This exhaustion of the personal estate need not be proven and in fact need not actually exist, but the statute requires a return "no property found" as a means of making a jurisdictional showing to that effect. *Hall v. McGregor*, 65 W.Va. 74, 64 S.E. 736 and *Jarvis v. Porterfield*, 370 S.E.2d 620, 179 W.Va. 525 (W. Va. 1988).

Syllabus point 3 of *Hinkle v. Bauer Lumber and Home Building Center, Inc.*, 158 W.Va. 492, 211 S.E.2d 705 (1975) provides that: "In the exercise of appellate jurisdiction, this Court will reverse a trial court which exceeds its lawful jurisdiction.". *Jarvis v. Porterfield*, 370 S.E.2d 620, 179 W.Va. 525 (W. Va. 1988).

Accordingly, it is clear that the Kanawha County Circuit Court acted without proper jurisdiction over this action, and should have dismissed the City's case from its docket.

Lastly, the Petitioners aver that no evidence was presented in support of the cease and desist/injunction order beyond the limited proffer of counsel. Accordingly, there cannot be sufficient evidence within the record to support the Court's findings and conclusion as the entirety of said order is built upon its own-condemnable house of cards.

VII. CONCLUSION

Petitioners T&C Construction Services, LLC and Theodore Miller request that this Court reverse the decision of the Kanawha County Circuit Court as being improper in that the Court lacked jurisdiction over the matter pursuant to *West Virginia* Code § 38-3-9, and that there was not sufficient evidence, rather there was no evidence, to support a cease and desist order nor any other findings. Further, that this matter be remanded with instructions to enter an order in support of their arguments, and for such other and further relief as the Supreme Court of Appeals deems appropriate herein.

Respectfully submitted,



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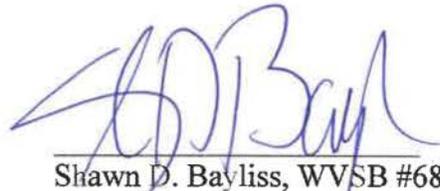
V.

**CITY OF ST. ALBANS,
Petitioner Below/Respondent.**

Certificate of Service

I, Shawn D. Bayliss, counsel for the Petitioners, hereby certify that a true and exact copy of the foregoing "Petitioners' Brief" was served upon the following counsel of record, by US Mail, postage prepaid, this 16th day of September 2022.

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