

IN THE SUPREME COURT 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)

BRIEF OF APPELLANT

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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 Court of Appeals may evaluate possible disqualification or recusal.


Douglas Gale
C.F.P. Properties, Inc.
Appellant

Scott Roberts
Nancy Lynn Roberts-Moneir
Roleh, Inc.
Appellee

Susan D. McNamara
Attorney for Appellant

Herbert J. Stelly, Sr.
Attorney for Appellee

Honorable Jim Persons
Chancellor, Harrison County, Mississippi



Susan D. McNamara, Esq.
Attorney for Appellant

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STATEMENT OF ISSUES

Whether the lower court erred in granting summary judgment in favor of Appellee.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This matter is before the Court from the lower Court's grant of summary judgment in favor of Roleh, Inc. ("Roleh and/or Appellee"). The lower Court's ruling was based on the timing of execution of the Clerk's Affidavit pursuant to *Miss. Code Ann.* §27-43-3. CFP contends that the statute does not impose a time requirement on the Clerk, and further, that this case involves other genuine issues of material fact, and that summary judgment should not have been granted.

II. COURSE OF PROCEEDINGS

Roleh filed this action in the Chancery Court of Harrison County, seeking to set aside a tax sale and the subsequent conveyance of the subject property to CFP. The parties engaged in limited discovery, then Roleh filed a Motion for Partial Summary Judgment as to the validity of the sale. The Chancellor granted the Motion, holding that the tax deed was set aside, and CFP's interest in the property was terminated. CFP then filed the present appeal.

III. RELEVANT FACTS

Roleh, Inc. ("Roleh") was formed in 1963. At the time of formation, T.N. Roberts was the registered agent for Roleh. (R. Vol. 2, p. 153). T.N. Roberts died on August 17, 2003. (R. Vol. 2., p. 152), and a search of the public records does not reveal a probate of Mr. Roberts' estate thereafter. As of August 30, 2004, Roleh was the record owner of the subject property, which is a commercial building. T.N. Roberts was still listed as the registered agent at this time, although he was deceased. On December 28, 2004, Roleh was

administratively dissolved by the Mississippi Secretary of State's office. (R. Vol. 2, p. 153).

Roleh failed to pay 2003 property taxes for the commercial property located at 1015 Pass Road in Gulfport as due. (R. Vol. 2, p. 170) On August 30, 2004, the subject property was sold for unpaid taxes to Maitland Investors 2004 LLC, CUST. (R. Vol. 2, p. 170).

Roleh had until 2006 to redeem the taxes from the 2004 tax sale. The Clerk's office first mailed notice of the expiration of the redemption period to Roleh on April 28, 2006 at P.O. Drawer Y, Gulfport, Mississippi 39501. (R. Vol. 2, p. 167). This Notice was returned marked "Returned to Sender not here." (R. Vol. 2, p. 167).

On July 7, 2006, the Clerk properly published Notice of the expiration of the redemption period. (R. Vol. 2, p. 168). Written notice was again sent on July 17, 2006 to Roleh at P.O. Drawer Y, Gulfport, Mississippi 39501, and was returned "Box Closed No Forwarding Order on File." (R. Vol. 2, p. 169).

Between August 30, 2004 and October 13, 2006, Roleh did not pay the taxes due to redeem the property. On October 13, 2006, the Tax Collector executed a Conveyance of Land Sold for Taxes, conveying the subject property to Maitland Investors 2004, LLC, CUST. (R. Vol. 2, p. 170).

On February 27, 2007, the Clerk executed the statutory Affidavit, stating its efforts to locate the owner. (R. Vol. 2, p. 171). On March 19, 2007, Maitland Investors 2004, LLC, CUST conveyed the property by Quitclaim Deed to Rebuild America, Inc. (R. Vol. 2, p. 172). On November 27, 2007, Rebuild America, Inc. conveyed the property by Quitclaim to CFP. (R. Vol. 2, p. 175).

On January 8, 2008, Roleh was reinstated by the Mississippi Secretary of State's

office. On February 26, 2008 (over four (4) years after Mr. Roberts' death and seventeen (17) months after the county sold the property for unpaid taxes) Roleh changed its registered agent from T.N. Roberts to Nancy R. Wheeler. (R. Vol. 2, p. 178). On April 17, 2008, Roleh filed the present action to set aside the August 30, 2004 tax sale and subsequent conveyances. (R. Vol. 1, p. 1).

On August 28, 2008, the Clerk of Harrison County executed an Affidavit, stating that he had reviewed the tax sale in question, and there was no Clerk's Affidavit. (R. Vol. 2, p. 180). This is obviously incorrect, as an earlier affidavit was signed by the Clerk's deputy on February 27, 2007. On October 7, 2008, a second Clerk's Affidavit was executed, again detailing the efforts to locate the owner. (R. Vol. 2, p. 182).

On September 18, 2008, Roleh filed its Motion for Partial Summary Judgment, seeking to void the August 30, 2004 tax sale. (R. Vol. 1, 96). On November 14, 2008, CFP responded to the Motion, arguing that the Clerk complied with Miss. Code Ann. §§27-43-1 and 27-43-3, as it executed the statutorily required Affidavit dated February 27, 2007. (R. Vol. 1, p. 136). Further, CFP argued that there were fact issues present, as there were conflicting Affidavit's executed by the Clerk's office, and further discovery was needed.

On February 9, 2009, the lower Court granted Roleh's Motion for Summary Judgment. In the Order granting the Motion, the Court stated as follows:

However, the Court need not substantively address the conflicting statements in these affidavits, as this is not a material fact dispute. The Court finds the tax deed in question is void because the Chancery Clerk did not strictly comply with the notice requirements in Miss. Code Ann. §27-43-3. 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 the Section's phrase "*then* the clerk shall file an affidavit to that effect" Surely, this notice requirement in §27-43-3 does not allow for the Chancery Clerk to wait to file the required affidavit only after an inquiry is made into the validity of the tax sale. "

(R. Vol. 2, p. 192-93).

CFP then filed its Notice of Appeal on March 10, 2009. (R. Vol. 2, p. 208).

SUMMARY OF THE ARGUMENT

The Clerk properly conducted the tax sale at issue in this case, and timely notified Roleh of the expiration of the redemption period. The issues in the present appeal are the timing of the execution of the Clerk's Affidavit, and whether a second Affidavit is required when the Clerk's search reveals no new addresses. Because the statute does not impose a time limitation on the Clerk for execution of the Affidavit, the trial Court erred in setting aside the tax sale.

ARGUMENT

I. Standard of Review

The standard of review in considering on appeal a trial court's grant or denial of summary judgment is de novo. *Price v. Purdue Pharma Co.*, 920 So. 2d 479, 483 (Miss. 2006)(citations omitted). Thus, this Court examines all evidentiary matters before it, including admissions in pleadings, answers to interrogatories, depositions, and affidavits. *Id.* Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Miss. R. Civ. P. 56. Material facts are those that tend to resolve an issue that a party properly raises. See *Prescott v. Leaf River Forest Prod., Inc.*, 740 So.2d 301, 309 (Miss. 1999) (quoting *Webb v. Jackson*, 583 So.2d 946, 949 (Miss. 1991).

The burden of demonstrating that no genuine issues of material fact exist is on the moving party, and all evidence must be viewed in the light most favorable to the nonmoving party. *Cothorn v. Vickers, Inc.*, 759 So. 2d 1241, 1245 (Miss. 2000)(citations omitted).

II. The Trial Court erred in granting summary judgment in favor of Roleh.

CFP should ultimately prevail in this matter, as the Clerk's office properly gave notice of the expiration of the redemption period. Regardless, this case involves fact issues which precluded the grant of summary judgment in favor of Roleh, as different employees of the Clerk's office executed conflicting Affidavits. For this reason, summary judgment

should not have been granted in favor of Roleh.

A. Relevant Statutes

Miss. Code Ann. §27-43-1 governs notice to be given, and requires the Clerk, between sixty (60) and one-hundred eighty (180) days prior to the expiration of the time of redemption, to give notice to the "record owner of the land." Miss. Code Ann. §27-43-3 requires that the Clerk provide the landowner with notice by three (3) separate methods: 1) the Sheriff must serve personal notice; 2) the Clerk must mail a copy of the notice to the owner by certified mail; and 3) the Clerk is to publish notice in the name of the owner in a public newspaper in the county in which the land is located. The statute sets forth execution of the Clerk Affidavit as follows:

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.

Miss. Code Ann. §27-43-3. It is important to note that this statute does not address when the Affidavit must be executed.

B. The Clerk complied with all statutory requirements.

1. The Clerk executed the required Affidavit.

The Clerk initially executed an Affidavit on February 27, 2007. (R. Vol. 2, p. 171). Attached to Roleh's Motion for Summary Judgment was the Affidavit of Virgil G. Gillespie, wherein he states that on February 27, 2007 he went to the Chancery Clerk's office to review the tax records. (R. Vol. 1, p. 103). Mr. Gillespie specifically attests that he asked for the Clerk Affidavit on February 27, 2007, and that later that day he was handed an Affidavit. (R. Vol. 1, p. 104). Roleh makes much of the fact that the Affidavit, attached as Exhibit "A" to Mr. Gillespie's Affidavit is dated February 27, 2006, prior to the date the matters sworn to occurred. However, it appears from a review of the Clerk's Affidavit, in conjunction with Mr. Gillespie's Affidavit, that the date on the Clerk's Affidavit is a typo. It likely was executed on February 27, 2007, the very date Mr. Gillespie attests he requested it, and the wrong date was simply typed in. However, this is a fact issue that should have precluded summary judgment. On August 28, 2008, the Clerk executed an Affidavit, stating that there was no tax sale Affidavit. (R. Vol. 2, p. 180). This is clearly contradictory to the February 27, 2007 Affidavit. In addition, on October 7, 2008, the Clerk executed a second Affidavit, detailing its efforts to locate the owner. (R. Vol. 2, p. 182).

Roleh argued that no Affidavit was ever signed, then challenged the Clerk's Affidavit attached to Virgil Gillespie's Affidavit. Obviously this argument is contradictory

because the two Affidavits are contradictory. Plaintiff cites *Norwood v. Moore*, as authority for the proposition that if the Clerk fails to execute an Affidavit, the sale is void. 932 So. 2d 63 (Miss. App. 2006). While this is the holding of *Norwood*, in that case, the Clerk simply failed to execute the Affidavit. This is obviously different than the present action, where the Clerk executed two Affidavits.

2. The statute imposes no time limitation on the Clerk's office for executing the Affidavit.

As is cited above, the lower Court's ruling is solely based on the timing of the execution of the Clerk's Affidavit. However, *Miss. Code Ann.* §27-43-3 imposes no such time limitation on the Clerk. It merely states that "then the clerk shall file an affidavit to that effect" The word "then" clearly implies that it be done after the notice is returned, *but* it does not say when it must be done.

Practically speaking, it is assumed that the Clerk's office issues thousands of notices in any given year. It is further assumed that stopping to execute an Affidavit immediately when the notice is returned would be a logistical nightmare for the Clerk's office. This is likely why the legislature did not impose a specific time deadline on the Clerk, and why it does not clearly impose a requirement that the Clerk execute a second Affidavit when its search reveals no new addresses. It is imperative that the parties hereto (and specifically CFP as a routine tax sale purchaser) receive guidance from this Court as to whether the Clerk's office actually erred. Regardless, this is information that needs to be determined through trial, and should have precluded summary judgment.

The trial Judge essentially stated that his ruling would be based upon his decision over what the statute required, when he said the following:

THE COURT: All right. Well, it would seem, then, that if the Court were to agree with you on that point, then your motion should be granted. If the Court disagrees with you on that point, then your motion -- then, at the very least, then the two affidavits, the August '08 and the February '07 affidavit, create a factual issue.

MR. STELLY: No, sir.

THE COURT: No. It would create a factual issue, because you've got one saying I didn't do it and one saying I did it. Now, the February '07 affidavit - - And I'm going to have to give this some thought and read the cases - - is that a timely affidavit? You know, if the answer is no, it's over with. Your motion is granted.

MR. STELLY: Exactly.

THE COURT: 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.

(Transcript at p. 29-30). From this exchange, it appears that the Court's view was that if the February 2007 Affidavit was timely, there was a fact issue over the conflicting Affidavits. But, CFP has been unable to locate any cases that clarify what "then" in *Miss. Code Ann.* §27-43-3 means. So it appears that the Court made its own decision as to what timing was required by the Statute, and found that there were no fact issues. This is clearly erroneous. Anytime a party executes an Affidavit attesting to certain facts, it is obviously going to be after those facts occurred. Likewise, the Clerk can attest to the actions it took based upon

its records, and there is no problem with that Affidavit being executed several months later. In fact, the Clerk could testify in Court today about what its file shows from tax sales conducted many years ago. The Affidavit at issue in this case is no different.

Finally, Roleh argued that on February 27, 2007 Affidavit is not noted in the tax sale records. The Mississippi Attorney General has instructed that the Clerk's office has no duty to record the Affidavit in the land records. See *Jimmy W. Jones*, 1997 WL 694100 (Oct. 17, 1997). Further, the tax sale records obtained by Plaintiff (attached as Exhibit "B" to Virgil Gillespie's Affidavit) are dated February 27, 2007. Since this is precisely the date the Clerk executed its first Affidavit, and the second Affidavit was executed in 2008, they would not appear in what the Plaintiff obtained on February 27, 2007.

Further, the statute does not intend for the Clerk to execute a second Affidavit anyway. Again, the Court's ruling on the issue was apparently that two (2) Affidavits are required, as the Court said "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 the Section's phrase "*then* the clerk shall file an affidavit to that effect" (R. Vol. 2, p. 192-93). So the Court found that the October 2008 Affidavit was invalid, as it was signed after the dispute arose. But the statute is not clear that the second Affidavit was even required since the search did not reveal any new addresses. Below is a Diagram evidencing the Clerk's procedure in giving notice.

Miss. Code Ann. 27-43-3 Process Diagram

Notice Process

Publishing

Send Notice by Certified Mail and by Personal Service Through Sheriff

If either is delivered, no further due diligence or direct noticing is required

If mail notice is returned undelivered, and sheriff's notice is returned not found, a further search of the records must be made.

If the second search does not reveal a new address, then only an affidavit attesting to the efforts made needs to be signed by the clerk (no due date so long as the clerk can be certain, by memory or by a review of its records, the work was performed).

If this second search turns up a new address, then both forms of notice (mail and sheriff's) must be attempted again at the new address.

If either form of direct notice is not returned (i.e. it is delivered), then no further due diligence or direct noticing is required.

If both forms of direct notice are returned, as in the first attempt, then only an affidavit attesting to the efforts made by the clerk needs to be signed by the clerk (no due date so long as the clerk can be certain, by memory or by a review of the its records, the work was performed.)

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

While not specifically addressed in the Court's ruling, Roleh also made much of the fact that the Clerk's Affidavit does not reflect that the Clerk's office checked the records of the Secretary of State in attempting to locate Roleh. What Roleh didn't explain to the Court is that the statute doesn't require the Clerk to search specific records, but rather to make "diligent" search and inquiry. Each Affidavit executed by the Clerk in this action states 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." Certainly a search of four (4) different sources (which again is the common practice of the Clerk's office), where the statute does not require the Clerk to search in any particular place, serves as diligent search and inquiry pursuant to the statute. The subject property is located at 1015 Pass Road, Gulfport, Mississippi 39501. However, on the property is a commercial building, with various tenants. Obviously, the Clerk could not send notice to the property address, as it is clear that is not the address for the owner. A review of the 2006 Landroll reflects that the Tax Assessor has P.O. Drawer Y, Gulfport, Mississippi 39501 as the address for Roleh. (R. Vol. 2, p. 183). See *Rains v. Teague*, 377 So. 2d 924, 926 (Miss.1979)(holding that a tax sale was valid because "[h]ere the clerk went to the property office to ascertain the landowners' address. Upon receiving it, she directed a notice to the address supplied by the tax assessor and, moreover, when the notice was returned, sought further information concerning the present address from directory assistance"). The Mississippi Supreme Court has found diligent search and inquiry was done in a case where the clerk did the following: 1) consulted current phone directories; 2) consulted the tax collector's office; 3) reviewed the

homestead exemption roll in the tax assessor's office; 4) checked the vesting deed; and 5) mailed notice to the address on the deed.¹ *Rush v. Wallace Rentals, LLC*, 837 So. 2d 191 200 (2003). The *Rush* court went on to state that while not lessening the responsibilities of the Clerks, Mississippi law "does not permit landowners to be inattentive to their annual property taxes . . . 'it is incumbent upon a landowner to be knowledgeable about the assessment on his property and to be diligent to make sure that his taxes are paid.' " *Id.* at 200 (citations omitted). What Roleh also fails to note is the possibility the Clerk did search the Secretary of State records, but didn't note the search on its form Affidavit. Simply put, the Clerk's office complied with the statute in its efforts to locate the landowner.

CONCLUSION

As set forth above, fact issues should have precluded the grant of summary judgment in favor of Roleh. For this reason, CFP requests that this Court reverse the lower Court's grant of summary judgment.

1

In the present action, the vesting Deed into Roleh was recorded in 1966, prior to the Statute requiring that the address and phone numbers of grantors/grantees be included on Deeds.

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:

Herbert J. Stelly, Sr.
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This the 22nd day of July, 2009.

A handwritten signature in black ink, appearing to read "Susan D. McNamara", written over a horizontal line.

SUSAN D. McNAMARA