No. 35627 – *Foster Foundation v. Gainer*

Ketchum, J., dissenting:

FILED
March 10, 2011
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

I disagree with the majority opinion's conclusion that the State Auditor was required, or even entitled, to charge an additional $457,386.79 "certification fee" under the facts of this case.

The record makes clear that there was a legitimate dispute as to whether the real estate owned by the Foster Foundation ("Foundation") was exempt from real estate taxes in Cabell County, West Virginia. A lawsuit was filed contesting the assessment and, as part of that lawsuit, the parties *negotiated* a pre-trial agreement. This pre-trial agreement was meant to allow the court time to rule whether Foster Foundation's property was exempt from real estate taxes and, in the meantime, to preclude the Foundation's property from being conveyed to the State Auditor or from being part of a sheriff's tax sale. The court ratified this negotiated pre-trial agreement in an order.

Following our decision in *In re Tax Assessment of Foster Foundation's Woodlands Retirement Community,* 223 W.Va. 14, 672 S.E.2d 150 (2008), where we held that the Foundation's property was subject to the disputed tax, the Foundation promptly paid the $4,303.399.97 in taxes that were in dispute, plus interest in the amount of $1,794.148.03.

However, the State Auditor charged the Foundation an additional "certification fee" of $457,386.79.

Our law does not allow the State Auditor to charge a certification fee unless the property was part of a sheriff's tax sale and the property was thereafter certified to the Auditor as having been "sold or unsold" at the tax sale. The majority opinion incorrectly concludes that *W.Va. Code, 11A-3-39,* authorizes the certification fee because the Foundation's property had been reported to the State Auditor as delinquent. However, a close reading of *W.Va. Code, 11A-3-39,* shows that it applies only to property that has been redeemed pursuant to *W.Va. Code,* 11A-3-38.

W.Va. Code, 11A-3-38, provides, in relevant part, that the "owner of any real estate certified to the Auditor pursuant to [*W.Va. Code,* 11-A-3-8], or of any nonentered real estate subject to the authority of the Auditor . . . may redeem such real estate from the Auditor at any time prior to the certification of such real estate to the deputy commissioner[.]" It is clear that *W.Va. Code,* 11A-3-38, applies to two scenarios. First, to property that has been certified to the Auditor following an unsuccessful sheriff's tax sale. Second, to nonentered lands. There is no claim that the Foundation's property is a "nonenetered" land for purposes of W.Va. Code, 11A-3-38, which means that any authority for the Auditor's "certification fee" must be derived from *W.Va. Code,* 11-A-3-8.

W.Va. Code, 11-A-3-8, provides that where a sheriff has held a tax sale, and "no person present bids the amount of taxes, interest and charges due on any real estate offered *for sale*, the sheriff shall certify the real estate to the Auditor . . . subject, however,

to the right of redemption provided by [*W.Va. Code*, 11-A-3-38]." (Emphasis added). The Foundation's property was not presented at a sheriff's tax sale, and *W.Va. Code*, 11-A-3-8, is therefore inapplicable. The Foundation is not the "owner of any real estate certified to the Auditor pursuant to [*W.Va. Code*, 11-A-3-8]" as that term is used in *W.Va. Code*, 11A-3-38, and therefore, the Auditor was not entitled to charge it a certification fee under *W.Va. Code*, 11A-3-39. Nevertheless, the Auditor argues that while the property was suspended from a tax sale, it was certified to the Auditor by the sheriff as a suspended sale. However, no statute, regulation, or law allows the auditor to charge a certification fee for property suspended from a tax sale.

Even if our law clearly provided that the certification fee was proper, I would bar the fee on the grounds of equity. The Foundation had a legitimate argument that the *ad valorem* tax was inapplicable to its property. It lawfully contested the tax assessment, and filed a law suit to prosecute its claim. As part of that lawsuit, a pretrial agreement was reached with the Cabell County Sheriff and the State of West Virginia. It was clearly the intent of the parties that the Foundation's property not be sold during the pendency of the suit and that the Foundation, if unsuccessful, would pay the tax due, plus interest. The Foundation kept its promise. The State did not and is receiving a $457,386.79 windfall because it is reneging on its agreement not to force the payment of the real estate taxes at a sheriff's sale until a court determined whether the Foundation's property was exempt from real estate taxes.

Evidently, the maxim that "a deal is a deal" does not apply when you are dealing with the State of West Virginia.

I respectfully dissent.