

NO. 2009-CA-00608-COA

IN THE COURT OF APPEALS  
FOR THE STATE OF MISSISSIPPI

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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

---

BRIEF FOR APPELLANT

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ORAL ARGUMENT IS NOT REQUESTED

CERTIFICATE OF INTERESTED PERSONS


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

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

<u>Name</u>	<u>Interest</u>
Hon. Margaret Alfonso	Chancellor
Lloyd A. Smith ,	Plaintiff
Deep Woods Investment Company, LLC	Defendant
ARF, LLC d/b/a Wolf Run	Defendant
Dennis Joslin	Defendant
Suresh Shah	Defendant
American Public Finance, Inc. and	Interested party seeking to be joined as a necessary party to set aside judgment.
Hon. T. Mitchell Kalom Hon. Roy J. Perilloux Hon. James Eldred Renfroe	Attorneys for Appellant, American Public Finance, Inc.
Hon. G. Martin Warren	Attorney for Appellee,  James Eldred Renfroe

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Chancery Court erred in refusing to join appellant American Public Finance, Inc. (hereinafter, "APF") as a necessary party, pursuant to Miss. R. Civ. P. Rule 19, in the civil action by appellee Lloyd A. Smith (hereinafter, "Smith") to quiet title and tax title to the subject property, where APF acquired title to the subject property after the action had been commenced by deed from Deep Woods Investment Co., LLC (hereinafter, "Deep Woods"), the prior owner named as a defendant in Smith's complaint.

2. Whether the Chancery Court erred in refusing to grant APF relief, pursuant to Miss. R. Civ. P. Rule 60(b), by setting aside the judgment entered in favor of Smith.

3. Whether the Chancery Court erred in applying the doctrine of bona fide purchaser for value as the basis for its ruling that APF was not entitled to be joined as a party and not entitled to have the judgment in favor of Smith set aside.

4. Whether the Chancery Court erred in giving undue weight to one of the principals of APF being an attorney.

5. Whether the Chancery Court erred by failing to give proper weight to Smith's failure to record a notice of lis pendens, and by failing to follow the requirements of Miss. Code Ann. § 11-17-29.

## STATEMENT OF THE CASE<sup>1</sup>

This case proceeded in two separate phases in the Chancery Court: first, the entry of the default judgment in favor of Smith; and second, APF's motion to join as a party and set aside the judgment, which led to the Chancery Court's Order Denying Motion To Add Third Party (hereinafter, the "Order") that is the subject of this appeal [Order, R.171-178. RE.5-12].

### 1. Entry of default judgment

On May 24, 2007, Lloyd A. Smith ("Smith") filed a complaint (hereinafter, the "Complaint" [R.1-8, RE. 13-20]) in the Chancery Court of Harrison County commencing an action to confirm and quiet title and tax title with respect to a parcel of real estate consisting of approximately 22.6 acres located in Harrison County (hereinafter, the "subject property").<sup>2</sup> Deep Woods, as the last previous owner of the subject property, was named as one of the defendants. [Complaint, ¶2(a), ¶8(q), R.2,5, RE.14,17.] The Complaint alleges that Smith acquired title to

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<sup>1</sup> In this brief, items in the Record and in the Record Excerpts are identified with a brief description (e.g., "Complaint") and with the notation "R.#" and "RE.#" referring to the page number of the Record and the Record Excerpts. References to the transcript are identified by reference to the Record Excerpts and by the notation "Tr.#, line(s) #", referring to the page number of the transcript and the line number on that page.

<sup>2</sup> The subject property is fully described in the Complaint, in the first of the paragraphs numbered "2". [Complaint, ¶2, R.1-2, RE.13-14.]

the subject property on March 16, 2006, by deed from Suresh Shah, and that Suresh Shah had acquired title to the subject property on October 20, 2005 by a tax deed from the Chancery Clerk of Harrison County. [Complaint, ¶¶8(t),8(u),and 9, R.5,6, RE.17,18.]

Based on the testimony of a witness, the Chancery Court found that Smith did not file a notice of lis pendens in the Land Records of the Harrison County Chancery Clerk giving notice of his civil action to quiet title. [Order, ¶¶10 and 11, R.175-176, RE.9-10; Tr.44, lines 10-18, RE.88.]<sup>3</sup>

Pursuant to Miss. R. Civ. P. Rule 4(h), service of the summons and the complaint on Deep Woods was required to be accomplished on or before September 23, 2007, the date one hundred twenty days from May 24, 2007. Prior to that date, on August, 13, 2007, Deep Woods conveyed the subject property to APF without knowledge of Smith's civil action, since service of process on Deep Woods had not yet been made. [Quitclaim Deed, R.79, RE.24-28.]

After the conveyance to APF, on September 18, 2007, the Chancery Court entered an order enlarging time for service on

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<sup>3</sup> APF offered its title search of the subject property into evidence [Tr. 42, lines 2-7; RE.86], but the Chancery Court refused to admit the title search into evidence on the ground that it was not introduced. [Order, fn. 2, R.173, RE.7.] A copy of the title search is in the record and marked as Exhibit 2 to the transcript [see RE.91-92].



Deep Woods [Order Allowing Additional Time, R.16, RE.29], and on October 10, 2007, Deep Woods was served with a copy of the summons and complaint by service on its registered agent, Hardy McInnis. [Return, R.23, RE.30.] However, on the date of service, Deep Woods had no interest in the subject property due to its conveyance to APF on August 13, 2007. Deep Woods never filed a responsive pleading in opposition to the complaint.<sup>4</sup>

On December 4, 2007, Smith applied to the Chancery Court for entry of a default against defendant Deep Woods and against defendant Wolf Run, and the clerk entered a default on December 5, 2007. [Application for default, R.27, RE.31; Affidavit, R.25-26, RE.32-33; Default, R.24, RE.34.] On January 8, 2008, Smith filed a motion requesting entry of judgment on the pleadings, and on the same day the Chancery Court entered final judgment quieting title and tax title in favor of Smith. [Motion for judgment, R.28-31, RE.35-38; Final Judgment, R.32-38, RE.39-45.] APF was not named or referred to in Smith's application for default, in Smith's supporting affidavit, in the Clerk's entry of default, in Smith's motion for judgment on the pleadings, or in the final judgment.

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<sup>4</sup> The absence of any responsive pleading by Deep Woods is shown by the Chancery Court Docket [unnumbered pages at front of Record, and RE.1-4] Two defendants (Suresh Shah and Dennis Joslin) filed waivers of process on June 14 and July 16, 2007. [Waivers, R.12, RE.15.] ARF, LLC d/b/a Wolf Run (hereinafter, "Wolf Run"), the remaining defendant, was served through the Mississippi Secretary of State. [Notice of Service, R.20.]

2. APF's Motion To Join As A Party And Set Aside The Judgment.

On April 17, 2008, APF filed a motion seeking to be added as a party to the action (hereinafter, "APF's Motion"). APF's Motion also requested relief from the judgment, and asserted various claims and defenses. [APF's Motion, R.39-52, RE.46-59.] In support of its motion, APF attached thereto as Exhibit "I" a copy of the Quitclaim Deed And Assignment conveying title to the subject property from Deep Woods to APF as of August 13, 2007. [APF's Motion, Ex. I, R.79, RE.60-64.]<sup>5</sup>

On June 3, 2008, Smith filed a response in opposition to APF's Motion. [Smith's Response, R.80-94, RE.65-79.]<sup>6</sup> On November 7, 2008, the Chancery Court conducted a hearing on APF's Motion and Smith's Opposition. On March 18, 2009, the Chancery Court entered an order overruling APF's Motion, and specifically denying both APF's request to be added as a party to the action and APF's request to set aside the default and the judgment in favor of Smith. [Order, R.171-178, RE.50-12.]

On April 10, 2009, APF filed a timely notice of appeal from the Chancery Court's order. [Notice of Appeal, R.179.]

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<sup>5</sup> The Record Excerpts includes a copy of the Quitclaim Deed And Assignment, but does not include the other exhibits to APF's Motion.  
\* THE RECORD EXCERPTS DOES NOT INCLUDE ANY OF THE EXHIBITS  
TO SMITH'S RESPONSE.

### STATEMENT OF FACTS

APF agrees with the Chancery Court's statement that "None of the facts in this matter are contested" [Order, R.172, RE.6], to the extent that those facts concern the chronological history of the transfer of ownership of the subject property. The facts found by the Chancery Court, as shown in its chronological history, are as follows [Order, R.172-773, RE.6-7]:

<u>Date</u>	<u>Type of deed or procedural event</u>	<u>Grantor or interested party</u>	<u>Grantee or interested party</u>
02/02/98	Quitclaim	K. Jones	Denis Joslin <sup>7</sup>
12/11/98	Quitclaim	Denis Joslin	Deep Woods <sup>8</sup>
12/15/98	Deed of trust	Deep Woods	Denis Joslin <sup>9</sup>
08/26/02	Tax sale for unpaid 2001 tax assessed to	Deep Woods	Wolf Run <sup>10</sup>
08/25/03	Tax sale for unpaid 2002 tax assessed to	Deep Woods	Suresh Shah <sup>11</sup>
09/13/04	Clerk's conveyance of land sold for taxes on 08/26/02		Wolf Run <sup>12</sup>

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<sup>7</sup> Complaint, ¶8(p), R.5, RE.17.

<sup>8</sup> Complaint, ¶8(q), R.5, RE.17; APF's Motion, ¶1, R.39, RE.46.

<sup>9</sup> Complaint, ¶8(r), R.5, RE.17; APF's Motion, ¶2, R.40, RE.47.

<sup>10</sup> APF's Motion, ¶5, R.41, RE.48.

<sup>11</sup> APF's Motion, ¶7, R.41, RE.48.

<sup>12</sup> Complaint, ¶8(s), R.5, RE.5; APF's Motion, ¶6, R.41, RE.48.

10/20/05	Clerk's conveyance of land sold for taxes on 08/25/03	Suresh Shah <sup>13</sup>
03/16/06	Quitclaim deed from Suresh Shah	Smith <sup>14</sup>
03/16/06	Deed of trust from Smith	Suresh Shah <sup>15</sup>
05/31/07	Complaint to confirm title; No lis pendens recorded	Smith
05/31-07	Publication	
08/13/07	Quitclaim deed from Deep Woods	APF
08/13/07	Power of attorney from Deep Woods	APF
09/04/07	Title Search by APF	
09/18/07	Order allowing 60 additional days for Smith to serve process on Deep Woods and APF, LLC, d/b/a Wolf Run.	
10/10/07	Service of process on Deep Woods	
12/05/07	Clerk's default against Deep Woods and Wolf Run	
01/08/08	Final judgment confirming and quieting title and tax title.	
04/17/08	APF files Motion To Join As Party and for relief from the judgment.	

These findings show that Deep Woods was the owner of the subject property in the year 2002. A tax sale of the subject

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<sup>13</sup> Complaint, ¶8(t), R.5, RE.17; APF's Motion, ¶8, R.41, RE.48. The Chancery Court's Order contains a typographical error as to the date of this conveyance: the correct date (October 20) was in the year 2005, not 2004. Smith's Complaint and APF's Motion agree on this point.

<sup>14</sup> Complaint, ¶8(u), R.6, RE.18; APF's Motion, ¶9, R.42, RE.49.

<sup>15</sup> Complaint, ¶8(v), R.6, RE.18; APF's Motion, ¶10, R.42, RE.49.

property for unpaid 2002 taxes on August 25, 2003, led to the issuance on October 20, 2005, of a tax deed to Suresh Shah by the Harrison County Chancery Clerk. On March 16, 2006, Suresh Shah conveyed his interest in the subject property to Smith. Smith filed his complaint on May 31, 2007, but did not record a lis pendens. On August 13, 2007, before the summons and complaint were served on Deep Woods, Deep Woods conveyed its interest in the subject property to APF. APF conducted a title search on September 4, 2007, and found no lis pendens revealing the existence of Smith's complaint to quiet title and tax title.

The Chancery Court found that APF's September 2007 title search should have shown the existence of two tax deeds conveying the subject property to others, one of who was Suresh Shah, and that Smith acquired a quitclaim deed to the subject property from Suresh Shah in March 2006. [Order, ¶11, R. 175, RE.9.] But the Chancery Court then denied APF any opportunity to challenge the validity of the tax deed to Suresh Shah on the grounds set forth in APF's Motion, which were based on the failure to strictly comply with the tax sale statutes, including, inter alia, failure to give proper notice of the tax sale and failure to give proper notice of expiration of the period of redemption pursuant to Miss. Code Ann. § 27-41-55 et seq. and § 27-43-1 et seq.

The Chancery Court found that APF did not conduct a title search of the subject property prior to accepting the deed from Deep Woods. [Order, ¶¶7,10, R.174,175, RE.8,9.] This finding is based on the recital in the deed stating, "title not examined," and on the testimony of Mr. Kalom, a principal of APF and its counsel, that he had prepared the deed and that as of August 13, 2007, no title search had been performed. [Quitclaim Deed to APF, R.79, RE.28; Kalom testimony, Tr. 45, lines 6-11, Tr. 45, lines 18-29 and 46, line 1, RE. 89-90.] However, the Chancery Court never addressed or ruled on the sufficiency or validity of the notice of the tax sale to Suresh Shah conducted on August 25, 2003, or the sufficiency or validity of the notice of expiration of the period of redemption.

The Chancery Court also found, based on the testimony of Mr. Kalom, that APF conducted a title search in September of 2007, and that the title search did not show the existence of a lis pendens of record or the existence of Smith's civil action. [Order, ¶10, R. 175, RE.9; Kalom Testimony, Tr. 44, lines 16-18; RE. 88.] But the Chancery Court failed to address the significance of Smith's failure to record a notice of lis pendens, and simply bypassed the issue by holding that no lis pendens was required to be filed since Smith's civil action was founded on two recorded instruments. [Order, ¶11, R. 175-176, RE. 9-10.]

The Chancery Court found that APF failed to discover the existence of Smith's civil action, and failed to adequately research the title to the subject property. [Order, ¶12, R. 176, RE.10.] The Chancery found that the existence of the tax deeds alone was sufficient to put a reasonably prudent man on notice and necessitate further inquiry. [Order, ¶15, R.177, RE. 11.] The Chancery Court concluded that APF was charged with notice of all the facts that would be disclosed by a diligent and careful investigation, and the APF was not a bona fide purchaser without notice. [Order, ¶15, R.177, RE.11.] Ignoring the effect of Smith's failure to record a notice of lis pendens, the Chancery Court stated that Smith was under no obligation "to constantly update and/or check the land records subsequent to filing the lawsuit to insure that all interested parties are included." [Order, ¶12, R.176, RE.10.]

Based on these findings, the Chancery Court denied APF's request to be added as a party to the action, and denied APF's request to set aside the default and the judgment in favor of Smith on the ground that APF was not a party and lacked standing to request relief under Rule 60(b). [Order, R.178, RE.12.]

### SUMMARY OF ARGUMENT

The Chancery Court quoted the words of Miss. R. Civ. P. Rule 60, which makes relief from a judgment available to a "party" to an action, and ruled that APF was not a "party" and was not entitled to be joined as a "party." But APF as the owner of the subject property is required to be joined as a necessary party in Smith's action to quiet title, pursuant to Miss. R. Civ. P. Rule 19. Indeed, the Chancery Court is authorized to join APF as a necessary party sua sponte. Entry of the final judgment is not a bar to joining APF as a necessary party, since the judgment effectively took away the property belonging to APF without any notice to APF, or to Deep Woods, the grantor, since service had not been made as of the date the Deep Woods conveyed the subject property to APF.

APF having been joined as a party, relief is available under Rule 60(b). The balancing test weighs overwhelmingly in favor of granting such relief, since the complete absence of notice of Smith's civil action to either APF or to Deep Woods as of the date of the conveyance to APF, precluded APF from having any opportunity to answer the merits of the complaint, or object to the entry of the default and the judgment.

The Chancery Court misapplied the bona fide purchaser for value doctrine. APF is not claiming that it took title to the subject property completely free and clear of the claims by Smith; rather, APF is seeking to assert its right to contest



Smith's claims. Since no service of process was accomplished at the time APF received the property and no lis pendens was filed, the judgment in favor of Smith was awarded without notice. Whether Smith actually has a valid title to the subject property -- the very issue that Smith's Complaint raises -- is a different question than whether Smith's title has been terminated by Deep Woods' deed to APF under the bona fide purchaser for value doctrine. The existence of a previous tax sale only shows the potential of ownership by Smith, since the tax sale process is not valid and complete without strict compliance with the tax sale statute (Miss. Code. Ann. 27-43-1), issues that the Chancery Court did not permit APF to raise.

Aggravating its error, the Chancery Court erroneously believed APF's attorney was also its owner, and improperly imposed a higher standard of care on APF based on the attorney-at-law status of APF's attorney.

The Chancery Court erroneously gave no weight to Smith's failure to record a lis pendens, and erroneously failed to enforce Smith's obligation to insure that all interested parties were named as of the date of entry of the judgment. The Chancery Court's order therefore violated the requirement of Miss. Code Ann. § 11-17-29 that Smith is required to establish validity of his title as of the date of the final hearing and entry of the decree.

### STANDARD OF REVIEW

A chancery court's interpretation and application of the law are reviewed de novo. Weissinger v. Simpson, 861 So. 2d 984, 987 (Miss. 2003). A chancery court's findings of fact will not be reversed if the record contains substantial evidence supporting those findings. UHS-Qualicare, Inc. v. Gulf Coast Cnty. Hosp., Inc., 525 So. 2d 746, 753 (Miss. 1987) See also Williams v. Duckett (In re Duckett), 991 So. 2d 1165 (Miss. 2008). Application of the balancing test under Miss. R. Civ. P. Rule 60(b) is reviewed for abuse of discretion. H & W Transfer & Cartage Service, Inc. v. Griffin, 511 So. 2d 895, 899 (Miss. 1987).

### ARGUMENT

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

APF's Motion expressly requested entry of an order joining APF as a necessary party. The caption of APF's Motion identifies it as a "Motion To ... Add Necessary Third Party Plaintiff," and the first prayer for relief (prayer "A") requests the Chancery Court to "[d]eclare that [APF] is an additional, proper, and necessary third party Plaintiff to the subject proceeding ... and adding same as a party thereto." [APF's Motion, R.39, RE.46 and R.49, RE.56.] The Chancery Court recognized that APF sought to be added as a necessary

party, and specifically denied this request. [Order, ¶9, ¶16, R.175, 178, RE.9,12.]

This ruling was erroneous, because Miss. R. Civ. P. Rule 19(a), as interpreted by Mississippi appellate decisions, requires that APF be joined as a necessary party. Rule 19 (a) provides:

(a) Persons to be joined if feasible. A person who is subject to the jurisdiction of the court shall be joined as a party in the action if:

(1) in his absence complete relief cannot be accorded among those already parties, or

(2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant or, in a proper case, an involuntary plaintiff.

Miss. R. Civ. P. Rule 19(a).

Deép Woods, as the owner of the subject property at the time of the tax sale to Suresh Shah, was entitled to challenge the validity of the tax sale, and to show that the sale was void as the result of deviation from the procedures mandated by Miss. Code §§ 27-43-1 et seq. "Statutes dealing with land forfeitures for delinquent taxes should be strictly construed in favor of the landowners. . . . Any deviation from the statutorily mandated procedure renders the sale void." Roach

v. Gobel, 8565 So.2d 711, 716 (Miss. Ct. App. 2003). See also Hammet v. Johnson, 624 So. 2d 58, 60 (Miss. 1993) ("the tax deed issued pursuant to this defective process is void.")

Deep Woods could raise these claims and defenses in the action to quiet tax title brought by Smith, who relied completely upon the deed from Suresh Shah. As Smith's Complaint allege, "Suresh Shah ... conveyed the subject property to Lloyd A. Smith ... [and] in connection with the ... tax sale to Suresh Shah, all things required to be done ... were in fact done ... and title to the subject property became vested in Suresh Shah." [Complaint, ¶¶8(u) and 10, R.6, RE.18.] If Suresh Shah's tax title deed was void, then Smith stood in no better position.

APF acquired all those claims and defenses from Deep Woods, by means of the quitclaim deed and assignment of rights executed by Deep Woods on August 13, 2007. Specifically, APF acquired the right to redeem the subject property by showing that the tax deed to Suresh Shah was void. Equity Services Company v. Mississippi State Highway Commission, 192 So. 2d 431 (Miss. 1966) see also Hammet v. Johnson, supra.

In these circumstances, APF was a necessary party to Smith's action to quiet title, since APF owned an interest in the subject property. This principle is well established, and ~~was forcefully stated by the Mississippi Supreme Court in~~ Aldridge v. Aldridge, 527 So. 2d 96 (Miss. 1988).

The relevant facts in Aldridge are quite similar to the facts in the present case. Mr. Aldridge conveyed property to Mrs. Aldridge pursuant to a decree of divorce, which also provided that Mr. Aldridge was entitled to receive \$16,000 within sixty days, or when the property was sold. Receiving no money after sixty days, Mr. Aldridge filed a complaint against Mrs. Aldridge on July 13, 1984. Three days later, on July 16, 1984, Mrs. Aldridge conveyed the property to the Faucettes, who borrowed the purchase price from the Bank of Mississippi and granted a deed of trust to the Bank to secure the loan. The Faucettes and the Bank, which had not been named as defendants, were allowed to intervene, but their motion for relief from a judgment imposing a lien against the property in favor of Mr. Aldridge was denied.

On appeal, the Supreme Court emphatically affirmed the Chancery Court's order joining the Faucettes and the Bank, who were both necessary parties by virtue of their ownership interest in the property, and who were both required to be joined pursuant to Rule 19(a) to satisfy the requirements of procedural due process.

The Faucettes were the owners of the property and The Bank of Mississippi held a deed of trust on the property; however, neither was made a party to the action. It is apparent that no proper adjudication of rights could be made in the absence of these parties. Both the Faucettes and The Bank of Mississippi obviously had an interest in the real property made subject to the lien in their absence. It is well settled that all persons needed for just adjudication should be joined as a party in the action. Miss. R. Civ. Pro. 19(a). We held that no proper

and complete adjudication of this dispute involving real property could be made in absence of the persons owning interests in the property affected. That included the Faucettes and The Bank of Mississippi.

The basis of procedural due process is simply that "parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be notified...." Furthermore, they must be notified in a manner and at a time that is meaningful....

Obviously the Faucettes and The Bank of Mississippi have rights with regard to this property and these rights are affected by the attempted imposition of a lien on that property in their absence. We hold they were entitled to be notified and to be heard and must be on remand.

Aldridge v. Aldridge, 527 So. 2d 96b at 98 Miss. 1988)  
(emphasis supplied.)<sup>16</sup>

The case at bar is identical to Aldridge on all salient points. As in Aldridge, title to the subject property was conveyed to APF after commencement of civil action involving the subject property. As in Aldridge, APF was never notified of the action. As in Aldridge, obviously APF had an interest in and rights with regard to the subject property, and these rights were affected by Smith's action to quiet title. As the court held in Aldridge, in the absence of APF, no proper and complete adjudication of Smith's claims could be made, and APF was required to be joined as a party. The Chancery Court's refusal to join APF as a party was clearly erroneous, and should be reversed.

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<sup>16</sup> The case was then remanded for further findings as to the validity of the lien.

The requirement that the record owner of title to property must be joined in an action affecting interests in the property again applied in Johnson v. Weston Lumber, 566 So. 2d 466 (Miss. 1990), an action to enforce an easement, wherein plaintiff Johnson conveyed the servient estate of the easement to Sylvester prior to the trial date. Judgment was entered in favor of Weston Lumber after neither Johnson nor Sylvester appeared for trial, and the Chancery Court thereafter denied Sylvester's motion to be joined as a necessary party and for relief under Rule 60(b). The Supreme Court reversed, stating simply, "Sylester should be joined as a necessary party because of his ownership interest in the land." Johnson v. Weston Lumber, 566 So. 2d 466 at 469 (Miss. 1990). In addition, the court held that it was an abuse of discretion not to set aside the judgment under Rule 60(b), since Sylvester had not been made a party to the action.

Because of the abuse of discretion by the Chancellor below, the lack of notice to the plaintiff, and the fact that Sylvester should have been a party to the proceeding, we hold that the Chancellor should have granted relief from the judgments or orders rendered against him, pursuant to MRCP 60(b)(6).

Johnson v. Weston Lumber, 566 So. 2d 466 at 469 (Miss. 1990) (emphasis supplied). In the case at bar, the Chancery Court's did not follow this rule. The refusal to join APF as a party, and the refusal to grant APF relief from the judgment in favor of Smith, were both erroneous and should be reversed.

This requirement is also applied when many persons own fractional interests in the same real estate, such as mineral interests. In Ladner v. Ladner, 505 So. 2d 288 (Miss. 1987), cited and relied on in Johnson v. Weston Lumber, 566 So. 2d 466 (Miss. 1990), supra, Ladner's complaint sought damages for surface and sub-surface trespass, but failed to join approximately 25% of the holders of mineral interests. The Circuit Court dismissed the action for failure to join all holders of mineral interests as necessary parties, and the Supreme Court affirmed this order, reasoning that the absent mineral interest holders came within the parameters of Rule 19(a):

There appears little doubt that the present litigation may impair or impede the ability of the absent mineral interest holders to protect their property interests from violations committed thereon by other persons. An unfavorable judgment ... would definitely impair the absent mineral interest holders from bringing suit against the appellee for the identical cause.

Ladner v. Ladner, 505 So. 2d 288 at 291 (Miss. 1987).

Just as Rule 19(a) requires joinder of fractional ownership interests, so it also requires joinder of APF, which acquired all the ownership interests of Deep Woods. If fractional interests are within the scope of Rule 19(a), then APF, as the holder of the totality of ownership interests transferred to it by Deep Woods, is also within the scope of Rule 19(a).



The importance of joining persons who are necessary to the just adjudication of an action is so great that the trial court can act on its own and join necessary persons sua sponte. Flowers v. McCraw, 792 So. 2d 339, 343 (Miss. Ct. App. 2001) ("The Court under the last quoted sentence of this rule [19(a)] can notice the absence of a necessary party and order the joinder.") In the case at bar, the Chancery Court would have acted correctly by ordering that APF be joined as a necessary party sua sponte, as soon as APF's ownership interest in the subject property was brought to its attention. As noted above, APF's Motion did not fail to request joinder as a necessary party, and the factual grounds for its request are clearly set forth. The Chancery Court's order denying joinder was erroneous and should be overruled.

Nor can the Chancery Court's order denying joinder of APF be sustained under Miss. R. Civ. P. Rule 25, which provides for substitution of parties and states as follows:

In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party.

Rule 25(c). As the Supreme Court stated in TXG Intrastate Pipeline Co. v. Grossnickle, 716 So. 2d 991, 1023 (Miss. 1997), "both rules [Rule 19(a) and 25(c)] are to be viewed together, and not as one trumping the other." In TXG Grossnickle, in his capacity as liquidating trustee for Xenerex Partners, Ltd.,

commenced an action in 1988 to recover an interest in a gas well known as the Smith Well. Grossnickle then assigned his interest in the subject matter of the action to four other parties in 1993,. The trial court denied TXG's motion to join those four parties pursuant to Rules 19(a) and 25(c), on the ground that Rule 25(c) permitted the action to continue without substituting the four parties and that they would be bound by any judgment. The Supreme Court reversed, citing Ladner, Aldridge, and Johnson, supra, and stated, "Empiric [one of the four parties], as owner of certain percentages in the Smith Well and interests in the litigation, is a necessary, indispensable party under [Rule 19(a)].... Procedural due process requires that parties who have rights that will be affected are entitled to be heard." TXG Intrastate Pipeline Co. v. Grossnickle, 716 So. 2d 991, 1023-1024 (Miss. 1997).

Rules 19(a) and 25(c) must also be read in conjunction with Miss. R. Civ. P. Rule 17, which allows only the real party in interest to prosecute its claims. Citizens Nat'l Bank v. Dixieland Forest Prods., LLC, 935 So. 2d 1004, 1014 (Miss. 2006). ("Because Rule 17 allows only the real party in interest to prosecute its claims, the trial court abused its discretion by refusing to substitute the bank as plaintiff.")

Deep Woods, the original defendant, was no longer the real party in interest after August 13, 2007, since on that date it conveyed its interest to APF. APF was then the real party in

interest. Since APF became the real party in interest by virtue of the conveyance by Deep Woods, the Chancery Court abused its discretion by failing to implement Rule 17 and refusing to substitute, or add, APF as a defendant.

In summary, APF acquired all of the ownership interests in ad to the subject property previously held by Deep Woods, a party Smith had originally named as a defendant precisely due to its ownership of those same interests. APF was therefore required to be joined as a party as it had requested, and the Chancery Court's order denying joinder should be reversed.

**B. The Chancery Court abused its discretion in refusing to set aside the judgment previously entered in favor of Smith**

APF's Motion also expressly requested relief from the judgment quieting title to the subject property in favor of Smith. The caption of APF's Motion unmistakably reads, "Motion To Set Aside Final Judgment...", and the seventh prayer for relief (numbered "G") requests the Chancery Court to "[d]eclare that that certain Judgment [referring to a copy of the judgment entered in favor of Smith attached as Exhibit K to APF's Motion] ... be immediately set aside ...." [APF's Motion, R. 39,50, RE.46,57.] But the Chancery Court's error in refusing to join APF as a party led the court to further err by denying relief under Rule 60(b). As expressed in the Chancery Court's order, "because APF is not, and may not become, a party to this

finalized matter, it has no standing to request relief pursuant to Rule 60(b)." [Order, ¶16, R.178, RE.12.]

In short, the Chancery Court never even reached or ruled on APF's request to set aside the judgment quieting title in favor of Smith, solely on the erroneous ground that APF could not be joined as a party. When this error is corrected, and APF is joined as a party for the reasons discussed above, then APF's right to relief from the judgment under Rule 60(b) becomes clear, and the Chancery Court's order refusing to set aside the judgment should be reversed.

Under the well-recognized three-prong standard for setting aside a default judgment, the trial court should determine:

- (1) The nature and legitimacy of the defendant's reasons for his default, i.e., whether the defendant has good cause for default;
- (2) whether the defendant in fact has a colorable defense to the merits of the claim, and
- (3) the nature and extent of prejudice which may be suffered by the plaintiff if the default is set aside.

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).

Application of this standard to this case is governed by the previously-cited decision in Johnson v. Weston Lumber, 566 So. 2d 466 (Miss. 1990). As in the case at bar, Johnson conveyed to Sylvester his interest in the property that was the subject of the pending action. Sylvester had no notice of the action, and a judgment was entered after neither Johnson nor

Sylvester appeared for trial. Reversing the Chancery Court's denial of Johnson's and Sylvester's motion to set aside the judgment, the Supreme Court held that the complete absence of any notice to Johnson of the setting of the trial date completely overweighed the balance and required that the judgment be set aside. The Supreme Court's reasoning is directly applicable in this case.

Applying the first part of the test, "whether the defendant has good cause for default," the record is devoid of any notice to Johnson as to the date of the trial. We need test no further. There can be no balance to a test where there is no notice. [E]very . . . defendant or respondent has the right to notice in a court proceeding involving him, and to be present, and to introduce evidence at the hearing. Where that valuable right is denied there must follow a reversal.

Johnson v. Weston Lumber, 566 So. 2d 466, 458 (Miss. 1990)  
(emphasis supplied)

In this case, just as in the Johnson case, APF -- the grantee and assignee of all of Deep Woods' interest in the subject property and a necessary party to the action -- had no notice of Smith's pending action, no opportunity to answer Smith's Complaint, and no opportunity to oppose Smith's request for a default and for judgment on the pleadings. The judgment in favor of Smith was only entered because APF had no notice of the action, and since Deep Woods no longer had any interest in the action after conveying the subject property to APF. Furthermore, when Deep Woods was finally served with process on October 10, 2007, Deep Woods was not a party in interest, and

had no grounds to file an appearance, since it had conveyed its interest to APF, the true party in interest although not recognized as such by the Chancery Court. Service on Deep Woods was not notice to APF.

APF was deprived of its valuable right to defend against the allegations of Smith's Complaint, and the Chancery Court was in error in denying APF's motion to set aside the judgment. The lack of any notice of Smith's action resulted in APF being deprived of its property interest without procedural due process, a fundamental right. The Chancery Court's order denying APF's motion to set aside the judgment should be reversed.

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

In denying APF's Motion, the Chancery Court reasoned that APF was not a bona fide purchaser for value without notice, since APF had not undertaken a diligent investigation into the sufficiency of title to the subject property before taking the conveyance from Deep Woods. [Order, ¶¶ 10-15, R. 175-177, RE. 9-11.] This reasoning was flawed because APF's Motion, to the extent that it requested joinder as a necessary party and setting aside the judgment in favor of Smith, did not seek to avoid the tax sale deed to Suresh Shah based on the doctrine of bona fide purchaser for value. AP's assertion that the tax sale deed to Suresh Shah was invalid was based squarely on the failure to follow the requirements of the tax sale statute

(Miss. Code Ann. 27-43-1 et seq.), not on the bona fide purchaser for value doctrine. See APF's Motion, ¶¶ 19, 28, and 30, R.44,46,47, RE.51,53,54. Instead of recognizing that the very purpose of the quiet tax title action is to provide a forum in which the validity of the tax sale can be determined, the Chancery Court relied on the bona fide purchaser for value doctrine to prevent APF from challenging Smith's claims.

The basic objective of the bona fide purchaser for value doctrine is to protect persons who have parted with value to purchase property from unknown defects in the title to that property. "Our law seeks to protect bona fide purchasers for value without notice and defines a bona fide purchaser as 'one who has in good faith paid a valuable consideration without notice of the adverse rights of another.'" Simmons v. Mississippi Transp. Comm'n, 717 So. 2d 300, 303 (Miss. 1998) (citations omitted). "An innocent purchaser for value has been defined as 'one who, by an honest contract or agreement, purchases property or acquires an interest therein, without knowledge, or means of knowledge sufficient to charge him in law with knowledge, of any infirmity in the title of the seller.'" Sun Oil Co. v. Broadhead, 323 So. 2d 95, 98 (Miss. 1975) (quoting Black's Law Dictionary). Cf. Florida Gas Exploration Co. v. Searcy, 385 So. 2d 1293 (Miss. 1980) (buyer was not a bona fide purchaser; deed reformed to reflect the true state of title). This doctrine requires that the

purchaser is charged with notice of any flaws in the title that might be exposed by the exercise of due diligence. Simmons v. Mississippi Transp. Comm'n, 717 So. 2d 300 (Miss. 1998).

The Chancery Court erroneously equated notice of flaws in title with notice of Smith's pending civil action, concluding that APF must be charge with knowledge of Smith's action since the pendency of that action could have been discovered by way of the tax titles. The error in the Chancery Court's logic is the equation of constructive notice of an actual defect in title with notice of a civil action that might potentially affect title. No reported decision extends the doctrine of bona fide purchaser for value so far as to hold that it supersedes the right of joinder conferred by Rule 19(a).

To the contrary, as discussed earlier, and as expressly stated in Aldridge v. Aldridge, 527 So. 2d 96, at 98 (Miss. 1988), "no proper and complete adjudication of [a] dispute involving real property [can] be made in absence of the persons owning interests in the property affected." Stated differently, the due diligence inquiry required by the bona fide purchaser for value doctrine is designed to ensure that actual defects in title that can be discovered by a diligent inquiry will not be allowed to benefit the purchaser, while the joinder requirement of Rule 19(a) is designed to ensure that potential defects in title that are the subject of active and ongoing litigation will not be adjudicated in the absence of the owner of an



interest in the property. The tax sale to Suresh Shah and the conveyance from Shah to Smith that formed the basis of Smith's complaint, which the Chancery Court relied on, only served to create a potential defect in title, not an actual defect. The Chancery Court's decision overlooked these fundamental differences, and should be overruled.

Of course, an actual defect in title, within the scope of the bona fide purchaser for value doctrine, would have arisen if a judgment quieting title in Smith had been entered before APF purchased the subject property from Deep Woods, instead of after. This is because, as discussed further below in section E, title is adjudicated as of the date of the final hearing and the entry of the decree, pursuant to Miss. Code Ann. § 11-17-29. That did not happen in this case. APF purchased the subject property from Deep Woods in August 2007, after the complaint was filed but before the final hearing and before entry of the judgment that purported to quiet title in Smith. No actual defect existed on which the bona fide purchaser doctrine could operate. Rather, since the judgment was entered in the absence of and without notice to APF and without APF's knowledge, APF is entitled to be joined as a party and have the judgment set aside.

The Chancery Court's error in applying the bona fide purchaser for value doctrine is highlighted by a consistent line of appellate decisions establishing a judicial policy that

favors the owner of real estate under the tax sale statutes. This judicial policy is well illustrated in Marathon Asset Mgmt., LLC v. Otto, 977 So. 2d 1241 (Miss. Ct. App. 2008), wherein the Appeals Court affirmed an order entered after the expiration of the redemption period deadline enlarging that statutory deadline. The Ottos were the successful bidders at the foreclosure of a deed of trust, but were delayed in obtaining title to the property until after expiration of the date for redeeming the property from a tax sale in which Marathon had obtained tax title. After the redemption deadline had passed, and despite the absence of any express statutory authority for doing so, the Chancery Court overseeing the foreclosure entered an order enlarging the redemption period deadline.

The order was affirmed, based squarely on the judicial policy that supports a liberal construction of the tax sale statute in favor of owners. The Court's reasoning shows that the interest of the owner of the property should be given preference over the tax sale purchaser in a doubtful case.

It is worthy to note that among the reasons given by some of the courts for such a liberal construction of statutes of this character is that the purchaser at a tax sale suffers no loss; he buys with full knowledge that his title cannot be absolute until the time for redemption expires, and if his title is defeated by redemption, it reverts to the original owner; and if it is redeemed, he is fully reimbursed for his outlay, with ~~the result that~~ the result is that explicitly prohibits the extension of the redemption period and our supreme court has directed us to construe the redemption statute liberally in favor of redemption,

we find no error in the chancellor's decision to extend the tax redemption period.

Marathon Asset Mgmt., LLC v. Otto, 977 So. 2d 1241 at 1245 (Miss. Ct. App. 2008) (emphasis supplied).

In this case, APF as the owner of the subject property was entitled to insist on the interpretation of the bona fide purchaser for value doctrine set forth above, which renders that doctrine inapplicable in this case and favors the right of APF as the owner of the subject property to be joined as a party. The Chancery Court should not have imposed the constructive notice standards of the bona fide purchaser for value doctrine against APF, where it is clear that on August 13, 2007, when APF purchased the subject property from Deep Woods, APF did not have actual knowledge of Smith's pending quiet title action, nor did Deep Woods which had not yet been served.

This Court should not adopt the Chancery Court's rationale, and should overrule the order denying APF's motion for joinder and denying APF relief from the judgment.

**D. The Chancery Court erroneously gave undue weight to one of the principals of APF being an attorney.**

In support of its erroneous reliance on the bona fide purchaser for value doctrine, the Chancery Court referred to APF's attorney (who testified at the hearing) as APF's owner, variously stating, "the attorney owner of APF," "the actions of [APF's] attorney-owner," and "APF is owned by an attorney and

represented by that same attorney." [Order, ¶10, ¶12, ¶14, R.175-177, RE.9-11.] But there is no evidentiary support for a finding that APF's attorney was also its owner. This idea was inserted as part of the argument by Smith's counsel in opposition to APF's Motion, who stated, "APF is owned by Mr. Kalom [APF's attorney]" and also referred on two other occasions to "APF's owner, Mr. Kalom." [Tr. 23, lines 9-10; Tr. 26, lines 6-7; Tr.29, lines 25-26; RE.80,81,82.] The only fact that shows the existence of business relationship between APF and its attorney is the following testimony by the attorney himself:

Q: Are you a principal of American Public Finance, Inc.?

A: Yes, I am.

Tr.44, lines 7-9, RE. 88.

There is no evidence as to what the position of "principal" means, and there is no evidence that the attorney owned the stock of APF or even served as an officer or director.

Incorrectly identifying APF's attorney as its owner, rather than simply as a principal, the Chancery Court went on to impose on APF a higher standard of care for finding out about the existence of Smith's civil action prior to its purchase of the subject property from Deep Woods. In paragraph 12 of its Order, the Chancery Court found it highly significant that APF was owned by an attorney, stating, "[t]he relief APF

is seeking asks this Court to ignore the actions of its attorney-owner in failing to discover the lawsuit at bar and/or failing to adequately research the title of the property." [Order, ¶12, R.176, RE.10.] In paragraph 15 of its Order, the Chancery Court again emphasized that APF was owned by an attorney, and relied on that belief to find that APF had not made a sufficiently diligent and careful investigation. [Order, ¶15, R.177, RE.11.]

The Chancery Court's reliance on APF's attorney being its owner was not only erroneous and unfounded but also completely misplaced. APF, not its attorney, was the owner of the subject property, and as such was entitled to be joined as a party to Smith's action to quiet title regardless of who its owners or principals were. Moreover, as discussed above, the bona fide purchaser for value doctrine is not applicable in this case in any event. The Chancery Court's erroneous factual findings regarding APF's attorney, and its misplaced reliance on those findings, provide additional reasons for this Court to overrule the order.

**E. The Chancery Court failed to give proper weight to Smith's failure to record a lis pendens and failed to apply the requirement of Miss. Code Ann. § 11-17-29 to adjudicate title as of the date the judgment was entered.**

The Chancery Court acknowledged that Smith had failed to record a notice of lis pendens, but refused to draw the only possible conclusion from this fact: that APF was precluded from discovering the pendency of Smith's civil action to quiet title

by means of an examination of the Land Records of Harrison County, and was thereby precluded from taking any steps to join Smith's civil action as a party. The Chancery Court erroneously applied Miss. Code Ann. § 11-47-3 in this case, holding that Smith was not required to file a notice of lis pendens because Smith's action was based on two recorded documents (the tax deed to Suresh Shah, and the Quitclaim Deed from Suresh Shah to Smith).<sup>17</sup> [Order, ¶11, R.176, RE.10.]

But this case involves the complete absence of any notice to APF of Smith's action to quiet title and APF's concomitant right to relief under the balancing test of Rule 60(b), not the effect of a failure to record a required notice of lis pendens. If a lis pendens notice had been recorded, and APF had failed to move promptly to intervene in Smith's action after its September 4, 2007, title search had revealed the lis pendens and the pendency of Smith's action, then APF's lack of diligence could properly be taken into account under the

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<sup>17</sup> Miss. Code Ann. § 11-47-3 provides as follows:

"When any person shall begin a suit in any court, whether by declaration or bill, or by cross-complaint, 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 statement of the nature of the lien, right, or interest~~ sought to be enforced." (emphasis supplied)

balancing test of Rule 60(b). By the same token, the Chancery Court should have given weight to Smith's failure to record a lis pendens as weighing in favor of granting APF relief from the judgment pursuant to Rule 60(b).

Instead, the Chancery Court erroneously held Smith harmless from any responsibility for monitoring the status of the title to the subject property after filing the complaint up to and including the date of entry of the final judgment. This ruling ignores, and is contradicted by, the provisions of Miss. Code Ann. § 11-17-29, which state as follows:

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).

This statute makes it clear that 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. This statute does indeed place the burden on Smith, contrary to the Chancery Court's ruling, to constantly update and check the land records after filing the lawsuit right up to the date of the final hearing. Smith's failure to record a lis pendens scarcely mitigates this duty, whether or not he was required to file it. Rather, the absence of a lis pendens throws into sharper relief Smith's obligation ~~to update the land records as of the date~~ of the final hearing, since no notice of the quiet title action

has been place on the land records and only Smith is in a position to locate and notify persons like APF who have acquired an interest in the property.

The operative date of the decree and the requirement that all adverse claims be resolved at the final hearing is well recognized by the Mississippi Supreme Court. In Norton v. Graham, 185 Miss. 164 (Miss. 1939), a final decree was given res adjudicata effect as against claims of adverse possession, since the prior complaint, even though based on a tax title, had also sought to quiet all claims including claims of adverse possession. Said the court, "The matters existing at the time of that suit . . . conclude the title as of the date of the decree, and not as of the date of the tax sale . . . ." Norton v. Graham, 185 Miss. 164, 186 (Miss. 1939).

The Chancery Court's order erroneously failed to give proper weight to Smith's failure to record a lis pendens, and failed to properly apply the requirements of Miss. Code Ann. § 11-17-29. The order should be reversed.

#### 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



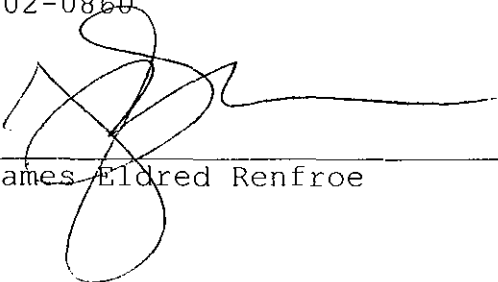
CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2009, I served the Brief for Appellant and the Appellant's Record Excerpts by mailing a copy via first class U.S. mail postage prepaid and properly addressed to:

Honorable G. Martin Warren, Esq.  
Counsel for Lloyd A. Smith, Appellee  
1311 Spring Street  
Gulfport, MS 39507

and by mailing a copy of the Brief for Appellant via first class U.S. mail postage prepaid and properly addressed to:

Honorable Margaret Alfonso, Chancellor  
Chancery Court, Harrison County  
Attn: Chancery Court  
c/o John McAdams, Chancery Clerk  
P.O. Drawer CC  
Gulfport, Ms 39502-0860



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James Eldred Renfroe