

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2014 Term

No. 13-0886

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

EB DOREV HOLDINGS, INC.,
Defendant Below, Petitioner

v.

WEST VIRGINIA DEPARTMENT OF ADMINISTRATION,
REAL ESTATE DIVISION,
Plaintiff Below, Respondent

Appeal from the Circuit Court of Kanawha County
The Honorable Paul Zakaib, Jr., Judge
Civil Action No. 12-MISC-186

AFFIRMED

Submitted: April 22, 2014
Filed: June 16, 2014

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The Opinion of the Court was delivered PER CURIAM.
JUSTICE LOUGHRY concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. “A circuit court’s entry of summary judgment is reviewed *de novo*.”

Syllabus point 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

2. “A motion for summary judgment should be granted only when it is

clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is

not desirable to clarify the application of the law.” Syllabus Point 3, *Aetna Cas. & Sur.*

Co. v. Federal Ins. Co. of New York, 148 W.Va. 160, 133 S.E.2d 770 (1963).

3. “Where a greater and less estate unite in the same person, without an

intermediate estate, the less at once merges into the greater.” Syllabus Point 4, *Turk v.*

Skiles, 45 W. Va. 82, 30 S.E. 234 (1898).

Per Curiam:

The instant action is before the Court upon the appeal of the Petitioner, EB Dorev Holdings, Inc. (“EB Dorev”) from a July 11, 2013, order of the Circuit Court of Kanawha County which granted the Respondent, West Virginia Department of Administration, Real Estate Division’s (“WVDOA”), motion for summary judgment voiding the sale of certain tax liens purchased by EB Dorev. In this appeal, EB Dorev alleges that 1) the circuit court erred in ruling that the real properties, which were owned by private entities on July 1, 2008, were rendered exempt from 2009 real estate taxes upon the subsequent purchase of the properties by the WVDOA in August and September of 2008; 2) the circuit court erred in concluding that the tax liens at issue were extinguished through the doctrine of merger; and 3) the circuit court erred in concluding that the tax liens at issue were inchoate and never matured into liens suitable for sale. Conversely, the WVDOA asserts that while the circuit court may have erred in finding that the properties at issue were rendered exempt from the 2009 taxes upon their purchase by the WVDOA in 2008, that ruling is irrelevant to the circuit court’s proper finding that the tax liens were extinguished by the doctrine of merger or were inchoate. Upon examination of the petition, the response, the submitted appendix, and the arguments of counsel, this Court concludes that, for the reasons set forth below, the circuit court’s order should be affirmed.

I.

FACTUAL AND PROCEDURAL BACKGROUND

On July 1, 2008, the real properties at issue in this appeal were owned by CRW Real Estate, LLC, So Park, LLC, and Knollwood Investments, LLC.¹ In August and September 2008, after the assessment date for the 2009 real estate taxes on the properties,² the subject properties were sold to the WVDOA. The 2009 real estate taxes on the properties were not timely paid, and on November 16, 2010, the Kanawha County Sheriff sold the tax liens on the properties to the Petitioner.³

After the tax lien sale, the Kanawha County Clerk, at the application and request of the Petitioner, sent a notice to redeem to the law firm Johnson & Lopez, PLLC, the closing attorneys for the sale of the properties at issue⁴, informing the closing

¹ The subject properties are the Plaza IV building (“Plaza IV”) in South Charleston, West Virginia, and to the Cornerstone building (“Cornerstone”) in Charleston, West Virginia. The sale price to the WVDOA of the Plaza IV property by South Park, L.L.C. and Knollwood Investments, L.L.C. was \$3,300,000.00. The sale price to the WVDOA of the Cornerstone building by CRW Real Estate, L.L.C., was \$1,930,000.00. The combined value of the properties was \$5,230,000.00.

² “Assessment date” means July 1 of the year preceding the tax year. W. Va. Code § 11-3-1(f)(1) (2010). “Tax year” or “property tax year” means the next calendar year that begins after the assessment date. W. Va. Code § 11-3-1(f)(3) (2010).

³ The WVDOA alleges that the sales contract for the properties required the sellers (the “former owners”) to pay all delinquent property taxes out of the proceeds from the sales.

⁴ The record reveals that the County Clerk sent the Notice to Redeem for the Plaza IV building to Sarah Lopez, Esq. in February of 2012. The Notice of Redeem for the Cornerstone building was sent to Nicholas Johnson, Esq. in February of 2012.

attorneys that if the delinquent real estate taxes were not paid in full by April 1, 2012, the Clerk would issue tax deeds for the properties to the Petitioner. The notice to redeem was not served on the former owner in whose name the real estate tax went delinquent and was not served on the new record owner, WVDOA, as provided in West Virginia tax sale statutes. The properties were not redeemed by the April 1, 2012, redemption date. However, on March 30, 2012, the WVDOA filed a Complaint against EB Dorev and the Kanawha County Clerk, Kanawha County Sheriff, and Kanawha County Assessor and a Petition for Writ of Mandamus seeking to prevent the issuance of the tax deeds to EB Dorev.⁵ Petitioner responded and asserted counterclaims and cross-claims seeking, *inter alia*, to compel the issuance of the tax deeds, to recover its attorney's fees and costs, and to recover the price they paid for the tax liens if the tax deeds were not issued.⁶

On November 16, 2012, the WVDOA filed a motion for summary judgment. Thereafter, EB Dorev filed a cross-motion for summary judgment.⁷ Following a hearing on the matter, the circuit court granted summary judgment in favor of the WVDOA. The circuit court found that (1) because State properties were tax exempt, the

⁵ It simultaneously filed a Petition for Temporary Restraining Order which the circuit court granted by orders dated March 30, 2012, and April 24, 2012.

⁶ Vera McCormick, in her capacity as the Clerk of Kanawha County Commission, and Mike Rutherford, in his capacity as the Sheriff of Kanawha County, also filed an answer to the WVDOA's Complaint. Neither is a party in the instant appeal.

⁷ Defendants McCormick and Rutherford also filed a response to the WVDOA's motion for summary judgment.

properties were rendered exempt from the 2009 real estate taxes when they were purchased by the WVDOA; and (2) the tax liens were extinguished through the doctrine of merger or, alternatively, were inchoate and thus never matured into saleable liens. The circuit court then voided the sale of the tax liens to petitioner and permanently enjoined the Clerk from transferring the properties to petitioner. Subsequently, EB Dorev timely filed the instant appeal.

II.

STANDARD OF REVIEW

“A circuit court’s entry of summary judgment is reviewed *de novo*.” Syllabus point 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). When reviewing a lower court’s decision regarding summary judgment, we apply the same standard required of the circuit court. *See Cottrill v. Ranson*, 200 W.Va. 691, 695, 490 S.E.2d 778, 782 (1997) (“We review a circuit court’s decision to grant summary judgment *de novo* and apply the same standard for summary judgment that is to be followed by the circuit court.” (citing *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 58, 459 S.E.2d 329, 335 (1995))). In this regard, we have long held that “[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963). Having established the proper standard for our review, we proceed with our consideration of this case.

III.

ANALYSIS

In its first assignment of error, EB Dorev alleges that the circuit court erred in ruling that the properties were rendered exempt from the 2009 real estate taxes upon the WVDOA's purchase of the properties in August and September of 2008. Specifically, EB Dorev contends that the taxes at issue in this appeal are the 2009 property taxes which were assessed on July 1, 2008, when the properties were owned by the former property owners, who, as private entities, are not entitled to tax exemption. EB Dorev asserts that the former owners were responsible for payment of the 2009 taxes on the subject properties pursuant to West Virginia Code § 11-3-1(c) (2010).⁸ In response, the WVDOA concedes that the circuit court erred in finding that the properties were exempt from taxation on the date of the July 1, 2008, assessment. We agree. To the extent that the subject properties were not owned by the WVDOA, a State agency, on the assessment date, we conclude that the circuit court's first finding, that "the property at issue was rendered exempt from the 2009 taxes upon the purchase by [the WVDOA] in 2008[.]" is contrary to law.

⁸ West Virginia Code § 11-3-1(c) provides that "[t]he taxes upon all property shall be paid by those who are the owners thereof on the assessment date whether it be assessed to them or others."

The exemption issue aside, the circuit court concluded that there were alternative reasons the tax lien sale should be voided. We will next address EB Dorev's assignment of error alleging that circuit court erred in concluding that the tax liens at issue were extinguished through the doctrine of merger.

The circuit court found that when the WVDOA acquired the properties in August and September of 2008, the WVDOA's lesser right as the holder of the tax liens that attached on July 1, 2008, was merged with its greater right as the owner of the properties and, as such, the liens were extinguished. In support of this merger theory, the circuit court relied on *Armstrong Products Corp. v. Martin*, 119 W.Va. 50, 192 S.E. 125 (1937), in which this Court found that where the WVDOA purchases land at a tax sale, the tax lien on the land is merged in its purchased title.

EB Dorev contends that *Armstrong* is inapplicable to the instant case because it addressed the State's purchase of land at a sheriff's sale. The circuit court also relied on a *State v. Locke*, 219 P. 790 (N.M. 1923), in which New Mexico's Supreme Court ruled that

when property is acquired by the State in its sovereign capacity, it thereupon becomes absolved, freed, and relieved from any further liability for taxes previously assessed against it, and which are unpaid at the time it becomes so acquired that from the moment of its acquisition the power to enforce the lien is arrested or abated. The claim of the State for such taxes becomes merged in its ownership of the fee. To consider it further burdened with such lien, and to permit it to

be subsequently sold for the payment thereof, results in the State selling its own property to pay itself.

219 P. at 792. EB Dorev contends that although this Court cited to *Locke* in the *Armstrong* case, it did not expressly adopt *Locke's* doctrine of merger. Although this language in *Locke* was not a direct holding or a syllabus point in *Armstrong*, we believe it is good law and supported by our holdings in other West Virginia cases.

In *Locke*, New Mexico's Supreme Court reasoned that it is nonsensical to sell property owned by the State for delinquent taxes. 219 P. at 792. EB Dorev contends, however, that raising state funds is not the issue in the case at bar. Instead, EB Dorev argues that the issue is raising funds for local government entities, such as the Kanawha County Board of Education, by taxing private property owners. *See* W.Va. Code § 11-8-4 (1933) (purpose of assessing taxes upon real property is to fund various state, county, and municipal governments, including schools). EB Dorev also avers that rejecting *Locke* causes no undue hardship to the WVDOA because when the WVDOA buys property from private owners, it can ensure that the closing documents contain a provision requiring that a portion of the sale price be withheld to pay any outstanding taxes for the tax year following the closing.

Additionally, EB Dorev maintains that adopting the doctrine of merger would contravene Article X, § 1 of the West Virginia Constitution which provides that "taxation shall be equal and uniform throughout the State, and all property, both real and

personal, shall be taxed in proportion to its value to be ascertained as directed by law.”

EB Dorev contends that if the doctrine of merger applies, private property owners who sell to the State will be treated differently than private property owners who sell to non-State entities. EB Dorev asserts that the doctrine of merger gives an unfair advantage to the WVDOA in purchasing property because, unlike private buyers who must ensure that the seller pays any outstanding taxes, the seller who sells to the WVDOA will not have to pay those taxes. EB Dorev contends that private sellers will be more likely to sell to the State than to private owners.

Conversely, the WVDOA contends that this Court’s reference to *Locke* in *Armstrong* demonstrates that West Virginia long ago recognized and applied the doctrine of merger as a valid legal principle. The WVDOA contends that the legal principles and rationale applied in *Locke* are clearly applicable to the case at bar and thus, the doctrine of merger applies in this case.

While we agree that the *Armstrong* case is technically distinguishable from the instant case, our review of the law on this issue reveals that this Court has previously recognized the doctrine of merger in other cases. In syllabus point 4 of *Turk v. Skiles*, 45 W. Va. 82, 30 S.E. 234 (1898), this Court held that “[w]here a greater and less estate unite in the same person, without an intermediate estate, the less at once merges into the greater.” It appears to be the general rule in the United States. *See*, 51 Am. Jur. 2d Liens § 64.

Subsequently, in *Sullivan v. Sanders*, 66 W. Va. 350, 66 S.E. 497 (1909), a case wherein a trust deed creditor bought the trust subject property and took a conveyance for it from his debtor, this Court again discussed the doctrine of merger. Recognizing the “general rule of law that where the holder of a lien upon land afterwards acquires the legal title, the lien is merged into his estate and is extinguished,” this Court made an exception to the rule and found that the lien at issue was not merged when the lienholder was conveyed the fee as a matter of equity to preserve the trust lien for the lienholder’s protection. *Id.* at 498. The grantee’s first lien was preserved in order to prevent a junior lienholder from obtaining a preferential lien against the property. *Id.* See also, *Tilhance Creek Investments, LLC v. BCBank, Inc.*, 2013 WL 1286130 (2013).

Applying the previously recognized doctrine of merger to the case before us, we conclude that when the WVDOA, as a State agency, acquired the properties in August and September of 2008, the State’s lesser right as the holder of the tax liens that attached on July 1, 2008, was merged with its greater right as the owner of the properties and, as such, the liens were extinguished. Finding no error in the circuit court’s ruling on voiding the tax lien sale on this basis, we affirm the circuit court’s order. Accordingly, to the extent that we conclude that the tax liens at issue were extinguished through merger upon the purchase of the property by the WVDOA, it is unnecessary to address EB Dorev’s remaining assignment of error alleging that the circuit court erred in concluding that the tax liens at issue were inchoate and never matured into liens suitable for sale.

As a final matter, having concluded that the tax lien sale should be voided, we wish to address EB Dorev's assertion that the circuit court impliedly ordered the return of the purchase money that EB Dorev paid for the subject tax liens when it voided the tax lien sale. EB Dorev contends that although the circuit court's order makes no specific reference to the purchase money, it is axiomatic that if the sale of the liens is void, then EB Dorev is entitled to a refund of the money that it paid for the liens. EB Dorev requests that this Court clarify that the purchase money must be refunded to it. The WVDOA argues that the lien had been extinguished and that EB Dorev purchased nothing. The WVDOA contends that it did not redeem the property and EB Dorev is not entitled to repayment required when property is redeemed under West Virginia's tax sale statutes. In sum, the WVDOA asserts that EB Dorev gambled on purchasing a tax lien on the Courthouse steps and the gamble did not pay off. To the extent that the circuit court did not expressly address this issue below, this matter has not been thoroughly briefed by the parties on appeal, and the Kanawha County Clerk, Kanawha County Sheriff, and Kanawha County Assessor are not parties to the instant appeal, we decline to address this issue in the instant appeal, but grant leave to EB Dorev to raise this issue with the circuit court.

IV.

CONCLUSION

For the foregoing reasons, we affirm the July 11, 2013, order of the Circuit Court of Kanawha County granting summary judgment to the WVDOA.

Affirmed.