

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

Subcarrier Communications, Inc.,
a New Jersey corporation,

Plaintiff/Appellee,

v.

Case No. 32752
From the Circuit Court of Preston
County, West Virginia.
Civil Action No: 02-C-146

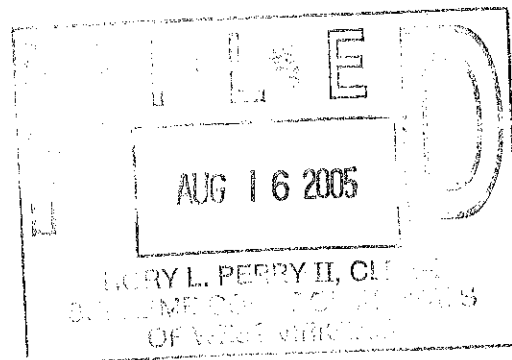
Ronald E. Nield, John P. Lusk,
Patrick Lee Nield, and L. LN&N Investments, LLC,
a West Virginia limited liability company,

Defendant and Third-Party Plaintiffs/Appellants,

v.

Neil A. Reed and The County Commission of Preston County,
a West Virginia statutory corporation,

Third-Party Defendants.



APPELLEE'S BRIEF AND CROSS ASSIGNMENT OF ERROR

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**I. KIND OF PROCEEDING AND NATURE OF RULINGS
IN THE LOWER TRIBUNAL**

This Court granted Appellant's petition for appeal from the order of the Circuit Court of Preston County entered October 25, 2004 and granting summary judgment in favor of Appellee, Subcarrier Communications and setting aside a tax deed that had been issued to Appellants by the Clerk of the County Commission of Preston County concerning a 9.23 acre tract of realty owned by Appellee and located in Preston County.

Appellee's Cross Assignment of Error asserts that the Circuit Court erred in denying Appellee's first motion for summary judgment filed on June 26, 2003. Appellee asserts that by

its order entered October 15, 2003 the Circuit Court erred, as a matter of law, in ruling that Appellant Patrick Neild, who was the Sheriff of Mineral County at the time he purchased the tax lien concerning the realty at issue, was not prohibited from purchasing such tax lien by virtue of West Virginia Code §11A-3-6(a). Appellate Record, Vol. 2, p. 441.

**II. STATEMENT OF FACTS OF THE CASE AND STATEMENT OF
OMISSIONS AND INACCURACIES IN APPELLANTS' STATEMENT OF THE
CASE**

This is an action to quiet title concerning a 9.23 acre tract of realty owned by Appellee and located in Preston County. On July 31, 2002, Appellee filed suit pursuant to West Virginia Code §§11A-4-3 and 4,¹ seeking to set aside a tax deed issued by the Preston County Court conveying the realty at issue to Appellants Ronald E. Nield, John B. Lusk, Patrick Nield. On July 26, 2004, Appellee filed a renewed Motion for Summary Judgment. Appellate Record, Vol. 2, p. 641. Subcarrier there argued that it had been denied due process in the form of adequate notice of the existence of a delinquency concerning real estate taxes owed on the realty at issue and concerning Appellants' request for issuance of a tax deed. Subcarrier argued that the tax deed issued to Appellants was voidable as a matter of law.

¹. Section 11A-4-3 provides, in relevant part:

(a) Whenever the clerk of the county commission has delivered a deed to the purchaser after the time specified in section twenty-seven of article three of this chapter, or, within that time, has delivered a deed to a purchaser who was not entitled thereto either because of his failure to meet the requirements of section nineteen of said article three [requiring that notice of the right to redeem be given to the owner of the realty], or because the property conveyed had been redeemed, the owner of such property, his heirs and assigns, or the person who redeemed the property, may, before the expiration of three years following the delivery of the deed, institute a civil action to set aside the deed...

Section 11A-4-4 provides:

(a) If any person entitled to be notified under the provisions of section twenty-two or fifty-five, article three of this chapter is not served with the notice as therein required, and does not have actual 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...

The Circuit Court of Preston County heard oral argument on Subcarrier's renewed Motion for Summary Judgment on September 22, 2004. Ruling from the bench, the Circuit Court then made extensive findings of fact and granted Subcarrier's Motion for Summary Judgment. Appellate Record, Vol. 5, pp. 1-13. The Circuit Court's findings and rulings were memorialized in an order entered October 25, 2004. Appellate Record, Vol. 3, pp. 1216-29. Importantly, Appellants do not argue on appeal that any of the Circuit Court's findings of fact are not supported by the record. Rather, appellants argue that the Circuit Court "failed to draw any permissible inferences from the underlying facts in the light most favorable to Appellants." Appellants' Brief, pp. 6-7. However, Appellants' Brief does not indicate what inferences should have been drawn by the Circuit Court that would have required the caps are Court to deny Subcarrier's motion for summary judgment.

The record and the findings of the Circuit Court establish the following facts. At all times relevant hereto, Subcarrier was a corporation organized and existing under the laws of the State of New Jersey. A copy of Appellee's certificate of good standing issued by the New Jersey Secretary of State is attached as Exhibit 1 to Appellee's Renewed Motion for Summary Judgment.² Subcarrier is engaged in the business of acquiring and operating communications towers for use in providing cellular and other wireless communication services. By deed dated November 6, 1996, of record in the Office of the Clerk of the County Commission of Preston County (hereafter (the Clerk's Office")) in Deed Book No. 594, at Page 719, Subcarrier acquired certain realty in Portland District, Preston County, West Virginia ("the realty"), from Skyline Communications Limited Partnership, a Virginia limited partnership ("Skyline").

². The exhibits to Appellee's Renewed Motion for Summary Judgment appear at Appellate Record, Vol. 2, pp. 681-717. Unless otherwise indicated, all references to exhibits made in Appellee's Brief refer to exhibits attached to Appellee's renewed Motion for Summary Judgment.

This deed was recorded in the Clerk's office on December 31, 1996, and identified Subcarrier as a New Jersey corporation. Renewed Motion for Summary Judgment, Exhibit 2.

At the time Subcarrier acquired the realty from Skyline, Subcarrier's administrative offices were located at 101 Eisenhower Parkway, Roseland, New Jersey. On or about September 9, 1997, Subcarrier relocated its offices to 139 White Oak Lane, Old Bridge, New Jersey. On or about September 15, 1997, Subcarrier filed a notification of change of its change of address with the New Jersey Secretary of State. Renewed Motion for Summary Judgment, Exhibit 3; Findings of Fact, ¶¶2, 3. Since September 1997, Subcarrier has maintained its principal office at the Old Bridge address. Affidavit of John Paleski, Renewed Motion for Summary Judgment, Exhibit 4. In order to assure that it would receive all pertinent tax and other documents from Preston County concerning the subject realty in light of Subcarrier's change of address, by correspondence dated November 25, 1997, Subcarrier advised the Preston County Clerk of Subcarrier's new address. Renewed Motion for Summary Judgment, Exhibit 5; Findings of Fact, ¶ 5.

As required by West Virginia law, in July of 1997, the Preston County Sheriff prepared a tax ticket for the real property taxes levied against the subject realty for the 1997 tax year. Because the deed transferring the realty from Skyline to Subcarrier was recorded after July 1, 1996, the 1997 tax ticket for the subject realty identified Skyline as the owner of the property. As a result, the Preston County Sheriff mailed the 1997 tax ticket concerning the realty to Skyline. Renewed Motion for Summary Judgment, Exhibit 6; Findings of Fact, 4¶.

Given that Skyline no longer owned the realty, it did not pay the 1997 real estate taxes and, as a result, the 1997 taxes became delinquent. As a result of the delinquency, in May 1998, the Sheriff sent a copy of the 1997 tax ticket and a notice of delinquency to Subcarrier

as required by West Virginia Code §11A-1-8. Renewed Motion for Summary Judgment, Exhibit 7. However, the tax ticket and notice were sent to Subcarrier at its former Roseland address. By letter dated June 17, 1998, Subcarrier made payment on the delinquent 1997 real estate taxes. Subcarrier advised the Preston County Sheriff that his office was continuing to use Subcarrier's previous address. The letterhead on which this letter was sent contained Subcarrier's current address. Moreover, the check tendered by Subcarrier with this correspondence and negotiated by the Sheriff in payment of the 1997 real property taxes likewise contained Subcarrier's current address. Renewed Motion for Summary Judgment, Exhibits 8, 9; Findings of Fact ¶¶ 6, 7.

In order to assure that Subcarrier's request for change of address had been acted upon by appropriate personnel in the Preston County Courthouse, John Paleski, Subcarrier's president, testified that he phoned the Preston County clerk's office to confirm its receipt of Subcarrier's request for change of address. Paleski testifying that he was advised that the request had been received and the changes noted in the records maintained at the courthouse. Deposition of John Paleski, pp. 44-46, beginning at Appellate Record, Vol 3, p. 1042.

Despite having been advised, in writing, on two occasions of Subcarrier's new address, the Preston County Sheriff and Preston County Clerk continued to send notices regarding real estate taxes on the subject realty to Subcarrier's former address. Thus, the 1998 and 1999 tax tickets for the realty were mailed to Subcarrier's former Roseland address. Renewed Motion for Summary Judgment, Exhibit 10; Findings of Fact, ¶¶ 8, 9. Due to the expiration of the forwarding order concerning the prior address, Subcarrier did not receive the delinquency notices concerning the 1998 real property taxes and mailed by the Preston County Sheriff on September 22, 1999. Rather, the envelope containing this notice was returned to the Preston

County Sheriff marked as "Undeliverable as Addressed, Forwarding Order Expired." Renewed Motion for Summary Judgment, Exhibit 11. Having failed to receive the 1998 tax ticket and delinquency notices related thereto, Subcarrier did not pay the 1998 real property taxes.

On or about August 18, 1999, Subcarrier retained Tri-Star Communications of Clarksburg, West Virginia to perform maintenance on the facilities located on the subject realty. Subcarrier also requested that Tri-Star affix a sign on the subject property identifying Subcarrier as the owner of the facility. Renewed Motion for Summary Judgment, Exhibit 12. The Circuit Court found that it was undisputed "that a sign attached to a fence surrounding the tower which bore [Subcarrier's] name correct address and telephone number... was on the property since at least August of 1999". Findings of Fact, ¶ 22.³

As a result of the nonpayment of the 1998 real estate taxes, on November 15, 1999, the Preston County Sheriff sold the tax lien on the realty for the amount of the 1998 real property taxes at an auction in Kingwood, West Virginia held pursuant to West Virginia Code §11A-3-4. Defendant Patrick Neild attended the Sheriff's tax sale and purchased the tax lien on the realty. At the time he purchased the tax lien, Appellant Patrick Neild was the Sheriff of Mineral County, West Virginia. Findings of Fact, ¶12. Patrick Neild testified that in his capacity as Sheriff of Mineral County, he had conducted similar tax sales. Neild testified that prior to attending the sale, he and his father, Appellant Ronald Neild and his father's friend, Appellant John Lusk discussed purchasing property at sheriffs' tax sales as an investment opportunity. In this regard, Patrick Neild testified that given his experience in conducting such sales as the Sheriff of Mineral County, he was aware that in the vast majority of such

³. Digital photographs depicting the signs at the tower site were lodged with the Circuit Court on compact disc. However, the compact disc does not appear to have been included in the appellate record forwarded to the Supreme Court by the Circuit Court of Preston County.

cases, the real estate was eventually redeemed by its lawful owners upon payment of the taxes due thereon along with statutory interest that had accrued on the taxes during the period the tax lien had been held by the purchaser of the lien. March 4, 2003 deposition of Patrick Neild, pp. 21-29, beginning at Appellate Record, Vol 1, p. 262.

Appellant Patrick Neild was also a reserve officer in United States Army at the time he attended the tax lien sale. Because of training exercises in which he was involved at Camp Dawson located in Preston County, Neild testified that he was generally familiar with the mountain on which the realty at issue is located. Neild also testified that he immediately after he purchased the tax lien at the Sheriff's sale, he proceeded to the Preston County Courthouse and located a deed for the realty in question. Neild further testified that because of information contained in the deed, he also concluded that a telecommunications tower was located on the realty. March 4, 2003 deposition of Patrick Neild, pp. 6, 34-38.

In the fall of 2000, Defendants retained Neil A. Reed, a licensed attorney practicing in Kingwood, West Virginia, to attempt to satisfy the requirements of West Virginia Code §11A-3-19(a) so that Appellants can acquire a tax deed for the realty. Said statute contains the procedure whereby the owner of the subject property must be given notice that a third party has purchased a tax lien on the subject realty and is requesting that a tax deed be issued by the County Clerk conveying the subject realty to the purchaser of tax lien.⁴ Said statute

⁴. Section 11A-3-19 provides:

What purchaser must do before he can secure deed:

(a) At any time after the thirty-first day of October of the year following the sheriff's sale, and on or before the thirty-first day of December of the same year, the purchaser, his or her heirs or assigns, in order to secure a deed for the real estate subject to the tax lien or liens purchased, shall: (1) Prepare a list of those to be served with notice to redeem and request the clerk to prepare and serve the notice as provided in sections twenty-one and twenty-two of this article; (2) provide the clerk with a list of any additional expenses incurred after the first day of January of the year following the sheriff's sale for the preparation of the list of those to be served with notice to redeem

required that Patrick Nield, as purchaser of the tax lien, "[p]repare a list of those to be served with notice to redeem and request the clerk to prepare and serve the notice as provided in [West Virginia Code §§11A-3-21 and 22]." Neild testified that Reed prepared such a list and by correspondence dated November 3, 1999, Reed mailed the same to Nield for his signature. Renewed Motion for Summary Judgment, Exhibit 13. Nield testified that upon receiving this correspondence and proposed notice, he noted that the address Reed proposed to use to provide notice via certified mail to Subcarrier was Subcarrier's former Roseland address. Nield was aware that this was the same address to which the Preston County Sheriff had mailed the notices of tax delinquencies, which Neild knew had been returned as undeliverable. Recognizing that mail directed to the Roseland address would not reach Subcarrier, Nield testified that he then contacted the West Virginia Secretary of State's office to determine whether it had a different address for Subcarrier. Nield testified that he was advised by someone at the Secretary of State's office that its records also reflected the Roseland address for Subcarrier. Nield testified that he then contacted Reed and advised Reed of his conversation with the Secretary of State's office. Nield testified that he believed Reed would do whatever was required to assure that Subcarrier received notice of Nield's request for issuance of a tax deed as was required by West Virginia law. July 12, 2004 deposition of Patrick Nield, pp. 110-117. Portions of said deposition transcript are attached as an exhibit to

including proof of the additional expenses in the form of receipts or other evidence of reasonable legal expenses incurred for the services of any attorney who has performed an examination of the title to the real estate and rendered a written opinion and certification thereon; (3) deposit, or offer to deposit, with the clerk a sum sufficient to cover the costs of preparing and serving the notice; and (4) present the purchaser's certificate of sale, or order of the county commission where the certificate has been lost or wrongfully withheld from the owner, to the clerk of the county commission. For failure to meet these requirements, the purchaser shall lose all the benefits of his or her purchase.

Appellants' response to the motion for summary judgment of Third-Party Defendant Neil Reed and appear beginning at Appellate Record, Vol. 3, p 1031.

Despite Reed's knowledge that the Roseland address he proposed to use to provide Subcarrier with notice of the request for a tax deed and right to redeem would not be delivered to Subcarrier, Reed made no additional inquiry to ascertain a current mailing address for Subcarrier. Rather, Reed forwarded the Notice to Redeem to the Preston County Clerk Subcarrier. As would be expected, the notice mailed to Subcarrier at its Roseland address and postmarked December 27, 2000 was returned as undeliverable. Renewed Motion for Summary Judgment, Exhibit 15.

No party redeemed the subject realty pursuant to the foregoing notice. On April 27, 2001, Appellant Patrick Nield executed an assignment of his rights as purchaser of the 1998 tax lien to Defendants Ronald E. Nield and Defendant John B. Lusk, and Patrick Lee Nield. Since the property was not redeemed, pursuant to West Virginia Code §11A-3-25, Patrick Nield delivered a deed prepared by Reed to the Preston County Clerk whereby the Clerk conveyed the subject realty to Defendants Ronald E. Nield, John B. Lusk, and Patrick Lee Nield. This tax deed was recorded in the Preston County Clerk's Office on May 2, 2001, in Deed Book No. 624, at Page 193. Renewed Motion for Summary Judgment, Exhibit 14; Findings of Fact, ¶¶ 20, 21. By deed dated July 5, 2001, and recorded in the Clerk's Office on December 5, 2001, in deed book No. 628, at page 280, Appellants Ronald E. Nield, John B. Lusk, and Patrick Lee Nield conveyed the realty to Appellant LN&N.⁵ Appellant Ronald Nield testified that after Appellants received the tax deed, he acquired a telephone number for Subcarrier in New Jersey via directory assistance. Ronald Nield thereafter phoned Subcarrier

⁵. Records in the West Virginia Secretary of State's office indicate that on April 30, 2001, the individual Appellants organized LN&N Investments, a West Virginia limited liability company. The individual Defendants are the sole owners of Defendant LN&N.

and spoke with its president, Mr. Paleski, and advised Paleski that Appellants now owned the property. August 20, 2003 deposition of Ronald Nield, p. 21, Paleski deposition, pp. 51-2

III. POINTS AND AUTHORITIES RELIED UPON, DISCUSSION OF LAW, AND RELIEF PRAYED FOR

Cases

City of Boston v. James, 530 N.E.2d 1254 (Mass. App. 1988) 21, 22
District of Columbia v. Mayhew, 601 A.2d 37 (D.C. App. 1991)..... 23, 24
In Re: Campbell, 575 S. 2d 539 (La. App. 1991)..... 22, 23
Lilly v. Duke, 376 S.E.2d 122 (W.Va. 1988),..... 11, 12, 13
Malone v. Robinson, 614 A.2d 33 (DC App. 1992) 22
Mountain Lodge Associates v. Crum & Forster indemnity Co., 558 S.E.2d 336 (W.Va. 2001)
..... 11
Painter v. Peavy, 451 S.E.2d 755 (W.Va. 1994)..... 11
Plemons v. Gale, 369 F.3d 569 (4th Cir. 2005)..... 16, 17, 18
Plemons v. Gall, 298 F. Supp. 380, (USDC, SD W.Va.) 14, 15, 16

Statutes

West Virginia Code §§11A-4-3 and 4 2
West Virginia Code §11A-3-19..... 7

Other Authorities

Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 Ind. Law. J 747. 12

VI. DISCUSSION OF LAW

A. STANDARD OF REVIEW

In *Mountain Lodge Associates v. Crum & Forster indemnity Co.*, 558 S.E.2d 336 (W.Va. 2001) the West Virginia Supreme Court reiterated that it applies a *de novo* standard of review of an award of summary judgment by a circuit court. This Court has also held that summary judgment is appropriate “where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.” *Painter v. Peavy*, 451 S.E.2d 755 (W.Va. 1994). Applying these standards to the facts presented in this action, it is clear that the Circuit Court correctly granted Appellee's Renewed Motion for Summary Judgment.

B. WEST VIRGINIA LAW REQUIRES THAT THE OWNER OF THE DELINQUENT REAL ESTATE RECEIVE ACTUAL NOTICE OF ITS RIGHT TO REDEEM SUCH PROPERTY

Appellants' sole contention on appeal is that Appellants made a sufficient inquiry to locate a current mailing address for Subcarrier to satisfy state and federal due process requirements in their efforts to acquire a tax deed for the subject realty. As such, Appellants contend that the Circuit Court erred in granting summary judgment in favor of Subcarrier. A review of pertinent West Virginia and federal law indicates that Appellants' contention must be rejected.⁶

In *Lilly v. Duke*, 376 S.E.2d 122 (W.Va. 1988), the West Virginia Supreme Court considered what notice was required to be given prior to a sheriff's sale of real property for

⁶ An exhaustive history of West Virginia statutory and case law concerning delinquent real estate tax sales is contained in the report of Appellee's expert, Robert Shuman, Esq. and appearing at Appellate Record, Vol. 1 p. 220.

delinquent taxes pursuant to West Virginia Code §11 A-3-1 *et seq.* In *Lilly*, plaintiff sold a parcel of realty located in Jackson County to Taylor. Plaintiff apparently provided financing for the transaction. Taylor executed a mortgage in favor of plaintiff which was secured by a deed of trust on the Jackson County property. Taylor failed to make the property tax payments on the property and, as a result, and unbeknownst to plaintiff, the property was sold for taxes. Plaintiff brought an action seeking to set aside the tax deed concerning the realty.

Plaintiff argued that he had not received notice of the tax delinquency or the notice advising that the property would be sold at public auction. The Jackson County Sheriff attempted to give notice of the tax delinquency by posting and, as in the present case, by publication in the local newspaper.

After surveying the decisions of the United States Supreme Court in *Mullane v. Central Hanover Bank and Trust Company*, 339 US 306 (1950) and *Mennonite Board of Missions v. Adams*, 462 US 791 (1983)⁷, the West Virginia Supreme Court held:

There are certain constitutional due process requirements for notice of a tax sale of real property. Where a party having an interest in the property can reasonably be identified from public records **or otherwise**, due process requires that such party be provided notice **by mail or other means as certain to ensure actual notice.** (emphasis added)

Lilly, supra, syl. pt. 1. This Court concluded that in light of this standard, the sheriff's attempts to give notice by posting and publication were constitutionally insufficient. This Court noted that the record supported the conclusion that the address of the plaintiff mortgagee was reasonably ascertainable by the sheriff, stating:

In the present case, we believe the Plaintiff's name and address were reasonably ascertainable. While the address did not appear on the face of the deed of trust, a handwritten notation in the margin thereof did provide an address. Furthermore,

⁷. A comprehensive history of the evolution of constitutional requirements of notice and due process in the context of sale of tax liens and acquisition of tax deeds is contained in Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 Ind. Law. J 747.

other identifying information was reasonably available. The deed of trust specifically named Walton S. Shepherd, III, a resident of Kanawha County, as trustee and notice could have been mailed to him in that capacity. The deed of trust also stated that note payments were to be remitted to the Bank of Sissonville, which was the collection agent for the Plaintiff. A simple inquiry at that bank presumably would have provided the necessary address.

376 S.E.2d at 125-26. Thus, *Lilly* requires that in order to discharge the duty to provide notice and a right to redeem property to a delinquent landowner or other interested party, a party required to give such notice may be required to make inquiry of persons identified in public records and access sources of information not contained in public land records to ascertain the whereabouts of parties entitled to receive notice of a right to redeem the delinquent property. *Lilly* indicates that such methods of inquiry include the placing of phone calls to persons or businesses located in counties other than the county in which the real estate is located to attempt to ascertain a correct mailing address for the landowner. There is nothing contained in the holding in *Lilly* indicating that such inquiries must stop at the West Virginia border as Appellants apparently contend.

B. APPELLANT PATRICK NIELD, AND HIS AGENT NEIL REED, FAILED TO MAKE A SUFFICIENT INQUIRY TO DETERMINE A CURRENT MAILING ADDRESS FOR SUBCARRIER FOR PURPOSES OF PROVIDING SUBCARRIER WITH ACTUAL NOTICE OF ITS RIGHT TO REDEEM THE SUBJECT REALTY

The record unequivocally established that Appellant Patrick Neild and his counsel, Neil Reed, made no attempt to locate a viable, current mailing address for Subcarrier. Instead, Neild and Reed knowingly provided the Preston County Clerk with an outdated address for purposes of attempting to provide Subcarrier with notice of its right to redeem as required by West Virginia law. See Appellee's Statement of Facts, pp. 7-9, *supra*. Despite this knowledge, and despite knowing that all previous notices to Subcarrier sent by mail to the address Reed proposed to use had been returned as undeliverable, Reed made no effort to acquire a current

address for Subcarrier. As Patrick Nield had anticipated, the attempt to give notice to Subcarrier regarding appellant's request for issuance of the tax deed in November of 2000 at Subcarrier's former Roseland address was unsuccessful and the notice was returned as undeliverable.

The vast majority of jurisdictions addressing the issue have held that where notice of a tax delinquency or right to redeem delinquent property sent by mail is returned as undeliverable, the party obligated to provide notice must undertake additional efforts to ascertain the present whereabouts of the delinquent landowner entitled to notice to the pending tax sale. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 Ind. Law. J. 747, 793. In *Plemons v. Gall*, 298 F. Supp. 380, (USDC, SD W.Va.) the United States District Court for the Southern District West Virginia discussed the obligations of a party seeking issuance of a tax deed under West Virginia law to give actual notice to a delinquent landowner of his right to redeem the subject property where notice sent to the delinquent landowner by mail is returned as undelivered. On August 9, 1999, plaintiff Plemons purchased real estate located at 913 Echo Road, South Charleston, West Virginia. On February 17, 2000, Plemons refinanced the property through Capital State Bank. Plemons believed that the real estate taxes on the property would be paid by Capital through an escrow account. However, Capital did not make the real estate tax payments and the taxes therefore became delinquent. On November 13, 2000, the Kanawha County Sheriff sold the tax lien on the property to defendant Advantage.

Advantage caused a title examination to be conducted concerning the property to identify those parties having an interest in the property and who were entitled to notice of a right to redeem the property under West Virginia law. Three addresses were identified for

Plemons. Advantage then prepared a notice to redeem identifying the persons Advantage believed were entitled to notice and provided the same to the County Clerk. Plemons was not residing on the subject property at the time the notices were sent, but rather resided at 405 Quarry Point, Charlestown West Virginia, an address that had not been identified by Advantage. As a result, all notices sent via certified mail by the County Clerk to Plemons were returned as undeliverable.

Given that all notices to Plemons sent by certified mail had been returned, Advantage caused a notice to redeem to be published in the local Charleston newspapers. When no party redeemed the property within the time provided in the notice, the Court issued a tax deed to Advantage. Advantage in turn conveyed the property to defendant Gale.

In granting Plemons' motion for summary judgment, the District Court found that the record established that Advantage failed to exercise reasonably diligent efforts to provide notice to Plemons of her right to redeem the property. Citing the United States Supreme Court's decision in *Mullane*, the District Court noted that due process requires that "the means employed [to provide notice to interested parties] must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it" *Mullane*, 339 U.S. at 315. The District Court went on to note the inherent tension created by West Virginia's statutory scheme of notice in that the tax lien purchaser has the duty to give notice to the delinquent taxpayer of his right to redeem, but also has an interest in profiting from the delinquent taxpayer's failure to redeem the property. In this regard, the Judge Goodwin noted:

[A] tax lien purchaser is unlikely to want a property owner to receive actual notice of her right to redeem as he hopes to make money on his purchase. This circumstance makes it imperative that courts strictly scrutinize efforts of a tax lien purchaser to ensure that they are "such as one desires of actually informing the absentee" might reasonably adopt. (citation omitted)

298 F. Supp. 2d. at 388.

Plemons further noted that

the requirements of due process are not satisfied by the mere act of mailing notice to *any* address....When notices sent via certified mail and returned unclaimed, the sender has positive knowledge that he sent the notice to the wrong address in that the mailing failed to convey actual notice to the intended recipient. If a reasonably diligent party wanted to provide actual notice and learned that the notice sent by mail is returned unclaimed, the party's next logical step would not be to publish a relatively small announcement in the newspaper. Rather, a reasonably diligent party would make further inquiry in hopes of finding the intended recipient's correct address. (emphasis by court, citations omitted)

298 F. Supp. 2d. at 389.

The District Court then discussed what might constitute a reasonable inquiry designed to identify a delinquent landowner's correct address, including contacting other parties, such as mortgagees, who had an interest in the property; contacting the Secretary of State's office to attempt to locate an address for a corporate landowner; visiting the property; and consulting phone directories to identify telephone numbers for the delinquent landowner. The District Court concluded, as a matter of law, that having failed to make such an inquiry, Advantage failed to make the requisite effort to give actual notice to the landowner as required by West Virginia and federal law.

After the entry of summary judgment in favor of Subcarrier by the Circuit Court of Preston County, the Fourth Circuit Court of Appeals reversed the District Court's granting of summary judgment in *Plemons*. *Plemons v. Gale*, 369 F.3d 569 (4th Cir. 2005). The Fourth Circuit agreed with the Southern District's conclusion that due process requires that a party seeking to acquire real estate pursuant to a tax lien make reasonable efforts to locate delinquent landowner's where notice by mail to the landowner is returned as undeliverable. In this regard, the Fourth Circuit stated:

The question before us is what efforts must be made by a party charged with giving notice of irrevocable loss of property via a tax sale, when it is, or should be, apparent from the initial mailings' prompt return that they have failed to provide any notice to the intended recipient.

Although the Supreme Court has not directly addressed this question, it has provided some guidance in *Covey* and *Robinson*. In *Covey*, 351 U.S. at 146-47, when a town had mailed notice of its intent to foreclose on a tax lien to a person whom the town knew to be mentally incompetent, the Court held that such notice was constitutionally insufficient. Because the town was aware that, as a consequence of the incompetence, the mailing did not actually provide notice, the foreclosure constituted a deprivation of property without due process of law. See also *Robinson*, 409 U.S. at 40 (holding that mailing that the government knew would not accomplish notice was insufficient). These cases, as one state supreme court has noted, "suggest that when the party seeking to affect a property interest is itself on notice of the failure of mailed notice to inform an interested party, the party must take further action to determine a more accurate address or otherwise ensure receipt of meaningful notice." ...Adopting the rule that prompt return of mailed notice triggers a duty to make reasonable follow-up efforts would seem to best comport with the instruction in *Mullane* that due process requires efforts "reasonably calculated" to actually "apprise interested parties" of the possible deprivation; that is, notice consistent with that of "one desirous of actually informing the absentee," rather than efforts that are but a "mere gesture." ...

Most courts have reached precisely this conclusion. In case after case they have held that the reasonable diligence standard requires a party charged with notice to follow up when a mailing has been returned as unclaimed or undeliverable. As the District of Columbia Court of Appeals has remarked, "The return of the certified notice marked 'unclaimed' should have been a red flag for some further action." (Citations omitted).

While the Fourth Circuit agreed with the District Court's assessment of applicable law, the Fourth Circuit nevertheless reversed the District Court's grant of summary judgment and remanded the case for the taking of further evidence. In this regard, the Fourth Circuit found there was no evidence in the record that the methods of acquiring a current mailing address for Plemons suggested by the District Court would have actually yielded an address for Plemons different than that that appeared in county land records. In this regard, the Fourth Circuit stated:

In this case, the district court considered several possible follow-up efforts. Although it initially noted that checking the public records would be reasonable, the court does not seem to have determined if that was done here. Instead, the court pointed to three other methods it believed

Advantage reasonably could have, but did not, pursue to obtain Plemons' address after receiving the returned mailings: consulting the telephone directory, asking the tenants at the Echo Road property, or making inquiries of the mortgagee bank. We do not agree that reasonable follow-up compelled such efforts in this case. Although checking the local telephone directory may be reasonable in a given situation, ... here it would have been an exercise in futility. The record shows that, both at the time the notices were sent out, as well as when they were returned, Plemons was not reachable at the number or address listed in the current directory, and calls to that number were no longer being forwarded to her mobile phone. Moreover, contacting the Echo Road tenants seems an unreasonable burden here. Because it is undisputed that the notice sent to Occupant at the property's mailing address was returned as undeliverable, it was a reasonable assumption that further investigation at that address would be unsuccessful. Nor do reasonable efforts require contacting the mortgagee bank, at least in this case. As the Supreme Court noted in *Mennonite*, a property owner and mortgagee are not in privity, and, under normal circumstances, one cannot be expected to communicate notice of an impending tax sale to the other. There is no evidence that Plemons enjoyed a special relationship with the bank such that attempting to enlist its help would have led to the discovery of her correct location. (Citations omitted)

369 F.3d at 577. Thus, the Fourth Circuit's ruling in *Plemons* does not stand for the proposition, as asserted by Appellants, that persons seeking to acquire delinquent lands at state-sponsored tax sales need look no further than county land records to acquire current mailing addresses for a delinquent landowner.

The uncontradicted evidence establishes that Appellant Patrick Neild and his agent, Neil Reed, knew that the notice of Subcarrier's right to redeem the property and Neild's request for a tax deed sent to Subcarrier via certified mail was returned as undelivered. Despite knowing that Subcarrier had not received actual notice as required by *Lilly*, supra, Neild and Reed thereafter made no inquiry to ascertain a correct mailing address for Subcarrier. Rather, Neild and Reed relied upon publication of notices of the request for issuance of a tax deed in local newspapers to provide notice to Subcarrier and other interested parties. Applying *Lilly* and *Plemons* to the facts of this case, the record establishes that Neild

or Reed could have identified Subcarrier's current mailing address from various sources with minimal effort and expense, including the following:

1. **The New Jersey Secretary of State:** On November 15, 1999, the day of the tax lien sale, Nield viewed a copy of the deed conveying the subject realty to Subcarrier maintained at the Preston County record room. The deed identifies Subcarrier as a New Jersey corporation. Prior to the mailing of the notice to redeem to Subcarrier, Patrick Nield contacted the West Virginia Secretary of State's office to attempt to locate a current address for Subcarrier. When the West Virginia Secretary of State provided no information different from what Nield already had, neither Nield nor Reed made an effort to contact the New Jersey Secretary of State's office to locate a current address for Subcarrier. Such a phone call would have yielded Subcarrier's current mailing address. Appellants point to no evidence in the record that contradict this conclusion.
2. **Directory assistance:** At all times relevant hereto, Subcarrier's phone number was available through directory assistance. Affidavit of John Paleski, Renewed Motion for Summary Judgment, Exhibit 4. Appellants point to no evidence that contradicts this conclusion.
3. **Travel to the tower site:** The Circuit Court found particularly compelling the fact that on the very day that Appellants acquired a tax deed for the subject realty, Appellant Patrick Nield traveled to the property, walked to the tower site and there located a sign on the fence surrounding the tower facility containing Subcarrier's name, address and phone number. The record establishes that by not later than August 1999, a sign containing Subcarrier's current address and telephone number was installed on the fence surrounding the tower facility. Patrick Nield testified that immediately after he purchased the tax lien concerning the

realty on November 15, 1999, he traveled to the Preston County Clerk's office and inspected the land records concerning the property. As a result of such inspection, Patrick Nield determined the general location of the property and further determined from the information contained in the deed to Subcarrier that transmission towers were located on the property. The record establishes that the realty in question was no more than 4 miles from the Preston County Courthouse. Appellants made no effort to visit the tower site before retaining attorney Reed in late 2000 to provide notice of the right to redeem the property to Subcarrier as required by West Virginia Code §11A-3-19(a).

Aside from a concern that they would have been trespassing on the property of adjoining landowners, Appellants have offered no other evidence indicating that they were somehow prevented from visiting the tower site prior to receiving a tax deed for the property. However, Appellants were apparently unconcerned about the possibility of trespassing on the property of adjoining landowners when they chose to cross that property to access Subcarrier's realty immediately after Defendants received the tax deed for the property.

4. Contact regulatory agencies: Patrick Nield was aware that telecommunications equipment was located on the property in question. Either Nield or Reed should have surmised that operators of such equipment would likely required a license from the Federal Communications Commission. Subcarrier had provided information concerning its ownership of the tower to the Federal Communications Commission in April 1999. Renewed Motion for Summary Judgment, Exhibit 4. Appellants point to no evidence that contradicts this conclusion.

5. **Internet Search:** Subcarrier maintained a web site indicating its current mailing address at the time the notice to redeem was being prepared. Renewed Motion for Summary Judgment, Exhibit 4.

Appellants do not argue that any of the foregoing efforts would not have yielded a current mailing address for Subcarrier. Rather, Appellants argue that they should not be required to make any effort to identify a correct mailing address for Subcarrier that involved searching for information outside the walls of the Preston County Courthouse. This contention is at odds with settled West Virginia and federal law and must be rejected.

C. SUBCARRIER'S FAILURE TO PAY PROPERTY TAXES AND FAILURE TO REGISTER WITH THE WEST VIRGINIA SECRETARY OF STATE DID NOT OBVIATE DEFENDANTS' OBLIGATION TO PROVIDE SUBCARRIER WITH ACTUAL NOTICE OF ITS RIGHT TO REDEEM THE SUBJECT PROPERTY

Appellants argue that as a landowner, Subcarrier should have been aware of its obligation to pay property taxes and, having failed to pay those taxes, Appellants somehow had a lesser obligation to attempt to locate Subcarrier for purposes of providing it with notice of its right to redeem the property. This argument must be rejected for several reasons. The delinquent tax statute under which Defendants acquired a tax deed to the property at issue only comes into play when a taxpayer fails to pay property taxes. Thus, the due process guarantees provided by the statute and by federal and state case law are by definition intended to provide the same due process protections to delinquent taxpayers as is provided to other interested parties such as mortgagees and lienholders. Cases addressing this contention have held that a property owner's failure to pay taxes or to provide a current address does not relieve the obligation of a person attempting to deprive the property owner of his property of providing constitutionally acceptable notice. In *City of Boston v. James*, 530 N.E.2d 1254 (Mass. App. 1988), the Appeals Court of Massachusetts rejected a similar argument made by

the City of Boston to justify its failure to provide actual notice of a foreclosure proceeding to a delinquent taxpayer, stating:

The City of Boston tries to blunt or circumvent criticism of its own fecklessness by suggesting that the owners brought the trouble on themselves by failing to pay the taxes, or to leave a forwarding address.... Such shifting of responsibility is inadmissible even when the persons deprived of notice are sophisticated and knowledgeable.... A party's ability to take steps to safeguard its interest does not relieve the State of its constitutional obligation. (citations omitted)

530 N.E.2d at 1257. *See also, Malone v. Robinson*, 614 A.2d 33 (DC App. 1992).

Appellants also argue that Subcarrier's failure to register to do business with the West Virginia Secretary of State prior to the issuance of the tax deed negates Appellants obligation to provide Subcarrier with actual notice of its right to redeem as required by West Virginia and federal law. To the contrary, it was Patrick Nield's knowledge that the West Virginia Secretary of State had no better address for Subcarrier than the outdated address Nield and Reed had used in the notice to redeem that triggered the duty of Nield, and/or his agent Reed, to make reasonable inquiry to locate an accurate address for Subcarrier. An analogous situation was presented in *In Re: Campbell*, 574 S.2d 539 (La. App. 1991). There, a Louisiana landowner relocated to a Houston, Texas address from which he made property tax payments for several years. The taxpayer eventually relocated to another address in Houston. The landowner thereafter ceased paying property taxes and the Louisiana taxing authorities sent notice of a tax sale to the landowner at his initial Houston address. This notice was returned undelivered with an indication that the addressee left no forwarding address. The taxing authority made no effort to give the landowner any further notice but rather sold the realty at a tax sale. The landowner then sought to set aside the tax deed, arguing that he had not received notice of the tax sale. In discussing the taxing authority's obligation to attempt to locate the taxpayer upon the return of the notice sent by mail, the Court stated:

When the letter was returned undelivered, the information on it conveyed that [the landowner] no longer lived on Long Road, and his whereabouts were not known by the U.S. Postal Service. The jurisprudence tells us that the state of affairs triggered the requirement that the tax collector take additional steps to notify the tax debtor of the delinquency. In this case we do not have to test the reasonableness of the subsequent steps taken by the tax collector, for by his own testimony, nothing was done, no steps were taken.

574 S.2d at 541. As in *Campbell*, Appellants took no action to locate Subcarrier after learning that the notice to redeem sent to Subcarrier was undeliverable at the Roseland address. It is Appellants subsequent failure to take any steps to attempt to locate Subcarrier that entitles Subcarrier to judgment as a matter of law.

D. WEST VIRGINIA LAW DOES NOT ARBITRARILY LIMIT THE SCOPE OF THE INQUIRY TO BE MADE TO IDENTIFY A CURRENT ADDRESS FOR THE OWNER OF DELINQUENT LANDS TO COUNTY LAND RECORDS

At the end of the day, Appellants essentially argue that West Virginia law does not require a person seeking to acquire a tax deed to delinquent property to look further than records maintained in the courthouse of the county where the realty is located to ascertain a current mailing address for the delinquent landowner. Research has shown no opinion by this Court that supports such a conclusion. Moreover, such a conclusion is at odds with cases addressing circumstances involving landowners or other interested parties residing in jurisdictions other than that wherein the real estate is located. *See, i.e. In re Campbell, supra.* In *District of Columbia v. Mayhew*, 601 A.2d 37 (D.C. App. 1991) the court affirmed a trial court ruling setting aside a tax deed. The property in question was located in the District of Columbia and was owned by a partnership. The partnership pledged the property as collateral pursuant to a deed of trust in favor of Connecticut Avenue, Inc. Leon Gerber and Samuel Dweck were identified as trustees on said deed of trust but their addresses were not contained in the deed of trust. Prior to the partnership's failure to pay property taxes, Connecticut Avenue, Inc. dissolved and its beneficial interest under the deed of trust was transferred to the

United Jewish Appeal Federation. However, the transfer of Connecticut Avenue's beneficial interest to the UJAF was not a matter of public record. However, Gerber and Dweck remained as trustees under the deed of trust in favor of Connecticut Avenue that remained of record.

When the landowner failed to pay property taxes, the District taxing authorities sent notices via mail to the partnership concerning its right to redeem the property. However, the District did not attempt to give notice via mail to trustees Gerber and Dweck under the deed of trust. After determining that the trustees were entitled to notice of the proposed tax sale and right to redeem, the Court discussed the effort the District taxing authorities were required to make to locate the trustees for purposes of providing notice of their right to redeem. For example, the Court indicated that the address of trustee Gerber was reasonably ascertainable as he was a physician who had resided in neighboring Montgomery County, Maryland for the previous 20 years; had an office in the District Columbia for the past 45 years; and both of the addresses for these locations were listed in telephone directories. 601 A.2d at 44.

Given the West Virginia Supreme Court's decision in *Lilly*, it is clear that this Supreme Court will not set an arbitrary geographical limit on a tax lien purchaser's to locate an out-of-state landowner for purposes of providing actual notice of the landowner's right to redeem delinquent property. Rather, *Lilly's* holding that due process requires that a party having an interest in property who can reasonably be identified from public records "or otherwise" be provided notice by mail or other means "certain to ensure actual notice" is equally applicable to out-of-state landowners. Indeed, constitutional equal protection considerations would prohibit the adoption of a rule of permitting a purchaser of a tax lien to make a lesser effort to identify delinquent out-of-state landowners than is required to identify delinquent West Virginia landowners. In this age of inexpensive, instantaneous

communication, any rule purporting to limit a party's obligation to provide notice based upon information available within the geographic boundaries of a given county would be arbitrary, artificial, and would run afoul of the due process rights of out-of-state landowners.

CONCLUSION

For the foregoing reasons, Appellee asserts that Appellant's prayer for relief must be denied and that Circuit Court's Order entered October 25, 2004 granting Appellee's Renewed Motion for Summary Judgment be affirmed.

CROSS ASSIGNMENT OF ERROR

THE TAX DEED ISSUED TO APPELLANTS IS VOIDABLE PURSUANT TO WEST VIRGINIA CODE §11A-3-6(A) AS A MATTER OF LAW

On June 26, 2003, Appellee filed a motion for summary judgment. In addition to the due process arguments that were again asserted in Appellee's subsequently filed Renewed Motion for Summary Judgment, Appellee also argued that it was entitled to void the tax deed to the subject property to Appellants as a matter of law because West Virginia Code §11A-3-6(a) prohibited purchases of such tax liens by Appellant Patrick Neild, who was the Sheriff of Mineral County at the time he purchased the tax lien. The Circuit Court denied Appellee summary judgment on said ground by order entered October 15, 2003.

POINTS AND AUTHORITIES RELIED UPON, DISCUSSION OF LAW, AND RELIEF PRAYED FOR

Statutes

West Virginia Code §§11A-3-6(a) 26

DISCUSSION OF LAW

West Virginia Code §11A-3-6(a) prohibits the purchase of such tax liens by a West Virginia Sheriff, stating:

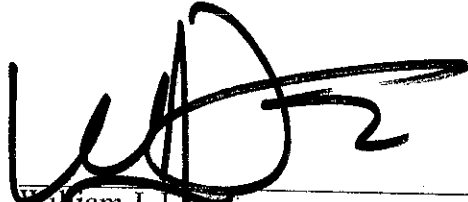
No sheriff, clerk of the county commission or circuit court, assessor, nor deputy of any of them, shall directly or indirectly become the purchaser, or be interested in the purchase, of any tax lien on any real estate at the tax sale or receive any tax deed conveying such real estate. Any such officer so purchasing shall forfeit one thousand dollars for each offense. **The sale of any tax lien on any real estate, or the conveyance of such real estate by tax deed, to one of the officers named in this section shall be voidable, at the instance of any person having the right to redeem, until such real estate reaches the hands of a bona fide purchaser.** (Emphasis added)

Appellant Patrick Neild testified that he was aware of the existence of this statute prior to his participation in the Preston County Sheriff's tax sale at which he purchased the tax lien on the subject realty. Neild testified, however, that he had been advised that the statute only prevented him from purchasing tax liens at Sheriff's sales over which he presided or which were conducted in Mineral County. March 3, 2003 deposition of Patrick Neild, p. 18. However, West Virginia Code §11A-3-6(a) is clear and unambiguous and makes no such distinction. The statute does not limit its prohibition to officers of the county in which the property at issue is located. Therefore, as provided by the statute, Patrick Neild's purchase of the tax lien on the subject realty and subsequent issuance of a tax deed concerning the realty is voidable by Subcarrier as a matter of law. Appellee asserts that the Circuit Court erred in denying Appellee summary judgment on this ground.

CONCLUSION

For the reasons stated herein, Appellee prays that this Court finds that the Circuit Court of Preston County erred in denying Appellee Subcarrier's motion for summary judgment on the foregoing grounds; that this Court reverse the order of the Circuit Court of Preston County entered October 15, 2003; and that this Court direct the Circuit Court of Preston County to enter judgment in Appellee's favor is a matter of law.

Respectfully Submitted,
Subcarrier Communications, Inc.,
Respondent, by counsel,

A handwritten signature in black ink, appearing to be 'WJL', written over a horizontal line.

William J. Leon
W. Va. Bar I.D. # 2182
William J. Leon, LC
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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

Subcarrier Communications, Inc.,
a New Jersey corporation,

Respondent/Respondent,

v.

Case No. 32752
From the Circuit Court of Preston
County, West Virginia.
Civil Action No: 02-C-146

Ronald E. Nield, John P. Lusk,
Patrick Lee Nield, and L. LN&N Investments, LLC,
a West Virginia limited liability company,

Petitioner and Third-Party Respondents/Petitioners,

v.

Neil A. Reed and The County Commission of Preston County,
a West Virginia statutory corporation,

Third-Party Petitioners.

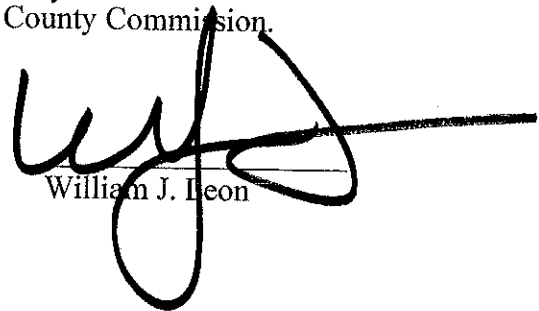
CERTIFICATE OF SERVICE

I certify that I served the Appellee's Brief and Cross Assignment of Error by placing the same in the United States Mail, first class and postage prepaid, upon counsel for Petitioners at the address listed below this 15th of August 2005.

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