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CAUSE NO. 2009-CA-00422

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IN THE SUPREME COURT OF MISSISSIPPI

GREEN TREE SERVICING, LLC

*Appellant*

v.

LINDA KAYE DUKES

*Appellee*

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REPLY BRIEF

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**IN THE SUPREME COURT OF MISSISSIPPI**

**GREEN TREE SERVICING, LLC**

**APPELLANT**

**V.**

**NO. 2009-CA-00422**

**LINDA KAYE DUKES**

**APPELLEE**

**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 this Court may evaluate possible disqualifications or recusal.

1. Green Tree Servicing, LLC, Appellant
2. Jeffrey D. Rawlings, Attorney for Appellant
3. Jon J. Mims, Attorney for Appellant
4. Rawlings & MacInnis, P.A., Attorneys for Appellant
5. Linda Kaye Dukes, Appellee

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## **TABLE OF STATUTES AND CASES**

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**IN THE SUPREME COURT OF MISSISSIPPI**

**GREEN TREE SERVICING, LLC**

**PLAINTIFF**

**VS.**

**CAUSE NO. 2009-CA-00422**

**LINDA KAYE DUKES**

**DEFENDANT**

---

**REPLY BRIEF**

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Green Tree Servicing, LLC successor in interest to Conseco Finance Servicing Corp., (“Green Tree”) submits this Reply Brief in opposition to Defendant Linda Kay Duke’s (“Dukes”) *Defendant’s Brief in Response* and in support thereof would show the following.

Certain statements made or issues raised in Defendant’s *Course of Proceedings and Disposition in Court Below* are either unsupported by the record, inaccurate, or are procedurally barred. First, the bench trial of this matter took place on February 14, 2008 on Plaintiff’s Complaint to Set Aside Tax Sale. See (R. 147). Dukes erroneously seeks to give the Court the impression that the bench trial was on Green Tree’s summary judgment motion and sets forth an incorrect standard of review. The record, including the Agreed Order Setting Trial (R. 147) and the transcript of the bench trial, clearly show that a bench trial took place.

Dukes states that a house was constructed on the property by Dukes and that both parties are disabled and unemployed. This statement is not supported by the record and should not be considered by the Court. Further, any issues that Dukes attempts to make of the unsupported statements, including equitable issues, are procedurally barred. See Williams v. Skelton, M.D., et. al., 6 So. 3rd (Miss. 2009).

Dukes also attempts to claim that Green Tree is not the interested party. Dukes attempted to raise this issue for the first time at trial wherein Green Tree objected on the basis that Dukes

had waived the issue. Green Tree reserved its objection that the issue was waived due to Duke's failure to plead and raise before trial. See Trial Transcript at Page 13, Lines 1-28. In fact, the objection was sustained. See Trial Transcript at Page 13, Line 28. Nevertheless, Green Tree laid to rest the untimely issue by presenting sufficient evidence setting forth that Green Tree was the same entity as Consecro Finance Servicing Corp. ("Consecro"). Green Tree is the proper party in this matter as evidenced by the Affidavit of Juawina Nichols and the supporting documents attached thereto evidencing the name change of Consecro Finance Servicing Corp. to Green Tree Servicing, LLC. (R. 160-168). This same evidence was set forth in Green Tree's response to Defendant's post-trial brief. (R. 151). In addition, Green Tree's representative, Juawina Nicols, testified at trial that Green Tree Servicing, LLC and Consecro Finance Servicing Corp. are one in the same. See Trial Transcript at Page 15, Lines 23-25. Consecro Finance Servicing Corp. is a Delaware Corporation who changed its name to Green Tree Servicing, LLC on June 9, 2003. Green Tree's status as a foreign limited liability company in good standing is on file with the Mississippi Secretary of State. (R. 166). Before the name change to Green Tree, Consecro maintained its status as a foreign business corporation in Mississippi until it applied for withdrawal on or about July 17, 2003. (R. 167). The trial court was obviously satisfied with Green Tree's evidence of the name change and set forth a statement noting the name change in its Judgment. (R. 224-25) The only issue properly before the trial court concerned whether the tax sale should be set aside due to a failure to strictly adhere to all tax sale notice requirements.

# I.

Duke's first issue is an attempt to argue that Green Tree Servicing, LLC lacks standing because it did not file an assignment pursuant to Miss. Code Ann. § 89-5-15. Green Tree objected to Dukes' untimely attempt to raise the issue at trial. Nonetheless, the evidence submitted by Green Tree in its post-trial brief should have resolved any doubt. Apparently,

Dukes failed to review or consider any of the evidence presented by Green Tree regarding its name change or the fact that its representative testified that Green Tree was the same company. Green Tree is not required to file an assignment when it simply changes its name. The assignment recorded at Book 605, Page 735 on September 5, 2000 to Conseco in the land records of Adams County, Mississippi was never sold or assigned to any other party. There is no law supporting that a name change requires that an assignment be recorded. Conseco exists today as Green Tree. As evidenced above, Conseco merely changed its name to Green Tree.

## II.

Dukes argues that the form of the notice to Conseco was sufficient. Green Tree addresses this issue in detail in its initial brief before this Court. It should be noted that Dukes completely fails to address Green Tree's position that the tax sale must also be set aside because there was no return of the sheriff's notice. This fact was undisputed. Under Miss. Code Section 27-43-3 and Moore v. Marathon Asset Mgt. LLC, 973 So.2d 1017 (2008), Green Tree has standing as an interested party entitled to redeem and, "the sale shall be void" "[s]hould the clerk inadvertently fail to send notice as prescribed". This Court recently stated that "statutes allowing the right of redemption from tax sales, whether by the owner of the fee, or any person who has an interest in the land, "are to be liberally and benignly construed in favor of the right to redeem." Marathon Asset Management, LLC, v. Otto, 977 So. 2d 1241,1245, quoting, Darrington v. Rose, 128 Miss. 16, 90 So. 632 (1922). In addition to the failure to obtain sheriff's notice, the lienholder notice to Conseco completely fails to strictly adhere to statutory requirements as set forth in detail in the Brief of Appellant.

## III.

In its post-trial brief, Dukes improperly sought to raise new arguments based on due diligence, laches, and equity. Dukes failed to plead or raise these arguments at any time before

or during the trial of this matter. Dukes waived its rights to bring these arguments and the arguments are irrelevant and immaterial to a determination of whether the tax sale should be set aside. Obviously, the tax sale statutes in this matter are the controlling authority.

Green Tree requested in its post-trial response brief that the trial court strike the improper post-trial statements that that Dukes built a home, is disabled, has limited income, and will be homeless. There was absolutely no evidence presented at trial as to these statements. The statements are irrelevant, immaterial and improper. Dukes failed to confirm her tax title pursuant to Miss. Code Ann. §11-17-1. She absolutely knew that she was purchasing an unconfirmed tax sale interest in the subject property as evidenced by Mississippi Land Company's statement that the sale covers "interest in the 2000 Adams County Taxes only." (R. 267). She knew or should have known the risks associated with purchasing tax title property. A tax sale purchaser is not an innocent purchaser for value but takes title subject to all its infirmities. See James v. Tax Investments Co., 40 So. 2d 539 (Miss. 1949).

Green Tree Servicing, LLC respectfully requests that this Court reverse the Judgment of the trial court and find that the trial court must rule as a matter of law that the tax sale shall be set aside and voided and award such other relief as is necessary under the circumstances.

This the 26th day of June, 2009.

Respectfully submitted,

**GREEN TREE SERVICING, LLC**

By: \_\_\_\_\_

  
Its Attorney

Jeff D. Rawlings, [REDACTED]  
Jon J. Mims, [REDACTED]  
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**CERTIFICATE OF SERVICE**

I do hereby certify that I have this date mailed a true and correct copy of the above and foregoing *Reply Brief* to the following:

William E. Murray  
Attorney for Linda Kaye Dukes  
P.O. Box 2293  
Natchez, MS 39121

Bruce Kuenhle  
P.O. Box 866  
Natchez, MS 39121

Betty W. Sephton  
Clerk of the Supreme Court of Mississippi  
P.O. Box 249  
Jackson, MS 39205-0249

Chancellor Kenneth E. Middleton  
P.O. Box 1144  
Natchez, MS 39121

This the 26th day of June, 2009.

  
Jon J. Mims

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**IN THE SUPREME COURT OF MISSISSIPPI**

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**V.**

**NO. 2009-CA-00422**

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5. Linda Kaye Dukes, Appellee
6. William E. Murray, Attorney for Appellee

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## **TABLE OF STATUTES AND CASES**

### **Statutory Authority**

Section 27-43-5 of the Mississippi Code of 1972, Annotated

Section 89-5-15 of the Mississippi Code of 1972, Annotated

### **Legal Authority**

Clark v. Moore Memorial United Methodist Church,  
538 So.2d 760 (Miss. 1989) citing from  
Dennis v. Searle, 457 So.2d 941 (Miss. 1984)

Gober v. Chase Manhattan Bank,  
918 So.2<sup>nd</sup> 841, 845 (Miss. 2005)

Hudson v. Belzoni Equipment Co.,  
203 Miss. 212, 33 So.2d 796 (1948)

Lamar Life Ins. Co v.Mente & Co.,  
181 Miss. 479, 458-486, 178 So. 89 (Miss. 1938)

Mennonite Bd. Of Missions v. Adams,  
462 U.S. 791, 798, 77 L.Ed 2d 180, 103 S. Ct. 2706 (1983)

Smith v. Dorsey,  
530 So.2d 5, 8 (Miss. 1988)

**IN THE CHANCERY COURT OF ADAMS COUNTY, MISSISSIPPI**

**GREEN TREE SERVICING, LLC**

**APPELLANT**

**VS.**

**NO. 2009-CA-00422**

**LINDA KAY DUKES**

**APPELLEE**

**DEFENDANT'S BRIEF IN RESPONSE**

**COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW**

This matter came before the Chancery Court of Adams County, Mississippi, in Cause #2004-457, to set aside a tax sale and void said tax sale on the property located at Lot 7 of Passman S/D, Map #49-52, Parcel #0137 0001 0007F, PPIN 11434, Adams County, Mississippi.

Plaintiff, Green Tree Servicing, LLC, filed a Motion for Summary Judgment. Upon submission of pleadings, memoranda, other documents, and testimony, the Court dismissed the complaint of Greentree Servicing LLC.

There is no issue that the property in question had regular and valid title through a deed to Francis Sullivan, dated August 29, 2000, and recorded in Book 21-W, at Page 420, of the Deed Records of Adams County, Mississippi. Of particular consequence is a Deed of Trust dated September 5, 2000, and recorded at Book 604, at page 735, in the Deed of Trust records of Adams County, Mississippi, in favor of Conseco Bank, Inc. Said Deed of Trust was assigned to Conseco Financial Servicing, Inc. at Book 605, Page 409 on September 5, 2000, in the Deed of Trust Records of Adams County, Mississippi. There is no other assignment of said Deed of Trust, which is the subject of this suit and motion.

On February 1, 2001, Ad Valorem taxes due to the State of Mississippi and County of Adams on said property became delinquent for the 2000 tax year.

On August 23, 2001, of its regular tax sale date, the property was sold to Mississippi Land Co., Inc. Taxes were not paid for several years until redeemed by Linda Kay Dukes.

As required by Section 27-43-5 of the Mississippi Code Annotated, on April 2, 2003, notice was sent by certified mail to lienholder, Consecro Financial Servicing, Inc., as well as to record landowner, Francis Sullivan, that the property would be deeded to a purchaser of said land. Said notice was sent by the Office of the Chancery Clerk of Adams County, Mississippi, as established by copies thereof and testimony of the representative of the Chancery Clerk of Adams County before this Court on or about February 14, 2008.

On October 15, 2003, the Chancery Clerk of Adams County, Mississippi conveyed said property to Mississippi Land Co., Inc., by Tax Deed dated October 15, 2003, and recorded in Deed Book 22-U, at Page 735 in the Office of the Chancery Clerk of Adams County, Mississippi.

On or about December 15, 2003, Consecro Finance Corp., filed for bankruptcy protection. It is unknown if the bankruptcy of Consecro Finance Corp., applied to Consecro Financial Servicing, Inc., the holder of this note, as evidenced by instrument recorded in Book 604, at Page 735, in the Deed of Trust Records of Adams County, Mississippi.

On February 17, 2004, Mississippi Land Co., Inc., conveyed said property to Linda Kay Dukes by Quitclaim Deed dated February 17, 2004, and recorded in Book 22-X at Page 267, in the Deed Records of Adams County, Mississippi.

On April 20, 2004, Francis Sullivan conveyed any interest he had in said property to Linda Dukes by Quitclaim Deed dated April 30, 2004, and recorded in Book 22-Z, Page 133, in

the Deed Records of Adams County, Mississippi.

On or about June 12, 2004, Green Tree Servicing, LLC filed its Complaint to Set Aside and Void Tax Sale, falsely claiming to be the assignee of said Deed of Trust and Note and successor in interest to Conseco Financial Servicing Corporation. Said Complaint further named Vernona Sanders, acting as the Adams County Tax Collector as a party in the sale of said property, not the Adams County Chancery Clerk. The basis of said Complaint was that Green Tree Servicing, LLC was not given notice of the delinquent taxes and of the right to redeem.

Subsequently, Linda Kay Dukes, abandoned the mobile home on said property and constructed a house in which she and her husband reside. Both parties are disabled and unemployed.

On or about December 16, 2005, in bankruptcy proceedings, In Re Linda Dukes, Green Tree Servicing, LLC, filed its Motion for Summary Judgment, which was transferred to the Adams County Chancery Court for disposition.

Defendants raised several issues against said motion including the validity of the notice of the tax sale, which is the subject of the appeal of Plaintiff. As evidenced by the brief of Defendant, Chancellor Middleton dismissed the complaint of Greentree Servicing LLC with costs to the Plaintiff. All other issues raised by Defendant then became moot, including the failure to produce a "Universal Note" to Green Tree Servicing, LLC; the failure to assign by Conseco Finance Servicing Corporation; the lack of intent of Conseco Finance Servicing Corporation to operate as a valid corporation in the State of Mississippi by failure to qualify; and proof that Green Tree Servicing, LLC. is one and the same as Conseco Bank, Inc., or Conseco Finance Servicing, LLC. It is apparent that Chancellor Middleton found that the lienholder did



receive notice and refused or neglected to act to redeem the property from tax sale.

In support of the ruling by the Court, Defendant relies on those cases cited which distinguish between the rights of landowners and lienholders. In support thereof the following cases are cited:

*Lamar Life Ins. Co v Mente & Co.*, 181 Miss. 479, 485-486 (Miss. 1938).

*Gober v. Chase Manhattan Bank*, 918 So.2d 841, 845 (Miss. Ct. App. 2005).

*Mennonite Bd. Of Missions v. Adams*, 462 U.S. 791, 798, 77 L.Ed 2d 180, 103 S. Ct. 2706 (1983).

“All Motions for Summary Judgment should be viewed with great skepticism and if the Trial Court is to err it is better to err on the side denying the Motion. When doubt exists whether there is a fact issue, the non-moving party gets the benefit. Indeed, the party against whom the Summary Judgement has been sought should be given the benefit of every reasonable doubt.”  
*Clark v. Moore Memorial United Methodist Church*, 538 So.2d 60 (Miss. 1989) citing from *Dennis v. Searle*, 457 So.2nd 941 (Miss. 1984).

### **ISSUES OF FACT**

**I.** The following issues of fact exist and have been presented to the Court by Defendant's Answer, testimony of the office of the Chancery Clerk of Adams County, Mississippi, and testimony of the representatives of Green Tree Servicing, LLC. Each of these issues can only be answered at trial, therefore making a Summary Judgment inapplicable and inappropriate in this case.

The pleadings by Movant, in their complaint state that “Francis Sullivan is indebted to

Green Tree Servicing, LLC, under a universal note.” There is no such note. Francis Sullivan apparently executed a note to Consec Bank, Inc. The Deed of Trust evidencing said note was assigned to Consec Finance Servicing Corporation as previously stated. There is no assignment of said Deed of Trust to Green Tree Servicing, LLC, on the face of said Deed of Trust as required by Section 89-5-15 of the Mississippi Code Annotated.

Further, reports from the Mississippi Secretary of State show that Consec Finance Servicing Corporation has withdrawn its status of a corporation in the State of Mississippi and last filed annual reports on July 12, 2002. It is apparent that said corporation had no intent to operate as a qualified corporation in the State of Mississippi at the time Green Tree Servicing, LLC, filed suit in this matter.

**II.** Further, Green Tree Servicing, LLC, claims in its pleadings that the required notice of sale was defective. Green Tree Servicing, LLC, does not deny that Consec Finance Servicing, Inc. received said notice as testimony by the Office of the Adams County Clerk has established. In *The Lamar Life Insurance Company v. Mente and Company*, 181 Miss. 479, 458-486, 178 So. 89 (Miss. 1938), it was established “that where the Chancery Clerk sends notice of tax sale by registered mail to lienholder, whether lienholder receives it or not is of no consequence as respects validity of the sale.”

With receipt of notice not an issue, it remains to be determined if notice was sufficient to allow Consec Finance Servicing Corporation to redeem said property prior to sale. Said notice contains a description of the Deed Book where the property could be determined, the parcel number, the tax receipt number, the name of the owner (both past and present) the party buying the property, the date of redemption and the date of notice. In due diligence, Consec Finance

Servicing, Inc., received sufficient notice to determine which property was being sold. Their note and Deed of Trust further identify the property as that located at Lot 7 of Passman Subdivision.

Movant seeks to convince this Court that the notice was insufficient. In Movant's memorandum to the Court, they have offered several cases in support of their position. In each of these cases, the issue was not the form of the notice but whether notice was received by the proper party. No Mississippi cases deal directly with this position.

Testimony from the representative of the Adams County Chancery Clerk revealed that all notices to lienholders have been done in the same manner for many years. If Green Tree Servicing, LLC is allowed to set aside this tax sale, all sales with notices to lienholders would be subject to the same result. Public policy dictates that the chaos following such a ruling would best be determined by trial of all issues rather than by Summary Judgment as sought by Green Tree Servicing, LLC.

### **III. Equitable Issues**

A. Due diligence on the part of Conseco would dictate that an investigation of a certified letter from the Chancery Clerk of Adams County, Mississippi, would be necessary.

Nothing but conscience, good faith, and reasonable diligence can call forth the activities of a court of equity, and that when these requisites are wanting, the Court is passive and does nothing. It makes no exertions to extend relief to those who, being able to take care of their interests, have neglected to do so, and thereupon find themselves in predicaments which ordinary care would have avoided. *Smith v. Dorsey*, 530 So.2d 5, 8 (Miss. 1988).

B. Laches. Laches is an inherent in a court of equity and applies where it would be practically unjust to give a remedy. Facts will show at trial that Defendant, Linda Kay Dukes

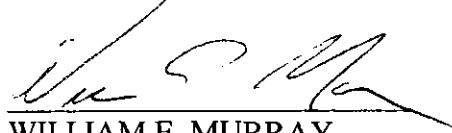
purchased the property, not at a tax sale, but from Mississippi Land Co., Inc., the original purchaser at the Adams County Tax Sale. Believing herself to be the owner, she and her husband, both disabled and on limited income, took what funds they had available and built their home on the captioned property. The mobile home sought by Green Tree Servicing, LLC, has been abandoned. There is no question that the result(s) from the action by Green Tree Servicing, LLC, would leave the parties homeless. "Laches is not simply delay in asserting a right, but is a delay which results in a disadvantage or an injustice to another." *Hudson v. Belzoni Equipment Co.* 33 So.2d 796 (1948). If Green Tree Servicing, LLC is successful in this motion enabling them to move forward to foreclose, the injustice or disadvantage to Linda Kay Dukes and her family would be devastating. Further, the facts of this case as previously stated, include those elements of change or intervention by a third party, should with the presumption of injustice arising out of the undue delay in action by Conseco Finance Servicing Corporation, without rebuttal by said company, would enable laches to apply. There is no doubt that loss of Conseco Finance Servicing Corporation as the party in interest, prevent records and testimony from said company to be available to Defendant, who was not a party to the original transaction.

#### **CONCLUSION:**

In conclusion, facts and equitable doctrines would be presented concerning the validity of notice, if no actual, constructive would not allow this matter to be concluded by Summary Judgment as sought by Green Tree Servicing, LLC. Said corporation has offered no proof of the validity of assignment from Conseco Finance Servicing Corporation as required by statute and

can not be a party as they claim. As a consequence of these matters, Defendant would ask the Court to dismiss the Claimant's Motion for Summary Judgment and move forward with a trial on the issues.

Respectfully submitted on this the 12<sup>th</sup> June, 2009.



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CERTIFICATE OF SERVICE

I do hereby certify that I have this date mailed a true and correct copy of the above and foregoing Defendant's Brief in Response to the following:

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This the 12<sup>th</sup> day of June, 2009.

  
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