

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

C.F.P. PROPERTIES, INC.

APPELLANT

VERSUS

ROLEH, INC.

APPELLEE

SUPREME COURT DOCKET NO. 2009-CA-00391

BRIEF OF APPELLEE, ROLEH, INC.

**APPEAL FROM THE
CHANCERY COURT OF HANCOCK COUNTY
CIVIL ACTION NO. 08-0988(1)**

ORAL ARGUMENT NOT REQUESTED

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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 and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

Douglas Gale
C.F.P. PROPERTIES, INC.
Appellant

Scott Roberts
Nancy Lynn Roberts-Moneir
ROLEH, INC.
Appellee

Herbert J. Stelly, Sr.
Attorney for Appellee

Honorable Jim Persons, Chancellor

Respectfully submitted, *ii*

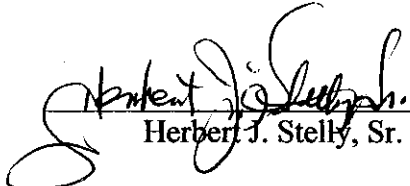

Herbert J. Stelly, Sr.

TABLE OF CONTENTS

Certificate of Interested Persons.....	ii
Table of Contents.....	iii
Table of Authorities.....	iv
Statement of the Case.....	1
Summary of the Argument.....	2
Argument.....	3
Conclusion.....	11
Certificate of Service.....	12
Certificate of Filing.....	13

TABLE OF AUTHORITIES

CASES

<i>Hathorn v. Illinois Cent. Gulf R. Co.</i> , 374 So.2d 813(Miss. 1979).....	8
<i>Jones v. Flowers</i> , 547 U.S. 220 (2006).....	9
<i>Lawrence v. Rankin</i> , 870 So. 2d 673 (Miss. App. 2004).....	7
<i>Norwood v. Moore</i> , 932 So. 2d 63 (Miss. App. 2006).....	7
<i>Rains v. Teague</i> , 377 So.2d 924 (Miss. 1979).....	11
<i>Reed v. Florimonte</i> , 987 So.2d 967 (Miss. 2008).....	7
<i>Rush v. Wallace Rentals, LLC</i> , 837 So.2d 191 (Miss. 2003).....	11

STATUTES

<i>Mississippi Code Annotated</i> § 27-43-3(2009).....	4, 5, 6, 10
<i>Miss. Code Ann.</i> § 79-4-5.02 (2209)	10

SECONDARY SOURCES

<i>Black's Law Dictionary</i> (8 th ed. 1999).....	8
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STATEMENT OF THE CASE

I. NATURE OF THE CASE

This matter is before the Court from the Chancellor's grant of partial summary judgment in favor of Roleh, Inc. ["Roleh"]. The Chancellor's ruling is based on two factors. The Chancellor determined that the Clerk had failed to strictly comply with the notice requirements of Miss. Code Ann. §27-43-3 by failing to file an affidavit in the record of the tax sale until six (6) months after the expiration of the redemption period and four (4) months after the Tax Collector executed a Conveyance of Land Sold for Taxes to the tax sale purchaser. (R. p. 193). In addition, the Chancellor noted a complete absence of proof that the Sheriff of Harrison County attempted to serve Roleh with personal notice of the tax sale or of a Sheriff's return in the record of the tax sale, as required by §27-43-3.

II. RELEVANT FACTS

On August 30, 2004, the taxing authority sold the subject property for delinquent taxes. (R.¹ p. 187). Pending the end of the two year redemption period, notice was mailed by the Chancery Clerk to Roleh. (R. p. 187). This notice was returned marked "Return to Sender not here." (R. p. 187). On July 7, 2006, the Chancery Clerk published notice of the expiration of the redemption period. (R. p. 187). On July 17, 2006, notice was again mailed to Roleh at the same address to which the earlier notice had been sent. (R. p. 187). This notice was returned marked "Box Closed No Forwarding Order on File." (R. p. 187). On October 13, 2006, the Tax Collector executed a Conveyance of Land Sold for Taxes. (R. p. 187). As of February 27, 2007, the record of the tax sale kept by the Chancery Clerk did not contain an affidavit describing the acts of diligent search and inquiry used to determine the correct address of Roleh. (R. p. 187).

¹ The following abbreviation is used: R for Record of Clerk's Papers

Such an affidavit was produced on February 27, 2007. (R. p. 187). The affidavit was dated February 27, 2006, but the deputy clerk admitted that it had just been prepared on the day it was produced. (R. p. 104). There is nothing to suggest that the affidavit was ever placed in the tax sale records. (R. p. 188 n.1). It lacked any recording notation. (see Exhibit "A" to affidavit of Gillespie, R. p. 105). On September 27, 2007, Virgil C. Gillespie requested and obtained a complete copy of all documents in the tax sale records regarding the subject property. (Affidavit of Gillespie, R. p. 104). Neither an affidavit of diligent search and inquiry or a Sheriff's return of process was in the file. (Affidavit of Gillespie, Exhibit B pp. 107-110). C.F.P. Properties, Inc. ["C.F.P Properties"] acquired its interest in the property by quitclaim deed recorded November 27, 2007. (R. p. 189). The Chancery Clerk verified that, as of August 28, 2008, there was no affidavit of diligent search and inquiry in the tax sale record. (R. p. 189). After commencement of the present action an affidavit of diligent search and inquiry dated October 7, 2008 was recorded in the tax sale record. (R. p. 189).

SUMMARY OF THE ARGUMENT

Mississippi Code Annotated § 27-43-3(2009) prescribes specific steps that must be completed by the Chancery Clerk before a tax deed may be issued. These steps are designed to provide actual notice to the landowner before his property is lost for nonpayment of taxes. Central to these requirements is that, if an initial notice to the taxpayer cannot be delivered, the clerk must conduct further diligent search and inquiry to determine the correct address of the taxpayer. An affidavit of the steps taken by the Clerk to obtain a correct address must be completed, noted in the tax sale records, and kept on file.

The public policy of Mississippi is to protect property owners from the sale of their land for taxes. Thus, statutes relating to the sale of property for delinquent taxes are strictly

construed. The failure of the clerk to prepare and file an affidavit reciting the efforts made to determine the correct address of a taxpayer who has not received notice renders the tax deed void.

In the present case, it is undisputed that the Clerk failed to prepare such an affidavit prior to delivery of the conveyance of land sold for taxes. Further, it is undisputed that no such affidavit was placed in the tax sale records until approximately two years after the tax conveyance was issued. Roleh contends that the absence of the affidavit during the redemption period rendered the tax conveyance void, such that a subsequent, after the fact, affidavit years later did not revive the invalid tax conveyance. Roleh further contends that the total lack of any record of attempted service of process by the Sheriff similarly renders the tax conveyance void.

Although not relied upon as grounds for granting summary judgment by the Chancellor, Roleh further contends that the Clerk failed to use reasonable diligence to determine its correct address. Roleh, as are all Mississippi corporations, was required to notify the Mississippi Secretary of State of its registered address. It did so. Had the Clerk made even a cursory examination of the Secretary of State's website, he would have learned the correct registered address of the corporation. The failure to consult this readily accessible, official source of information available for any Mississippi corporation was a lack of reasonable diligence.

ARGUMENT

1. The absence of a clerk's affidavit rendered the tax deed void.

The question before the Court is whether a conveyance of land sold for taxes is valid when it is undisputed that, at the time the conveyance is executed, the tax sale record lacks both of a sheriff's return of process and an affidavit of the Chancery Clerk detailing the acts of

diligent search and inquiry used to determine the correct address of the property owner. Roleh contends that the absence of even one of these required documents renders the conveyance void.

Mississippi Code Annotated § 27-43-3(2009) prescribes in detail the steps that must be taken to afford the owner of property adequate notice of a tax sale before a valid tax deed may be issued to the purchaser of the property. The applicable provisions of the statute provide as follows:

§ 27-43-3. Notice to owners; service of notice; fees

The clerk shall issue the notice to the sheriff of the county of the reputed owner's residence, if he be a resident of the State of Mississippi, and the sheriff shall be required to serve personal notice as summons issued from the courts are served, and make his return to the chancery clerk issuing same. The clerk shall also mail a copy of same to the reputed owner at his usual street address, if same can be ascertained after diligent search and inquiry, or to his post office address if only that can be ascertained, and he shall note such action on the tax sales record. The clerk shall also be required to publish the name and address of the reputed owner of the property and the legal description of such property in a public newspaper of the county in which the land is located, or if no newspaper is published as such, then in a newspaper having a general circulation in such county. Such publication shall be made at least forty-five (45) days prior to the expiration of the redemption period.

If said reputed owner is a nonresident of the State of Mississippi, then the clerk shall mail a copy of said notice thereto in the same manner as hereinabove set out for notice to a resident of the State of Mississippi, except that personal notice served by the sheriff shall not be required.

Notice by mail shall be by registered or certified mail. In the event the notice by mail is returned undelivered and the personal notice as hereinabove required to be served by the sheriff is returned not found, then the clerk shall make further search and inquiry to ascertain the reputed owner's street and post office address. If the reputed owner's street or post office address is ascertained after the additional search and inquiry, the clerk shall again issue notice as hereinabove set out. If personal notice is again issued and it is again returned not found and if notice by mail is again returned undelivered, then the clerk shall file an affidavit to that effect and shall specify therein the acts of search and inquiry made by him in an effort to ascertain the reputed owner's street and post office address and said affidavit shall be retained as a permanent record in the office of the clerk and such action shall be noted on the tax sales record. If the clerk is still unable to ascertain

the reputed owner's street or post office address after making search and inquiry for the second time, then it shall not be necessary to issue any additional notice but the clerk shall file an affidavit specifying therein the acts of search and inquiry made by him in an effort to ascertain the reputed owner's street and post office address and said affidavit shall be retained as a permanent record in the office of the clerk and such action shall be noted on the tax sale record.

The failure of the landowner to actually receive the notice herein required shall not render the title void, provided the clerk and sheriff have complied with the duties herein prescribed for them.

Should the clerk inadvertently fail to send notice as prescribed in this section, then such sale shall be void and the clerk shall not be liable to the purchaser or owner upon refund of all purchase money paid.

As can be seen, the purpose of the statute is to assure that reasonable efforts are made to provide the property owner with notice. In addition to the requirement of service of notice by the sheriff, the statute requires that notice be sent by registered or certified mail. If personal notice by the sheriff is unsuccessful and the initial notice sent to the property owner is returned unclaimed, the clerk is required to make further search and inquiry to locate the correct address of the property owner and again seek to secure delivery of the notice. Finally, upon a failure to secure delivery of the required notice, "then the clerk shall file an affidavit specifying therein the acts of search and inquiry made by him in an effort to ascertain the reputed owner's street and post office address and said affidavit shall be retained as a permanent record in the office of the clerk and such action shall be noted on the tax sale record." *Miss. Code Ann. § 27-43-3* (2009)(emphasis added).

Arguably, §27-43-3 is not a model of clarity. There is reference to two affidavits by the clerk. Whether or not two affidavits are required of the clerk under the facts of this case, clearly at least one affidavit is required to be prepared and retained as a permanent record in the office of the clerk. *Miss. Code Ann. § 27-43-3* (2009).

The issue before the Court is simply whether the clerk's affidavit may be executed and filed at any time. Simply put, the question is whether the affidavit may be created and filed months, or years, after the redemption period has expired and the conveyance of land sold for taxes has been made, as is argued by C.F.P. Properties. Roleh urges that the execution and filing of the clerk's affidavit is a statutory requirement that must be complied with before the redemption period has expired and the conveyance of land sold for taxes is issued.

A careful reading of the §27-43-3 reveals when the clerk's affidavit must be filed. According to the statute, "...if notice by mail is again returned undelivered, then the clerk shall file an affidavit to that effect and shall specify therein the acts of search and inquiry made by him...." *Miss. Code Ann. § 27-43-3 (2009)* (emphasis added). This language clearly contemplates that the clerk, having recently completed the steps to ascertain the correct address of a property owner, would make the affidavit while the information is reasonably fresh in his recollection. Practicalities suggest that the rule of promptly preparing the affidavit is especially important in view of the fact that such searches are often performed by deputy clerks who may perform dozens, if not hundreds, of such searches over a year. After significant time has passed the affidavit becomes little more than a statement of the policy of the office as to how the searches are to be conducted, rather than an affirmation of how a particular search was, in fact, conducted. If the word "then" carries with it any meaning of expediency, it certainly means that the affidavit must be executed and filed within the two year redemption period.

It is undisputed that the tax file contained no affidavit regarding steps of diligent search and inquiry when the conveyance of land sold for taxes was executed on October 13, 2006. The Chancery Clerk verified that, as of August 28, 2008, there was no affidavit of diligent search and inquiry in the tax sale record. (R. p. 189). This omission, alone, renders the tax deed void.

In *Norwood v. Moore*, 932 So. 2d 63 (Miss. App. 2006), the Mississippi Court of Appeals considered this precise question. In *Norwood* the addresses of the grantor and grantee on a deed had been transposed. *Id.* at (¶ 2). An individual purchased the property at a tax sale and paid taxes on succeeding years. *Id.* at (¶ 3). Prior to the expiration of the redemption period, the chancery clerk mailed notice by certified mail to the address she had for the owner. *Id.* at (¶ 4). After the notice sent by certified mail was returned undelivered, the clerk used the internet in an effort to find the correct address. *Id.* She further searched the phone directory for Rankin County and the Jackson area, the Rankin County Tax Collector's office, the Rankin County Tax Assessor's office, the voter registration records of Rankin County, the tag division of the Rankin County Tax Collector's office, the telephone company's information department, the Rankin County Court Department, and the UCC files. *Id.* A second notice was sent by certified mail to a second address which she located. *Id.* The property owner failed to receive either notice.

The Mississippi Court of Appeals noted that in Mississippi it is public policy to favor and protect landowners from sale of their land for taxes. *Id.* at (¶7). Further, the court held that courts must strictly construe sections 27-43-1 and 27-43-3 (Rev. 2002). Thus, according to the court, "failure of the chancery clerk to file the requisite affidavits renders a tax deed void." *Id.*

In reaching its decision, the Court of Appeals relied on its prior decision in *Lawrence v. Rankin*, 870 So. 2d 673 (Miss. App. 2004). The Court of Appeals in *Lawrence* had similarly held that in the context of delinquent taxes and forfeiture, where personal notice is returned undelivered, the failure of the chancery clerk to file a supporting affidavit pursuant to *Miss. Code Ann.* § 27-43-3(Rev. 2002) renders the tax deed void. *Id.* at (¶14). In fact, any deviation from the statutorily mandated procedure renders the sale void. *Reed v. Florimonte*, 987 So.2d 967 (¶15) Miss. 2008 (citing *Hart v. Catoe*, 390 So.2d 1001, 1003 (Miss.1980)).

Thus, under the rationale of both *Lawrence* and of *Norwood*, the tax deed was void at the time it was issued. “Void” generally means “of no legal effect; null.” *Black’s Law Dictionary* (8th ed. 1999). By proffering an affidavit executed two years after the void tax deed was issued, and more than two years after the expiration of the redemption period, C.F.P. Properties does nothing more than seek to resurrect a conveyance that was declared legally dead by the decisions of *Lawrence* and of *Norwood*.

C.F.P. Properties argues somewhat disingenuously that the Mississippi Attorney General Opinion issued to Jimmy W. Jones on October 12, 1997, indicates that the clerk’s affidavit need not be recorded. In fact, the opinion states, “In our opinion, the clerk must retain the affidavits specified in Section 27-43-3 in a permanent record in the clerk’s office and must note such action upon the tax sale records, but is not required to record the affidavits in the land records.” From the opinion, it appears that the Attorney General makes some distinction between tax sale records and “land records.” Whether or not this distinction is valid, clearly the interpretation requires that the affidavit be filed in the clerk’s office.

C.F.P. Properties is not an innocent purchaser. It had constructive knowledge of the contents of the tax sale records when it purchased the property. *See Hathorn v. Illinois Cent. Gulf R. Co.*, 374 So.2d 813, 817 (Miss. 1979) (noting that for over one hundred years *Staton v. Bryant*, 55 Miss. 261 (1877) has held people to constructive notice of what land records reveal). Had it examined the records of the tax sale, C.F.P. Properties would have learned that the required affidavit was missing.

2. The clerk’s office failed to perform diligent search and inquiry.

Although the Chancellor did not make any finding regarding the sufficiency of the clerk's search for the correct address of the landowner, C.F.P. Properties has raised the matter in its brief. As a matter of caution Roleh responds.

Aside from the procedural requirement that the chancery clerk file an affidavit setting forth his acts of search and inquiry, a substantive right exists that the clerk actually and diligently perform a search for the landowner's correct address. In *Jones v. Flowers*, 547 U.S. 220 (2006), the United States Supreme Court recognized that before a State may take property and sell it for unpaid taxes, the Due Process Clause of the Fourteenth Amendment requires the government to provide the owner notice and opportunity for hearing appropriate to the nature of the case. *Id.* at 223. In *Jones*, the state had mailed two notices by certified mail to the property owner. *Id.* at 224. Neither was received by the owner. *Id.* After the property was sold for delinquent Arkansas taxes, the landowner sued, claiming that the failure to provide notice amounted to the taking of his property without due process. *Id.*

The Supreme Court granted certiorari to determine whether the Due Process Clause requires the government to take additional reasonable steps to notify a property owner when notice of a tax sale is returned undelivered. *Id.* at 225. The Court held that when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so. *Id.*

Jones dealt with Arkansas statutes which apparently provided no follow-up if notices sent by certified mail went unclaimed. Mississippi statutes require further search and inquiry. Nevertheless, *Jones* clearly demonstrates that the State must take additional "reasonable steps" to notify the landowner when the State is aware that he has not received notice. *Id.* at 224. Thus,

both Miss. Code Ann. §27-43-3 and the Due Process Clause of the United States Constitution require that reasonable efforts to locate the landowner be made.

With regard to what type of search would be diligent or reasonable in connection with delivering notice to a corporation, the Mississippi Secretary of State would be an obvious source of information. *Miss. Code Ann.* § 79-4-5.02 (2209) provides that a change of a corporation's street address of its current registered office, the street address of any new registered office, the name of its current registered agent, or the address of the registered agent is made by filing appropriate forms with the Mississippi Secretary of State.

In fact, the information regarding the principal office address, the name of the registered agent and her address are all available to the general public at the website of the Mississippi Secretary of State. This information was correct as of the time the required notices were mailed. According to the Certificate of the Secretary of State, on August 1, 2004, and August 1, 2006, the registered office of the corporation was 2310 19th Street, Gulfport, Mississippi. (R. p. 113). Had the chancery clerk made a cursory search of the Mississippi Secretary of State's website, he would have immediately learned that the address to which he had mailed notice was incorrect. He would also have learned the true address of the corporation and of its registered agent.

The failure of the Chancery Clerk to ascertain the current address of ROLEH, INC., or of its registered agent, from the Mississippi Secretary of State, when that office is charged by law to maintain such records, was simply not reasonable. This is particularly true in view of the fact that the Secretary had the correct information readily available and accessible to the general public on its website. Thus, the Chancery Clerk failed to comply with the provisions of Miss. Code Ann. § 27-43-3. Further, the issuance of the tax deed without taking such a reasonable step

to determine its address deprived Roleh, Inc. of its property without due process in violation of the Fourteenth Amendment.

The reliance of C.F.P. Properties on *Rains v. Teague*, 377 So.2d 924 (Miss. 1979) and on *Rush v. Wallace Rentals, LLC*, 837 So.2d 191 (Miss. 2003) for the proposition that searching current phone directories, searching the tax collector's office, reviewing the homestead exemption roll, checking the vesting deed, and mailing notice to the address on the deed was sufficient diligence is misplaced. The property owner in *Rains* was an individual. *See Rains v. Teague*, 377 So.2d 924, 925 (Miss. 1979) (property conveyed to Joe D. and D.B. Teague). The property owner in *Bush* was also an individual. *See Rush* at ¶2 (Rush conveyed to Eloise Moffitte via quitclaim deed).

In the present case, Roleh is a corporation incorporated in the State of Mississippi. (R. p. 113). Arguably, no more reliable source of information may be found concerning the address and contact information of a corporation than the Mississippi Secretary of State. Given the reliability of the information and the ease with which it can be obtained, Roleh contends that as a matter of law, failure to consult the Secretary of State's website for the correct address of a corporation is a lack of reasonable diligence on the part of the Chancery Clerk.

CONCLUSION

For the foregoing reasons, the Order Granting Motion for Partial Summary Judgment should be affirmed in all respects.

CERTIFICATE OF SERVICE

I, Herbert J. Stelly, Sr., attorney for Appellee, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing *BRIEF OF APPELLEE, ROLEH, INC.* to the following:

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SO CERTIFIED, this the _____ day of _____, 2009.


HERBERT J. STELLY, SR.

CERTIFICATE OF FILING

I, Herbert J. Stelly, Sr., attorney for the Appellee, Roleh, Inc, do hereby certify that I have this date submitted and filed Brief of Appellee by depositing an original and three copies of *BRIEF OF APELLEE, ROLEH, INC.* with the United States Postal Service, first class postage prepaid, addressed to Betty W. Sephton, Clerk, Supreme Court and Court of Appeals, Post Office 249, Jackson, Mississippi 39205-0249.

This, the 20th day of August, 2009.


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