

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2006-TS-01405

NAPOLEAN MOORE

APPELLANT

VS.

MARATHON ASSET MANAGEMENT, L. L. C.

DEFENDANT

Appeal from the Chancery Court
of the First Judicial District of Hinds County, Mississippi

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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VS.

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DEFENDANT

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court or the judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Napoleon Moore, Appellant
2. Marathon Asset Management, LLC, Appellee
3. Honorable William H. Singletary
4. Paul E. Rogers, Esquire
5. H. Fariss Crisler, III, Esquire

Respectfully Submitted,



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STATEMENT OF ISSUES

- I. THE TRIAL COURT ERRED IN NOT SETTING ASIDE THE TAX SALE, VOIDING DEFENDANT/APPELLEE'S TAX DEED AND QUIETING TITLE TO THE SUBJECT PROPERTY IN PLAINTIFF/APPELLANT.
- II. THE TRIAL COURT ERRED IN NOT AWARDING PLAINTIFF/APPELLANT AN EQUITABLE LIEN AGAINST THE SUBJECT PROPERTY IN AN AMOUNT EQUAL TO FUNDS HE HAS PUT INTO THE PROPERTY.

STATEMENT OF THE CASE

NATURE OF THE CASE

This appeal resulted from a case in the court below wherein Plaintiff/Appellant was seeking to have a tax sale set aside, the tax deed voided and title confirmed in himself. The lower Court held that the Chancery Clerk had complied with the statutory notice requirements and denied Plaintiff/Appellant's request to void the tax deed and quiet title in Plaintiff/Appellant.

Plaintiff/Appellant requested, in the alternative, that he be granted an equitable lien against the property for all sums expended to purchase the property and the costs of all improvements made to the property which request was also denied.

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Plaintiff/Appellant filed his Complaint to Quiet and Confirm Title or for Damages against Defendant/Appellee on August 31, 2004. On October 28, 2004, Defendant/Appellee filed its Answer and Counter-Claim wherein Defendant/Appellee prayed for confirmation of its tax deed. Plaintiff/Appellant filed his Response to Counter-Claim on October 28, 2004.

Defendant/Appellee filed its Third Party Complaint against the State of Mississippi, Hinds County, Mississippi, Faye Peterson, the District Attorney of Hinds County, Mississippi and any and all interested persons on February 6, 2006. An Answer was filed by the State of Mississippi on March 16, 2006.

The trial of the matter was held on March 8, 2006. The lower Court entered its Order in this cause on May 12, 2006 wherein the Court stated that the Chancery Clerk had followed the correct procedure and that the tax sale should not be set aside and the deed transferred to Plaintiff/Appellant. Moreover, the Court found that Plaintiff/Appellant's alternative request for relief in the form of an

equitable lien should be denied. On July 21, 2006, the Court entered its Final Judgment declaring Marathon Asset Management, LLC to be the fee simple title holder of the subject property. Plaintiff/Appellant filed his Notice of Appeal on August 21, 2006. Plaintiff/Appellant's Designation of Record was filed on August 28, 2006 along with his Certificate of Compliance with Rule 11(b)(1).

STATEMENT OF FACTS

On August 27, 2001, the subject property was sold at a tax sale to Heartwood 88, Inc. which later transferred its interest to Defendant/Appellee by quitclaim deed. Notice of the upcoming expiration of the period for redemption was mailed to Edward Chapman and Florida Chapman by certified mail on May 27, 2003 and both were returned unclaimed. Personal service on Edward Chapman was attempted on July 15, 2003 but he was not found by the Sheriff.

Plaintiff/Appellant purchased the subject property at a foreclosure sale on June 13, 2003. Notice of the foreclosure sale was published in the Clarion-Ledger once a week for four consecutive weeks prior to the June 13, 2003 sale.

The period for redeeming the subject property ran on August 27, 2003 and Heartwood 88, Inc. was given a tax deed to the subject property. However, Plaintiff/Appellant purchased the subject property at the foreclosure sale more than three months prior to the expiration of the period for redemption.

SUMMARY OF THE ARGUMENT

Pursuant to §27-43-3 of the Mississippi Code Annotated (Rev.2000), the Chancery Clerk is required to provide the reputed owner of property notice of a tax sale and notice of the expiration of the period of redemption by certified mail, personal service and by publication. Further, if the notice sent by certified mail comes back undeliverable or if the reputed owner is not found by the

Sheriff then the Clerk file an affidavit to that effect and perform a "diligent search and inquiry" to ascertain the identity and location of the reputed owner.

The Chancery Clerk failed to file an affidavit stating that a diligent search and inquiry had been performed and listing the specific actions taken by the Clerk to located the reputed owner.

ARGUMENT

SCOPE OF REVIEW

In order to reverse a finding of fact made by a Chancellor, an appellant court must find that the Chancellor "was manifestly wrong or applied an erroneous legal standard." *Nosser v. Buford*, 852 So.2d 57, 60 (citing *Morgan v. West*, 812 So.2d 987, 990 (Miss.2002)).

To reverse a Chancellor's ruling on questions of law, an appellant court applying a de novo standard of review must find error in the Chancellor's interpretation or application of the law. *Id.* at 60 (citing *Morgan v. West*, 812 So.2d 990 (Miss.2002))

I. THE TRIAL COURT ERRED IN NOT SETTING ASIDE THE TAX SALE, VOIDING DEFENDANT/APPELLEE'S TAX DEED AND QUIETING TITLE TO THE SUBJECT PROPERTY IN PLAINTIFF/APPELLANT.

As stated in the Summary of Facts above, Plaintiff/Appellant purchased the subject property located at 462 Downing Street, Jackson, Mississippi at a foreclosure sale on June 13, 2003. Upon purchasing the subject property, Plaintiff/Appellant spent approximately three months remodeling and repairing the residence before renting it out to a third party in approximately September, 2003.

The subject property was sold at a tax sale on August 27, 2001 to Defendant/Appellee's predecessor in title Heartwood 88, Inc. which matured in Heartwood 88, Inc. on August 27, 2003. A tax deed was issued to Heartwood 88, Inc. September 22, 2003. Heartwood 88, Inc. transferred all of its right, title and interest in the subject property to Defendant/Appellee by quitclaim deed

dated October 22, 2003.

Pursuant to Mississippi Code Annotated §27-43-1, the Chancery Clerk is to provide notice to owner of property sold for non-payment of taxes within 180 days of the expiration of the period of redemption but not less than 60 days from the expiration date.

Further, Mississippi Code Annotated §27-43-3, requires the Chancery Clerk to provide said notice to the reputed owner by personal service, certified mail and by publication in newspaper where the property is located.

In the present case, Napoleon Moore was never provided notice of the expiration of the period of redemption. The Clerk mailed notice to Edward Chapman and Florida Chapman by certified mail on May 27, 2003 and both notices were returned "unclaimed". Personal service on Edward Chapman was attempted on July 15, 2003 but he was not found by the Sheriff. Pursuant to Mississippi Code Annotated §27-43-3, if the Clerk is unable to serve the reputed owner by certified mail and by personal service then the Clerk shall file an affidavit listing the actions taken to ascertain the whereabouts of the owner and to serve the owner with notice. After filing the first affidavit, the Clerk is to make another search and inquiry to ascertain the reputed owner's address. If the Clerk is still unable to discover the reputed owner's address after the second search then the Clerk is to file a second affidavit stating that the reputed owner was unable to be located after diligent search and inquiry and identifying the actions taken to discover the owner's address.

There was no evidence or testimony presented at trial that the Clerk filed either affidavit or that the Clerk attempted to make the second search and inquiry once the original notices sent by certified mail came back as "unclaimed" and the Sheriff was unable to personally serve him. Although the Chancery Court records showed that title was held by Edward Chapman, there is a high

likelihood that the Clerk would have discovered that the property had been sold at a foreclosure sale to Napoleon Moore. At trial Napoleon Moore testified that he spent a lot of time at the property for the three months proceeding the foreclosure and that once the majority of the remodeling had been performed, he rented the property to a third party. *Tr. at 12 -13.* Had personal service been attempted upon Edward Chapman, the deputy would more likely than not have discovered someone on the property who could have provided him notice of Napoleon's ownership interest.

§27-43-3 refers to the person to whom notice is to be given as the "reputed owner" which is defined in Black's Law Dictionary as "one who has to all appearances the title to, and possession of, property". Plaintiff/Appellant purchased to subject property at a foreclosure sale on June 13, 2003 and was given a Substituted Trustee's Deed. After purchasing the subject property, Napoleon Moore began remodeling the residence located thereon which, according to his testimony at trial, took him approximately three months to complete. *Tr. at 12-13.* Napoleon Moore also testified that he performed some of the repairs himself in order to save on cost and spent countless hours at the property. *Tr. at 18.* It should have been obvious to anyone including the sheriff that the once abandoned property had been purchased by a new owner who was renovating it. Based upon the before mentioned reasons, Plaintiff/Appellant would be the "reputed owner" of the subject property and should have been given notice of the expiration of the period of redemption.

Further, beginning in August, 2003, Plaintiff/Appellant rented the residence to a third party. The tenant could have provided the Clerk, the Sheriff or anyone attempting to provide notice to Plaintiff/Appellant with Plaintiff/Appellant's name and contact information.

The Mississippi Supreme Court in *Carmadelle v. Custin*, 207 So.2d 51, 55(Miss., 1968), as well as in later cases, held that statutes allowing property to be redeemed from tax sales are to be liberally construed in favor the owner.

Further, the Mississippi Court of Appeals affirmed the trial court's decision in the Norwood v. Moore case wherein the tax deed was held to be void because the Clerk had failed to file the second affidavit. *Norwood v. Moore*, 932 So. 2d 63 (Miss.Ct.App., 2006) The Court of Appeals held that the chancery clerk's failure to "strictly adhere" to requirements of the statute rendered the tax deed void. *Id. at 66*.

The Hinds County Chancery Clerk did not strictly adhere to the requirements of Mississippi Code Annotated §27-43-(1-3) and the Clerk's failure to do so renders the subject tax deed void.

II. THE TRIAL COURT ERRED IN NOT AWARDING PLAINTIFF/APPELLANT AN EQUITABLE LIEN AGAINST THE SUBJECT PROPERTY IN AN AMOUNT EQUAL TO FUNDS HE HAS PUT INTO THE PROPERTY.

Appellant expended funds to purchase and rehabilitate the subject property. Appellant testified at trial that he purchased the subject property in June of 2003 for \$27,330.40 and spent \$19,011.47 to rehabilitate the property. (*Tr. at 11*)

The lower court held that Appellant was not entitled to a lien based upon its finding that the tax deed was valid and upon expiration of the period for redemption, the tax title related back to the date of the tax deed which was prior to the date Appellant purchased the subject property at the foreclosure sale.

The lower court denied Appellant's request for an equitable lien despite the fact that Appellant expended the sums mentioned above without any knowledge of the tax sale and with no reason to believe that the property had been sold for taxes prior to his purchase of the property.

Appellee has acquired this property free and clear of the mortgagor's lien which was satisfied by the foreclosure sale and with valuable repairs and improvements having been made to the property by Appellant. If the tax sale is not held void and Appellee's title to the subject property is confirmed, then Appellee should be required to reimburse Appellant for the cost of removing the mortgagor's lien from the property and for all repairs and improvements made to the property.

In Associates Financial Services Company of Mississippi, Inc. v. Bennett, 611 So. 2d 973 (Miss. 1992), the Court granted the holder of a deed of trust an equitable lien against the property in the amount received by the person seeking to have the deed of trust declared void. The purpose of the Court granting the holder an equitable lien is to prevent unjust enrichment of the person seeking to have the deed of trust declared void. An equitable lien against the subject property in an amount equal to Appellant's purchase price and cost of repairs and improvements in this case would serve the same purpose as in the before mentioned case. It would prevent Appellee from receiving a windfall at the expense of Appellant.

CONCLUSION

In conclusion, Mississippi Code Annotated §27-43-(1-3) requires the Chancery Clerk to provide notice to owner of property sold for non-payment of taxes within 180 days of the expiration of the period of redemption but not less than 60 days from the expiration date.

Further, Mississippi Code Annotated §27-43-3, requires the Chancery Clerk to provide said notice to the reputed owner by personal service, certified mail and by publication in newspaper where the property is located.

In the present case, the Hinds County Chancery Clerk did not strictly adhere to the requirements of Mississippi Code Annotated §27-43-(1-3) and the Clerk's failure to do so renders the subject tax deed void.


In the alternative, Appellant should be granted an equitable lien in the amount of the purchase price paid at the foreclosure sale and the cost of improvements and repairs made to the subject property. An equitable lien is necessary in this case to prevent Appellee from being unjustly enriched.

Based upon the above stated facts and applicable law, Appellant prays that the Court will reverse the decision of the Hinds County Chancery Court wherein Appellant's reverse the lower Court's ruling and render its decision voiding the Appellee's tax deed and vesting title in Appellant. In the alternative, should the Court uphold the decision of the Hinds County Chancery Court regarding the validity of the tax deed, Appellant prays that this Court will reverse the lower Court's denial of an equitable lien and will render its decision granting a lien in the amount of the purchase price paid and the amount expended for repairs and improvements.

Respectfully submitted,

NAPOLEAN MOORE

BY: 
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CERTIFICATE OF SERVICE

I, Paul E. Rogers, do hereby certify that I have this day caused to be served via U.S. mail, postage pre-paid, a true and correct copy of the above and foregoing to the following:

Honorable William H. Singletary
Hinds County Chancery Judge
P. O. Box 686
Jackson, MS 39205

H. Fariss Crisler, III, Esquire
840 E. River Place, Ste. 508
Jackson, MS 39202

Mississippi Supreme Court Clerk
P. O. Box 249
Jackson, MS 39205-0249

THIS the 19 day of January, 2007.


PAUL E. ROGERS