

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

**ICA EFiled: Dec 23 2024
04:48PM EST
Transaction ID 75300401**

**U.S. BANK TRUST NATIONAL ASSOCIATION
AS TRUSTEE OF LB-RANCH SERIES V TRUST,
Petitioner Below, Petitioner,**

vs.) No. 24-ICA-398

**(Appealed from the Circuit
Court of Berkeley County
Civil Action No. 23-C-15)**

**DUNCAN HOMES, LLC,
Defendant Below, Respondent,**

**CONRAD LEGAL CORPORATION,
Third Party Defendant Below, Respondent.**

RESPONDENT DUNCAN HOMES, LLC'S BRIEF

Eric S. Black, Esquire
West Virginia State Bar #7567
380 South Washington Street
Berkeley Springs, West Virginia 25411
(304) 258-2931
esblegal@frontier.com

Counsel for Respondent
Duncan Homes, LLC

TABLE OF CONTENTS

I. Introduction.....4

II. Statement of the Case.....4

III. Summary of the Argument.....6

IV. Statement Regarding Oral Argument and Decision.....7

V. Standard of Review.....7

VI. Argument.....8

VII. Conclusion and Relief Requested.....12

TABLE OF AUTHORITIES

CASES	Page
<i>Angelucci v. Fairmont General Hosp., Inc.</i> , 217 W.Va. 364, 618 S.E.2d 373 (2005).....	8
<i>Painter v. Peavy</i> , 192 W.Va. 189, 451 S.E.2d 755 (1994).....	8
<i>Summers v. Kanawha County</i> , 26 W. Va. 159 (W. Va. 1885).....	9
<i>Wood v. Accordia of West Virginia, Inc.</i> , 217 W.Va. 406, 217 W.Va. 406 (2005).....	8
 OTHER AUTHORITIES	
WV Code §11A-3-62.	5
W.Va. Code §11A-3-62(b)	12

I.

INTRODUCTION

Now comes the Respondent, Duncan Homes, LLC (hereinafter “the Respondent”) by and through his counsel, Eric S. Black, Esquire, respectfully to file this Response to Petitioner’s Brief filed by Petitioner and its counsel, Lakyn Cecil, Esquire. Respondent asserts he Circuit Court of Berkeley County, West Virginia correctly granted summary judgment in favor of the Respondent Duncan Homes, LLC, finding that Petitioner and its predecessors had no legal interest in the Property at issue and that title to the Property is quieted and fully vested in Duncan Homes, LLC.

II.

STATEMENT OF THE CASE

The Respondent is the fee simple owner of a parcel of real estate situate in Berkely County, West Virginia, and being further described as “LT 1A OR .99 AC KETTERING SD, OPEQUON DISTRICT.” (hereinafter “the Property”). Respondent acquired the Property through a tax sale in Berkeley County, West Virginia.

On August 29, 2019, State Auditor G. Russell Rollyson, Jr. sold the Property to the Respondent for the sum of \$6,000.00 as a result of delinquent and unpaid real estate taxes for the years 2016 through 2019.

A tax sale Deed, dated February 27, 2020, was executed by the State Auditor’s Office conveying the Property to Respondent. The tax sale Deed is recorded in the Office of County Clerk of Berkeley County, West Virginia in Deed Book 1286, at Page 275. A.R. Vol. I, p. 249.

The Petitioner filed a Complaint for Declaratory Judgment and Injunctive Relief on January 13, 2023, moving the Court to set aside and rescind the February 27, 2020, tax sale Deed

based upon allegations of failure to provide the Petitioner lender and its successors redemption notices as a lienholder. A.R. Vol. 1, p. 251-257.

Petitioner's Complaint alleged that its predecessor in interest (Associates Financial Services of America, Inc.) was the beneficiary of a Deed of Trust executed on June 21, 2000—nearly 25 years ago. A.R. Vol. II, p. 521-522. Petitioner's Complaint recounts the title record of assignments of said Deed of Trust encumbering the Property at issue in this litigation. Ultimately, over the course of several recorded assignments, the Petitioner became the beneficiary of the June 21, 2000, Deed of Trust.

Respondent filed an Answer and Counterclaim February 17, 2023, denying the Petitioner's allegations. A.R. Vol. I, pgs. 121-128. Respondent further asserted a Counterclaim as follows:

The Respondent LLC is the fee simple owner of that certain parcel of real estate situate in Berkely County, West Virginia, and being further described as "**LT 1A OR .99 AC KETTERING SD, OPEQUON DISTRICT.**" Respondent acquired the tax sale Property by a deed from the State Auditor's Office dated the 27th day of February 2020 and recorded in the Office of County Clerk of Berkeley County, West Virginia in Deed Book 1286, at Page 275.

That, since obtaining fee simple ownership of the property, Respondent LLC has been paying any and all real property taxes assessed to the aforesaid real Property.

That the Respondent followed all proper procedures in the process of purchasing the tax sale property including engaging an attorney to conduct a title examination.

That the Respondent wishes to obtain clear title for its real property described herein and to eliminate any and all claim(s) in the future affecting clear title to his real property, pursuant to West Virginia Code §11A-3-62, et seq.

Respondent seeks an Order from this Court finding that it is the fee simple owner of the above real Property and that neither the Petitioner, nor any other claimant, has a right to ownership or possession of said Property.

The Petitioner filed a Motion to Dismiss the Respondent's Counterclaim on March 8, 2023.

Upon reviewing legal memoranda and hearing the argument by counsel, the Circuit Court denied the Petitioner's Motion to Dismiss Respondent's Counterclaim. A.R. Vol. I, pgs. 137-139.

On April 12, 2024, each of the parties filed cross-motions for summary judgment. Respondent Duncan Homes, LLC asserted that it was entitled to judgment as a matter of law because any purported mortgage lien encumbering the Property was **extinguished** by operation of law based upon a prior tax sale on the same Property that occurred in November 2012 and consummated by a tax sale Deed dated April 1, 2014. A.R. Vol. I, p. 249. A tax sale of the instant Property was conducted by the Sheriff of Berkeley County, West Virginia on November 23, 2012. The Property was sold to RAI Custodian WV TL, LLC. A.R. Vol. II, pgs. 533-534. The tax sale purchaser, RAI Custodian WV TL, LLC, identified and served Associates Financial Services of America, Inc. (the Petitioner's predecessor in title related to the Deed of Trust) with a notice of redemption via the State Auditor's Office by regular and certified mail. A.R. Vol. II, pgs. 536-542. Despite being served with the Notice of Right of Redemption, Associates Financial Services did not redeem the taxes to the Property. As a result, the State Auditor issued a Deed to RAI Custodian WV TL, LLC on April 1, 2014, making it the fee simple owner. A.R. Vol. II, pg. 544.

Respondent respectfully asserts the Circuit Court of Berkeley County properly granted the Respondent's Motion for Summary Judgment and denied Petitioner's Motion for Summary Judgment. Respondent moves this Honorable Court to affirm the Circuit Court's Order entered August 23, 2024.

II.

SUMMARY OF ARGUMENT

The Circuit Court of Berkeley County correctly granted summary judgment to Duncan Homes, LLC, as U.S. Bank's claimed interest in the property was extinguished by a prior 2012 tax sale. Under West Virginia law, a properly executed tax deed terminates and extinguishes all prior liens and encumbrances unless specifically preserved by statute. U.S. Bank's predecessor,

Associates Financial Services, failed to redeem the property after receiving proper notice of the 2012 tax sale, extinguishing its lien.

Duncan Homes, LLC fully complied with the statutory notice requirements during the 2019 tax sale, providing notice to all reasonably identifiable interested parties based upon a title search conducted by his legal counsel. Respondent asserts the tax sale Deed execute by the WV State Auditor's Office on February 27, 2020, is valid and enforceable. Respondent further asserts the Circuit Court of Berkeley County properly granted the Respondent's Motion for Summary Judgment finding the Respondent Duncan Homes, LLC is the fee simple owner of the Property at issue in this instant litigation. Respondent respectfully moves this Honorable Court to affirm the Circuit Court's ruling.

IV.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent states the appellate pleadings contains the facts and legal arguments pertinent to the instant appeal. Respondent further states it does not believe oral argument is necessary in this matter unless the Court deems the same necessary to the disposition of Petitioner's appeal.

V.

STANDARD OF REVIEW

Rule 56(c) of the West Virginia Rules of Civil Procedure provides the following standard regarding summary judgment:

c) *Motion and proceedings thereon.*—The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

In formulating the parameters of the Rule 56 summary judgment standard, the West Virginia Supreme Court has set forth the following standard:

Summary judgment is proper where the record demonstrates that there is no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law. *Wood v. Accordia of West Virginia, Inc.*, 217 W.Va. 406, 217 W.Va. 406 (2005).

Motion for summary judgment should be granted if the pleadings, exhibits, and discovery depositions upon which the motion is submitted for decision disclose that the case involves no genuine issue as to any material fact and that the party who made the motion is entitled to a judgment as a matter of law. *Angelucci v. Fairmont General Hosp., Inc.*, 217 W.Va. 364, 618 S.E.2d 373 (2005).

Summary judgment should be denied even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom. *Wilson v. Daily Gazette Co.*, 214 W.Va. 208, 588 S.E.2d 197 (2003).

The West Virginia Supreme Court has further held that a circuit court's entry of summary judgment should be reviewed *de novo* by an appellate Court. *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

VI.

ARGUMENT

A. THE CIRCUIT COURT OF BERKELEY COUNTY PROPERLY GRANTED SUMMARY JUDGMENT TO RESPONDENT DUNCAN HOMES, LLC. PETITIONER'S VAGUE CLAIMS ABOUT DISCOVERY DO NOT NEGATE THE COURT'S PROPER APPLICATION OF WEST VIRGINIA LAW.

Petitioner's first asserted ground of error alleges the Circuit Court erred by granting summary judgment because Petitioner was entitled to summary judgment based upon documents disclosed during discovery. Respondent would first note that Petitioner's claims are conclusory in nature, not supported by any reference to the record, and further not supported by reference to any legal authority.

The Circuit Court granted summary judgment to the Respondent by Order entered on August 23, 2024. The Court's Order was preceded by two (2) separate dates wherein the parties appeared before the Court for oral argument. The Court granted summary judgment based upon the documents and exhibits admitted into the record—including the prior 2012 tax sale deed which has always been a matter of public record for more than a decade.

Petitioner's vague and conclusory statements about discovery violations are not substantiated by the record. The record reflects the Circuit Court permitted proper motion practice, conducted two evidentiary hearings, and ultimately granted summary judgment to the Respondent. Respondent asserts there were no discovery or related violations in this matter and the record property and fully supports the Circuit Court's grant of summary judgment to Respondent Duncan Homes, LLC.

B. THE CIRCUIT COURT PROPERTY GRANTED SUMMARY JUDGMENT BECAUSE THE APRIL 1, 2014, TAX SALE DEED EXTINGUISHED THE PETITIONER'S DEED OF TRUST BENEFICIARY INTEREST RELATED TO THE PROPERTY.

The West Virginia Supreme Court addressed the specific issue in dispute in *Summers v. Kanawha County*, 26 W. Va. 159 (W. Va. 1885). In *Summers*, the Court held the following regarding the legal impact of a tax sale on mortgage and deed of trust liens:

1. The purchaser of land sold for taxes, who has obtained his tax deed therefor, and had the same duly recorded in the proper county, becomes invested with such estate in and to the land so purchased by him, as at the commencement of or at any time during the year for which the said taxes were assessed was vested in the party assessed with said taxes. (p. 172.)

2. *If at the time of such sale the land sold be under a mortgage or deed of trust, or if there be any other lien or incumbrance thereon, and such mortgagee, trustee, cestui que trust, lienor or incumbrancer shall fail to redeem the same within the time prescribed by law, then all the right, title and interest of such mortgagee, trustee, cestui que trust, lienor or incumbrancer, shall pass to and be vested in the*

purchaser at such tax-sale, and his title to the premises shall in no way be affected or impaired by such mortgage, deed of trust, lien or incumbrance. (p. 172.)

3. Where land has been so purchased by and conveyed to the purchaser, and his tax-deed therefor has been duly recorded, and before the land was so sold, it had been conveyed to a trustee to secure the payment of a debt, such tax-deed will extinguish the title vested in such trustee by said deed of trust. (p. 173.)

In the instant case, the Deed of Trust encumbering the Property was executed on June 21, 2000. Petitioner's Complaint alleged that its predecessor in interest (Associates Financial Services of America, Inc.) was the beneficiary of the Deed of Trust executed on June 21, 2000. A.R. Vol. II, p. 521-522. The exhibits and record in this matter reflect that a tax sale of the Property occurred in 2012, and that Associates Financial Services failed to redeem the taxes after having been served with notice of the tax sale and its right of redemption. Based upon the same, the West Virginia State Auditor's Offices issued a tax sale Deed to the purchaser on April 1, 2014.

The Petitioner set forth in its Complaint the chain of title and deed of trust beneficiary assignments from Associates Financial Services directly to the current Petitioner lienholder. Pursuant to the West Virginia Supreme Court's holding in *Summers* and its progeny, the Petitioner's lienholder and beneficiary interests were extinguished by operation of law on April 1, 2014.

A tax sale of the instant Property was conducted by the Sheriff of Berkeley County, West Virginia on November 23, 2012. The Property was sold to RAI Custodian WV TL, LLC. A.R. Vol. II, pgs. 533-534. The tax sale purchaser, RAI Custodian WV TL, LLC, identified and served Associates Financial Services of America, Inc. (the Petitioner's predecessor in title related to the Deed of Trust) with a notice of redemption via the State Auditor's Office by regular and certified mail. A.R. Vol. II, pgs. 536-542. Despite being served with the Notice of Right of Redemption, Associates Financial Services did not redeem the taxes to the Property. As a result, the State

Auditor issued a Deed to RAI Custodian WV TL, LLC on April 1, 2014, making it the fee simple owner. A.R. Vol. II, pg. 544.

When the Respondent Duncan Homes, LLC purchased the Property at a tax sale and received a tax sale Deed from the State Auditor's Office on February 27, 2020, the Petitioner's (and its predecessor's and successor's) lienholder beneficiary interests had been extinguished and rendered unenforceable many years prior to the Respondent's tax sale purchase and conveyance. Vol. I, p. 249.

Based upon the same, the Circuit Court properly granted summary judgment in favor of Respondent and was further correct in finding that Duncan Homes, LLC has full and unencumbered fee simple ownership of the Property at issue in this litigation.

C. RESPONDENT IS ENTITLED TO SUMMARY JUDGMENT BECAUSE THE RESPONDENT COMPLIED WITH ALL NOTICE REQUIREMENTS AND, PURSUANT TO W.VA. CODE §11A-3-62, THE TAX DEED IS CONCLUSIVE EVIDENCE OF ACQUISITION OF TITLE TO THE PROPERTY.

WV Code §11A-3-62 provides the following regarding actions to quiet title for tax sale purchased properties:

§11A-3-62. Title acquired by individual purchaser.

(a) Whenever the purchaser of any tax lien on any real estate sold at a tax sale, his heirs or assigns, shall have obtained a deed for such real estate from the deputy commissioner or from a commissioner appointed to make the deed, he or they shall thereby acquire all such right, title and interest, in and to the real estate, as was, at the time of the execution and delivery of the deed, vested in or held by any person who was entitled to redeem, unless such person is one who, being required by law to have his interest separately assessed and taxed, has done so and has paid all the taxes due thereon, or unless the rights of such person are expressly saved by the provisions of section forty-nine of this article or section two, three, four or six, article four of this chapter.

The tax deed shall be conclusive evidence of the acquisition of such title. If the property was sold for nonpayment of taxes, the title so acquired shall relate back to July 1, of the year in which the taxes, for nonpayment of which the real estate was sold, were assessed. If the property was sold for nonentry pursuant to section thirteen

of this article, or escheated to the state, or is waste and unappropriated property, the title shall relate back to the date of sale.

(b) Any individual purchaser to whom a tax deed has been issued may institute and prosecute actions to quiet title in any such real estate conveyed thereby. Such action may be maintained for all or any one or more of the lots or tracts conveyed.

The tax deed conveyed by the State Auditor on February 27, 2020 is “conclusive evidence of the acquisition of such title” to the Property at issue in the present case. Pursuant to WV Code §11A-3-62, upon receipt of the tax sale Deed from the State Auditor’s Office, the Respondent, conclusively became the fee simple owner of the Property at issue in this civil action. Petitioner’s claims of lack of proper statutory notice are wholly without merit because, as asserted above, Petitioner was not entitled to notice based upon the extinguishment of its lienholder interest based upon the prior tax sale.

VII.

CONCLUSION AND RELIEF REQUESTED

For the reasons outlined above, the Circuit Court’s decision was consistent with established West Virginia law, and Respondent respectfully requests that this Court affirm the Circuit Court’s grant of summary the judgment to Respondent.

Respectfully submitted,
Respondent Duncan Homes, LLC,
By Counsel,

/s/ Eric S. Black, Esquire
Eric S. Black, Esquire
State Bar I.D. #7567
380 South Washington Street
Berkeley Springs, West Virginia 25411
(304) 258-2931

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

**U.S. BANK TRUST NATIONAL ASSOCIATION
AS TRUSTEE OF LB-RANCH SERIES V TRUST,
Petitioner Below, Petitioner,**

vs.) **No. 24-ICA-398**

**(Appealed from the Circuit
Court of Berkeley County
Civil Action No. 23-C-15)**

**DUNCAN HOMES, LLC,
Defendant Below, Respondent,**

**CONRAD LEGAL CORPORATION,
Third Party Defendant Below, Respondent.**

CERTIFICATE OF SERVICE

I, Eric S. Black, counsel for the Respondent, Duncan Homes, LLC, do hereby certify that on this 23rd day of December 2024, I have served a true and accurate copy of the foregoing **RESPONDENT DUNCAN HOMES, LLC'S BRIEF** upon all counsel of record via File and Serve Xpress, which will provide notice of the same to the following parties:

Lakyn Cecil, Esquire
Samuel I. White, P.C.
5000 Coombs Farm Dr., Suite 104
Morgantown, WV 26508

J. Peter Glaws, IV, Esquire
Carr Maloney, P.C.
2000 Pennsylvania Avenue, N.W., Suite 8001
Washington D.C. 20006

/s/ Eric S. Black, Esquire
Eric S. Black, Esquire
State Bar I.D. #7567
380 South Washington Street
Berkeley Springs, West Virginia 25411
(304) 258-2931