

IN THE COURT OF APPEALS OF MISSISSIPPI

C.F.P. PROPERTIES, INC.

APPELLANT

VS.

NO. 2009-CA-00391

ROLEH, INC.

APPELLEE

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

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. The Clerk timely executed the Required Affidavit.

In its Reply Brief, Roleh, Inc. ("Roleh" and/or "Appellee") concedes that *Miss. Code Ann.* §27-43-3 is "not a model of clarity" and that the legislature does not specify an exact time at which the Clerk is required to file the affidavit required under the statute. Roleh also does not dispute that the required affidavits were prepared and filed. The only issue before this Court, with respect to the affidavit, is whether the affidavit must be filed prior to the expiration of the redemption period.

Miss. Code Ann. §27-43-3 imposes no time limit during which the Clerk must prepare and file the Affidavit. In the present action, the Clerk executed an Affidavit on February 27, 2007, detailing its efforts to locate the owner. (R. Vol. 2, p. 171). On October 7, 2008, the Clerk executed a second Affidavit, again detailing its efforts to locate the owner. (R. Vol. 2, p. 182). Roleh argues to this Court that the tax sale is void because the Affidavit was not filed of record prior to the expiration of the redemption period (thus arguing the timeliness of the Affidavit).

In support of its erroneous position, Roleh relies on *Norwood v. Moore*, 932 So. 2d 63 (Miss. App. 2006), a case in which the chancery clerk failed to execute and record a second affidavit. Notably, the chancery clerk in *Norwood* filed an Affidavit after her initial search and inquiry. Upon finding an alternate address for the delinquent taxpayer and attempting notice at the new address, the chancery clerk failed to file a second affidavit after the notice to the new address was returned. In the case *sub judice*, no alternate address was found for Roleh after the clerk's diligent search and inquiry. Accordingly, only one

affidavit was required to be filed in the present case pursuant to *Miss. Code. Ann.* §27-43-3. *Norwood* does not hold that the failure to timely file the Affidavit voids the tax sale, as Roleh would have this Court believe. Instead, *Norwood* holds that the failure to file a second affidavit, when required, shall void the tax sale. This is obviously different than the present action, where the Clerk did not find an alternate address after the initial search and inquiry, and also executed two Affidavits.

Similarly, the cases of *Lawrence v. Rankin*, 870 So. 2d 673 (Miss. App. 2004) and *Reed v. Florimonte*, 987 So. 2d 967 (Miss. 2008), do not hold that the Clerk's Affidavit must be filed prior to the expiration of the redemption period. In *Lawrence*, the Clerk failed to file any affidavit at all, which is not the case here. The *Reed* Court, affirmed the lower court's decision because it agreed that the record did not support that a diligent search and inquiry was performed. Neither of these cases even addressed when the affidavit must be filed. Roleh's suggestion that these cases support its position and the lower court's decision is a fallacy.

Roleh further 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." (See Reply Brief at p. 3). Like much of its brief, Roleh does not provide any authority for its conclusion. In fact, the Mississippi Supreme Court's decision in *Rush v. Wallace Rentals, LLC*, 837 So.2d 191 (Miss. 2003), is in complete disagreement with Roleh's conclusory statement. In *Rush*, the subject property therein was sold for taxes due for the 1997 tax year. *Id.* at 192. The deadline for the taxpayer to redeem the property was August 31, 2000. *Id.* The clerk in *Rush* executed the

Affidavit on October 2, 2000, more than one month following the expiration of the redemption period. *Id.* The Supreme Court, in affirming the chancellor's decision to confirm title in the tax purchaser's name, stated, "In the case before us today, the chancery clerk and her staff strictly complied with the applicable statutes . . ." *Id.* at 199. Despite not signing the Affidavit until after the redemption period had expired and after all notices were provided, our Supreme Court has upheld such Affidavits as being in strict compliance with the applicable statutes. Based solely upon the authority provided in *Rush*, this Court should reverse the trial court's decision.

Roleh further argues that the phrase "then the clerk shall file an affidavit" in *Miss. Code Ann.* §27-43-3 "means that the affidavit must be executed and filed within the two year redemption period." (See Reply Brief at p. 6) The lower court similarly interpreted such provision: "A strict interpretation of § 27-43-3 required the Chancery Clerk to file an affidavit in the record of tax sale as part of the notice requirement during the redemption period when the second attempted notice was returned undeliverable, as evidenced by the word 'then' . . ." In light of the Mississippi Supreme Court's decision in *Rush* wherein the Court approved the signing of the Affidavit after the redemption period expired, the lower court erred in its interpretation of the statute and no such obligation is imposed on the Chancery Clerks of Mississippi.

The United States Supreme Court recently addressed the issue of due process in *Jones v. Flowers*, 547 U.S. 220, 2006 (U.S. Ark. 2006). The Court found that due process does not require that the landowner actually receive the notice. Rather, it requires the state government to take reasonable steps to get notice to the landowner. *Id.* Clearly, the

intention of the Mississippi statute is to require local governments to take certain steps to notify the landowner. The requirement of strict compliance with the statute is focused on the Chancery Clerk taking those steps, *not* on the paperwork it completes to reflect the steps taken.

The Mississippi Supreme Court in *Rush* understood how impractical it is to require the affidavit to be executed and filed immediately after each search is performed. Both of the parties herein agree and understand that the Clerk's office issues thousands of tax sale notices in any given year. The burden of demanding the Clerk to complete affidavits as each search is performed is unduly. This is precisely why the legislature did not impose a deadline for the Affidavit to be filed by the Clerk, and why it does not clearly impose a deadline for the second Affidavit, if a second address is found and attempted. Mississippi's tax sale noticing statutes are very detailed and precise. In fact, the statutes require that the Chancery Clerk perform certain functions within a specific time frame – 1) notice by mail is to be given between sixty (60) and one hundred eighty (180) days prior to the expiration of the redemption period (*Miss. Code Ann.* §27-43-1); and 2) publication of the expiration of the redemption period is to be done forty-five (45) days prior to the expiration (*Miss. Code Ann.* §27-43-3). However, no time frame for completion of the Affidavit is given. The silence of a deadline with regard to the Clerk's Affidavit is very telling, and it is not for this Court to impose such a deadline when the legislature has refused to impose the same.

Roleh has failed to cite a single case or statute that supports its self-serving interpretation of the timing of the execution of the Affidavits required in *Miss. Code Ann.*

§27-43-3. The Chancery Clerk in this case fulfilled his obligations under *Miss. Code Ann.* §27-43-3 as written by the legislature by executing its Affidavits documenting the diligent search and inquiry by the Clerk. Accordingly, the lower court's decision should be reversed and CFP should ultimately prevail.¹

II. The Clerk's office did perform a diligent search and inquiry.

Although the lower court's decision did not hinge on, or address, whether a diligent search and inquiry was performed, it is important for this Court to know that such effort was taken and documented by the Clerk. As set forth by CFP in its initial Brief, both the February 27, 2007, and October 7, 2008, Affidavits executed by the Clerk in this action state that "Search and inquiry as to the address of the aforesaid Party was made by means of City Directory, Telephone Directory, Land Rolls, and Tax Rolls." Yet, Roleh continues to argue that the Clerk failed to perform a diligent search and inquiry. Roleh does not cite a single case that requires more than what the Clerk did in this case. Instead, Roleh directs this Court to the *Jones* case, a United States Supreme Court decision which applied Arkansas law. *See Jones*, supra. In *Jones*, the Court considered the validity of Arkansas' statutes, which required no follow-up notices if certified mail was unclaimed. Unlike the Arkansas statutes under review by the U.S. Supreme Court, the Mississippi statute requires additional search and inquiry in the event the personal service and certified mail be

¹ Although CFP should prevail in this action, the issue before this Court is whether summary judgment was appropriate. CFP has argued it was not, because of the conflicting Affidavits. Judge Persons likewise recognized this conflict, as he stated "If that affidavit is timely, just timely - - I'm not looking at the contents of it, but timely - - then I've got this affidavit in February of '07 that says these are the steps I took, whatever they were. And then I've got an August '08 affidavit that says I didn't do a darn thing. That then creates clearly a factual issue. That's the point I'm trying to make in my mind." (T. at 29).

returned unclaimed, and these duties were performed by the Clerk *sub judice*. In fact, *Jones* is in direct support of CFP's contention that the intent of the Mississippi legislature was to provide notice to property owners before the taking of property as prescribed in the 14th Amendment. Nothing in *Jones* or the 14th Amendment makes requirements of documentation of such actions, let alone deadlines for documentation.

More importantly, Roleh makes no attempt to distinguish the cases cited by CFP (all of which support what the Clerk did in this case), other than stating that the property owner in *Rains* and *Bush* was an individual. The fact remains that the Mississippi Supreme Court has suggested and approved a "check list form affidavit" as a proper method by which to document the clerk's efforts. See *Rush*, 837 So.2d at 200 ("As a matter of suggestion, the chancery clerks could perhaps consider a 'check list' form affidavit containing a general list of the description of actions normally taken in a search and inquiry, and then merely 'check off' on the list the action actually taken in any particular search and inquiry."). This is exactly what was performed by the clerk. The clerk "checked off" that the city directory, telephone directory, land rolls, and tax rolls were searched.

Roleh suggests that because it is a corporation, the Clerk is required to check different sources, such as the Mississippi Secretary of State. In fact, Roleh's Brief states that "Roleh, as are all Mississippi corporations, was required to notify the Mississippi Secretary of State of its registered address." (See Reply Brief at p. 3). While it may be resourceful at times, the Mississippi Secretary of State's office would not have yielded any beneficial information in this case. Roleh conveniently fails to mention that on December 28, 2004, Roleh was administratively dissolved by the Mississippi Secretary of State. Roleh was not

reinstated by the Mississippi Secretary of State until January 8, 2008. Roleh further fails to disclose that the registered agent for the dissolved company was deceased at the time the clerk was attempting to provide notice to Roleh. T. N. Roberts died on August 17, 2003. (R. Vol. 2., p. 152). Roleh did not change its registered agent with the Mississippi Secretary of State until February 26, 2008 - over four (4) years after Mr. Roberts' death and seventeen (17) months after the county conveyed the property for the 2003 unpaid *ad valorem* taxes. (R. Vol. 2, p. 178). In 2006, when the notices were mailed by the Clerk, T.N. Roberts was listed as the registered agent for the dissolved company, and he was deceased. *Miss. Code Ann.* §79-4-5.01 requires a corporation to "continuously maintain" a registered agent that is an "individual who resides in this state and whose business office is identical with the registered office." Roleh cannot argue that the Clerk should have looked at the Secretary of State's records, while wholly failing to comply with *Miss. Code Ann.* §79-4-5.01. Even assuming the Clerk had looked at the Secretary of State's records, it would have found a deceased registered agent, sent the notice to that registered agent, and that certified mail would have been returned undeliverable. Under these facts, the Clerk clearly did all it was required to do to locate Roleh. Similarly, in *Plemons v. Gale*, 396 F.3d 569 (2005), the 4th Circuit directed the lower court to determine both what sources were searched and if a search of additional sources would have yielded an address at which Plemons could be found. On remand, the lower court found no listing of an address at which Plemons could be found at the time of the tax foreclosure. The 4th Circuit then affirmed the lower court's grant of summary judgment. *Plemons v. Gale*, 161 Fed. Appx. 334 (4th Cir. 2006).

III. The Sheriff had no duty to serve Roleh under the facts of this case.

Roleh also raises the fact that the Sheriff did not serve Roleh with notice. *Miss. Code Ann.* §27-43-3 does not clarify whether the Sheriff is even required to serve notice on an active corporation, let alone an inactive corporation. In any event, personal service by the Sheriff in this case would have been impossible for two reasons. First, the only address provided and available to the Chancery Clerk for Roleh was a P.O. Drawer. The lack of any physical address for Roleh made service upon any agent of Roleh an impossibility. Second, Roleh's only officer, who was also the registered agent for the dissolved company, was deceased at the time the redemption period expired. T.N. Roberts was the registered agent for Roleh from 1963 to February 26, 2008. Although Mr. Roberts died on August 17, 2003, no efforts were made to change Roleh's registered agent until February 26, 2008. Since there was no living agent for service of process on Roleh, the Chancery Clerk was not required to see that personal service was perfected. Furthermore, even if the Chancery Clerk were required to give personal notice, notice on the registered agent of Roleh would have been impossible. Mississippi courts must recognize that situations exist where personal service is unattainable no matter how diligent the Chancery Clerk's efforts are and enforce tax sales in such instances despite the lack of personal service.

IV. Roleh made no effort to redeem this property, even after the redemption period expired.

In effort to make CFP out as the "bad guy", Roleh interjects "C.F.P. Properties is not

an innocent purchaser.”² Yet, Roleh is far from an “innocent owner.” As already explained, Roleh failed to comply with Mississippi statutes and update its registered agent information with the Mississippi Secretary of State. Roleh further failed to update the Chancery Clerk with a new address once it closed its P.O. Drawer. Then, after CFP received the tax deed, CFP in good faith contacted the only known representatives of Roleh (there was no active officer or registered agent, so CFP spoke with the leasing agent, the estate attorney for T.N. Roberts, and Scott Roberts, son of T.N. Roberts and executor of the will) to see if it had any intent on redeeming the property. Roleh represented to CFP that it had no interest in redeeming the subject property.

Specifically, Pamela Fleming, then an employee of CFP, spoke with both Larry Corban (attorney for the estate of Mr. Roberts), and Scott Roberts (son of T.N. Roberts). (R. Vol. 2, p. 184). Ms. Fleming told Larry Corban that the property had been obtained by Rebuild America, and that it was the intention of CFP to clean up the property which necessitated removing Mr. Roberts’ personal belongings. (R. Vol. 2, p. 184). Mr. Corban advised Ms. Fleming to contact Scott Roberts to make arrangements for removal of Mr. Robert’s personal property. (R. Vol. 2, p. 184). On April 2, 2007, Ms. Fleming spoke with Mr. Roberts, and he acknowledged that the property had been lost for unpaid taxes.³ When nothing had been done by August 6, 2007, CFP did the following: 1) stored legal documents

2 Roleh states in its Reply Brief that had CFP examined the land records when it purchased the property it would have learned the required affidavit was missing. (See Reply Brief at p. 8) Roleh’s statement is false. Had CFP examined the records in November of 2007, CFP would have found the Clerk’s February 27, 2007, affidavit.

3 Interestingly, the record contains an Affidavit from Scott Roberts, which states that “Since the death of my father I have had Ray Crowell Real Estate as managers of this property until March, 2007.” (R. Vol. 1, p. 111). This certainly corroborates Pam Fleming’s statement that in April 2007, Scott Roberts acknowledged the property had been lost due to unpaid taxes.

were shredded on site; 2) Personal belongings were donated to local charities; and 3) Mr. Roberts' urn and remains were delivered to Larry Corban's office. (R. Vol. 2, p. 184-5). During this time, Roleh made no effort to pay the past due taxes or resolve the issues with the purchaser, CFP. In fact, Roleh did not even remove Mr. Roberts' personal belongings from the property. After it disposed of them, CFP expended substantial funds in renovating this property.

In summary, Roleh cannot fail to pay taxes as due, fail to take any action for almost four (4) years after the tax sale is conducted, fail to take any action for over a year after the Tax Deed is issued (and after the purchaser has taken possession), then file for reinstatement of the Company and file suit to set aside the tax sale. Mississippi Courts have long applied the "clean hands" doctrine, which provides that a complaining party cannot have the "aid of a court of equity when his conduct with respect to the transaction in question has been characterized by willful inequity." *See e.g. Price v. Price*, 5 So. 3d 1151, 1157 (Miss. App. 2009)(citations omitted). Roleh does not come into Court with clean hands, and ultimately should not prevail in this case.

CONCLUSION

In light of the void of any statutory deadline and the Mississippi Supreme Court's application of *Miss. Code Ann.* §27-43-3 in *Rush*, the lower court erred in finding the Affidavit filed by the Chancery Clerk was untimely. Furthermore, the lower court's grant of summary judgment in reliance upon the lack of personal service was erroneous. The only address available to the Clerk was a P.O. Drawer. Additionally, no registered agent or other officer of Roleh existed at the time the notices were sent by the Clerk. This Court

should practically interpret the provisions of *Miss. Code Ann.* §27-43-3 and not require the impossible from the Chancery Clerks of Mississippi. For these reasons, CFP requests that this Court reverse the lower Court's grant of summary judgment.


DATED, this the 9th day of November, 2009.

Respectfully submitted,

C.F.P. PROPERTIES, INC.

By and Through Counsel:

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CERTIFICATE OF SERVICE

I, Susan D. McNamara, attorney for C.F.P. Properties, Inc., certify that I have this day served a copy of this Brief of Appellant by United States mail with postage prepaid on the following persons at these addresses:

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This the 9th day of November, 2009.

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