IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Case No. 24-ICA-398

ICA EFiled: Nov 23 2024
01:06AM EST
Transaction ID 75078795

U.S. BANK TRUST NATIONAL ASSOCIATION AS TRUSTEE OF LB-RANCH SERIES V TRUST

PLAINTIFF BELOW, PETITIONER,

v.

DUNCAN HOMES, LLC

DEFENDANT/THIRD-PARTY PLAINTIFF BELOW, RESPONDENT,

AND

CONRAD LEGAL CORPORATION

THIRD PARTY DEFENDANT BELOW, RESPONDENT.

ON APPEAL FROM THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

PETITIONER'S BRIEF

Counsel for Petitioner, U.S. Bank Trust National Association as Trustee of LB-Ranch Series V Trust

Lakyn Cecil, Esq. (WVSB #14121)
Samuel I. White, P.C.
5000 Coombs Farm Drive, Suite 104 Morgantown, West Virginia, 26508
(O) 304.413.0010 ext. 5303
(F) 304.413.0014
Email: Lcecil@SIWPC.com
Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ASSIGNMENTS OF ERROR

1. THE CIRCUIT COURT ERRED IN DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND FURTHER ERRED IN GRANTING RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT.

2. THE CIRCUIT COURT ERRED BY FAILING TO FIND THAT PETITIONER's PREDECESSOR WAS AN IINTERESTED PARTY ENTITLED TO DUE PROCESS IN THE FORM OF NOTICE OF THE TAX SALE AND OF ITS RIGHT TO REDEEM THE PROPERTY.

3. THE CIRCUIT COURT ERRED BY FINDING THAT RESPONDENT DUNCAN HOMES, LLC SATISFIED THE STATUTORY AND CONSTITUTIONAL REQUIREMENTS AS A TAX SALE PURCHASER.

4. THE CIRCUIT COURT ERRED BY PERMITTING THE INTRODUCTION OF PREJUDICIAL EVIDENCE NOT PRODUCED DURING THE DISCOVERY PERIOD.

INTRODUCTORY NOTE

The Plaintiff Petitioner U.S. Bank Trust National Association, as Trustee of LB-Ranch Series V Trust will be referred to as "Petitioner"; the Defendant/Third-Party Plaintiff Respondent Duncan Homes, LLC, will be referred to as "Respondent Duncan Homes"; the Third-Party Defendant Respondent Conrad Legal Corporation, will be referred to as "Respondent Conrad Legal"; the Office of the Clerk of the County Commission of Berkeley County will be referred to as "the Clerk"; Judge Bridgett Cohee, Judge of the Circuit Court of Berkeley County, will be referred to as "the Circuit Court". References to the Appendix Record—the contents of which were agreed to by the parties—are set forth as "A.R. Vol. ___, p. __."

STATEMENT OF THE CASE

i. FACTS

Richard S. Palmer is the original record owner of Real Property located at 264 Dale Earnhardt Lane, Martinsburg, Berkeley County, West Virginia and legally described as: LT 1A

OR .99 AC KETTERING SD OPEQUON DISTRICT (hereinafter referred to as "the Property").[1] A.R. Vol. 1, p. 11, ¶4.

On June 21, 2000, Richard S. Palmer conveyed the Property to Trustee John Wentz in that certain Deed of Trust recorded on June 28, 2000, in the Office of the Clerk of the County Commission of Berkeley County, West Virginia as Instrument No. 2000014556, in Book 881, at Page 404 (the "Deed of Trust."). A.R. Vol. 1, p. 11. Associates Financial Services of America, Inc. was the original Beneficiary under the Deed of Trust ("Associates Financial"). A.R. Vol. 1, p. 18, ¶5.

On November 14, 2012, RAI Custodian WV TL ("RAI") purchased the Property at a tax sale (the "2012 Tax Sale"). A.R. Vol. 1, p. 239, ¶10. The redemption notice was *attempted* via mail, to only one single address, upon Associates Financial, who was still the beneficiary of the Deed of Trust at the time of the 2012 Tax Sale. A.R. Vol. 1, p. 273-280. However, the notice was returned to the sender. Notice was not attempted again via mail, or to any other mailing address.

After the 2012 Tax Sale, RAI assigned its interest in and to the tax certificate unto American Pride Properties, by Assignment recorded on March 27, 2014, in Book No. 1065, at Page 300. A.R. Vol. 2, p. 443. The State Auditor, G. Russell Rollyson, Jr., failed to recognize the recorded assignment and erroneously issued a deed to RAI. A.R. Vol. 1, p. 282. To correct the erroneous tax sale deed, RAI recorded a Quitclaim Deed re-conveying all interest unto American Pride Properties. A.R. Vol. 2, p. 444-445. Shortly thereafter, on May 20, 2015, American Pride Properties intentionally quitclaimed all its right and interest in the Property back to the original

[1] Richard Palmer is also the record owner of multiple different parcels of property in the Martinsburg, West Virginia area including a parcel located at 209 Dale Earnhardt Lane, Martinsburg, West Virginia. It is believed that the County has been applying tax payments, made by the Petitioner and its predecessors in title, to the property located at 209 Dale Earnhardt Lane for many years.

record owner Richard S. Palmer.[2] A.R. Vol. 2, p. 446. This Quitclaim Deed was presumably lost in the mail, as it was never recorded. *Id.* Accordingly, on July 14, 2016, American Pride Properties once again quitclaimed its right and interest to the Property unto Richard S. Palmer effectively permitting him to redeem the Property subsequent to the original redemption period for $12,200.00, an amount almost identical to the redemption cost plus the taxes paid since with interest.[3] *Id.* This Quitclaim Deed,[4] which is recorded with the Clerk in Book No. 1145, at Page 19, effectively rescinded the 2012 Tax Sale and subsequent Tax Sale Deed, and effectively reinstated the Deed of Trust as a first-lien Deed of Trust. *Id.*

On September 22, 2016, Associates First Capital Corporation, a Delaware Corporation, Successor by Merger to Associates Financial Services of America, Inc., a West Virginia Corporation assigned the Deed of Trust unto CitiFinancial Inc. d/b/a CitiFinancial Inc. (WV) a West Virginia Corporation by Assignment of Deed of Trust recorded on October 4, 2016, with the Clerk as Instrument No. 20160035185 in Book 1150, at Page 23. A.R. Vol. 1, p. 20.

Thereafter, on September 22, 2016, CitiFinancial Inc. assigned the Deed of Trust unto Bayview Loan Servicing, LLC by Assignment of Deed of Trust recorded on October 4, 2016, as Instrument No. 20160035189 in Book 1150, at Page 24.[5] At all relevant times, Bayview was an interested party of record. A.R. Vol. 1, p. 21.

---

[2] It appears that American Pride Properties has repeatedly purchased property at a tax sale and subsequently conveyed it back to the delinquent taxpayer.

[3] The assessed value of the Property at the time was $73,800.00.

[4] Quitclaim Deeds are typically used to clear property title disputes, *i.e.* where there may have been insufficient notice of an interested parties' right to redeem and the tax sale Purchaser's title may be in dispute. Instead of going through the Court system and wasting judicial resources, it appears that the Parties here chose to Quitclaim all of its interest back to the original landowner.

[5] On July 14, 2022, Community Loan Servicing, LLC f/k/a Bayview Loan Servicing, LLC assigned the Deed of Trust unto Nationstar Mortgage LLC. On April 5, 2023 Nationstar Mortgage LLC thereafter assigned the Deed of Trust unto U.S. Bank Trust National Association, as Trustee of LB-Tiki Series V Trust who subsequently assigned the Deed of Trust to Plaintiff, U.S. Bank Trust National Association as Trustee of LB-Ranch Series V Trust on April 19, 2023. U.S. Bank Trust National Association as Trustee of LB-Ranch Series V Trust is the current Party-Plaintiff. (Order Granting Motion to Substitute-Plaintiff).

Between 2016 and 2019, taxes on the Property were not paid and became delinquent. On August 29, 2019, the Property was sold at a tax sale to Duncan Homes by G. Russell Rollyson, Jr., the Commissioner of Delinquent and Nonentered Lands of Berkeley County, West Virginia, for the aforementioned delinquent taxes.

Thereafter, Duncan Homes provided the Auditor with the following interested parties to serve notice to redeem upon: (1) Richard S. Palmer or Occupant; (2) Richard S. Palmer; (3) Associates Financial Services of America, Inc.; and (4) Berkeley County Emergency Ambulance Authority. A.R. Vol. 1, pp. 23-24.

Duncan Homes did not provide the Auditor with the following interested party to serve notice to redeem upon: Bayview Loan Servicing, LLC, an interested party of record at all relevant times. A.R. Vol. 1, pp. 23-24. Accordingly, Bayview did not receive the required notice of the tax sale and of its right to redeem the property, which it was entitled to.

The Tax Sale Deed, dated February 27, 2020, in which G. Russell Rollyson, Jr. conveyed the Property to Respondent Duncan Homes, was recorded on May 15, 2020, as Instrument No. 202000013370, in Book 1286, at Page 275. A.R. Vol. 1, p. 17.

Petitioner contends that Respondent Duncan Homes failed to give Bayview Loan Servicing, LLC, a secured lienholder of record at the time of the relevant tax sale, or any of its successors in interest, the statutory required notice of the relevant tax sale and of Bayview's right to redeem the subject property, and thus, it had been deprived of due process. A.R. Vol. 1, p. 10.

ii. NATURE OF THE CASE AND MATERIAL PROCEEDINGS

On January 13, 2023, Petitioner filed a Complaint in the Circuit Court of Berkeley County, West Virginia, seeking declaratory and injunctive relief, specifically that the tax sale occurring on August 29, 2019 be rescinded and the resulting tax sale deed be declared void. A.R. Vol. 1, p. 10.

Duncan Homes, LLC, filed its Answer/Counterclaim on February 17, 2023, to which Petitioner timely filed its Motion to Dismiss. In its Counterclaim, Duncan asserted that it is the fee simple owner of the subject property pursuant to the tax sale deed recorded in the Office of the County Clerk. A.R. Vol. 1, p. 126, ¶2. Duncan amended its Answer and Counterclaim on September 28, 2023, to simply assert a Third-Party Complaint against Respondent Conrad Legal, to which Petitioner timely filed its renewed Motion to Dismiss. A.R. Vol. 1, pp. 164, 199. Respondent Conrad Legal filed its Answer to Respondent Duncan Homes' Third-Party Complaint with this Court on October 30, 2023. A.R. Vol. 1, p. 211.

The Circuit Court ordered the Parties to fully brief the issues presented in Petitioner's Motion to Dismiss Respondent Duncan Homes' Counterclaim by October 31, 2023 and heard oral arguments on December 21, 2023. A.R. Vol. 1, p. 208. The Court advised that the Motion to Dismiss would be better served as a Motion for Summary Judgment after the close of Discovery and advised Respondent Duncan Homes to file an Order with the Court. No Order was ever filed. A.R. Vol. 1, p. 1. Petitioner filed its protective Answer to Respondent Duncan Homes' Amended Counterclaim on January 19, 2024. Neither Respondent initiated or engaged in further Discovery.

The amended discovery period closed on March 22, 2024. A.R. Vol. 1, p. 197. At the close of discovery, the pleadings, answers to interrogatories, production of documentation, admissions on file, alleged defenses, and arguments heard by the Parties, indubitably showed that there existed "no genuine issue as to any material fact," that Bayview was a reasonably identifiable, interested party of public record entitled to notice of the tax sale and of its right to redeem, and that Duncan failed to uphold its statutory requirements as a Tax Sale purchaser.

After the close of Discovery, the parties filed their cross motions for summary judgment. In their Motions, Respondents prejudicially alleged that Petitioner's interest in the Property was

extinguished by a prior tax sale. Respondents never disclosed or presented this theory, or evidence of the prior tax sale, in Discovery. A.R. Vol. 1, pp. 1-9. Petitioner filed its Motion in Limine to exclude the evidence as prejudicial, the disclosure of which created a genuine issue of material fact and deprived Petitioner of its ability to utilize the discovery period to vitiate any contradictory claims. A.R. Vol. 2, p. 559. The admission of this prejudicial evidence and theory is a violation of the purpose, letter, and spirit of Discovery.

On May 17, 2024, the Circuit Court considered oral arguments from all parties on their cross motions for summary judgment only. The Court set an additional hearing date for May 30, 2024, to hear oral argument on the outstanding Motions in Limine. At the May 30 hearing, however, the Circuit Court did not hear argument on the Motions in Limine, but instead advised the Parties that it would be denying Petitioner's Motion for Summary Judgment. The Circuit Court did not consider nor permit oral argument on Petitioner's Motions in Limine and Motions to Strike, nor did the Court make a ruling on the aforementioned Motions.

On August 23, 2024, the Circuit Court entered an Order granting Respondent Conrad Legal's Motion for Summary Judgment, granting Respondent Duncan Homes' Motion for Summary Judgment on its Counterclaim, and denying Petitioner's Motion for Summary Judgment. Counsel for Petitioner endorsed with objection and it is from that Order that the Petitioner now appeals. A.R. Vol. 2, p. 650.

SUMMARY OF ARGUMENT

Despite undisputed facts showing that the Respondent Duncan Homes failed to uphold its statutory and constitutional duties as a tax sale purchaser to provide notice to Petitioner's predecessor in title, an interested party of record, at all relevant times, entitled to notice of the tax sale and of its right to redeem, and that no genuine issue of material fact existed at the close of the

extensive discovery period, the Circuit Court improperly denied Petitioner's motion for summary judgment.

The Circuit Court further abused its discretionary powers regarding admissibility of evidence by permitting Respondents to introduce incurable and highly prejudicial evidence after the close of a 15-month discovery period, despite Petitioner's opposition, which clearly created a genuine issue of material fact and deprived Petitioner of its ability to utilize the discovery period to vitiate any contradictory claims.

The Circuit Court ultimately entered an Order which granted summary judgment to the Respondents erroneously and irrespective of the clear genuine issues of material fact that remained unresolved due to the Circuit Court permitting the introduction of highly prejudicial evidence not disclosed in discovery.

It is from this Order that Petitioner now appeals.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

STANDARD OF REVIEW

Petitioner requests this Court to review an order from the Berkeley County Circuit Court granting summary judgment to Respondents. It is well established that a Circuit Court's entry of summary judgment is reviewed de novo. *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755, Syl. Pt. 1 (1994).

Additionally, the standard of review this Court will use when reviewing the motion for summary judgment is the same standard used by the trial court. "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry

concerning the facts is not desirable to clarify the application of the law." *Williams v. Precision* Coil, Inc., 194 W. Va. 52, 59, 459 S.E.2d 329, 336 (1995). "The Circuit Court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." *Peavy*, 192 W. Va. 189, 451 S.E.2d 755, Syl. Pt. 3 (1994).

Petitioner further requests this Court to review the Circuit Court's decision regarding the admission of prejudicial evidence. "Decisions regarding the admission and exclusion of evidence" will be reviewed under an abuse of discretion standard. *McDougal v. McCammon*, 193 W. Va. 229, 235, 455 S.E.2d 794 (1995).

ARGUMENT

There are a multitude of complex issues presented in this case. The main issue presented to this Court, however, is whether the Circuit Court erred in denying the Petitioner's motion for summary judgment and further erred in granting the Defendant/Third-Party Plaintiff Respondent and Third-Party Defendant Respondents' motions for summary judgment.

The purchaser of property at a tax sale is required to prepare a list of all interested parties of record who could be reasonably identified from public records to be served with notice of the tax sale and of their right to redeem the property. W. Va. Code §§11A-3-19; 11A-3-52 (2020).[6] The West Virginia Legislature enacted specific statutory provisions providing interested parties with a statutory, equitable remedy where a purchaser at a tax sale fails to uphold its statutory duty to provide interested parties with the required notice.

> If any person entitled to be notified under the provisions of section twenty-two [§11A-3-22] or fifty-five [§11A-3-55], article three of this chapter is not served with the notice as therein required, and does not have actual

[6] The burden is exclusively upon the tax sale purchaser to show that it complied with the statutory requirements. *Archuleta v. US Liens, LLC*, 240 W. Va. 519, 525, 813 S.E.2d 761 (2018); *Mason*, 233 W. Va. 673, 680, 760 S.E.2d 487 (2014); *Rebuild Am., Inc. v. Davis*, 229 W. Va. 86, 94, 726 S.E.2d 329 (2012).

> knowledge that such notice has been given to others in time to protect his interests by redeeming the property, he, his heirs and assigns, may, before the expiration of three years following the delivery of the deed, institute a civil action to set aside the deed.

(W.Va. Code §11A-4-4 (2020)).

Petitioner, an identifiable interested party of record entitled to notice of the Tax Sale and of its right to redeem was not provided with the requisite notice. Accordingly, as Petitioner's rights were expressly saved by the provisions of West Virginia Code Section 11A-4-4, Petitioner initiated its civil action to set aside the Tax Sale Deed before the expiration of three years following the delivery of the Tax Sale Deed.

I. THE CIRCUIT COURT ERRED IN DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND FURTHER ERRED IN GRANTING RESPONDENTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT.

At the summary judgment stage in the case *sub judice*, the Circuit Court's only obligation was to determine whether a genuine issue of material fact existed for trial. *Peavy*, 192 W. Va. 189, 451 S.E.2d 755, Syl. Pt. 3 (1994).

A. The Circuit Court erred in Denying Petitioner's Motion for Summary Judgment because at the close of discovery, there existed no genuine issue of fact to be tried and summary judgment in favor of the Petitioner was proper.

At the close of a 15-month long discovery period, it was undisputed that Respondents produced absolutely no evidence at all which would contradict the allegations set forth in Petitioner's Complaint and the relief sought therein. More specifically, it was undisputed that: (1) Respondent Duncan Homes was the purchaser of the Property legally described as LT 1A OR .99 AC KETTERING SD OPEQUON DISTRICT at a 2019 tax sale; (2) as the purchaser of a property sold at a tax sale, Respondent Duncan Homes was required to prepare a list of all interested parties of record who could be reasonably identified from public records to be served with notice of the Tax Sale and of their right to redeem the Property; (3) Petitioner's predecessor, Bayview, was a

reasonably identifiable interested party of record; and (4) Respondent Duncan Homes failed to provide Petitioner's predecessor notice of the Tax Sale and of its right to redeem the Property. At the close of discovery, it was clear that there existed no genuine issue of fact to be tried and summary judgment in favor of the Petitioner was proper. Accordingly, Petitioner filed its motion for summary judgment, which the Circuit Court denied, and to which Petitioner now appeals.

B. The Circuit Court erred in Granting Respondents' Cross-Motions for Summary Judgment because Permitting the Disclosure of Prejudicial Evidence After the Close of Discovery Introduced Genuuine Issues of Material Fact for Trial.

"A trial by ambush is not contemplated by the Rules of Civil Procedure," and it is very clear that "[t]he fairness and integrity of the fact-finding process is of great concern to this Court." *McDougal v. McCammon*, 193 W. Va. 229, 236, 455 S.E.2d 788 (1995).

Throughout the entire course of case development and the 15-month discovery period, Respondents not only failed to participate in good faith in discovery, but further failed to produce any evidence, or defenses, which would dispute the allegations set forth in Petitioner's Complaint.

Prejudicially, Respondents presented documents of a prior 2012 tax sale at the pre-trial stage of the case, well *after* the close of the 15-month discovery period, a period which was extended once by the Court.[7] This disclosure of prejudicial documents and defenses clearly created a genuine issue of material fact and deprived Petitioner of its ability to utilize the discovery period to vitiate any contradictory claims and was a violation of the purpose, letter, and spirit of Discovery, was clearly prejudicial to Petitioner, and was sanctionable. Despite Petitioner's objections and motions in opposition to the introduction of this prejudicial evidence at such a late stage in the case, the Circuit Court permitted the documents and defenses to come in.

[7] It should further be noted that in the Motion to Dismiss stage of this case, Respondent Duncan Homes specifically requested that the Circuit Court permit it to engage in further discovery, but ultimately failed to engage in any further discovery included supplementing its original responses.

The Circuit Court erred in granting the Respondents' cross-motions for summary judgment because it is clear that the introduction of the prejudicial evidence created genuine issues of material fact: (1) was the Petitioner's predecessor in title, Bayview, an interested party entitled to due process in the form of notice of the tax sale and of its right to redeem?; (2) did Respondent Duncan Homes comply with due process notice requirements and the requirements of West Virginia Code Sections 11A-3-1, *et seq*.?

II. THE CIRCUIT COURT ERRED BY FAILING TO FIND THAT THE PETITIONER'S PREDECESSOR WAS AN INTERESTED PARTY ENTITLED TO DUE PROCESS IN THE FORM OF NOTICE OF THE TAX SALE AND OF ITS RIGHT TO REDEEM THE PROPERTY.

A. The June 21, 2000 Deed of Trust is a valid, secured Deed of Trust on the Property.

"A deed of trust is a deed that conveys title to real property in trust as security until the [trustor] repays the loan," *i.e*. the trustor agrees to pledge the property as collateral for the loan until the loan is paid off. *Arnold v. Palmer*, 224 W. Va. 495, 501, 686 S.E.2d 725 (2009). It remains undisputed that: (1) Richard S. Palmer pledged the Property as collateral in the June 21, 2000 Deed of Trust in exchange for funds in the sizeable monetary amount of $78,946.78, which he accepted and was enriched with; (2) the Deed of Trust was recorded on June 28, 2000; (4) Associates Financial was the original Beneficiary of the Deed of Trust; (5) at the time of the 2019 Tax Sale, the Beneficiary of record was Bayview; (6) Richard S. Palmer continued making payments pursuant to the Deed of Trust; and (7) Richard S. Palmer reconfirmed his obligations under the Deed of Trust by entering into a Loan Modification on March 1, 2020 with the beneficiary of record at the time, Bayview.

B. The 2012 Tax Sale did not Extinguish Petitioner's Secured Deed of Trust.[8]

On or around November 14, 2012, RAI Custodian WV TL ("RAI") purchased the Property at a tax sale (the "2012 Tax Sale"). A.R. Vol. 1, p. 239. ¶10. The redemption notice was *attempted* via mail, to only one single address, upon Associates Financial Services, Inc., beneficiary of the June 21, 2000 Deed of Trust at the time of the Tax Sale. A.R. Vol. 1, pp. 273-280. However, the notice was returned to the sender. Notice was not attempted again via mail, or to any other mailing address, despite the specific statutory provision advising that notice served by publication should only be used if the person cannot be discovered by due diligence on the part of the purchaser.[9] W. Va. Code §11A-3-22 (2014).

After the 2012 Tax Sale, RAI assigned its interest in and to the tax certificate unto American Pride Properties, by Assignment recorded on March 27, 2014, in Book No. 1065, at Page 300. A.R. Vol. 2, p. 443. The State Auditor, G. Russell Rollyson, Jr., failed to recognize the recorded assignment and erroneously issued a deed to RAI. A.R. Vol. 1, p. 282. To correct the erroneous tax sale deed, RAI recorded a Quitclaim Deed re-conveying all interest unto American Pride Properties. A.R. Vol. 2, pp. 444-445. Shortly thereafter, on May 20, 2015, American Pride Properties intentionally quitclaimed all its right and interest in the Property back to the original record owner Richard S. Palmer.[10] A.R. Vol. 2, p. 446. This Quitclaim Deed was presumably lost in the mail, as it was never recorded. *Id.* Accordingly, on July 14, 2016, American Pride Properties

---

[8] Petitioner would like the Court to note that due to the Circuit Court permitting the introduction of prejudicial evidence in regard to the alleged 2012 tax sale after the discovery period closed, Petitioner had no time to vitiate the contradictory claims through discovery, add potential expert witnesses, add potential third-party defendants, and ultimately had no time or opportunity to cure the prejudice.

[9] Associates Financial Services, as an interested party of record, had until approximately June 30, 2017, to institute a civil action to set aside the deed for lack of proper notice of its right to redeem. However, Associates Financial Services' need to institute said civil action to protect its interest was rendered moot, as the Borrower essentially redeemed the Property via Quitclaim Deed, almost immediately after the tax sale, and continued making payments pursuant to the Deed of Trust up to and until his loan modification and default in 2020.

[10] It appears that American Pride Properties has repeatedly purchased property at a tax sale and subsequently conveyed it back to the delinquent taxpayer.

once again quitclaimed its right and interest to the Property unto Richard S. Palmer effectively permitting him to redeem the Property subsequent to the original redemption period for $12,200.00, an amount almost identical to the redemption cost plus the taxes paid since with interest.[11] *Id.* This Quitclaim Deed,[12] which is recorded with the Clerk of the County Commission of Berkeley County in Book No. 1145, at Page 19, effectively rescinded the 2012 Tax Sale and subsequent Tax Sale Deed, and effectively reinstating the Deed of Trust as a first-lien Deed of Trust. *Id.*

The re-conveyance of the Property back to the original owner and delinquent taxpayer, Richard S. Palmer, effectively rendered the 2012 Tax Sale, and any legal claims disputing the validity of the 2012 Tax Sale which Associates Financial Services, Inc. would have had pursuant to West Virginia Code Section 11-A-4-1, *et seq*., moot and unnecessary. [13]

Furthermore, Richard S. Palmer never stopped making payments on the Deed of Trust. In fact, he entered into a Loan Modification Agreement dated March 1, 2020, with Bayview Loan Servicing, LLC, the beneficiary of record at the time, modifying the principal balance, interest rate, and monthly payment terms of the June 21, 2000, and *re-confirming* the original, valid Deed of Trust. A.R. Vol. 2, p. 448. Pursuant to the language and terms of the Loan Modification, all

[11] The assessed value of the Property at the time was $73,800.00.
[12] Quitclaim Deeds are typically used to clear property title disputes, *i.e.* where there may have been insufficient notice of an interested parties' right to redeem and the tax sale Purchaser's title may be in dispute. Instead of going through the Court system and wasting judicial resources, it appears that the Parties here chose to Quitclaim all of its interest back to the original landowner.
[13] The West Virginia Legislature did not intend for delinquent landowners and tax sale purchasers to utilize the delineated provisions of Chapter 11A to schematically purchase a delinquent property in order to eliminate any liens on title and subsequently re-convey all rights and interest in the Property back to the delinquent landowner, rendering an interested parties' claim pursuant to W. Va. Code §11-A-4-1, *et seq*., moot. The Legislatures' sole purpose and intent in enacting Chapter 11A was to balance transferring delinquent lands to those more responsible while still protecting an interested parties' due process rights. Additionally, West Virginia Courts have made it clear that one party shall not be enriched at the expense of another, restoring Deeds of Trusts and creating equitable liens and mortgages where fairness requires.

other covenants, agreements, stipulations, and conditions of the Deed of Trust remain unmodified and in full force and effect.

C. At all relevant times, Petitioner's predecessor Bayview Loan Servicing was an identifiable party with an interest in the Property.

The West Virginia Supreme Court has recognized that persons entitled to notice to redeem pursuant to W. Va. Code §11A-3-19(a)(1) are "those persons who are permitted to redeem the real property subject to a . . . lien" which includes any "person who was entitled to pay the taxes thereon." *Rollyson v. Jordan*, 205 W. Va. 368, 374-75, 518 S.E.2d 372 (July 9, 1999).

Petitioner, and its predecessors in title, were identifiable parties of record entitled to pay the taxes on the subject property at all relevant times, and thus, identifiable parties with an interest in the property.[14] Accordingly, due process, and West Virginia statutory law, requires that Bayview, its successors and assigns, be provided with notice of the tax sale and of its right to redeem. *Archuleta v. US Liens, LLC*, 240 W.V. 519, 521, 813 S.E.2d 761 (2018) (citing *Lilly v. Duke*, 180 W. Va. 228, 376 S.E.2d 122 (Nov. 29, 1988)); W.Va. Code §11A-3-1, *et seq*. (2020).

Respondent Duncan Homes even confirmed in its Pleadings that at all relevant times, Bayview was an interested party of record, and therefore the Deed of Trust is valid, in its Answer and Amended Answer.[15] A.R. Vol. 1, pp. 121, 164, 237. Respondent Duncan Homes even went as far as to file an Amended Answer with the Circuit Court asserting a Third-Party Complaint against Respondent Conrad Legal, alleging that it "breached the parties' contract by failing to fully and

---

[14] Petitioner would like this Court to take notice that although Petitioner has not had a proper opportunity to vitiate any contradictor claims prejudicially permitted to be introduced after the close of discovery, public tax records and Petitioner's payment history reflects that Petitioner and its predecessors in title were in fact paying taxes on the Property to the Tax Office. It appears that the tax office was applying these payments to the wrong property. Instead of being applied to the Property at issue here, which is encumbered by the Deed of Trust, the tax office has been applying the payments to a different property owned by Richard S. Palmer.

[15] "Averments in a pleading to which a responsive pleading is required . . . are admitted when not denied in the responsive pleading." W. Va. R. Civ. Pro R. 8(d).

properly perform all of the legal services required by the parties' Contract," and that it has been "directly and proximately damaged as a result of the [third-party's] breach of the parties' Contract." A.R. Vol. 1, p. 171. Additionally, Notice to Redeem the Property pursuant to the 2019 Tax Sale was served upon the original Beneficiary of the Deed of Trust, Associates Financial. Accordingly, since it is the parties' intention and belief that the original Beneficiary was entitled to notice to redeem the Property and is considered an interested party of record, then it clearly follows that Associate Financial's heirs and assigns, specifically Bayview Loan Servicing, are interested parties also entitled to notice of the Tax Sale and of its right to redeem.

Furthermore, Petitioner specifically requested the factual basis upon which Respondent Duncan Homes relied upon to support its contention that it followed all proper procedures, and additionally requested all documents supporting Respondent Duncan Homes' asserted affirmative defenses and Counterclaim. Despite Petitioner's repeated requests over the course of an extensive discovery period, Respondent Duncan Homes failed to provide any factual basis or evidence that contradicted the validity of the Deed of Trust and of Bayview's interest. A.R. Vol. 2, pp. 389-398.

III. THE CIRCUIT COURT ERRED BY FINDING THAT RESPONDENT DUNCAN HOMES, LLC SATISFIED ITS CONSTITUTIONAL AND STATUTORY REQUIREMENTS AS A TAX SALE PURCHASER.

The decisions of our courts have made it clear that there are recognized constitutional due process notice requirements for identifiable parties having an interest in property subject to delinquent tax sales. "Where a party having an interest in the property can be reasonably identified from public records or otherwise, due process requires that such party be provided notice by mail

or other means as certain to ensure notice." *Archuleta v. U.S. Liens, LLC*, 240 W. Va. 519, 521 (citing *Lilly v. Duke*, 180 W. Va. 228, 376 S.E.2d 122 (1988)).[16]

Furthermore, the West Virginia Legislature explicitly "carved out detailed statutes that regulate every aspect of the sale of real property for delinquent taxes and the redemption of such property" and enumerated the importance of protecting parties' interests in real property. W. Va. Code § 11A-3-1, *et seq*. (2020). Specifically, the Legislature sought to ensure that property owners, lienholders, and other interested parties would be provided adequate notice of their right to redeem delinquent property. W.Va. Code §§11A-3-19; 11A-3-52 (2020).

As the purchaser of the Property, and pursuant to the aforementioned specific statutory provisions enacted by the Legislature and constitutional due process notice requirements, Respondent Duncan Homes was required to, at the very least, exercise reasonably diligent efforts by performing a title examination to identify all parties of record that have an interest in the Property and prepare a list of those interested parties of record to be served with notice of the Tax Sale and of their right to redeem the Property. In this case, Petitioner's predecessor was a reasonably identifiable party of record with an interest in the Property. It is undisputed that Respondent Duncan Homes failed to list Petitioner's predecessor as an interested party of record and failed to provide Petitioner's predecessor with proper notice of the Tax Sale and of its right to redeem.

Accordingly, Duncan Homes indubitably failed to uphold its statutory and constitutional requirements as a tax sale purchaser and thus must lose all benefits of its purchase, and the Tax Sale Deed should be set aside.

---

[16] *Mennonite Bd. Of Missions v. Adams*, 462 U.S. 791, 800, 103 S. Ct. 2706 (1983); *Anderson v. Jackson*, 180 W. Va. 194, 375 S.E.2d 827 (1988); *Wells Fargo Bank, N.A. v. Up Ventures II, LLC*, 223 W.Va. 407, 411, 675 S.E.2d 883 (2009); *Mason v. Smith*, 233 W. Va. 673, 760 S.E.2d 487 (2014).

IV. THE CIRCUIT COURT ERRED BY PERMITTING THE INTRODUCTION OF PREJUDICIAL EVIDENCE NOT PRODUCED DURING THE DISCOVERY PERIOD.

While the West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure "allocate significant discretion to the trial court in making evidentiary and procedural ruling[s,]" evidence not produced during discovery should be excluded when "the danger of unfair prejudice, confusion, or undue delay is disproportionate to the value of the evidence." *Graham v. Wallace*, 214 W. Va. 178, 183, 588 S.E.2d 167 (2003); *State v. Derr*, 192 W. Va. 165, 178, 451 S.E.2d 731, 744 (1994) (citing *State v. Dillon*, 191 W. Va. 648, 447 S.E.2d 583, 596 (1994)); W. Va. R. Evid. 403. Where evidence is both incurable and highly prejudicial, its admission can amount to harmful error and should be reversed. *Wallace*, 214 W. Va. at 172.Thus, it follows that the Circuit Court had inherent authority to and abused its discretion by not granting Plaintiff's *Motion in Limine* to exclude all evidence not previously produced in Discovery as unduly prejudicial.

A. The Respondents violated the West Virginia Rules of Civil Procedure and the Accompanying Circuit Court Deadlines.

The West Virginia Rules of Civil Procedure and accompanying Circuit Court deadlines impose upon Respondents the obligation of producing all evidence it intended to introduce at trial against the Petitioner and to supplement its prior discovery responses. W. Va. R. Civ. P. 26(e). The Circuit Court specifically delineated the discovery period, and amended it, to which Respondents clearly and prejudicially disregarded, violating "both the letter and spirit of one of the most important discovery rules." *McCammon*, 193 W. Va. at 236.

Throughout the entire course of discovery, however, Respondents failed to participate in good faith and brought forth absolutely no evidence or defenses which would contradict the allegations set forth in Petitioner's Complaint and the relief sought therein. Respondent Duncan Homes further failed in its obligation to supplement its discovery responses in good faith.

B. The Respondents Introduction of Evidence after the Close of Discovery was very Clearly Unduly Prejudicial to Petitioner and Violated the Purpose of Discovery.

The entire purpose of Discovery is to eliminate surprise and provide parties with the ability to confront prejudicial evidence before it comes to the attention of the trier of fact, *i.e* the ability to pursue discovery to vitiate any contradictory claims or evidence. *McCammon*, 193 W. Va. at 236 (1995). Facts the Court should consider in determining whether the evidence should be excluded include: "(1) the prejudice or surprise in fact of the party against whom the evidence is to be admitted; (2) the ability of the party to cure the prejudice; (3) the bad faith or willfulness of the party who failed to supplement discovery requests; and (4) the practical importance of the evidence excluded." *Wallace*, 214 W. Va. at 172.

It is undisputed that the documents and defenses pertaining to the 2012 Tax Sale were not properly disclosed by the Respondents in the extensive discovery period, and instead were used as an ambush technique against Petitioner. These documents and defenses are very clearly prejudicial to Petitioner and to Petitioner's Complaint and request for relief, particularly with the Circuit Court granting Respondents' Cross-Motions for Summary Judgment based solely upon the severely delayed introduction of said documents and defenses.

Petitioner was not only deprived of its ability to utilize the discovery period to vitiate any contradictory claims, because up until approximately a month before trial, none existed, but was further deprived of any ability to cure the aforementioned prejudice by the Circuit Court's disregard of Petitioner's opposition and motions in limine and of its granting of Respondents' Cross-Motions for Summary Judgment. The Circuit Court, at the very least, should have re-opened the discovery period to permit the Petitioner to engage in further discovery to properly, fairly, and efficiently vitiate their claims before the Court and address alternative theories of lien validity.

Petitioner worked relentlessly and spent an extraordinary amount of time, money, and effort preparing its case for Trial and responsively participated throughout the entirety of this case in good faith and in accordance with the Court's Scheduling Order and Amended Scheduling Order. The same cannot be said for Respondents. Petitioner has and continues to suffer extensively at the hands of the Respondents, particularly with their ambush of prejudicial evidence.

CONCLUSION

The Petitioner prays that this Court find that the Circuit Court of Berkeley County erred in granting Defendant/Third-Party Plaintiff Respondent Duncan Homes, LLC and Third-Party Defendant Respondent Conrad Legal Corporation's motions for summary judgment; that this Court reverse the Circuit Court of Berkeley County's admission of prejudicial evidence not disclosed during discovery; reverse the Circuit Court of Berkeley County's order granting summary judgment entered August 23, 2024; order the Circuit Court to enter judgment in favor of Petitioner; or alternatively reamand this matter for further discovery and proceedings.

Respectfully submitted,

U.S. Bank Trust National Association,
as Trustee of LB-Ranch Series V Trust,
Petitioner, by Counsel

/s/ Lakyn D. Cecil
Lakyn D. Cecil, Esquire (WV Bar #14121)
Counsel of Record for Petitioner

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Case No. 24-ICA-398

U.S. BANK TRUST NATIONAL ASSOCIATION AS TRUSTEE OF LB-RANCH SERIES V TRUST

PLAINTIFF BELOW, PETITIONER,

V.

DUNCAN HOMES, LLC

DEFENDANT/THIRD-PARTY PLAINTIFF BELOW, RESPONDENT,

AND

CONRAD LEGAL CORPORATION

THIRD PARTY DEFENDANT BELOW, RESPONDENT.

CERTIFICATE OF SERVICE

I, the undersigned, counsel for U.S. Bank Trust National Association as Trustee of LB-Ranch Series V Trust, hereby certify that on this 23rd day of November, 2024, I caused a true and accurate copy of the foregoing **Petitioner's Brief** to be served on counsel of record via File and Serve Xpress, which will provide notice of the same to the following parties:

Eric S. Black, Esq. (WWSB #7567)
380 South Washington Street
Berkeley Springs, West Virginia 25411
Counsel for Respondent Duncan Homes, LLC

J. Peter Glaws, IV (WVSB #13401)
Carr Maloney, P.C.
2000 Pennsylvania Avenue, N.W.
Suite 8001
Washington, DC 20006
Counsel for Respondent
Conrad Legal Corporation

/s/ Lakyn D. Cecil
Lakyn D. Cecil, Esquire (WV Bar #14121)