IN THE MISSISSIPPI SUPREME COURT

HOLLY SPRINGS REALTY GROUP, LLC — DEFENDANT-APPELLANT

V. — CASE NO. 2009-CA-00923

BANCORPSOUTH BANK, et al. — PLAINTIFF-APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of the 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.

1. Holly Springs Realty Group, LLC, Appellant
2. Frank M. Hurdle, Attorney for Appellant
3. William F. Schneller, Attorney in bankruptcy for Appellant
4. Christopher C. Stephenson, managing member, Holly Springs Realty Group, LLC
5. Kada C. Stephenson, managing member, Holly Springs Realty Group, LLC
6. Sidney L. Hurdle, creditor, Holly Springs Realty Group, LLC
7. BancorpSouth Bank, Appellee
8. John J. Crow, Jr., Attorney for BancorpSouth Bank
9. Daniel Myles Martin, Attorney for BancorpSouth Bank
10. Rhea Tannehill, Attorney for BancorpSouth Bank
11. Matthew S. McKenzie, Attorney for BancorpSouth Bank
12. Les Alvis, former Attorney for BancorpSouth Bank
13. Norma S. Bourdeaux, Co-defendant
14. Langston Oxford Properties, L.P., Co-defendant
15. Susan M. Bryan, Co-defendant
16. Lynn M. Grenfell, Co-defendant
17. John Albriton, Co-defendant
18. Lynn ALbriton, Co-defendant
19. Dana E. Kelly, Esq., Attorney for Appellees Norma S. Bourdeaux, John Albriton, Lynn Albriton, Lagnston Oxford Properties, L.P., Susan M. Bryan and Lynn M. Grenfell
20. Shane Langston, Esq., manager and co-counsel for Langston Oxford Properties, L.P.
21. Van Buren Property Owners Association
22. James B. Grenfell, spouse and co-counsel of Lynn M. Grenfell
23. Robert W. Crumpton, defendant
24. Shelby K. Brantley, Jr., defendant

25. G. Todd Burwell, Esq. Attorney for Shelby K. Brantley, Jr. and Robert W. Crumpton
26. Van Buren Group, LLC, defendant
27. Clairborne Frazier, defendant
28. Austin Frazier, defendant
29. C. E. Frazier, defendant
30. Mathena Wetlands, LLC, charged with payment of the judgment
31. Ergon-Frazier Development I, LLC, charged with payment of the judgment
32. W. Robert Jones III, Attorney, managing member of Ergon-Frazier Development I, LLC
33. Frazier Development, LLC, charged with payment of the judgment
34. Taylor, Covington & Smith, P.A., third party defendants
35. Watkins & Eager, PLLC, third party defendants
36. David W. Mockbee, Esq., Attorney for Taylor, Covington, & Smith, P.A. and Watkins & Eager, PLLC

This the 28th day of January, 2010.

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STATEMENT ON ORAL ARGUMENT

It is the position of BancorpSouth Bank that oral argument by the parties is not needed. The facts, while lengthy, are based on paper documents, and the rule of law has been presented to the court through the briefing of the arguments. As such, oral argument would likely only produce a repetition of those arguments made in the briefs, which Appellee feels would be a waste of this Court's time and resources.

STATEMENT OF THE ISSUES

1: Whether the Chancellor was correct in holding that the doctrine of inverse order of alienation is not applicable to Unit 309 because it was not a sale and/or alienation within the meaning of the principle. (Issue 3 of the Brief of the Appellant)

2: Did the Chancellor commit reversible error when he mentioned the status of the Five Other Owner's title, when his Final Judgment did not rely nor reference that unsupported fact? (Issue 10 of the Brief of the Appellant)

3: In an *in rem* action where several properties were owned by different owners but subject to a common mortgage, did the Chancellor err in allowing Plaintiff to determine which property should be charged with the payment of the debt instead of requiring Plaintiff to stand quietly by while the Defendants presented their defenses to the Court, and the Court then determined an order of charging? (Issue 2 of the Brief of the Appellant)

4: In a foreclosure action, did the Chancellor err in ordering that the property in foreclosure be sold in parcels when Appellant, the only property owner that filed an answer, requested that the property be sold as a whole or not at all? (Issue 12 of the Brief of the Appellant)

5: Whether BXS gave the Appellant proper notice of its claim and request for relief, when Plaintiff's Complaint did not contain Appellant's name. (Issue 1 of the Brief of the Appellant)

6: Did the Chancellor err when he denied Appellant's motion to dismiss case because five Co-defendants were not served within 120 days of the filing of the original

complaint, as well as failure to join other necessary and indispensable parties and Plaintiff's failure to fully prosecute its case? (Issue 5 of the Brief of the Appellant)

7: Did the chancellor err when he denied Appellant's motion to enter a docket entry of default against the Five Other Owners who intentionally did not file an answer in an *in rem* action for more than one year, when Appellant had no standing to request the relief prayed for? (Issue 6 of the Brief of the Appellant)

8: Did the Chancellor, by allowing Plaintiff to agree to an enlargement of time by which certain parties might answer, show bias in favor of Plaintiff that Appellant was not assured of receiving a fair hearing? (Issue 7 of the Brief of the Appellant)

9: In an *in rem* action, where the court must decide if or how properties are to be charged for the payment of a debt, did the Chancellor err in granting summary judgment and foreclosure against Appellant when five other Defendants owning property subject to the debt had not filed an answer? (Issue 8 of the Brief of the Appellant)

10: Whether the Chancellor erred in finding that the actions of BancorpSouth Bank were not a material breach of the Agreed Order to reimburse Holly Springs Realty Group, LLC for taxes paid, when the monies agreed upon were deposited with the registry of the Court, and the Appellant has since taken custody of said money, all prior to the foreclosure? (Issue 9 of the Brief of the Appellant)

11: Whether the Chancellor erred in denying to estop BancorpSouth Bank from foreclosing on Appellant due to alleged dishonest behavior and alleged bad faith toward Appellant, when there was no proof of either? (Issue 4 of the Brief of the Appellant)

12: Whether the Chancellor erred in not holding that appellant was a surety who was relieved of its duty upon BXS'S bad faith and dishonest behavior, when the facts showed no bad faith or dishonest behavior? (Issue 11 of the Brief of the Appellant)

THE FACTS

Summary of the Facts

The underlying facts of this action are not at issue, they are unambiguous and are founded on the records maintained at the Lafayette County Chancery Court. A mortgagor conveyed to mortgagee a tract of land and thereafter constructed a condominium complex thereon. From that complex, the mortgagor sold all of the units, but one, to bonafide purchasers for a bargained for exchange. R-137-138.[1] The mortgagee released from its mortgage all of the condominium units but six. *Id.* The mortgagee believed that the six units not released were still owned by the mortgagor when it began to posture itself to foreclose on the mortgaged condominium units. *Id.* Upon title examination, the mortgagee discovered that the mortgagor sold five of the units to third parties, and that one unit was sold at a tax sale and not redeemed. R-342, 358, 138. The mortgagee received no notice of the tax sale until after the period of redemption had expired and a tax deed had been issued. R-138-139. Pursuant to Mississippi Statute and due to the failure of mortgagee to receive notice, the tax sale is void as to the mortgagee. R-139. The mortgagee has sought judicial foreclosure of its deed of trust. R-1. The Chancery Court has Ordered Foreclosure of the unit sold for taxes, and it has been sold. R-442.

Statement of the Facts

On September 5, 2001, Van Buren Group, LLC, a Mississippi limited liability company,[2], by and through Claiborne Frazier, executed a note in the amount of

[1] R is used to denote a citation of the Record, T is used to denote a citation of the Transcript, AP is used to denote a citation to the Brief of the Appellant.

[2] Hereinafter Van Buren Group, LLC, a Mississippi Limited Liability Company is referred to as Van Buren.

$5,400,000.00 in favor of BancorpSouth Bank, a Mississippi Banking Corporation[3] to mature September 5, 2003, secured by a 1st Deed of Trust on .40 acres. R-14-19. The proceeds of the note were to be used to construct thirty (30) condominium units on the .40 acres owned by Van Buren. R-137. Said note was to be reduced and repaid through the sale of the units after completion. R-137. The deed of trust contained the provision that "Trustee shall at the request of Secured Party, sell the Property conveyed, or a sufficiency thereof, to satisfy the indebtedness at public outcry to the highest bidder for cash." R-15.

Twenty-four (24) units were sold. R-340. BXS executed Partial Releases of the Deed of Trust for such units. R-137.

Van Buren became delinquent in payment of the note and defaulted resulting in the filing of a Complaint by BXS on October 1, 2007. R-1, 125. As of May 8, 2009, the balance owed by Van Buren was $1,286,042.31. T-32. Interest accrues at the rate of $228.21 per diem, which equals the rate of 8.5 percent per annum. R-47. Upon an examination of the title in preparation of this suit, BXS uncovered the fact that Van Buren had sold five of the six unreleased condominium units. R-342, 137.

John Albriton and Lynn Albriton, who own Unit 303, Langston Oxford Properties, L.P., who owns Unit 102, Susan M. Bryan, who owns Unit 207, Lynn M. Grenfell, who owns Unit 201, and Norma Bourdeaux, who owns Unit 111, are the owners of five unreleased condominium units. T-07. These are the five other owner defendants in the lower court.[4] The proceeds generated by the sales of these units were not received by BXS.

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[3] Hereinafter BancorpSouth Bank, a Mississippi Banking Corporation is referred to as BXS.
[4] Hereinafter these five other Parties are referred to as the Five Other Owners.

As to the sixth unreleased condominium unit, Unit 309 was sold for delinquent municipal taxes (City of Oxford, Mississippi) to Holly Springs Realty, LLC[5] on August 29, 2005, for the sum of $472.68. R-138. On February 14, 2008, subsequent to the filing of the Complaint and Amended Complaint, Holly Springs applied for and received a Tax Deed, which it recorded in the office of the Chancery Clerk of Lafayette County, Mississippi, on February 15, 2008. R-342.

On or about March 5, 2008, one of the attorneys for BXS was advised, after a title examination of Unit 309, of the filing of the Tax Deed to Unit 309 in favor of Holly Springs. *Id.* On or about March 11, 2008, one of the attorneys for BXS discussed the matter with the attorney for Defendant, Holly Springs. R-251.

Statement of the Case

Paragraph 15 of the Amended Complaint filed by BXS stated "BancorpSouth and all Defendants herein who claim title to the above described property, claim through the title vested in Van Buren and through its ownership prior to September 5, 2001." R-46. Paragraph 25 of said Amended Complaint stated

> Title to unit 309 of the Condominium remains vested in Van Buren, and insofar as BancorpSouth is aware, Van Buren has not sold it. BancorpSouth has received no payment whatsoever for the sale of unit 309 and has not executed a partial release of the Deed of Trust for unit 309. Accordingly, unit 309 remains subject to the Deed of Trust and serves as collateral for payment of the debt.

R-49. Paragraph 32 stated in part, "BancorpSouth is entitled to immediate judicial foreclosure on the single unit (unit number 309) which is owned by Van Buren subject to the Deed of Trust." R-51. Lastly, paragraph (C) of the Relief Requested asked the

[5] Hereinafter Holly Springs Realty, LLC, a Mississippi Limited Liability Company is referred to as Holly Springs.

Court to grant the foreclosure of "the lien interest of BancorpSouth by selling the Condominium units identified in Paragraphs 22 and 25." R-53.

On March 28, 2008, BXS and Holly Springs agreed, by Order, on Motion Ore Tenus, that Holly Springs would be given the money they had paid for the redeemed tax sales, plus the consideration it paid for the Tax Deed and 18% interest on the aforesaid amounts to date of payment. R136. Holly Springs agreed that the Tax Deed would be set aside as to the mortgage interest of BXS. Prior to the execution of the Agreed Order, Holly Springs was not a party to the suit. Paragraphs 1-12 of the Agreed Order recited the facts leading up to the filing. R136-139. Paragraph 17 of said Agreed Order stated that BXS agreed to reimburse Holly Springs for the taxes paid on Unit 309, plus interest, and that Holly Springs agreed to set the attached tax deed aside as to BXS. R-140. Said Order was signed "Agreed and Approved by Frank M. Hurdle, Attorney for Holly Springs Realty Group, LLC." *Id.*

On or about April 17, 2008, BXS filed a petition to join Holly Springs as a necessary and indispensable party, but mistakenly titled the pleading as a petition to join Holly Springs as a party for purposes of determining title to Unit 309. R-141. The prayer of such pleading only requested that Holly Springs be joined as a party for purposes of judicial foreclosure. R-142.

On or about May 22, 2009, Holly Springs filed an answer to such petition and admitted it was a necessary party to the case, but not as to determining title and agreed to be joined. R-154. On June 5, 2008, the Chancery Court of Lafayette County, Mississippi entered an order joining Holly Springs as a necessary party. R-157.

On June 27, 2008, a summons was issued to Holly Springs to answer the complaint. R-158. On June 28, 2008, Frank Hurdle, attorney for Holly Springs, entered his appearance as attorney for Holly Springs and on like date filed an answer to the complaint and a counterclaim against BXS. R-160, 161.

Pursuant to the Agreed Order of March 28, 2008, on July 24, 2008, the sum of $24,005.89 was forwarded to Holly Springs, representing all city and county delinquent taxes on Unit 309, as well as the amount paid by Holly Springs to the City of Oxford on August 29, 2005. R-180.

On August 4, 2008, Holly Springs filed its Answer and Counterclaim to the Amended Complaint. R-161. Holly Springs and BXS agreed to deposit the aforementioned funds in the registry of the Court, because of Holly Springs' position that BXS did not timely pay such sum. R-186. Thereafter, Holly Springs propounded Discovery to the Plaintiff and the Remaining Defendants. R-183. On October 27, 2008, BXS filed its Motion to Foreclose on Unit 309 immediately. R-234. On November 20, 2008, Holly Springs responded to the BXS Motion to Foreclose on Unit 309. R-246. On September 23, 2008, Lynn Ablriton, who is a co-owner of Unit 303 of the Van Buren Condominiums, was added as a party defendant to this case. R-213.

Appellant conducted no depositions, nor filed any Motions to Compel Discovery Responses.

SUMMARY OF THE ARGUMENT

Appellant presented twelve issues to the Court. Holly Springs and BXS expended a lot of time in the litigation of this matter dealing with the doctrine of inverse order of alienation. While inverse order of alienation is a sound and equitable

principle, it does not have any application in the foreclosure of Unit 309 due to Holly Springs having acquired Unit 309 by tax deed and subject to the deed of trust held by BXS. This tax sale is the root of most of Appellant's angst and BXS's position that Holly Springs stepped into the shoes of the mortgagor Van Buren. Pursuant to Miss. Code Ann. § 27-43-11, where the clerk fails to give lien holders notice of the tax sale, the tax sale is void as to that lien holder. BXS did not receive such notice.

Appellant argues that the Chancellor should have dismissed the case against Holly Springs because the Complaint served upon it did not contain its name, or any facts giving notice of BXS's claim against it. The time line of events, however, show Appellant entering into an Agreed Order and stipulating to the facts establishing BXS's claim before the Complaint was even served. After the service of process was complete, Appellant's affirmative defenses and counterclaim show that Holly Springs was well aware of the basis of the cause of action and the relief requested by BXS.

Appellant next contends that the Agreed Order entered into between Holly Springs and BXS was a binding contract that BXS failed to perform, performed in bad faith, and failed to deal fairly. Due to this alleged failure by BXS, Appellant contends that BXS should not be allowed to foreclose on Unit 309. Appellant through its own argument has shown that there was no mutual assent to any alleged contract. Further, due to the lack of definite terms, BXS was not aware of any time deadline or time is of the essence issues for its payment to Appellant, and cannot be found to have breached provisions of a contract that did not exist. No proof was presented to establish any lack of fair dealing or bad faith beyond the counsel for the Appellant's blind allegations.

The Chancellor allowed for the issue of the foreclosure of the Five Other Owners be separated from the foreclosure of Unit 309. This is within the Court's discretion under M.R.C.P. 42(b), and does not pose any violation of M.R.C.P. 19. The Appellant claims that any defenses of the Five Other Owners may inure to it some unknown benefit, and that therefore Holly Springs has been prejudiced. Appellant's claims of prejudice are baseless, and are plain supposition and guesswork.

The Appellant alleges there was a Mary Carter type agreement that has prejudiced his client and that supports its arguments of BXS's bad faith and lack of fair dealing against Holly Springs. The facts show, and the Chancellor held, that there was no Mary Carter agreement, simply an extension of time granted by one litigant to a group of others.

Issue 7 and 11 of Appellant's brief fails to meet the minimum requirements set by the Supreme Court for the Court to address those assignments of error. Appellant's failure to adequately brief that issue has left Appellee, BXS, unable to adequately respond. It is BXS's position that this court should refuse to address Issue 7 and 11 of Appellant's brief.

ARGUMENT

STANDARD OF REVIEW

When reviewing appeals from chancery court, the Supreme Court of Mississippi applies a limited standard of review. *Tucker v. Prisock*, 791 So.2d 190, at 192 (Miss. 2001). The Supreme Court should not second guess the chancery court's "findings of fact unless the Chancellor was manifestly wrong and not supported by substantial, credible evidence." *Matter of Estate of Homburg*, 697 So.2d 1154, 1157 (Miss. 1997).

Unless the trial court's finding of fact are manifestly wrong, they should and must be accepted. *UHS-Qualicare, Inc. v. Gulf Coast Community Hosp., Inc.*, 525 So.2d 746 at 753, 754 (Miss. 1987).

This standard of review, however, does not apply to the Supreme Court's review of questions of law decided by a chancery court. *Bailey v. Estate of Kemp*, 955 So. 2d 777, 781 (Miss. 2007). Justice Robertson stated in *UHS-Qualicare* that notwithstanding the Court's respect and deference to the Chancellor, the Supreme Court is the ultimate expositor of the law of this state, and on matters of law, it is their job to get it right, the fact that the Chancellor came close is not good enough. 955 So.2d 746, 754. Therefore, the Supreme Court should review the chancery court's interpretation and application of the law under a de novo standard. *Tucker v. Prisock*, 791 So.2d 190, 192 (Miss. 2001).

1: Whether the Chancellor was correct in holding that the doctrine of inverse order of alienation is not applicable to Unit 309 because it was not a sale and/or alienation within the meaning of the principle. (Issue 3 of the Brief of the Appellant)

2: Did the Chancellor commit reversible error when he mentioned the status of the Five Other Owner's title, when his Final Judgment did not rely nor reference that unsupported fact. (Issue 10 of the Brief of the Appellant)

Rule of Law:

The initial issue involves a relatively unknown principle or doctrine called the inverse order of alienation. There are only seven cases that have dealt with this subject in the history of the jurisprudence of this state. An understanding of the purpose of the principle is necessary.

Mississippi adheres to the doctrine of inverse order of alienation. The birth of the doctrine in this state took place in *Agricultural Bank of Mississippi v. Pallen*, 16 Miss. 357 (1847), and was reaffirmed in the following cases: *Rollins, et al v. Thompson*, 21 Miss. 522, 13 S&M (1850); *Dillon v. Bennett*, 22 Miss. 171 (1850); *Keaton, et al v. Miller*, 38 Miss. 630 (1860); *Kausler, et al v. Ford, et al*, 47 Miss. 289 (1872); *Millsaps v. Bond*, 64 Miss. 453 (1887); *Pongetti v. Bankers Trust Savings and Loan Ass'n*, 368 So.2d 819 (Miss. 1979).

The equitable principle of inverse order of alienation was created to protect the mortgagor's grantees who have paid full value for their property with the warranty or understanding that the mortgagor would in turn protect their title from the encumbrance they took subject to.

> In so far as the inverse order of alienation doctrine requires that the land retained by the lienee must first be sold to pay the paramount encumbrance, before the land aliened by him may be reached, it seems to be based on the fundamental notion of equity that in the absence of a contract or intention indicating to the contrary, one man's property may not be used to pay the debts of another; and that an owner of land subject to a paramount encumbrance, who encumbers or alienates a part, retaining the other part, who does not expressly charge the parcel encumbered or aliened with the payment of the paramount encumbrance, must be presumed to have intended or agreed that the encumbrance should be discharged out of the part remaining in his hands, and that the parcel aliened or encumbered should be free from the burden of the paramount encumbrance, ***particularly where he conveys the part with covenants of warranty against encumbrances, and receives full value for the part aliened.***

P.H. Vartanian, *Sale in Inverse Order of Alienation*, 131 ALR 4, 1. (2009); *emphasis added.* ***"the interposition of equity of course presupposes that the alienation was made in good faith, and for valuable consideration."*** *Pallen*, at 358, *emphasis added.*

The facts sub judice involve a tax sale purchaser asking the Chancellor to enforce the doctrine of inverse order of alienation. The Courts of Mississippi have not issued an opinion on this subject. However, the Appellate Court of Illinois in *Erlinger v. Boul*, while dealing with a similar issue, held that a purchaser of land through a judicial sale could not invoke the principle of inverse order of alienation. 7 Ill App 40 (1880). The court went on to explain that in a normal sale of encumbered property "there is 'persuasive equity' in the presumption that [the mortgagor] will not ask his grantee--from whom he has received a satisfactory consideration--to pay his debt." *Id.*, at 45. In a judicial sale the principle of *caveat emptor* applies and the execution debtor, the mortgagor, "is held to no warranty, nor is he under any legal or moral obligation to redeem from the sale, or to do any other act for the protection of the purchaser." *Id.*, at 44. The court stated the following:

> When the alienation is involuntary, the case is essentially different. He [the mortgagor] had placed the incumbrance upon the whole property, thereby in express terms binding it all primarily for the whole debt, each parcel as much bound as the other; and until a different intention can be inferred from some other act, the obligation must be so enforced. Courts can not make another contract for him, but can only require the performance of such a contract as he has made for himself, according to the express terms thereof, or such terms as may be implied from his acts in the premises.

Id., at 45.

A tax sale purchaser is in a unique legal position as to the previous owner and the grantees of that previous owner, and does not share the protections and burdens of a bonafide purchaser in good faith. "A purchaser at a tax sale is a stranger to the title. The purchaser takes without warranty and subject to the doctrine of *caveat*

emptor." 16 McQuillan Mun. Corp § 44.161 (3rd ed.); *see Parsons v. Marshall*, 243 Miss. 719, 728 (1962).

While Miss. Code Ann. § 27-45-23 states that the tax sale will vest in the purchaser a perfect title, such title is contingent upon the proper notice being given by the sovereign. Miss. Code Ann. § 27-43-11 states in part "a failure to give the required notice to such lienors shall render the tax title void as to such lienors, and as to them only." (West 2009).

As this Court well knows, the Court of Chancery is a court of equity. Despite all of the doctrines and principles that exist, the paramount concern of equity is doing what is just and right. The Eighth Circuit Court of Appeals stated that "it is almost, if not quite, a maxim of the law that courts will not do vain and futile things." *Drexler v. Commercial Sav. Bank*, 5 F.2d 14, 15 (C.A. 8th 1925). In *Drexler*, a grantee of the mortgagor was seeking the Court's order that the bank should use inverse order of alienation in the foreclosure of the mortgaged property. *Id.* Before issuing said order however, the court analyzed whether the grantee is "entitled to the relief prayed for." *Id.* The court stated that the elements of invoking inverse order of alienation are as follows:

> that (a) where a mortgagee holds a mortgage on more than one parcel of land, or a single tract capable of division, and (b) parts or parcels thereof are thereafter conveyed by the mortgagor to third persons with notice and (semble) with warranty of title, and (c) an action to foreclose is brought by the mortgagee, wherein all persons interested in the several tracts, or parts, are parties, and (d) all the lands to be affected are involved, the court will decree a sale of the parcels in the inverse order of alienation, (e) if such a decree will not do injustice to the mortgagee, to the debtor, to the several alienees, or to third persons. In short, as to the last-named condition, ***equitable reasons must be present in such wise that the application and enforcement of the doctrine will not contravene natural equity and justice.***

Id., at 16, *emphasis added.*

Argument

For the Five Other Owners, Van Buren's intent to have the debt paid out of those other units still encumbered was evidenced by its receipt of consideration and the grant of a warranty deed. Holly Springs enjoys no such equitable promise or contract. Further, according to the analysis by the Court in *Erlinger v. Boul*, the tax deed from the City of Oxford was not an alienation that is protected by the doctrine of inverse order of alienation. Due to the failure of the City of Oxford to give BXS proper notice of the tax sale, Holly Springs acquired a defective tax title as to BXS pursuant to Miss. Code Ann. § 27-43-11, and therefore, Unit 309 is subject to foreclosure. A tax title is subject to the doctrine of *caveat emptor*. Holly Springs knew there were risks. A cursory search of the land records office before its acquisition would have given it notice of BXS's deed of trust. An investigation by Holly Springs as to whether the City of Oxford issued the proper notice, as contemplated herein, would have shown Holly Springs the status of the lien of BXS. Obviously, Holly Springs did not conduct such investigation.

The doctrine of inverse order of alienation does not provide for the type of relief requested by the Appellant, and neither does Mississippi law. The alienation in a tax sale is involuntary, and therefore lacks good faith. The language of the Supreme Court in *Pallen* infers that without good faith and valuable consideration the interposition of equity will not be required. According to the reasoning of the Court in *Erlinger*, a tax sale purchaser should not be afforded the protections assigned to a bonafide purchaser for value.

However, even if this Court determines that the doctrine of inverse order of alienation applies, it should still determine whether justice would result. For if, the invocation of the doctrine will only create an inequitable result, then, according to the Eighth Circuit Court of Appeals in *Drexler*, the doctrine should not be implemented.

A tax sale purchaser does not receive guarantees or warranties of title, nor any equitable protection from the other mortgaged estate. Holly Springs argues that due to its tax sale, it suffers no equitable burdens. BXS agrees, but would add that it gains no equitable benefits either. Appellant lacks the privity with Van Buren that protects the Five Other Owners by affording them the principle of inverse order of alienation because Holly Springs received no warranty of title.

BXS would argue that Holly Springs is subrogated to the rights of Van Buren as they purchased the property subject to Plaintiff's lien, and have therefore stepped into the mortgagor's shoes. They do not step into the shoes of a similarly situated grantee because of the nature of the tax sale and the lack of a bargained for exchange and the general warranties of a deed with the mortgagor. Holly Springs' title, as to BXS, consists only of the equity of redemption that Van Buren enjoyed.

This was the holding of the Chancellor sub judice. Appellant stresses the statement of the Chancellor when he stated in part that "these other units, these were purchasers, arms length transaction with the Van Buren Group." This was *gratis dictum* on behalf of the Chancellor, which was followed by roughly sixteen pages of more argument in the trial transcript. T-42. The actual holding of the Court did not

make any reference to the other buyers' title, but only the deficiencies of Holly Springs' title. T-58. In issuing his judgment, the Chancellor stated the following:

> When Holly Spring Realty Group bought the property at a tax sale, they bought whatever interest Van Buren Group had. And they bought it as buyer beware. Whatever they have got, you have got. There was an outstanding deed of trust encompassed on the property. If BancorpSouth had been notified properly they could have gone in and paid the taxes, and they could have foreclosed on unit 309 and got it, but they weren't. So because they were not notified does not put them in an inferior position, they can go in now against unit 309 and foreclose. They are in the same position that they were before. *Id.*

Appellant would try to persuade this Court that its purchase through a tax sale acts as a shield, but fails to recognize in its analysis that, due to the failure of the City of Oxford to give proper notice, the shield is cracked. Appellant's tax title is defective and therefore cannot be compared to the other tax titles across the state. Appellant is not a grantee within the meaning of inverse order of alienation due to the method in which it took its title. The Chancellor's Order authorizing the sale of Unit 309 provided for an equitable remedy to all parties involved. Defendant Holly Springs hopes to argue themselves into a windfall judgment, and in possession of a $300,000.00 condominium for the sum of $472.68 in taxes. R-138. Equity will not allow this.

3: In an in rem action where several properties were owned by different owners but subject to a common mortgage, did the Chancellor err in allowing Plaintiff to determine which property should be charged with the payment of the debt instead of requiring Plaintiff to stand quietly by while the Defendants presented their defenses to the Court, and the Court then determined an order of charging. (Issue 2 of the Brief of the Appellant)

Rule of Law

Appellant cites *Am. Jur. 2nd* and *Biswell v. Gladney et al.* in his argument that BXS should have stood quietly by while the defendant argued itself into a windfall using the doctrine of inverse order of alienation. The case law Appellant cited from *Am. Jur.* 2nd supports the proposition that if the Mortgagor's subsequent grantee wishes to invoke the doctrine of inverse order of alienation, then they have the burden of proving the facts to justify its application. *Am. Jur.* 2nd § 50, *Pleading and Proof; citing Washington Asphalt Co. v. Boyd*, 63 Wash.2d 690 (1964). "The burden...is upon the party seeking the benefit of the doctrine." *Id.*

The court in *Biswell* set out the principle that, once the Court has determined that inverse order of alienation applies, the mortgagee should not be able to argue against its enforcement unless the invocation of the doctrine will cause him some prejudice so as to result in an inequitable result.

> Where the mortgagee sues the owner and successive purchasers from him to foreclose his mortgage, and one defendant has a prior equity over another defendant as to the land liable primarily, if no release is made by the mortgagee to the land primarily liable, he is not interested, whether he had notice, or not, of the equities between them. If had done no act to prejudice the right of the holder of the superior equity, his mouth is closed as to ***the enforcement of the equity and the sale of the land in accordance therewith***, unless the foreclosure sale of the land in parcels would prejudice his debts and prior rights, where his mortgage is a blanket one on the land as an entire tract

Biswell; 182 S.W. 1168, at 1171 (Tex.App. 1916); *emphasis added.*

"An order marshaling assets is granted by a court only when the holder of a junior interest who is entitled to its protection requests it." Rest 3d Prop-Mort §8.6 (1997).

Argument

Appellant argues that BXS should not have made any of its arguments against the invocation of inverse order of alienation, as it is not its place to do so. The law Appellant cited does not support this argument. BXS did not attempt to usurp the role and discretion of the Chancellor, but attempted to afford the Chancellor a more proper analysis of the doctrine of inverse order of alienation and the facts than was provided by the Appellant. The quote stated above from *Am. Jur.* 2nd suggests only that the Appellant had the burden of proving that the doctrine of inverse order of alienation be applied under the set of facts. It does not stand for the proposition that the Court should refuse to allow BXS to prove the inapplicability of the doctrine. BXS is not arguing against the enforcement of the doctrine of inverse order of alienation but its application to the facts sub judice. There is nothing that prohibits BXS from arguing to the court that Holly Springs is not entitled to the protections of inverse order of alienation. Had the Chancellor determined that Holly Springs was protected by the doctrine, then BXS would have been precluded from arguing against the enforcement of the inverse order of alienation. This, however, was not the case.

4: In a foreclosure action, did the Chancellor err in ordering that the property in foreclosure be sold in parcels when Appellant, the only property owner that filed an answer, requested that the property be sold as a whole or not at all? (Issue 12 of the Brief of the Appellant)

Rule of Law

Appellant quotes *Lee v. Magnolia Bank* in support of the arguments that BXS has no right to foreclose on property in piecemeal fashion. 209 Miss. 804 (1950). The underlying facts of the *Lee* case are different. In *Lee*, Magnolia Bank foreclosed on the mortgaged property using its power of sale through its deed of trust. *Id.*, at 812. The question before the Court was whether this was allowed pursuant to Mississippi statute. *Id.*, at 813. The Court stated "as a general proposition of law, in the absence of statute, this argument might merit serious consideration, but we are at once confronted with the express provisions of the aforesaid statute...". Id, at 813. *Lee* does not stand for common law, but is an interpretation of Miss. Section 888, Code of 1942, which is the predecessor of Miss. Code Ann. § 89-1-55, and which states in part the following:

> All lands comprising a single tract, and wholly described by the subdivisions of the governmental surveys, sold under mortgages and deeds of trust, shall be sold in the manner provided by section one hundred eleven of the constitution for the sale of lands in pursuance of a decree of court, or under execution.

(West 2009). Section 111 of the Mississippi Constitution states the following in part:

> All lands comprising a single tract sold in pursuance of decree of court, or execution, shall be first offered in subdivisions not exceeding one hundred and sixty acres, or one quarter section, and then offered as an entirety... but the chancery court, in cases before it, may decree otherwise if deemed advisable to do so.

Section 111 expressly grants the right for the chancery courts to order piecemeal foreclosures.

Argument

Holly Springs contends that the Chancellor is not within his discretion in ordering the piecemeal sale of the Van Buren Condominium. Section 111 of the Mississippi Constitution, however, explicitly places that power within the discretion of the Chancery Court. How else could the courts apply the doctrine of inverse order of alienation without the ability of ordering the encumbered land sold in the order in which its parcels were alienated? Further, the Deed of Trust itself grants the right to foreclose on the property in parcels. R-15. "Trustee shall at the request of Secured Party, sell the Property conveyed, or a sufficiency thereof, to satisfy the indebtedness at public outcry to the highest bidder for cash." *Id.*

5: Whether BXS gave the Appellant proper notice of its claim and request for relief, when Plaintiff's Complaint did not contain Appellant's name? (Issue 1 of the Brief of the Appellant)

Rule of Law

The Mississippi Appellate case *Chalk v. Bertholf* is not applicable to the case sub judice because it dealt with a suit for slander, which involves a higher standard of notice. 980 So.2d 290 (Miss. App. 2008). The defendants in *Chalk* filed for a motion for summary judgment, which the trial court converted sua sponte to a motion to dismiss pursuant to 12(b)(6). *Id.*, at 293. In its decision, the circuit court stated that the complaint lacked the requisite information to state a claim which relief could be granted for a slander action. *Id.*, at 293. In review of the lower court's decision, the appellate court took a closer look at the applicable law of defamation, and quoted the Federal Courts as stating in part that "Mississippi law requires that a complaint for defamation must provide allegations of sufficient particularity so as to give the

defendant or defendants notice of the nature of the complained of statements." *Id.*, at 197 The Appellate Court then cited *Mitchell v. Random House, Inc.*, 703 F. Supp. 1250, 1258 (S.D.Miss. 1988) which quoted a treatise stating "Thus, unlike most litigation, in a libel suit the central event-the communication about which the suit has been brought-is usually before the judge at the pleading stage." *Id.*, at 298. The Appellate Court concluded by holding that the complaint did not set forth any information about the content of the alleged slanderous statements, to whom the statements were directed, by whom the statements were made, and how said statements may have been slanderous. *Id.*, 288. The allegations of the complaint consisted of "bare legal conclusions with no support." *Id.*

Rule 8(a) of the Mississippi Rules of Civil Procedure states:

> a. Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain
> (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and,
> (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

Any relief can be granted under a general prayer for relief that the complaint justifies and that is established by the facts, provided however, that the relief granted will not cause the defendant surprise or prejudice. *Crowe v. Crowe*, 641 So. 2d 1100, 1104 (Miss. 1994), *citing Smith v. Smith*, 607 So.2d 122, 127 (Miss. 1992). While under Rule 8, a complainant does not have to state the facts in detail, the rule does require the Complaint to provide enough facts to give the opposing side "fair notice' of the basis of the claim." *Hester v. Bandy*, 627 So.2d 833, 838 (Miss. 1993). The Plaintiff is required to provide "factual allegations, either direct or inferential,"

in regards to each material element of the legal theory they are requesting relief under. *Penn Nat'l Gaming, Inc. v. Ratliff*, 954 So.2d 427, 434 (Miss.2007).

There are two ways in which jurisdiction of the court can be established over an individual. *Pace v. Pace*, 16 So.3d 734, at 738 (Miss. App. 2009). Jurisdiction over a person can be obtained by either service of process or by their appearance in the action. *Id.* In *Pace*, the defendant disputed that the trial court had obtained jurisdiction over him. *Id.* The Mississippi Appellate Court held that the Court did in fact have jurisdiction over the defendant, due to the defendant having made a general appearance by participating in a hearing. "This entry of appearance and waiver of process was reaffirmed on each of the many occasions that David invoked the jurisdiction of the trial court to grant to him some specific relief." *Id.*

Argument

While Appellant can argue it had no notice, all the evidence and pleadings lead a prudent rational examiner to the opposite conclusion. First, Appellant stipulated to the facts contained in the Agreed Order dated March 31, 2008, when its counsel signed the document "Agreed and Approved". Secondly, the Amended Complaint is blatantly clear that BXS is requesting immediate foreclosure of Unit 309. Third, Holly Springs voluntarily made its appearance in this action in the Agreed Order dated March 31, 2008. The point of said order being BXS'S recognition of Holly Springs Tax Title to Unit 309 and Holly Springs' recognition of BXS'S lien on Unit 309. It is beyond question that Holly Springs accepted and claimed ownership of Unit 309.

While the Complaint and Amended Complaint do not state that Holly Springs is a Defendant, or state its name in its pages, it does give Holly Springs fair notice of the

requested relief through inference, thereby satisfying the standard set forth in *Penn Nat, Gaming, Inc.* The Complaint alleges that there is a note secured by a deed of trust, both of which are executed by the fee simple owner of the property, and further, that the note is now in default, and that the Bank desires to foreclose on its deed of trust. The Complaint adequately describes the property and gives specific reference to the Unit number of the Condominium complex. The Complaint alleges each and every fact required for a judicial foreclosure of Unit 309, thereby satisfying M.R.C.P. rule 8 and providing Appellant with notice.

In addition to Appellant's stipulation of facts from the Agreed Order, it is apparent from the Answer, Affirmative Defenses, and Counterclaim it made, that it was fully aware of the facts of the action brought against it and understood what relief BXS requested. R-161.

Lastly, *Chalk* does not apply to this case as the suit in that matter was a slander action that invoked special rules of pleadings. The law and the civil procedure discussed in *Chalk* are directed to defamation actions, not judicial foreclosures.

6: Did the Chancellor err when he denied Appellant's motion to dismiss case because five Co-defendants were not served within 120 days of the filing of the original complaint, as well as failure to join other necessary and indispensable parties and Plaintiff's failure to fully prosecute its case? (Issue 5 of the Brief of the Appellant)

Rule of Law

M.R.C.P. 4(h) states the following:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such

> service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

(West 2009). In interpreting rule 4(h), and who may invoke the defense that service was not made within the required period, the Court in *Raines v. Gardner* stated that the last phrase of the above quoted Rule "or upon motion" logically infers the party upon whom the process was not served. 731 So.2d 1192, 1195 (Miss. 1999). The Court went on to detail that the provisions of M.R.C.P. 12(h) dictate that such motion be filed prior or concurrently with the initial motion or responsive pleadings and not after and that failure to do so would constitute a waiver of said defense. *Id.*

Appellant also raises the issue that BXS failed to join other necessary and indispensable parties. Rule 19 states in part:

> (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
> (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.

(West 2009).

The purpose of M.R.C.P. 19 is to ensure the preservation of rights of all persons who may have an interest in an action. *First Investors Corp. v. Rayner*, 738, So.2d 228, 237 (Miss. 1999). In *Rayner*, an investor was swindled by his broker out of a large sum of money. *Id.*, at 230. The investor in turn sued the banks, brokerage companies, and mutual fund that were involved. *Id.* At the conclusion of the trial, the mutual fund was found liable for the broker's, Bernie Smith's, theft, and they

appealed the verdict. *Id.*, at 231. One of the mutual fund's issues on appeal was whether the trial court had erred by procedurally treating Rayner's claim separately, and "not allowing the Fund to proceed simultaneously with its claims against others and in failing to allow joinder of Smith." *Id.*, at 236. The Appellate Court concluded that M.R.C.P. 42 allowed for a separate trial, and that under M.R.C.P. 19, Bernie Smith was not a indispensable party to the suit. *Id.*, at 237.

> Rules 20 and 42(b) M.R.C.P. give our trial courts broad discretion in determining when and how claims are tried. The judgment in favor of Smith ends the matter for him and ripens First Investors' claim against the banks. Conversely, a judgment in favor of First Investors would have ended the matter for it and left Smith to pursue his claim against the banks and others. We see no prejudice to First Investors and no abuse of the court's discretion here. As such, this Court holds that the lower court acted within its discretion in bifurcating the proceedings.

Id., at 238.

Argument

Appellant alleges that due to BXS not serving the Co-Defendants within 120 days of the filing of the original complaint, in addition to its alleged failure to join other necessary and indispensable parties, and BXS allegedly failing to fully prosecute its case, the Chancellor should have dismissed the case. These are all defenses to be raised by the other Defendants. None of these arguments would provide Appellant with relief.

As per the holding in *Raines*, the Appellant does not have the standing to raise a M.R.C.P. 4(h) defense for the co-defendants. The Appellant has conceded this point in its brief.

M.R.C.P. 19 has been satisfied in this matter as all necessary and indispensable parties have been joined for the foreclosure of Unit 309. There is not another party

who in his absence complete relief cannot be granted among those already parties, or another party claiming an interest in the action of the foreclosure of Unit 309. The foreclosure of Unit 309 involved two parties, the sole and only parties who claimed any interest in the title, Appellant and BXS. The allegation of other necessary and indispensable parties relates to the foreclosure of the other units and the common areas of the Van Buren Condominium, which is completely irrelevant to the foreclosure of Unit 309.

The allegation that BXS had failed to prosecute its case is entirely directed at its actions against the other Defendants and again has no bearing on the foreclosure of Unit 309. In fact, the Appellant states in its brief that "It is freely admitted that Plaintiff was most diligent in the prosecution of its case against Appellant." AB-36. The defenses and counterclaims that may be raised by the other Unit owners would serve Holly Springs no benefit due to the Appellant's unenviable position of being first up for foreclosure under its tax title. (See argument in Issue 1 of this brief).

7: Did the chancellor err when he denied Appellant's motion to enter a docket entry of default against the Five Other Owners who intentionally did not file an answer in an *in rem* action for more than one year, when Appellant had no standing to request the relief prayed for. (Issue 6 of the Brief of the Appellant)

Rule of Law

Appellant argues that the Chancellor should have entered a default judgment against the other unit owners. Case law interpreting M.R.C.P. 55 provides, however, that the grant of default judgment "is discretionary with the court, and not a matter of absolute right." *Bryant, Inc. v. Walters,* 493 So.2d 933, 938 (Miss. 1986). The

Supreme Court has stated, "Whenever there is doubt whether a default should be entered, the court ought to allow the case to be tried on the merits." *Smith v. Everett*, 483 So.2d 325, 327 (Miss. 1986).

M.R.C.P. 55 requires two procedural steps for acquiring a default judgment. *Rush v. North American Van Lines, Inc.*, 608 So.2d 1205, 1208 (Miss. 1992). The first procedural step is to obtain an entry of default from the clerk, and the second is to make application to the court for judgment on the default. *Id.* The application to the court must be made by an adversary. *Smith, supra* at 327. The Supreme Court in *Smith* stated that where the written application by the adversary has not been made, the court lacks the authority to grant the default judgment. *Id.* M.R.C.P 55(b) states in part, "In all cases the party entitled to a judgment by default shall apply to the court therefore."

Argument

The Chancellor was well within his discretion in denying the request for default judgment. As stated by the Court in *Bryant, Inc.*, a party does not have an absolute right to a default judgment, it is entirely within the trial court's discretion. It was certainly reasonable for the Chancellor to assume that granting a default judgment against a party he knows has been given an extension by his adversary within which to file an answer would be unjust. As per the holding in *Smith v. Everett*, Appellant had no standing to request a default judgment, because Holly Springs was not in an adversarial position to the Five Other Owners. BXS was the only party that had standing to request a default judgment, and it did not do so.

8: Did the Chancellor, by allowing Plaintiff to unilaterally grant enlargement of time by which certain parties might answer, show bias in favor of Plaintiff that Appellant was not assured of receiving a fair hearing. (Issue 7 of the Brief of the Appellant)

Rule of Law

"The appellant bears the burden on appeal, and we will entertain no claims for which no supporting authority has been cited." *Kelly v. International Games Technology*, 874 So.2d 977, 981 (Miss. 2004). Further, the appellant must base his assertion on the record. *Id.* The Court requires appellants to make condensed statements of the case and to "support propositions of law with reason and authorities." *Pate v. State*, 419 So.2d 1324, 1326 (Miss. 1982). The Supreme Court has "repeatedly held that failure to cite any authority may be treated as a procedural bar, and it is under no obligation to consider the assignment." *Soriano v. Gillespie*, 857 So.2d 64, 67 (Miss. App. 2003), *citing McClain v. State*, 625 So.2d 774, 781 (Miss. 1993).

If the Court should decide to review this issue, BXS would provide the Court with the following references as to the standard for determining whether the Chancellor was bias. The Mississippi Supreme Court presumes a trial judge is qualified and unbiased. *In re Enlargement and Extension of Mun. Boundaries*, 920 So.2d 452, 458 (Miss. 2006). This presumption can be disproven by showing evidence that creates a "reasonable doubt as to the judge's impartiality." *Id.* The test in doing so is whether "a reasonable person, knowing all of the circumstances, would harbor doubts about the [judge's] impartiality." *Id.*, citing *Turner v. State*, 573 So.2d 657, 678 (Miss. 1990). The party alleging that the trial judge is biased "has a substantial burden to show the grounds therefore." *Turner*, at 678.

Argument

Appellant cites no case law bearing on the issue of Rule 6(b) or how the Chancellor's actions in relation to that rule of Civil Procedure would result in an abuse of discretion or error requiring reversal. AP-38. Appellant has provided neither adequate propositions of law nor facts from the record in support of his assertions. Therefore, this Court should decline to review this Issue of Appellant's brief.

If this Court does decide to entertain this assignment, BXS would argue that it was within the Chancellor's discretion to approve the stipulation of the extension of time agreed to by BXS and the Five Other Owners, and did not evidence any prejudicial preference to one party or another. There are no supporting facts that would show bias by the Court, or that Holly Springs was prejudiced.

While the Court did make references to the Five Other Owners title, which was not in evidence, the Chancellor did not base his ruling on those assumptions of fact. T-42. His ruling was based solely on the deficiencies of Appellant's tax title. T-58. A reasonable person knowing all the facts would not doubt the Chancellor's impartiality. There is no relation between the Chancellor and the parties or their attorneys, and there are no allegations of such. There is no prior involvement with the Chancellor and the facts of the case, and there are no allegations of such. Appellant is simply saddled with a tax title that is subject to a deed of trust.

9: In an *in rem* action, where the court must decide if or how properties are to be charged for the payment of a debt, did the Chancellor err in granting summary judgment and foreclosure against Appellant when five other Defendants owning property subject to the debt had not filed an answer (Issue 8 of the Brief of the Appellant)

Rule of Law

Rule 42(b) of the Mississippi Rules of Civil Procedure states:

> The Court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by Section 31 of the Mississippi Constitution of 1890.

The official comment to this rule states that "the purpose of Rule 42 is to give the court broad discretion to decide how cases on its docket are to be tried so that the business of the court may be dispatched with expedition and economy while providing justice to the parties." (West 2009).

The issue as to separate hearings or trials is within the discretion of the trial judge. *Sherman v. Stewart Co.*, 216 Miss. 549, 556 (Miss. 1953). With it, comes the responsibility to ensure that all parties are afforded a fair trial. *State Farm Fire and Casualty Co. v. Simpson*, 477 So.2d 242, 254 (Miss. 1985), *Chief Justice Patterson for the court speaking in dicta about M.R.C.P. 42(b).*

In the case, of *Ammons v. Cordova Floors, Inc.*, the Mississippi Court of Appeals held that a Circuit Court Judge had not erred by treating a motion hearing as a separate trial on that issue. 904 So.2d 185, 190 (Miss. App. 2005). The Appellate Court reasoned that despite Rule 56 being a more proper procedure for ruling on the motion before the lower court, Rule 42(b) allowed for a separate trial for a

counterclaim. *Id.* The Appellate Court further stated that the parties had waived any objections they had by failing to object to the Court's procedure at the hearing. *Id.* "Therefore, we decline to hold the trial judge in error and review his findings under the same deferential standard accorded those of a chancellor." *Id.*

Argument

The trial court's bifurcation of the foreclosure on the separate units of the Van Buren Condominium was within the Chancellor's discretion as provided by M.R.C.P. 42(b). In paragraph 32 of its Amended Complaint, BXS requested "immediate judicial foreclosure on the single unit (unit number 309) ...and, promptly thereafter, and if necessary, to judicially foreclose on unit numbers 111, 102, 201, 207, and 303. T10. This request in effect asked the Court to separate the foreclosure of the several units, and to grant separate hearings. The separation of the foreclosures only served to simplify the matters presented before the court, as can be seen by the volume of pleadings filed at the time of this appeal, which concerned merely the foreclosure of one unit, not six.

BXS contends that the hearing on BXS's "*Motion to remove Holly Springs Realty Group, LLC from Unit 309 of Van Buren Condominiums and for immediate approval to pursue Foreclosure on Unit 309 of the Van Buren Condominiums*" was a separate trial on the issue, not a hearing on a motion for summary judgment. BXS did not ask for summary judgment, but asked for the foreclosure of Unit 309. T-234. Not once did BXS state the words summary judgment in the motion, during the hearing, or in the final order. Additionally, a standard for granting summary judgment was not presented to the court by either party.

The simple counter argument to all of Appellant's contentions under this issue, is that regardless of the other unit owners' involvement in this litigation, Unit 309 was always going to be wiped out in this foreclosure action. There were arguably three positions that the trial court could have taken as to the Appellant's interest in Unit 309 as to BXS's lien. The first position, and the one that BXS maintains is proper, is that Appellant as a buyer beware tax sale purchaser, whose title was subject to BXS's lien, stepped into Van Buren's shoes. The second position, is that while Appellant holds a perfect title subject to BXS's lien, said title is antagonistic to Van Buren and therefore does not carry the equitable protections that the other unit owners enjoy; it therefore cannot invoke inverse alienation. The last position, is that Appellant holds a perfect title subject to BXS's lien, that inverse alienation applies, and that said title vested at the date of the tax sale, so that Appellant is third in line to be foreclosed on. The debt still owed BXS is roughly 1.2 million dollars and the value of each condo unit ranges from $300,000.00 to $325,000.00. T-49, (Frank Hurdle, counsel of Holly Spring answering the Chancellor's question). It would therefore necessitate the foreclosure of four units to satisfy the debt still owed BXS. The point of this analysis is to illustrate that regardless of what position it may take, Appellant is wiped out in the foreclosure, therefore Appellant's arguments are moot. The trial court when deciding this issue was clearly within its discretion in finding that Appellant was not biased, prejudiced, or harmed by the Five Other Owners lack of participation in the litigation.

10: Whether the Chancellor erred in finding that the actions of BancorpSouth Bank were not a material breach of the Agreed Order to reimburse Holly Springs Realty Group, LLC for taxes paid, when the monies agreed upon were deposited with the registry of the Court, and the Appellant has since taken custody of said money, all prior to the foreclosure? (Issue 9 of the Brief of the Appellant)

Rule of Law

Whether there exists a contract is a question of fact, to be decided by the either the jury or the trial judge. *Hunt v. Coker*, 741 So.2d 1011, 1014 (Miss. App. 1999); *citing* 75A Am.Jur.2d Trial § 791 (1991). A valid contract consists of six elements "(1) two or more contracting parties; (2) consideration; (3) an agreement that is sufficiently definite; (4) parties with the legal capacity to make a contract; (5) mutual assent; and (6) no legal prohibition precluding contract formation." *Bert Allen Toyota, Inc. v. Grasz*, 909 So.2d 763, 768 (Miss. App. 2005). *Black's Law Dictionary* defines mutual assent as follows:

> *mutual assent.* Agreement by both parties to a contract, usu. in the form of offer and acceptance. In modern contract law, mutual assent is determined by an objective standard - that is, by the apparent intention of the parties as manifested by their actions.

(West 2007). A contract must have assent and consideration. *Hunt*, supra, at 1015.

A mutual mistake warrants reformation, while a unilateral mistake requires rescission. *Grasz*, supra at 768. Before reformation is warranted, however, the proof of the mutual mistake must be clear and convincing. *Id.*, at 769. For the court to grant rescission due to a unilateral mistake, a four part test must be satisfied. *Id.* "First, the mistake was of so fundamental a character that the minds of the parties have not, in fact, met. Second, there was no gross negligence on the part of the

plaintiff. Third, no intervening rights have accrued. Fourth, the parties may still be placed in status quo." *Id.*

The general principle behind rescission is that the parties are returned to the status quo that existed pre-contract. "Therefore, the general rule is that a party who wishes to rescind a contract must return the opposite party to the status quo." Am Jur Contracts § 574, *Generally; rule requiring restoration* (West 2009).

Argument

Holly Springs argues that the Agreed Order constitutes a contract between BXS and Holly Springs "to give and reserve to each of the parties, in writing, certain of the rights available to them under Mississippi Law." Appellant's Brief p. 41. Holly Springs asserts that said order was a settlement agreement intending to avoid litigation, and since BXS paid the sum beyond what Holly Springs considers a reasonable time, it breached the contract. The Agreed Order was entered into pursuant to a motion ore tenus between legal counsel for BXS and Holly Springs. Oddly, when such was done, Holly Springs was not a party to the litigation because it had not moved to be joined as a necessary party, nor had BXS moved to do so as required under the Mississippi Rules of Civil Procedure.

What litigation was to be avoided? Was BXS agreeing not to seek foreclosure on Unit 309 before seeking foreclosure on the remaining units? Did BXS agree to pay the amount stated in the Agreed Order in exchange for Holly Springs not contesting the priority status of BXS'Ss mortgage covering Unit 309? The Agreed Order is simply void of terms. T136. Apparently, Appellant thought that the agreement of BXS in the Agreed Order was that its recognition of their tax title was a recognition of title

superior to those of the five other unit owners. While, BXS was under the impression that this agreement would avoid further litigation with Appellant, and it would be allowed to foreclose on Unit 309 immediately unopposed. It appears that both parties were mistaken in their assessment of the agreement.

It is BXS'S position that a contract was not created under the Agreed Order. This was due to two of the elements required to create a contract, as cited by the court in *Grasz*, not having been satisfied. The terms of the agreement were not definite and there was no mutual assent by the parties. The Agreed Order was so void of terms as to be vague and ambiguous, this in turn led the parties to different conclusions about the intended purpose of the agreement, as can be seen by the different positions taken by the parties in the current litigation. With a lack of definite terms and no mutual assent, a contract was not created. As such, the Chancellor was perfectly within his discretion in determining what would be an equitable relief for BXS under the current set of facts.

Alternatively, while as stated BXS does not contend a contract was created by the Agreed Order, if a contract had been created, BXS could not have been deemed to have materially breached it. There are no provisions contained in the Agreed Order as to when BXS will be required to make payment. There is no "time is of the essence" clause. Payment of the agreed upon money was made less than four months after the Agreed Order was entered with the court. The total sum paid to Appellant under the agreement was $24,005.89. $1,989.52 of that sum was interest paid at the agreed rate of 18%. The Court did not order BXS to tender the money, it did so of its own volition.

As for bad faith and fair dealing issues, since Holly Springs, as owner of Unit 309, was a necessary party to the litigation, BXS filed its petition to join Holly Springs as such. It was not to slander the title of Holly Springs to Unit 309. BXS never informed Holly Springs that it would not pursue foreclosure of 309 first. Further, Holly Springs claims it "made serious efforts to negotiate a release of unit 309 and Plaintiff refused to negotiate in good faith". The only thing Holly Springs did was to offer to buy a release of the Unit from the mortgagee for the sum of $200,000.00 which if accepted would have been far less than the $351,000.00 received in the foreclosure sale. R-252, (the amount Unit 309 was sold for at foreclosure is not in the record). A release to Appellant at those terms would have placed BXS in an adverse position to the remaining Defendants in light of the law of this State.

Appellant claims that BXS misled them as to their intentions behind the Agreed Order, and that they believed BXS wanted to simply reinstate its mortgage to protect its lien. For what other purpose would a bank want to protect its lien other than to be able to collect its security in the case of default. That is the whole intent behind a lien, to secure payment. This is a frivolous argument.

BXS did deal fairly with Holly Springs and not in bad faith, or else Appellant would never have received any money from their purchase of a buyer beware tax title. Accordingly, due to there being no provisions of timeliness in the Agreed Order, no breach occurred; the money was paid well in advance of the foreclosure, and Appellant has accepted tender of the monies. The terms of the Agreed Order should be regarded as having been fully performed by both parties.

Appellant also makes the contention that due to BXS'S alleged breach, Holly Springs has a right to rescind the contract. This argument is moot because, upon Appellant getting the contract rescinded, the parties would be returned to the status quo they enjoyed pre-contract. Pre-Contract, BXS had a first paramount lien against Unit 309 due to the City of Oxford having failed to comply with statutory notice requirements. This would allow BXS to foreclose on Unit 309 immediately and prior to the foreclosure of the other units, just as they already have.

11: Whether the Chancellor erred in denying to estop BancorpSouth Bank from foreclosing on Appellant due to dishonest behavior and bad faith toward Appellant, when there was no proof of either. (Issue 4 of the Brief of the Appellant)

Rule of Law

While Mississippi Courts have recognized the existence of Mary Carter Agreements, there is scarce references to what they consist of. The Fifth Circuit Court of Appeals has stated that a "Mary Carter agreement generally is a secret contract between the plaintiff and one of several defendants whereby the contracting defendant will settle with the plaintiff before trial, but must remain in the suit, and will be reimbursed to some specific degree from the plaintiff's recovery from the other defendants." *McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298, 309 (5th Cir. 1993). The contracting defendant then is placed in the atypical position of helping the plaintiff recover from the other co-defendants. *Id.*

It is the Supreme Court of Mississippi's position that whether an Agreement is a Mary Carter agreement or not is not relevant as to its evidentiary treatment as a settlement agreement. *Smith v. Payne*, 839 So.2d 482, 485 (Miss. 2002). In *Smith*,

the Supreme Court acted with indifference to the litigants "tremendous effort arguing whether the settlement agreement...was a Mary Carter agreement." *Id.* Instead, the Court focused on the evidentiary matters raised by such an agreement. *Id.* The Court, while not classifying the agreement as a Mary Carter type or otherwise, held that the trial court should disclose the settlement to the jury, but not the amount of said settlement. *Id.*, at 489.

Argument

Appellant argues that the agreement between BXS and the five other owners defendants "is similar to some extent to a Mary Carter Agreement." AP-25. This analogy is absurd and frivolous and so is Appellant's legal argument under this issue. There was no Mary Carter Agreement.

There were two primary hearings in this matter. The first hearing was for the court to hear Appellant's motion to dismiss and motion to enter default against the five other defendants, which took place on March 29, 2009. T-1, 26. The second hearing was on BXS's motion to immediately foreclose on Unit 309, and was held on May 8, 2009. During the March hearing, on Appellant's Motion to enter default against the five other defendants, the counsel for BXS and the five other defendants openly discussed the agreement. T-20. Mr. Dana Kelly, who represented four of the five other owner defendants, explained to the Court that "There is nothing hidden from this Court. This is merely an extension of time to file a responsive pleading. There is no formal written agreement." *Id.*

Appellant propounded one Request for Admission to the five other unit owner defendants. The request for admission by Appellant and answer by the five other unit owner defendants consisted of the following:

> BancorpSouth Bank or its counsel entered into an agreement, either explicit or implicit, formal or informal, with [defendant name], whereby BancorpSouth agreed not to seek a default judgment against [defendant] if he did not file an answer to BancorpSouth's complaint in this action. (An agreement made with a person's agent or counsel is to be construed as being made with that person).
>
> RESPONSE
>
> Denied.

R224-232. Appellant cries foul due to the five other unit owners denying the above request for admission. What Appellant fails to concede is that its counsel drafted a less than artful discovery request. The agreement between BXS and the other defendants was an extension of time. It was not, as the request for admission suggests, an agreement for the five other defendants not to file an answer, or an agreement that encompassed BXS's future action if the five other defendants failed to file an answer. As such, the request for admission was properly denied. It does beg the question, however, why did Appellant fail to conduct more discovery if it felt there were additional facts that needed to be brought before the court? Appellant produced one request for admission to the Defendants. There were no depositions conducted, or Motions to Compel responses by the Appellant, yet it requests this court to overturn the Chancellor's ruling based on unfounded allegations and paranoia.

Again, whatever defenses, the other five unit owner defendants may have will not inure to Appellant some unknown benefit. Holly Springs' position is distinctly

different from the Five Other Owners, in that the tax title Appellant acquired was void of warranties and defective, and as such, it stepped into Van Buren's shoes when it took possession.

12: Whether the Chancellor erred in not holding that appellant was a surety who was relieved of its duty upon BXS'S bad faith and dishonest behavior, when the facts showed no bad faith or dishonest behavior. (Issue 11 of the Brief of the Appellant)

Rule of Law

BXS would ask that the Court refer back to its prior statement of the Rule of Law in Issue 8 of this brief, which outlines the requirements the Appellant must satisfy before this Court will entertain an issue on appeal.

Argument

Appellant claims that it is a surety, but states no case law supporting said contention. Appellant cites a secondary source from 1888 for the proposition that a surety is released by the misrepresentation or concealment amounting to a misrepresentation of a material fact, but then does not state what material fact BXS misrepresented. AP-45. Appellant then lists a series of duties that BXS had to Holly Springs, but states no case law, authority, and no facts from the record to support that argument either. AP-46. Appellant claims that BXS had a duty of good faith and fair dealing, but fails to allege what behavior constituted a breach of said duty, making a blanket allegation that BXS "has clearly breached this duty." AP-46. For supporting authority, Appellant cites various foreign cases and two secondary sources. *Id.*

Appellant has failed to present adequate reason, authority, and facts from the record in support of its argument. According to the Court in *Kelly* and *Pate*, the court should decline to address this assignment of error.

All other allegations or contentions that Appellant may contend have been raised by its argument here are vetted in the prior issues; being primarily failure to act in good faith and fair dealing, and Appellant's claim of a conspiracy. Accordingly, BXS will not burden the court with a regurgitation of its arguments.

Conclusion

All of Appellant's arguments are without merit. The one essential underlying fact to this case is that Appellant acquired a property through a tax title under the doctrine of caveat emptor, and said property was subject to an unreleased mortgage held by BXS. Holly Springs tries to shield itself from this fact by arguing the Agreed Order created a contract, and the extension of time given to the five other owners caused it prejudice. However, the facts speak for themselves. Appellee, BXS, respectfully requests this Court to affirm the orders of the Chancellor that Appellant has appealed.

Dated: January 28, 2010.

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CERTIFICATE OF SERVICE

I, John J. Crow, Jr., attorney for Appellee, BancorpSouth Bank, do hereby certify that I have this day served a true and correct copy of the Brief of Appellee, by United States Mail, postage pre-paid, to the following persons at these addresses:

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This the 28th day of January, 2010.

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