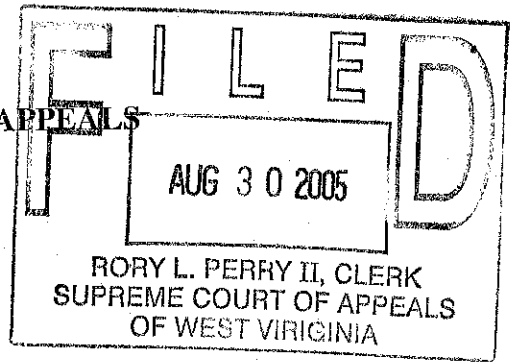


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



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 B. Lusk,
Patrick Lee Nield, and LN&N Investments, LLC,
a West Virginia limited liability company,

Defendants and Third-party Plaintiffs/Appellants,

v.

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

Third-party Defendants.

APPELLANTS' REPLY BRIEF

Robert S. Kiss, Esquire
W. Va. Bar No. 2066
Camden P. Siegrist, Esquire
W. Va. Bar No. 3394
Heather G. Harlan, Esquire
W. Va. Bar No. 8986
Bowles Rice McDavid Graff & Love LLP
600 Quarrier Street
Post Office Box 1386
Charleston, West Virginia 25325
(304) 347-1100
Counsel for Appellants

TABLE OF CONTENTS

I. POINTS AND LEGAL AUTHORITIES.....	1
II. DISCUSSION OF LAW.....	2
THE CIRCUIT COURT ERRED, AS A MATTER OF LAW, IN GRANTING SUMMARY JUDGMENT IN FAVOR OF SUBCARRIER BECAUSE SUBCARRIER WAS NOT ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW, INASMUCH AS APPELLANTS FULLY AND FAITHFULLY COMPLIED WITH W. VA. CODE §11A-3-19, WHICH GOVERNS WHAT A PURCHASER MUST DO BEFORE HE OR SHE MAY SECURE A DEED AND §11A-3-22, WHICH GOVERNS NOTICE REQUIREMENTS FOR SERVICE OF NOTICE AND INASMUCH AS SUBCARRIER FAILED TO DEMONSTRATE BY CLEAR AND CONVINCING EVIDENCE THAT APPELLANTS FAILED TO EXERCISE REASONABLY DILIGENT EFFORTS TO PROVIDE NOTICE TO SUBCARRIER OF THEIR INTENT TO ACQUIRE A TAX DEED TO THE PROPERTY.....	2
III. PRAYER FOR RELIEF.....	10

I. POINTS AND LEGAL AUTHORITIES

Cases

<u>Citizens Nat'l Bank v. Dunnaway,</u> 184 W. Va. 453, 400 S.E.2d 888 (1990).....	7
<u>Cook v. Duncan,</u> 171 W. Va. 747, 301 S.E.2d 837 (1983).....	2, 3
<u>Hock v. City of Morgantown,</u> 162 W. Va. 853, 253 S.E.2d 386 (1979).....	8
<u>Lilly v. Duke,</u> 180 W. Va. 228, 376 S.E.2d 122 (1988).....	7
<u>Mennonite Bd. of Missions v. Adams,</u> 462 U.S. 791 (1983).....	3, 7, 9
<u>Mingo County Revelopment Auth. v. Green,</u> 207 W. Va. 486, 534 S.E.2d 40 (2000).....	8
<u>Mullane v. Central Hannover Bank & Trust Co.,</u> 339 U.S. 306 (1950).....	3
<u>Plemons v. Gale,</u> 298 F. Supp. 2d 380 (S.D. W. Va 2004).....	4
<u>Plemons v. Gale,</u> 396 F.3d 569 (4th Cir. 2005)	3, 4, 5
<u>Statutes</u>	
West Virginia Code §11A-3-1	8
West Virginia Code §11A-3-6	6
West Virginia Code §11A-3-19	7
West Virginia Code§11A-3-22	7
West Virginia Code §31D-15-1501	9
West Virginia Code §31D-15-1503	9

II. DISCUSSION OF LAW

THE CIRCUIT COURT ERRED, AS A MATTER OF LAW, IN GRANTING SUMMARY JUDGMENT IN FAVOR OF SUBCARRIER BECAUSE SUBCARRIER WAS NOT ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW, INASMUCH AS APPELLANTS FULLY AND FAITHFULLY COMPLIED WITH W. VA. CODE §11A-3-19, WHICH GOVERNS WHAT A PURCHASER MUST DO BEFORE HE OR SHE MAY SECURE A DEED AND §11A-3-22, WHICH GOVERNS NOTICE REQUIREMENTS FOR SERVICE OF NOTICE AND INASMUCH AS SUBCARRIER FAILED TO DEMONSTRATE BY CLEAR AND CONVINCING EVIDENCE THAT APPELLANTS FAILED TO EXERCISE REASONABLY DILIGENT EFFORTS TO PROVIDE NOTICE TO SUBCARRIER OF THEIR INTENT TO ACQUIRE A TAX DEED TO THE PROPERTY.

As stated in Appellants' Initial Brief, the sole issue in this case is whether the Circuit Court erred in granting summary judgment in favor of Subcarrier because Appellants failed to make a reasonable inquiry that could and would have revealed the correct mailing address for the notice requirements set forth in W. Va. Code §11A-3-22.

In Appellee's Brief and Cross Assignment of Error (the "Response"), Appellee attempts to change the constitutional due process standards by which Appellants were obliged to follow in order to obtain legal title to the Property via tax deed. Apparently, Appellee takes the position that Appellants were required to provide them with actual notice in order to obtain proper title to the Property. Statutory and case law in this State impose no such requirement. Indeed, were actual notice required, the publication requirements set forth in W. Va. Code §11A-3-1, *et. seq* would themselves be unconstitutional.

This Court very clearly articulated the due process requirements imposed upon purchasers of land pursuant to W. Va. Code §11A-3-1. See Cook v. Duncan, 171 W. Va. 747, 301

S.E.2d 837 (1983). Those requirements do not require, as Appellee's suggest, actual notice, but rather, require that the purchaser of a tax deed use "due diligence" when providing the previous owner notice of the right to redeem. See id. at 751, 841. The Court went on to define "due diligence" as "the exercise of a reasonable effort to locate a person's residence so that notice of the right to redeem may be provided." Id.

Equating the due diligence requirements imposed upon purchasers of tax deeds to those found in the West Virginia Rules of Civil Procedure, the Court explained that:

the West Virginia Rules of Civil Procedure require that "service of all process shall be made with due diligence." W. Va. R. C. P. 4(c). The similarities also extend to use of publication to provide both notice of the right to redeem and constructive service of process. W. Va. Code § 11A-3-24 requires due diligence when publication is used, and the Rules of Civil Procedure authorize use of publication when "the plaintiff has used due diligence to ascertain the residence of the defendant, without effect" W. Va. R. C. P. 4(e)(1)(C).

In the seminal procedural due process case in this country, the United States Supreme Court explained that due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hannover Bank & Trust Co., 339 U.S. 306, 314 (1950).

Following the lead set forth by the United States Supreme Court, the Fourth Circuit Court of Appeals recently held that "[a]lthough a party required to provide notice need not 'undertake extraordinary efforts to discover ...whereabouts ...not in the public record,' it must use 'reasonably diligent efforts' to discover addresses that are reasonably ascertainable". Plemons v. Gale, 396 F.3d 569, 574 (4th Cir. 2005)(quoting Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 798, n.4 (1983)).

Inexplicably, the Response spends the better part of five (5) pages discussing the opinion of the United States District Court for the Southern District of West Virginia in Plemons v. Gale, 298 F. Supp. 2d 380 (S.D. W.Va. 2004), a case that was overruled by the Fourth Circuit in Plemons v. Gale, 396 F.3d 569, 574 (4th Cir. 2005). In that diatribe, the Response, after incorrectly asserting that Appellants did nothing or took no steps to ensure that Appellee was given proper notice, recites the steps that the District Court found that the purchaser could or should have taken to notify the delinquent landowner of the tax sale, steps that the Fourth Circuit deemed to be unnecessary and possibly futile. Then, the Response launches into an exhausting list of steps that it asserts Appellants should have followed in order to properly notify Appellees of the impending tax sale.

As explained in Appellants' Initial Brief, the Fourth Circuit in Plemons flatly rejected the District Court's determination that the subsequent purchaser there could have consulted the local telephone directory, asked the current tenants of the property in question for the subsequent owner's address, or made inquiries of the mortgagee bank. See id. at 577.

The Fourth Circuit reasoned that checking the local telephone directory would have been an exercise in futility, given that the previous landowner was not reachable at the then current telephone number listed. See id. The Court further held that contacting the then tenants at the property would have been an unreasonable burden to impose upon the subsequent purchaser. See id. at 21. Finally, the Court held that reasonable efforts did not require the subsequent purchaser to contact the mortgagee bank. See id.

As to what reasonable diligence does require, the Fourth Circuit stated that “[a]ccordingly, reasonable diligence required Advantage to search all publicly available county records once the prompt return of the mailings made clear that its initial examination of the title to the Echo Road property had not netted Plemons’ correct address.” Id. at 578 (emphasis added). As previously noted, however, the Court vacated and remanded the case to determine what efforts, if any, the subsequent purchaser made to search public documents, or whether the landowner’s proper address would have been easily ascertainable from such a search. See id.

In the case at hand, it is undisputed that Appellants checked the county records as required by Plemons. In fact, the Appellants hired an attorney (which is not statutorily required), to ensure that the proper procedures were followed with respect to obtaining a tax deed. That attorney performed a search of the public records of the Preston County Courthouse and prepared a list of interested persons to be notified of the right to redeem the Property.

In addition, Appellants even checked the records maintained at the West Virginia Secretary of State’s office in order to obtain an address for Appellee. However, Appellee failed to register with the West Virginia Secretary of State until July of 2002, although Appellee was required to do so prior to transacting business in West Virginia. Appellee commenced transacting business in West Virginia in November 1996 when Appellee acquired the Property, if not sooner. The Circuit Court had absolutely no statutory authority to impose upon Appellants a requirement to call the New Jersey Secretary of State’s Office to locate a current address and by doing so, has essentially ignored the statutory requirements in West Virginia with which foreign corporations must comply in order to do business in this State.

Further, Appellants were under no statutory duty to call one of the trustees named in the notice of right to redeem, given that such trustees had received proper notice of Subcarrier's redemption right through certified mail. Moreover, Appellants were under no duty to physically visit the property and indeed, to do so prior to obtaining the tax deed would have constituted a trespass under West Virginia law, as Appellant did not have proper title to the Property prior to acquiring the tax deed and had no authority to traverse over or to the Property to read the posted signs.

Finally, there is absolutely no legal requirement that Appellants perform an internet search for Subcarrier's address or for that matter, that they even own a computer. The mere suggestion that an internet search is required opens the door to a plethora of due process concerns, namely, whether an individual purchasing a tax deed is required to have a computer, have access to a computer, or be knowledgeable in the operation of a computer or proficient at internet searches and whether the information obtained from such a search is reliable or even admissible in court. Thus, the above requirements imposed upon Appellants by the Circuit Court and posited by Appellee's in the Response are excessive, unsupported by the governing statute and unreasonable.

Moreover, the Circuit Court improperly imposed an even higher standard of diligence upon Petitioner Patrick Nield because he was the Sheriff of Mineral County at the time that the Property was purchased. Neither the governing statutes nor any jurisprudence in construction thereof support such a conclusion. In this regard, the Response's cross-assignment of error is without merit. First, W. Va. Code §11A-3-6 is inapplicable to Patrick Nield because the Property is located in Preston County, and Patrick Nield was never the Sheriff of Preston County. W. Va. Code § 11A-3-6, when read in context with the remaining sections of W. Va. Code Chapter 11A, Article 3 pertaining to the sale of tax liens, clearly applies only to the sheriff of the county in which the tax

sale is being conducted. Moreover, Appellee's challenge under this statutory provision became time barred once the Property was sold to LN&N Investments, LLC, a bonafide purchaser.

Unlike in Plemons, here it is undisputed that attorney Neil Reed checked the public records for a proper address and that Patrick Nield phoned the West Virginia Secretary of State to confirm the address for Subcarrier. Although the Appellee will assert that the Appellants made no effort, let alone a reasonable effort, to obtain a current address for Appellee, the record is replete with evidence of the efforts that Appellants made, including engaging an attorney to complete a lien search and title search of the Property, who performed a thorough and complete search of the relevant county records and contacting the West Virginia Secretary of State.

The efforts made by Patrick Nield and his attorney far exceed the requirements for due diligence and satisfy the requirements of W. Va. Code §§11A-3-19, 11A-3-22. Further, the Clerk properly attempted to notify Subcarrier of its right to redeem pursuant to W. Va. Code §§11A-3-21. Quoting the United States Supreme Court, the Lilly court noted that “[w]e do not suggest that a governmental body is required to take extraordinary efforts to discover the identity and whereabouts of a mortgagee whose identity is not in the public record.” Lilly v. Duke, 180 W. Va. 228, 231, 376 S.E.2d 122, 125 (1988), n.7, quoting Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 798, n.4. (1983). See also Citizens Nat’l Bank v. Dunnaway, 184 W. Va. 453, 458, 400 S.E.2d 888, 893 (1990) (“We hold that the lack of personal notice to the Bank was caused by an improperly indexed deed that could not be located by reasonably diligent efforts, and therefore, no due process violation exists to vitiate the sale.”).

The Legislature has established a system to provide for the steps that a purchaser must take in order to secure a tax deed. See W. Va. Code 11A-3-19(a). This system provides that a prospective purchaser must perform a search of the public records, which was done in this case. Deviation from that system depletes the public confidence in land ownership, imposes unnecessary and constitutionally impermissible restrictions upon prospective land purchasers and erodes an already thin tax base in this State. As this Court recently recognized,

confidence in one's title to land is of paramount importance. As we have remarked previously, "certainty above all else is the preeminent compelling public policy to be served." Hock v. City of Morgantown, 162 W. Va. 853, 856, 253 S.E.2d 386, 388 (1979). We are also mindful that the government must make a timely collection of property taxes in order to function properly. As pointed out by the Legislature:

In view of the paramount necessity of providing regular tax income for the state, county and municipal governments, particularly for school purposes; and in view of the further fact that delinquent land not only constitutes a public liability, but also represents a failure on the part of delinquent private owners to bear a fair share of the costs of government, . . .

Mingo County Redevelopment Auth. v. Green, 207 W. Va. 486, 534 S.E.2d 40 (2000)

(citing W. Va. Code 11A-3-1).

Throughout the Response, Appellee attempts to shirk its statutory responsibility to (1) register to do business in this State and (2) pay taxes in this State. Appellee is a foreign corporation that has availed itself of the benefits and protections of the State of West Virginia by purchasing land and conducting business in West Virginia. With those benefits and protections come rights and responsibilities, which Appellee chose to ignore. The record below reveals that Appellee knew that it had a duty to pay property tax on real estate owned in West Virginia because it paid such taxes for

the 1997 year. Although Appellee has argued that it attempted to notify the Preston County Clerk of its change in address, common sense dictates that Appellee should have known that such change was not properly effected, given that it did not receive a tax ticket for 1998.

Further, despite the fact that Subcarrier generated income from the Property and from operation of the tower on the Property since 1996, Appellee failed to obtain a certificate of authority from the West Virginia Secretary of State to transact business in West Virginia until 2002, long after the tax deed had been properly delivered.

W. Va. Code §31D-15-1501, et. seq. mandates that a foreign corporation must obtain a certificate of authority from the West Virginia Secretary of State before transacting business in this State. Any foreign corporation deemed to be transacting business in West Virginia is required to obtain a certificate of authority from the West Virginia Secretary of State. See W. Va. Code §31D-15-1501. Foreign corporations that transact business in West Virginia without the requisite authority are subject to certain penalties and may not even maintain a proceeding in any circuit court of this State until such certificate is obtained. See W. Va. Code §31D-15-1503.

Because Appellee failed to do even the statutory minimum required to operate in this State, it cannot show that Appellants failed to exercise due diligence in giving notice because “[w]hen a party is unreasonable in failing to protect its interest despite its ability to do so, due process does not require that the State save the party from its own lack of care.” Menonite Board of Missions v. Adams, 462 U.S. 791, 809 (1983).

In short, Appellee received all the due process that it is due, and the Circuit Court erred as a matter of law by granting it summary judgment because it failed to show by clear and


convincing evidence that Appellants failed to exercise reasonably diligent efforts to provide notice of their intention to acquire title to the Property. Accordingly, Appellee was not entitled to judgment as a matter of law.

II. PRAYER FOR RELIEF

WHEREFORE, based upon the evidence in the record and the authorities cited herein, Appellants respectfully submit that the Circuit Court of Preston County's Order Granting Plaintiff's Motion for Summary Judgment is in error, and as such, that Order should be reversed and vacated.

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

By Counsel



Robert S. Kiss, Esquire (WVSB #2066)
Camden P. Siegrist, Esquire (WVSB #3394)
Heather G. Harlan, Esquire (WVSB #8986)
Bowles Rice McDavid Graff & Love LLP
600 Quarrier Street
Post Office Box 1386
Charleston, West Virginia 25325-1386
(304) 347-1100
(304) 343-3058

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-46

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

Defendants and Third-party Plaintiffs/Appellant,

v.

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

Third-party Defendants

CERTIFICATE OF SERVICE

I, Robert S. Kiss, Esquire, do hereby certify that on August 30, 2005, a true and exact copy of the foregoing Appellant's Reply Brief has been served, by United States Postal Service, postage prepaid and properly addressed upon the following:

Christopher K. Robertson, Esq.
Jackson Kelly, PLLC
310 West Burke Street
Martinsburg, West Virginia 25401
Counsel for Third Party Defendants Neil A. Reed

Boyd L. Warner, Esq.
John E. Treadwell, Esq.
Water, Warner & Harris, PLLC
701 Goff Building
Post Office Box 1716
Clarksburg, West Virginia 26302-1716
Counsel for Third Party Defendant Preston County Commission

Andrew G. Fusco, Esquire
William J. Leon, Esquire
Eckert Seamans Cherin & Mellot, PLLC
2400 Cranberry Square
Morgantown, West Virginia 26505
Counsel for Subcarrier Communications, Inc.

William J. Leon, Esquire
William J. Leon LC
117 Tibbs Road
Morgantown, West Virginia 26505
Counsel for Subcarrier Communications, Inc.



Robert S. Kiss