NO. 2009-CA-00608-COA

IN THE COURT OF APPEALS
FOR THE STATE OF MISSISSIPPI

AMERICAN PUBLIC FINANCE, INC.,
APPELLANT

v.

LLOYD A. SMITH,
APPELLEE

ON APPEAL FROM A JUDGMENT ENTERED
IN THE CHANCERY COURT OF HARRISON COUNTY
FIRST DISTRICT

REPLY BRIEF OF APPELLANT

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ORAL ARGUMENT IS NOT REQUESTED

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ARGUMENT

American Public Finance, Inc. the appellant ("APF") submits this brief in reply to the brief of appellee, Lloyd A. Smith ("Smith"). APF respectfully submits that Smith fails to address any of the points raised by APF in this appeal, and instead merely relies on sweeping statements and broad generalities extracted from appellate decisions and presented out of context. Smith's contentions wholly fail to cure the errors in the Chancery Court's order denying APF's motion to intervene and to set aside the order entered January 8, 2008. That denial was manifestly wrong and clearly erroneous and should be reversed.

A. The Chancery Court was required to join APF as a necessary party to Smith's quiet title action.

Smith begins by emphasizing so much of the Mississippi statute that governs confirming and quieting tax title, Miss. Code Ann. § 11-17-1 (1972) as he believes supports his position. Read as a whole, however, the statute clearly shows that Smith should have, and by the exercise of the slightest degree of due diligence could have, identified APF as a party interested in the title to the subject property and joined APF as a party prior to January 8, 2008, the date of the final hearing. The statute required that Smith "shall set forth in his complaint his claim under the tax sale, and the names and places of residence of all persons interested in the land, so far as known to plaintiff, or as he can ascertain by diligent

inquiry." Miss. Code Ann. § 11-17-1 (emphasis supplied). Smith points to nothing in the statute that expressly limited his duty of diligent inquiry to the period prior to the filing of the complaint. No such express limitation exists, nor can such a restriction can be implied (as Smith seems to claim) in the face of the express language of Miss. Code Ann. § 11-17-29 (1972). As APF pointed out in parts C and E of its opening brief, Section 11-17-29 unequivocally states that the determination of title is made at the time of the final hearing and is conclusive "from the date of the decree" -- not from the date of the tax sale (Norton v. Graham, 185 Miss. 164 (1939)), and specifically is not conclusive as of the the date the complaint is filed as alleged by Smith.

> If on the final hearing of any such suit, the court shall be satisfied that the complainant is the real owner of the land, it shall so adjudge, and its decree shall be conclusive evidence of title as determined from the date of the decree as against all parties defendant.

Miss. Code Ann. § 11-17-29 (emphasis supplied).

Thus, the key date in an action to quiet title and tax title is the date of the final hearing and the date of the decree. But Smith failed to exercise even the most rudimentary of due diligence prior to the final hearing in January 2008, which would have revealed APF as the successor in title to Deep Woods Investment Company, LLC (Deep Woods) and thus required the joinder of APF as a party.

Smith then deploys, with no analysis whatsoever, aphorisms gleaned from Lamar Life Ins. Co. v. Billups, 175 Miss. 771, 169 So. 2d 32 (1936) and Hatten v. Jones, 218 Miss. 326, 67 So. 2d 363 (1953). But both these decisions support APF's argument in this appeal and show the manifest error of the Chancery Court's order.[1]

In Lamar, the Johnsons were the owners of land assessed for taxes in 1931 that they failed to pay, and Billups purchased the land at a tax sale in September 1932. In 1934, Lamar Life foreclosed a deed of trust given by the Johnsons. Billups received a tax deed in February 1935, and brought an action to quiet tax title under the predecessor of Miss. Code Ann. § 11-17-1. However, Billups failed to name the Johnsons, the owners of the land at the time of the sale, as defendants. The chancery court entered an order quieting title in favor of Billups, which the supreme court reversed under the well-established rule that "'[i]t is of the very essence of a proceeding to confirm tax title that the owner of the land at the date of sale...should be made part[y]....'" Lamar, 175 Miss. at 782 (quoting Smith v. W. Denny & Co., 90 Miss. 434, 43

[1] Furthermore, APF respectfully notes that Smith has relied upon decisions of this Court that are more than sixty and seventy-five years old, whereas APF submits that the more recent decisions set forth in its opening brief are a more accurate statement of the law.

So. 479 (1907)). This was the holding of Lamar, and the reasoning of the Denny decision that supports that holding is directly applicable to the instant case. After stating the rule quoted in Lamar, the Smith court went on to say,

> "[w]ho could be imagined to be a more necessary party, or have greater interest in the proceeding, than the party who is about to lose his land by virtue of the very act that complainant seeks to vest the title in himself? All interested parties, so far as known or can be ascertained by diligent inquiry, must be made parties by the complainant...."

Smith, 90 Miss. at 438.

Here APF, by virtue of having secured a conveyance from Deep Woods, and having placed same of record, became the owner of the subject property less than three months after the complaint was filed -- well before any service had been attempted or had on Deep Woods, well before the final hearing was held, and well before the decree was entered -- and consequently should have been joined as a necessary and indispensable party. In the words of Smith, who could be imagined to be a more necessary party than APF? The Chancery Court erred in failing to give effect to this important precept.

After entering its holding, the Lamar court then went on to state the reason Billups had not named the owner as a party. In explaining why Billups was mistaken, the court used the generic language that Smith now recites at p. 2 of his brief.

> "It seems to be the theory of...Billups, that the foreclosure of the deed of trust given by...Johnson...dispensed with the necessity of making [Johnson] parties to the suit; it having divested their title existing at the time of the sale. This view is unsound. The purpose of the suit to confirm the tax title is not only to settle contentions between the main parties, but is to make the tax title a good and perfect title against all persons whatsoever, so that there may be no further litigation concerning the validity of the tax title.

Lamar, 175 Miss. at 782. In context, this statement is merely a comment on why Billups' theory was unsound and does not express the court's holding in the case. Nonetheless, the court's observation reinforces the point that all necessary and interested parties must be joined, especially the owner. The Chancery Court committed plain and manifest error in not joining APF, the owner of the subject property.

Hatten involved a collateral attack by Jones on a decree entered in a prior quiet tax title action. In the prior action Hatten, who purchased tax title in 1937, was the plaintiff and Colson, the owner of the land individually and in his capacity as trustee, was one of the defendants. In September 1940, the chancery court entered a final decree confirming tax title in Hatten from which no appeal was taken. In 1947 Colson -- although no longer the owner -- sold the land to Jones. The court acknowledged that the prior decree might have been reversed if Colson had taken a timely appeal, but held that since the decree was not void on its face it was binding on

Colson and on Jones as Colson's successor in title. As the court stated,

> "[T]he [chancery] court had jurisdiction of both the subject matter of confirming the tax titles to this land located in the county where that suit was brought, and jurisdiction of the person of all of the defendants named therein.... Jones, being the successor in title of defendants [Colson] in that confirmation suit, is bound by the decree rendered therein since the same was of record in the court when he bought the land from Robert J. Colson.... (emphasis supplied)

Hatten, 67 So. 2d at 365. But the key fact in the case at bench is that, unlike in Hatten, no final decree had yet been entered of record when APF acquired title to the subject property. Unlike Jones, APF did not take title subject to a decree confirming tax title in Smith, and should have been added as a party defendant.

The facts of Minge v. Davidson, 94 Fla. 1197, 115 So. 510 (1928), cited in Smith's brief at p.3, are the same as in Hatten, supra. A decree was entered in July 1924 quieting title in Davison as against Hoebel and all Hoebel's successors in title; as the court stated, "Minge acquired any interest he might have had [from the Hoebel heirs] subsequent to the final decree quieting title in Davison." Id., 115 So. at 511 (emphasis supplied). Thus the Minge court's holding, that Minge lacked standing to intervene in a suit against Davison by the heirs of Hoebel, is not relevant to this case, since APF

acquired title to the subject property in August 2007, long before entry of the final decree in January 2008.

Smith's reliance on Marathon Asset Mgmt., LLC v. Otto, 977 So. 2d 1241 (Miss. Ct. App. 2008), borders on the frivolous. As the Marathon court noted, "Ironwood was notified by letter of the foreclosure sale and the possibility that the tax redemption period could be extended. This knowledge was imputed to Marathon, as Ironwood's successor." Id. at 1246 (emphasis supplied). Since in Marathon the foreclosure sale occurred on June 4, 2002, the redemption period expired on August 28, 2002, and Ironwood "subsequently" obtained a tax deed and "thereafter transferred title to Marathon" (id. at 1243), Ironwood plainly received the letter of notification before conveying title to Marathon. In the instant case, however, Deep Woods was not served with the complaint until October 10, 2007 - nearly two months after conveying title to APF.

Smith fails to make any meaningful argument that the doctrine of res judicata is applicable here, merely mentioning the doctrine in a parenthetical comment on page three of his brief that is unaccompanied by any discussion of the four elements that must be satisfied for the doctrine to apply (see, e.g., Standard Oil Co. v. Howell, 360 So.2d 1200 (Miss. 1978); Norman v. Bucklew, 684 So. 2d 1246 (Miss. 1996); Cowan v. Gulf

City Fisheries, Inc., 381 So. 2d 158 (Miss. 1980); Mississippi Employment Security Commission v. Georgia-Pacific Corp., 394 So.2d 299 (Miss. 1981); Dunaway v. W.H. Hopper & Associates, Inc., 422 So. 2d 749, 751 (Miss. 1982)). APF therefore respectfully requests the Court to disregard this parenthetical reference, since Smith has failed to make any cognizable appellate argument with appropriate reference to supporting authority and thus fails to comply with Miss. R. App. P. Rule 28(a)(6). Evanna Plantation, Inc. v. Thomas, 999 So. 2d 442 (Miss. Ct. App. 2009).

Moreover, Jenkins v. Terry Investments, LLC, 947 So. 2d 972 (Miss. App. Ct. 2006), does not support applying res judicata in this case. The question before the Chancery Court below was whether to join APF as a party defendant based on APF's status as the owner of the subject property. This question was certainly not adjudicated previously in the final decree entered in January 2008, which APF moved to vacate. In Jenkins, by contrast, the same Rule 60(b) motion had been previously decided adversely to Jenkins. The Court should disregard Smith's passing reference to an irrelevant theory.

At pages 5-6 of his brief, Smith fails to address the significance of the line of cases that interpret and apply Miss. R. Civ. P. Rules 19 and 25(c), and merely notes that they

"do not contain the same facts".[2] But TXG, Johnson, and Aldridge are indeed directly on point, since they involved persons who acquired an interest in the subject of the litigation after the complaint had been filed -- in fact, in TXG, the assignment to Empiric occurred after the trial. Holding that joinder was required, the TXG court stated,

> In [Johnson], this Court held that a transferee, who obtained his interest in the property just a little more than a month before the chancellor's judgment was rendered, was an indispensable party and should be joined under Miss. R. Civ. P. 19 (a). Likewise, this Court holds that Empiric was an indispensable party and should have been joined upon TXG's motion on January 6, 1994.

TXG at 1023. Similarly, Smith makes no attempt to argue that Miss. R. Civ. P. Rule 17, which allows only the real party in interest to prosecute its claims (see Citizens Nat'l Bank v. Dixieland Forest Prods., LLC, 935 So. 2d 1004, 1014 (Miss. 2006)) is not applicable to this case, and Smith does not deny that Deep Woods, the original defendant, was no longer the real party in interest after conveying its interest to APF August 13, 2007.

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[2] This line of cases, cited in APF's opening brief, includes TXG Intrastate Pipeline Co. v. Grossnickle, 716 So. 2d 991, 1023 (Miss. 1997), Aldridge v. Aldridge, 527 So. 2d 96 (Miss. 1988), Johnson v. Weston Lumber, 566 So. 2d 466 (Miss. 1990), Ladner v. Ladner, 505 So. 2d 288 (Miss. 1987), and Flowers v. McCraw, 792 So. 2d 339, 343 (Miss. Ct. App. 2001).

Under the well-established interpretation of these rules, the Chancery Court's order denying APF's motion to join as a necessary party was manifestly wrong and should be reversed.

B. The Chancery Court abused its discretion in refusing to set aside the judgment previously entered in favor of Smith pursuant to Rule 60(b).

Smith's brief at pages 6-7 does not address any of the applicable standards for granting relief under Miss. R. Civ. P. Rule 60(b).[3] Instead, Smith merely repeats, without providing any supporting authority, the Chancery Court's erroneous reasoning that APF is not entitled to relief "since it is not a party." APF again respectfully submits that these contentions should be disregarded, since Smith fails to comply with Miss. R. App. P. 28(a)(6). Evanna Plantation, Inc., supra.

Nor does Smith's reference to Trilogy Communications., Inc. v. Thomas Truck Lease, Inc., 733 So. 2d 313 (Miss. Ct. App. 1998) cure this defect, since Trilogy upheld the trial court's denial of the Rule 60(b) motion for three reasons that are completely absent from this case. In Trilogy the motion was made several years after judgment had entered and was therefore untimely; by contrast, in this case APF moved

[3] See, e.g., Chassaniol v. Bank of Kilmichael, 626 So. 2d 127, 134 (Miss. 1993); see also H.W. Transfer and Cartage Service v. Griffin, 511 So. 2d 895 (Miss. 1987).

promptly for relief from judgment. In Trilogy the Court noted that the moving party had attempted to litigate the issue of damages seven times and would not be allowed to do again by way of Rule 60(b); again, by contrast, in this case APF has been denied the fundamental opportunity to litigate the merits of its claim as owner of the subject property. In Trilogy the judgment called for the moving party to pay damages, which as the Court noted had not been paid or satisfied in compliance with Rule 60(b), but in this case no such judgment has been entered and that condition to Rule 60(b) relief does not even apply here.

Since APF should have been joined as a party, the Chancery Court's order denying relief under Rule 60(b) was clearly erroneous and should be reversed.

C. The Chancery Court erroneously applied the bona fide purchaser for value standard in denying APF's Motion.

Smith continues to defend the Chancery Court's erroneous reliance on the "bona fide purchaser for value" doctrine, arguing that APF, by failing to examine the title to the subject property prior to purchasing it, was precluded from being joined as a party to Smith's quiet title action. The bona fide purchaser for value doctrine is not, and should not be made, an issue in this case, and Smith fails to recognize that APF expressly disclaims any reliance on the doctrine of

bona fide purchaser for value, for the reasons set forth in section C of APF's opening brief. The Court need only examine the decision in Faulkner v. Wilcher (In Re Wilcher), 994 So.2d 187 (Miss. Ct. App. 2007), rev'd 994 So. 2d 170 (Miss. 2008), cited at p. 9 of Smith's brief, to see why the doctrine of bona fide purchaser for value is not applicable here.[4]

In Wilcher, the Faulkners were defending the validity of their title to the property, and sought to uphold the validity of the deed to them from Connie Wilcher on the ground that they were not aware that Connie Wilcher had a will at her death. In this case, by contrast, APF seeks to be joined as a party to the litigation, not to defend its title based on its bona fide purchaser status, but to raise affirmative defenses against Smith's tax title claim arising out of defects in Smith's tax title. Wilcher is not relevant, nor is Harrell v. Lamar Co., LLC, 925 So. 2d 870 (Miss. App. Ct. 2005), which merely repeats the bona fide purchaser doctrine. These authorities do not support the Chancery Court's erroneous application of the

[4] APF respectfully notes that in Wilcher the Supreme Court specifically held that the Faulkners were inncocent purchasers, contrary to the statement in Smith's brief that this Court's decision was "reversed on other grounds" by the Supreme Court. See id., 994 So. 2d at 177 ("[T]here was absolutely nothing to indicate that a will existed.")

doctrine to validate the absence of a lis pendens, as discussed more fully below.

Equally inapplicable are Quates v. Griffin, 239 So. 2d 803 (Miss. 1970), McKinley v. Lamar Bank, 918 So. 2d 689 (Miss. App. Ct. 2004), rev'd 919 So. 2d 918 (Miss. 2005), Buchanan v. Stinson, 335 So. 2d 914 (Miss 1976), and Collier v. King, 170 So. 2d 632 (Miss 1965), all of which repeat the rule that a purchaser of real estate should investigate the state of the title by examining the record. But in this case, such an examination of the title by APF would have revealed nothing but the quitclaim deed from Suresh Shah to Smith in March 2006. These decisions do not bar either APF's status as the actual owner of and holder of title to the subject property, or its right to be joined as a necessary party to the quiet title action. In fact, to the extent they insist on an examination of the title, these decisions bring out more clearly Smith's failure to record a lis pendens, which would have given notice of his quiet title action, as discussed in the next section.

D. Smith's failure to record a lis pendens precluded APF from obtaining notice of his action in time to move to intervene prior to entry of the final decree in January 2008, a fact that the Chancery Court erroneously disregarded.

The following facts are undisputed: (a) that Smith never recorded a notice of lis pendens; (b) that APF did not examine the record of title to the subject property prior to taking a

deed to the subject property from Deep Woods; and (c) that APF did examine the record of title to the subject property on September 4, 2007, approximately one month prior to service of process on Deep Woods and one month after taking title to the subject property.

The Chancery Court, in holding that that Smith was not required to file a notice of lis pendens, relied on Miss. Code Ann. § 11-47-3, which states:

> When any person shall begin a suit in any court... to enforce a lien upon, right to, or interest in, any real estate, unless the claim be founded upon an instrument which is recorded, or upon a judgment duly enrolled, in the county in which the real estate is situated, such person shall file with the clerk of the chancery court of each county where the real estate, or any part thereof, is situated, a notice containing the names of all the parties to the suit, a description of the real estate, and a brief statement of the nature of the lien, right, or interest sought to be enforced. The clerk shall immediately file and record the notice in the lis pendens record, and note on it, and in the record, the hour and day of filing and recording.

Miss. Code Ann. § 11-47-3 (1972).

The purpose of a lis pendens is to give notice that an adverse party claims an interest in the property. The lis pendens does not prevent a transfer of title, but insures that the purchaser will take tit title subject to the adverse claim. This simple objective is well established, as shown by the following statement in an early decision:

> The filing of a lis pendens does not prevent or make unlawful the sale of the land to be affected by the suit

> in which the notice is filed, except to the extent that parties purchasing the land pendente lite take it subject to the rights of the parties to the suit as it may be finally determined.

Glattli v. Bradford, 105 Miss. 573, 581 (Miss. 1913). See also Aldridge v. Aldridge, 527 So. 2d 96, 99 (Miss. 1988)("The legal function of Lis Pendens is to give notice to the world of an alleged claim of a lien or interest in the property....") and Guaranty Mortg. Co. v. Seitz, 367 So. 2d 438 (Miss. 1979).

This principle explains the reason for the underlined phrase: if "the claim be founded on an instrument which is recorded," then any purchaser will already know about the claimant's adverse interest, and no lis pendens is required. The true significance of the lis pendens statute is found in Miss. Code Ann. § 11-47-9 (1972), which provides protection for a bona fide purchaser for value if no lis pendens is recorded.

> If a person beginning any such suit, by declaration, bill, or cross-complaint affecting real estate, or if an officer levying any process upon real estate, shall fail to have the required notice entered in the lis pendens record, such suit or levy shall not affect the rights of bona fide purchasers or incumbrancers of such real estate, unless they have actual notice of the suit or levy.

Miss. Code Ann. § 11-47-9 (1972).

But this merely means that a litigant is entitled to rely on the recorded instrument to establish the priority of his claim as a matter of real property law. It does not do away with the necessity of giving notice of the lawsuit to all

persons who may have an interest in the property. For example, this statute does not obviate the requirement that Deep Woods, as the purported owner of record, must be served with process. Nor does this statute obviate the need to join APF, the new owner, as a party.

To illustrate this point, APF respectfully requests the Court to assume that Smith had recorded a lis pendens after August 4, 2007 (the date title was conveyed to APF) but before September 4, 2007 (the date APF examined the record). In that event, APF would have acquired knowledge of the pendency of Smith's quiet title action in time to move promptly to intervene as a party defendant. Clearly, such a motion, brought prior to the entry of the final judgment in January 2008, would have been allowed virtually as a matter of course. Indeed, in such a case, if APF had failed to move for joinder promptly, the recorded lis pendens would have protected Smith and insured the finality of the judgment. By failing to record a lis pendens, Smith has forfeited that protection.

The above-quoted statute is not designed to enable parties like Smith to improve their position by not recording a notice of lis pendens. Furthermore, as noted above and in APF's opening brief, APF does not claim to be a bona fide purchaser for value, and thus does not assert or rely on Miss. Code Ann. § 11-47-9 (1972). Smith's failure to record a notice of lis

pendens, while permissible as a matter of real property law, had the direct effect of preventing APF from receiving notice of Smith's quiet title action in time to move to be joined as a party before entry of the final judgment.

The practical effect of the Chancery Court's order is that APF would be required to undertake a search of the dockets of all the Mississippi state and federal courts, on an ongoing basis, to determine whether any civil actions affecting the title to the subject property had been commenced. The Chancery Court was manifestly wrong in relying on Miss. Code Ann. § 11-47-9 (1972) to deny APF's motion to intervene, and Smith's brief fails to disclose any justification for such erroneous reliance.

E. Smith fails to address the other points raised in APF's opening brief.

Smith does not dispute or address the well-established judicial policy that favors owner of real estate, like APF, under the tax sale statutes, and should there be any other determination then such would in effect constitute a taking of property without proper due process. See Darrington v. Rose, 128 Miss. 16, 25 (1921); McLain v. Meletio, 166 Miss. 1, 5 (1933); James v. Tax Inv. Co., 206 Miss. 605, 618, (1949) ;Marathon Asset Mgmt., LLC v. Otto, 977 So. 2d 1241, 1244 (Miss. Ct. App. 2008).

Smith attempts to brush aside the plain evidence of the transcript, and merely asserts at page 12 of his brief that there is "no merit" to APF's contention that the Chancery Court gave "undue weight" to one of APF's principals being an attorney. APF respectfully stands on the submission in its opening brief with respect to this point.

CONCLUSION

Wherefore, for the foregoing reasons, APF respectfully requests this Court to enter an order:

(1) Overruling the Chancery Court's order denying APF's motion for joinder as a necessary party,

(2) Overruling the Chancery Court's order denying APF's motion for relief from the judgment quieting title in favor of Smith,

(3) Remanding the case to the Chancery Court with directions

(a) add APF as a party to Smith's action to quiet title,

(b) to set aside the judgment quieting title in favor of Smith, and

(c) for further proceedings on the merits,

or in the alternative,

(4) Remanding the case to the Chancery Court to (a) add APF as a party to Smith's action to quiet title, and (b) for

further proceedings to determine whether relief is available to APF pursuant to Miss. R. Civ. P. Rule 60(b).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2010, I served the Reply Brief of Appellant by mailing a copy via first class U.S. mail postage prepaid and properly addressed to:

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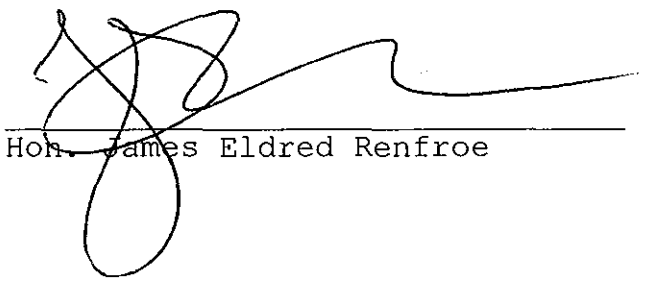

Hon. James Eldred Renfroe