

IN THE SUPREME COURT OF MISSISSIPPI
THE COURT OF APPEALS

DELTA HOUSING DEV. CORP.

APPELLANT

v.

No. 2008-CA-02127 *CoA E*

MABEL JOHNSON

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Miss. R. App. P. 28(a)(1), 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 and/or the judges of the Court of Appeals may evaluate possible disqualifications or recusal.

1. Delta Housing Development Corporation, Appellant
2. Clanton Beamon, Executive Director Delta Housing Development Corporation, Appellant
3. Mabel Johnson, Appellee
4. Carver A. Randel, Sr. Esq., Counsel for Appellant
5. Alsee McDaniel, Esq., Counsel for Appellant
6. Derek D. Hopson, Counsel for Appellee
7. Drew M. Martin, Counsel for Appellee
8. Melissa Selman Martin, Counsel for Appellee
9. David Neil McCarty, Counsel for Appellee

So CERTIFIED, this the 8th day of September, 2009.

Respectfully submitted,



Melissa Selman Martin

Miss. Bar No. [REDACTED]

Attorney for Appellee Mabel Johnson

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STATEMENT OF THE ISSUES

Whether the trial court properly exercised its discretion in finding that Ms. Mabel Johnson was the record owner of certain property and thereafter ejecting the Defendant/Appellant for trespass.

STATEMENT OF THE CASE

Procedural History

The instant case was filed in the Chancery Court of Bolivar County, Second Judicial District on August 19, 1997, alleging a trespass and seeking ejectment. R. at 7. The court entered a Temporary Restraining Order (TRO) that same day. R. at 14. The TRO was extended by agreement of the parties. Exhibits Volume at 104. The trial court appointed a surveyor, David Evans, as special master to determine the boundary line of Mabel Johnson's property. R. at 45. The Special Master submitted his report on February 5, 1998, finding that Mabel Johnson was in fact the record owner of the disputed property. R. at 48. Defendant/Appellant Delta Housing Development Corporation ("Delta Housing") did not file an objection to the Special Master's Report. R. 50. The trial court adopted the Master's findings that Mabel Johnson was the record owner of the disputed property on February 25, 1998. R. at 50. The trial court then conducted a trial as to damages, hearing testimony on July 2, 2007, March 11, May 27 and 28, August 12 and 13, 2008. The Court entered a judgment ejecting Delta Housing from Mabel Johnson's property. R. at 225. The Chancellor reserved his ruling as to damages until after the removal of the trespassing structures. T. at 339-340.

Relevant Facts

In 1944, Mabel Johnson's father purchased certain property in Mound Bayou, Bolivar County, Mississippi. R. at 168. He made a home on this property with his wife and three children in 1946. T. at 318. In 1947, a subdivision plat for the Rox C. Sneed Subdivision was

recorded in the land records of Bolivar County. T. at 96.; Exhibits Volume at 8. The subdivision plat contained an error and caused an overlap with the adjoining Johnson property of 0 to 18.4 feet. R. at 48. The City of Mound Bayou is unable to locate any minutes related to an ordinance approving the Rox C. Sneed Subdivision plat. R. at 94-95. Earl Lucas, the Mayor of Mound Bayou from 1969 to 1993, testified that the City recognized the property in question as belonging to Mabel Johnson, and that the City could not proceed with a public work program until it obtained an easement from Mabel Johnson over this particular land. (T. 246, 248, 263).

In 1988, the Rox. C. Sneed Subdivision was sold for taxes and purchased by Herman Johnson.¹ R. at 34. After the time for redemption, the tax collector deeded the Rox C. Sneed Subdivision to Mr. Johnson in 1990. R. at 34. Mabel Johnson had no notice of the tax sale or subsequent suit to confirm title. R. at 164-168. Herman Johnson was a board member of Delta Housing at the time he purchased the land and at the time of the suit to confirm the tax sale. T. at 8. In 1993, Herman Johnson deeded the land to his wife Alfreta Johnson, who in turn sold the property to Delta Housing in 1995. R. at 35-36. In late 1995 or early 1996, Delta Housing hired Hooker Engineering to perform a survey of the newly acquired property. R. at 432. Alfreta Johnson, a former neighbor of Mabel Johnson, as a child crossed Mabel Johnson's property, acknowledging the subject property as belonging to Mabel's father. T. at 320; Exhibits Volume at 120.

In March or May of 1996, Mabel Johnson learned, through Clanton Beamon, Executive Director of the Defendant, Delta Housing Development Corporation, that Delta Housing intended to develop the property adjacent to her as a self help housing project. T. at 355-356; 430. Mr. Beamon admitted that prior to the survey in 1995 or 1996, he believed the boundary line between Mabel Johnson's property and the Rox C. Sneed Subdivision to be a drainage ditch,

¹ Neither Herman Johnson nor his wife, Alfreta Johnson, are related to Mabel Johnson in any way.

and that upon inspection after the survey he noticed a survey stake angled out into Mabel Johnson's field. T. at 430. In their first meeting, Mabel Johnson told Mr. Beamon that she did not object to the project as long as it did not interfere with her property. T. at 355-356. Mabel Johnson promised her father on his deathbed that she would take care of his property for their family. T. at 337.

On October 4, 1996, Delta Housing entered into a construction contract related to the project. T. at 165. On October 14, 1996, Mabel Johnson, through her attorney and before any construction began, objected to any construction by Delta Housing on her property. Exhibits Volume at 2. On October 18, 1996, construction on the project began. T. at 165. The first encroachment on Mabel Johnson's property occurred on December 31, 1996, when a lift station was installed. T. at 181. Thereafter, Mabel Johnson retained a surveyor who completed his work on July 31, 1997. Exhibits Volume at 8-15. Mabel Johnson then filed a suit for ejectment and obtained a Temporary Restraining Order on August 19, 1997, which was served on Delta Housing on August 20, 1997. R. at 14; T. at 222. Despite Mabel Johnson's attempts to protect her property, further encroachment occurred on August 21, 1997, as the road bed was laid. T. at 182. Despite the TRO and Delta Housing's agreement to extend it, Delta Housing continued to interfere with Mabel Johnson's property. On October 15, 1997, it conveyed Lot 10 of the subdivision to Huery Morgan. Exhibits Volume at 93. Delta Housing provided Mr. Morgan with technical assistance in the construction of his home, a portion of which lies on property of which Mabel Johnson is the record owner. T. at 384, 390. Also, despite the TRO, Delta Housing completed laying asphalt on the encroaching road bed on May 14, 1998. T. at 182.

SUMMARY OF THE ARGUMENT

The findings of the Special Master and the Chancellor should be affirmed. Each correctly concluded that Mabel Johnson is the record owner of the subject property. Mabel

Johnson has the senior deed and therefore senior right. The City of Mound Bayou and Defendant/Appellants' own executive director have recognized Mabel Johnson as the owner of the subject property for years. Further, Delta Housing has waived any argument that Mabel Johnson is not the record owner of the property by failing to object to the Special Master's Report in February of 1998. There is no evidence of estoppel or laches that would prevent ejectment of Delta Housing and its trespassing structures from Mabel Johnson's land. Therefore the order of the Chancery Court of Bolivar County, Second Judicial District should be affirmed and a mandate issued from this Court requiring Delta Housing to remove its trespassing structures immediately.

ARGUMENT

I. The Chancellor Did Not Err in Finding Mabel Johnson the Record Owner of the Property and Was Correct to Eject Delta Housing.

A. Standard of Review

In boundary disputes, a determination of the legal boundary between properties is a question of fact for the chancellor. *Farris v. Thomas*, 481 So.2d 318, 319 (Miss.1985). When reviewing a chancellor's findings, this Court will not disturb such findings unless the chancellor abused his discretion, was manifestly wrong, or clearly erroneous. *Zeman v. Stanford*, 789 So.2d 798, 801-02 (Miss.2001).

B. Mabel Johnson's Senior Deed Makes Clear That She is the Record Owner of the Property.

Mabel Johnson's deed from 1944 takes precedence over any later deed, such as Delta Housing's 1995 deed. In Mississippi, and in general, when there is a "disputed boundary case," the rule is that the "older deed . . . prevail[s] over [a younger] deed." *Dunn v. Stratton*, 160 Miss. 1, 133 So. 140, 140 (Miss. 1931). In that case, the Court specifically held that "[i]n [a] disputed boundary case, older deed to defendants' predecessor in title prevailed over deed to

complainant's predecessor in title." *Id.*; see also *Howard v. Fulcher*, 806 So. 2d 328, 331 (Miss. Ct. App. 2002).

"[I]n a conflict between written instruments of conveyance, such as where descriptions overlap, title to the disputed area lies with the 'senior right;' i.e., with the owner whose claim is based on an original conveyance which is chronologically older than that establishing the junior right." Danny L. Crotwell, "Unresolved Boundaries," National Business Institute, *Boundary Law in Mississippi* (2004), retrievable at 18822 NBI-CLE 10. Many other state courts agree that a senior instrument, whether deed or survey, controls over a junior one. See *Millar v. Bowie*, 694 A.2d 509, 513 (Md. App. 1997) (senior survey controls over junior one); *Hill v. Whiteside*, 749 S.W.2d 144, 151 (Tex.App.-Fort Worth 1988) ("when the senior survey can be easily identified, a junior survey cannot be made to control the senior survey"); *Tremblay v. DiCicco*, 628 A.2d 141, 143 (Me. 1993) (first "deed is controlling because [that] conveyance was first in time"); *Williamson v. Kelly*, 520 So.2d 868, 872 (La.App. 3 Cir. 1987) ("the plaintiffs' title is more ancient and the trial court properly gave it preference over the defendants' title, in using it to fix the boundary"); *Wysinski v. Mazzotta*, 472 A.2d 680, 683 (Pa. Super. 1984) ("the law is clear that where there is a conflict between boundaries described in deeds from the same grantor, the deed first executed has priority, and the grantee named therein has superior title").

Further, even if Mabel Johnson did not possess the senior deed, the reputation, tradition, and accepted local practice in Mound Bayou recognized the property in question as belonging to Mabel Johnson. Under Mississippi law, this is binding as well. "In the event that a section corner cannot be identified by the field notes [of a surveyor] with reasonable accuracy, then the line can be established by general reputation in the community and by extrinsic evidence." *Riley v. Richardson*, 267 So. 2d 901, 904 (Miss. 1972).

Mabel Johnson's 1944 deed is without question the senior deed. As will be discussed more fully later, the adoption of the Rox C. Sneed Subdivision plat in 1947 by the City of Mound Bayou did nothing to change this fact. Additionally, former mayor Earl Lucas testified at trial that the City of Mound Bayou recognized the property in question as belonging to Mabel Johnson in the 1970's. Delta Housing's own grantor, Alfreta Johnson, and former neighbor to Mabel Johnson, recognized the property in question as belonging to Mabel Johnson. Delta Housing's Executive Director, Clanton Beamon, also believed the property in question to belong to Mabel Johnson prior to Delta Housing's acquisition of the property. Under longstanding Mississippi law, "adjoining landowners who occupy their respective properties up to a certain line if continued for a sufficient length of time are precluded from claiming that the boundary thus recognized and acquiesced in is not the true one." *Howard v. Fulcher*, 806 So. 2d 328, 332 (Miss. Ct. App. 2002). The Chancellor was correct in his establishment of the boundary line between Mabel Johnson and Delta Housing's adjoining property and his findings should not be disturbed.

C. Mabel Johnson Is Entitled to Removal of Delta Housing's Trespassing Structures.

The general rule is that a trespassing structure must be removed regardless of the damage caused by the trespass or disproportionate expense of the removal. *Gulf Park Water Co., Inc. v. First Ocean Springs Development Co.*, 530 So.2d 1325, 1334 (Miss. 1988). Noting that land is *per se* property of peculiar value, the Court in *Gulf Park*, found that:

[t]he facts that the aggrieved owner suffers little or no damage from the trespass, that the wrongdoer acted in good faith and would be put to disproportionate expense by the removal of the trespassing structures, that neighborly conduct as well as business judgment would require acceptance of compensation in money for the land appropriate, are ordinarily no reasons for denying an injunction.

Id. The only exception to this rule is where some estoppel, laches or refusal by the landowner to allow the acts necessary to the abate trespass exists. *Id.*

There is little question that Delta Housing has trespassed upon Mabel Johnson's land. The Chancellor found as a matter of fact that Mabel Johnson was the record owner of the land in question. There is no doubt that there exists a lift station, sewer and water lines, asphalt paved road, and a house on property that belongs to Mabel Johnson. Mabel Johnson is therefore entitled to ejectment of these trespassing structures. The disparate cost between removal of Delta Housing's trespassing structures and the value of Mabel Johnson's property is immaterial. Additionally, there is no evidence in the record to support a claim that estoppel or laches should prevent the ejectment of Delta Housing's trespassing structures.

The record shows that when Mabel Johnson was first made aware of Delta Housing's plans for its adjoining land in March or May of 1996, Mabel Johnson made clear that she had no objection to a new housing development next to her **so long as it didn't interfere with her property**. Prior to the beginning of construction, Mabel Johnson reiterated her objection to any construction that encroached on her property. Delta Housing chose to proceed at its own risk; and despite knowledge of a dispute in ownership of a portion of the property, it began construction, and encroached on Mabel Johnson's property on December 31, 1996, with the installation of the lift station. Delta Housing continued to operate at its own risk after the TRO in this case was issued on August 19, 1997, when it cut a road bed on Mabel Johnson's property. Delta Housing continued to increase its trespass, and therefore the cost of the its removal, when after the Special Master determined Mabel Johnson to be the record owner of the subject property in February of 1998, Delta Housing completed the asphalt portion of its road work on May 14, 1998. Also subsequent to the injunction, Delta Housing purported to sell a portion of Mabel Johnson's property to Huery Morgan in November of 1997, and continued to help Mr.

Morgan construct a home on Mabel Johnson's property through May of 1998. Mabel Johnson took active steps from the moment she learned of the proposed development to protect her land. She has done nothing to prevent the abatement of Delta Housing's trespass. Delta Housing, who on the other hand, proceeded at its own risk with full knowledge of the dispute and later in violation of the TRO, can hardly be described as acting in good faith.

II. Delta Housing Waived Any Argument That the Subject Property Does Not Belong to Mabel Johnson.

In the instant case a special master was appointed pursuant to Mississippi Rule Civil Procedure 53. A special master's report to the court is highly persuasive, as "[t]he court *shall accept* the master's findings of fact unless manifestly wrong." Miss. R. Civ. Pro. 53(g)(2) (emphasis added); *see generally Brewer Const. Co., Inc. v. David Brewer, Inc.*, 940 So. 2d 921, 925 (Miss. 2006). In *Brewer*, the Supreme Court found a special master entitled to the same deference with regard to his findings as a chancellor, and a special master's findings will not be reversed on appeal where they are supported by substantial, credible, and reasonable evidence." *Id.* at 925. Even prior to the adoption of our Rules of Civil Procedure, "[t]he law of this State, through the years, has uniformly been that the report of a master in chancery has the effect of the verdict of a jury in the circuit court, and the chancellor could not vacate or set it aside, unless manifestly wrong as against the overwhelming weight of the evidence." *Merchants Fertilizer & Phosphate Co. v. Standard Cotton Gin*, 199 Miss. 201, 207, 23 So. 2d 906, 907 (Miss. 1945) (citing *Hines v. Imperial Naval Stores Co.*, 101 Miss. 802, 58 So. 650, 651 (Miss. 1912) ("the report of the master has the same effect as the verdict of a jury, and consequently must be approved if there is competent evidence to support it"))).

Here the Special Master found conclusively that Mabel Johnson was the record owner of the property in question. The trial court adopted the special master's finding. No objection was filed to the Special Master's Report.

One can only challenge the findings of a special master by closely following Rule 53. "Within ten days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties," and any such objections "shall be by motion and upon notice as provided by Rule 6(d)." Miss. R. Civ. Pro. 53(g)(2). These procedural requirements are taken seriously, as lack of compliance may waive objections or have serious repercussions to the proceedings. Indeed, the Supreme Court has even "caution[ed] attorneys, litigants and trial judges of this state to utilize Rule 53 in the future with great care." *Massey v. Massey*, 475 So. 2d 802, 806 (Miss. 1985). As Delta Housing did not object to the report of the special master within ten (10) days it has waived any argument that the report and its finding that Mabel Johnson is the record owner of the disputed property are in error.

III. It Was Beyond the Legal Authority of the City of Mound Bayou to Take Mabel Johnson's Land by the Adoption of a Subdivision Plat.

Municipalities in Mississippi, including the City of Mound Bayou, have the power to take the property of private citizens only through the power of eminent domain and then only by following certain procedures. In our system of law, while one can put a value on the land for sale or condemnation, the inherent right to the land itself is priceless; it is a cornerstone of our society. Writing in the 1760's, Sir William Blackstone noted that the right to property was an "absolute right, inherent in every Englishman," and that the laws had evolved to safeguard that right." William Blackstone, *Commentaries on the Laws of England*, Book I, 134 (Hein 1992). "So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community." *Id.* at 135. In

1791, the Fifth Amendment to the U.S. Constitution was ratified, providing that no citizen will “be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. Const. amend. V.

Multiple components of our state Constitution enshrine the same ideals. “No person shall be deprived of life, liberty, or property except by due process of law.” Miss. Const. of 1890, art. 3, Section 14. Regarding eminent domain, our state constitution requires that:

Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public.

Miss. Const. of 1890, art. 3, Section 17. Importantly, our state constitution expressly forbids private corporations utilizing the powers of eminent domain, as “the exercise of the police powers of the state shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe upon the rights of individuals or general well-being of the state.” Miss. Const. of 1890, art. 37, Section 190.

Municipalities may take the property of its citizens only for certain public purposes. Miss. Code Ann. §21-37-47. Even then, the exercise of that power must follow a strict procedure, including filing a complaint with the circuit clerk, a trial on the matter determining the amount of due compensation and the payment of that due compensation to the property owner. Miss. Code Ann. §11-27-1 *et. seq.* In no situation is a municipality allowed or empowered to take the property of one citizen and give it to another.

The required eminent domain procedure was not performed by the City of Mound Bayou with respect to Mabel Johnson’s property. The act of approving a subdivision plat is not a manner by which a city can take the property of its citizen. The record is devoid of any evidence

that the City of Mound Bayou intended take Mabel Johnson's property with its adoption of the Rox C. Sneed subdivision plat in 1947. Further, the City of Mound Bayou still recognized the subject property as belonging to Mabel Johnson thirty (30) years after its approval of the Rox C. Sneed subdivision plat. The adoption of the plat had no effect on the ownership of the subject property. The owner of the Rox C. Sneed subdivision did not obtain Mabel Johnson's property by the City's adoption of its plat, nor can any party claim ownership of Mabel Johnson's property through it. Delta Housing's argument to the contrary is disingenuous at best, as its own Executive Director testified he believed the land in question to belong to Mabel Johnson, until it became to his advantage to claim otherwise. The effect of the City's action in approving the plat as argued by Delta Housing is outside the authority and power of any city.

IV. The Doctrine of *Res Judicata* is Inapplicable to the Instant Case.

While the doctrine of *res judicata* operates to prevent parties from re-litigating issues tried in a prior lawsuit, "four identities must be present before the doctrine of *res judicata* will be applicable: (1) identity of the subject matter of the action, (2) identity of the cause of action, (3) identity of the parties to the cause of action, and (4) identity of the quality or character of a person against whom the claim is made." *Deere & Co. v. First Nat. Bank of Clarksdale*, 12 So. 3d 516, 522 (Miss. 2009). For the doctrine to apply, "[r]es judicata requires a finding of all four identities." *Id.*

Delta Housing claims that the confirmation of Herman Johnson's tax title somehow precludes Mabel Johnson from protecting her rights to her property. The suit to confirm tax title did not address in any way a dispute regarding the boundary line between Mabel Johnson and the adjoining land purchased by Herman Johnson at a tax sale. Therefore, identity of subject matter does not exist. The previous suit was for confirmation of a tax sale, while the instant action is for ejectment for trespass. Therefore, identity of the cause of action does not exist.

Further, Mabel Johnson was not a party to that action, nor was she given any notice that it might affect her legal rights in any way. There is no identity of parties. The four identities of *res judicata* are not present here and the doctrine is therefore inapplicable to the instant case.


CONCLUSION

The Special Master and Chancellor properly exercised their discretion in finding Mabel Johnson the record owner of the disputed property. Moreover, they were correct. Delta Housing has waived any argument that these findings were in error as it failed to object to the Special Master's Report in February of 1998. Mabel Johnson has the senior deed and the senior right. Further, the City of Mound Bayou and Defendant/Appellants own executive director have recognized Mabel Johnson as the owner of the subject property for years. There is no evidence of estoppel or laches that would prevent ejectment of Delta Housing and its trespassing structures from Mabel Johnson's land.

Delta Housing's assertion that the City of Mound Bayou somehow took the property of its citizen by approving a subdivision plat is unsupported by law and is without merit. The Constitution of this State and laws enacted by our legislature forbid the taking a person's property to simply to give to another person. Delta Housing's argument that *res judicata* bars the instant action is also without merit. A prior action of a different nature cannot bar a non party who had no notice of the proceedings. Therefore the order of the Chancery Court of Bolivar County, Second Judicial District should be affirmed and a mandate issued from this Court requiring Delta Housing to remove its trespassing structures immediately.

Respectfully Submitted, this the 8th day of September, 2009

Appellee Mabel Johnson


Melissa Selman Martin, MSB No. [REDACTED]
One of her Attorneys

CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that I have served by United States mail, postage prepaid, a true and correct copy of the above and foregoing document, to the following persons at these addresses:

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THIS, the 8th day of September, 2009.


MELISSA SELMAN MARTIN