

**IN THE
SUPREME COURT OF VIRGINIA**

Record No. 210389

**KEN McKEITHEN, SUCCESSOR TRUSTEE OF THE
CRAIG E. CALDWELL TRUST U/A DATED DECEMBER
28, 2006**

Appellant,

v.

CITY OF RICHMOND,

Appellee.

APPELLEE'S OPENING BRIEF

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STATEMENT OF THE CASE

Virginia Code § 58.1-3967 states that after two years, money remaining unclaimed from the sale of tax-delinquent realty shall be paid to taxing localities. The issue presented in this case is whether money unclaimed by a superior lienholder should be paid to an inferior lienholder or to a locality.

ASSIGNMENTS OF ERROR

1. The Trial Court erroneously ruled that Appellant's lien claim established under Va. Code § 58.1-3967 to the net tax sale proceeds to be distributed after payment in full of the City of Richmond's statutory tax lien is not a constitutionally protected private property interest in the Disputed Tax Sale Proceeds.
2. The Trial Court erroneously failed to rule that the provisions of Va. Code § 58.1-3967 granting the City of Richmond the right to the Disputed Tax Sale Proceeds remaining after satisfaction of all obligations due the City of Richmond under its statutory tax lien was an unconstitutional taking of the Caldwell Trust's property right in the Disputed Tax Sale Proceeds without just compensation under the United States and Virginia Constitutions.

STATEMENT OF FACTS

Appellee the City of Richmond (“the City”) concurs with Appellant (“the Caldwell Trust”) that “(t)here is no dispute as to any material facts of this case.” Appellant’s Brief, p. 7. However the City will summarize and highlight some of these facts as follows.

On June 14, 2017 the City filed a Complaint in Richmond Circuit Court pursuant to Virginia Code § 58.1-3965, et seq. to enforce its lien for unpaid taxes owing on 3422 Keighly Road. [JA 1-4]. The Compliant listed liens on the property, to include a deed of trust recorded on January 5, 2001 (“the superior lien”) and the Caldwell Trust’s judgment lien recorded on December 3, 2012 (“the inferior lien”). [JA 2]. The property sold at auction, and on April 30, 2018 the Circuit Court entered an Order of Confirmation directing disbursement of proceeds from the sale, to include \$14,000.00 paid into court for the superior lien, and \$7,171.10 paid into court for the inferior lien. [JA 69-71].

On June 17, 2019 the Caldwell Trust filed a Motion to Amend Order of Confirmation, claiming the \$7171.10 paid into court for the inferior lien. [JA 73-85]. The City did not oppose this motion, and it was granted the same day. [JA 86-88].

A year later on June 29, 2020 the Caldwell Trust filed a Motion for Order of Distribution claiming the \$14,000.00 paid into court for the superior lien, with this motion being again filed on October 1, 2020, and the City filing a Brief in Opposition. [JA 89-107, 108-121, 125-127]. On November 5, 2020 the Circuit Court denied the Caldwell Trust's motion claiming the superior lien, and on January 20, 2021 denied the Caldwell Trust's Motion for Reconsideration. [JA 128, 143-144].

ARGUMENTS AND AUTHORITIES

The Caldwell Trust had no constitutionally protected interest in money paid into court for the benefit of a superior lienholder because it had no property interest in that money.

All of the Caldwell Trust's arguments are premised on an incorrect presumption: that it had a property interest protected by the Fifth Amendment in the \$14,000.00 paid into the registry of the court for the superior lien. The Takings Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, provides "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V; see *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 247, 17 S. Ct. 581, 41 L. Ed. 979 (1897). In order to state a claim under the Takings Clause, plaintiffs must first show that they had a legitimate property interest that was "taken" either through a physical invasion or governmental regulation. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 122, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). Thus, the "threshold question in any takings case is whether the government action has affected a property interest that is cognizable under the pertinent clauses of the United States and Virginia constitutions. In other words, does the plaintiff have an interest that is recognized as a property interest?" *Johnson v. City of Suffolk*, 299 Va. 364, 370, 851 S.E.2d 478, 481 (2020) (citations omitted).

The scope of property interests protected by the Takings Clause are “defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). In this case, this threshold inquiry “is simple to resolve”, and Virginia statutes and cases define the Caldwell Trust’s property rights. *Johnson*, 299 Va. at 371, 851 S.E.2d at 482.

The Caldwell Trust claims that its inferior lien created “a property right under Virginia law in and to at least \$7171.10” of the funds paid into court. Appellant’s Brief, p. 12. However the Caldwell Trust neither claims, nor demonstrates, that it had a property interest in the property in dispute in this case: the \$14,000.00 paid into court for the superior lien.

The Caldwell Trust obtained a judgment against the prior owner of 3422 Keighly Road. [JA 1-2, 79]. Under Virginia Code § 8.01-458, this gave the Caldwell Trust a judgment lien on 3422 Keighly Road. But a judgment lien itself is not money. Rather, a judgment lien is “a right given the judgment lien creditor to have his claim satisfied by the seizure of the land of his judgment debtor...merely a right to levy on any such lands for the purpose of satisfying the judgment.” *Jones v. Hall*, 177 Va. 658, 664, 15 S.E.2d 108,

111 (1941). Thus, the Caldwell Trust did not have a property interest in the \$14,000.00 which it alleges was "taken" in violation of the Takings Clause.

CONCLUSION

For the reasons stated in this brief, the City requests that the Circuit Court's November 5, 2020 Order denying Appellant the Caldwell Trust's motion claiming \$14,000.00 be affirmed.

Respectfully submitted,
CITY OF RICHMOND,
Appellee

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