IN THE SUPREME COURT OF MISSISSIPPI

HOLLY SPRINGS REALTY GROUP, LLC — APPELLANT

v. — CAUSE NO.2009-CA-00923

RT

BANCORPSOUTH BANK; NORMA S. BOURDEAUX; LANGSTON OXFORD PROPERTIES, L.P., a Mississippi Limited Partnership; SUSAN M. BRYAN; LYNN M. GRENFELL and JOHN ALBRITON — APPELLEES

ON APPEAL FROM THE CHANCERY COURT OF LAFAYETTE COUNTY
CAUSE NO. 2007-504A

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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ISSUE ONE: Where Plaintiff's complaint did not contain Appellant's name, make any claim against Appellant or contain any operative facts to connect Appellant to the case, and Appellant raised 12(b)(6) defense in its answer, did the chancellor err in granting summary judgment and foreclosure against Appellant?

BANCORPSOUTH'S RESPONSE: Holly Springs's use of defamation case as authority not valid, as defamation has heightened pleading requirements. All that is required is notice to prevent surprise or prejudice. The Court had jurisdiction over Holly Springs by virtue of its participation.(BancorpSouth has renumbered this as Issue 5).

HOLLY SPRINGS'S REPLY: Appellant admits it had notice of the lawsuit. It

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STATEMENT ON ORAL ARGUMENT

Oral Argument is requested.

Because of the complexity of both the factual and legal issues involved, Appellant believes oral argument would be helpful to the Court.

This case presents several issues of first impression with the court, for which oral argument might also be of benefit.

REPLY TO APPELLEE'S STATEMENT OF FACTS

1. Holly Springs Realty Group has repeatedly denied that the Five Other Owners were purchasers for value, in that the recording pattern suggested some might have used "pocket deeds" as debt instruments, or agreed to receive good title at a later date in return for a lower price on their unit, making them little more than unsecured creditors. (R-278, T-50 L-27 Hurdle).

2. The second sentence on page 19 of Appellee's Response is apparently a typographical error. Frank Hurdle, attorney for Holly Springs Realty Group, signed and mailed an entry of appearance and the Answer and Counter-claim of Holly Springs Realty Group on July 28, 2008 and they were filed August 4, 2008, not June 28, 2008. (R-160).

3. Lynn Albriton, who is a co-owner of Unit 303, was not added as a party defendant on September 23, 2008. The Court granted leave to BancorpSouth to amend its complaint to add Mrs. Albriton as a defendant, but no complaint was ever filed (R-213), although a summons was eventually issued on March 19, 2009 (R-400). Mrs. Albriton did sign a "Waiver of Service of Process," filed on April 7, 2009 but it is unknown what process she "waived." (R-427). Holly Springs maintains that with no evidence she has been served with an amended complaint, she is not joined.

REPLY ARGUMENT[1]

ISSUE ONE

Plaintiff's complaint did not contain defendant's name, contain any facts to tie defendant to case, or ask for relief from defendant

BancorpSouth's Response to Issue 1: Holly Springs's use of defamation case as authority not valid, as defamation has heightened pleading requirements. All that is required is notice to prevent surprise or prejudice. The Court had jurisdiction over Holly Springs by virtue of its participation.(BancorpSouth has renumbered this as Issue 5).

Reply Argument: Appellant admits it had notice of the lawsuit. It voluntarily submitted to the authority of the Court by not contesting the Petition to Join. The fact that Appellant was able to figure out that it was being sued does not make a

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[1] In its Reply, Holly Springs has presented a short synopsis of BancorpSouth's Response, followed by a synopsis of its Reply. BancorpSouth did not provide a synopsis of its arguments in its brief, so Holly Springs has written one, and in so doing has attempted to fairly and accurately represent BancorpSouth's position; however, the Response synopsis is provided merely to provide context for the Reply Argument.

> deficient complaint valid. If it did, all 12(b)(6) defenses would automatically fail on the grounds that the defendant managed to object.

It is true in this case that Holly Springs Realty Group's in-house counsel was able to cobble together an answer to the complaint, based on what he thought plaintiff was asking for. Perhaps he should have refused, but he thought the service of the defective complaint was a ploy to get him to seek a dismissal and thus lose the protection his client had concerning the litigation of title on refiling. But it is far more difficult to answer an unwritten, inferred complaint than to one that is reduced to writing. More importantly, Holly Springs Realty Group's managing member was denied the opportunity to walk around town, proper complaint in hand, to seek the advice of other attorneys.

The fact is that a defendant is entitled to have a plaintiff's claims laid out before him in black and white, where he can then present his best defense. This is a matter of fundamental due process, and no argument succeeds in denying a defendant of this right should it be asserted either by motion or in an answer in response to the original complaint. If plaintiff's complaint is deficient he must amend, at which time defendant may amend his answer.

In Mississippi, the relief granted must be based on the complaint, and it is the duty of the plaintiff to amend its complaint, if necessary. A failure to amend results in relief being denied, as the language in *Powell v. Clay County Bd. Of Sup'rs*, 924 So.2d 523 (Miss. 2006) shows:

> This argument is barred because only negligence, not malice, was pled in the complaint, and no amendment was made. It is well-settled law in Mississippi that plaintiffs are bound by what is alleged in the complaint,

> absent a subsequent amendment or modification....
>
> If Powell's Estate sought to use malice as a way to pierce the government's immunity, it should have done so in the complaint, an amendment or modification to the complaint, or properly in a Rule 60 motion.

Id., at 527.

Another case in which a minor yet significant error in a complaint led to a finding that the complaint did not state a claim for unlawful taking under the Tort Claims Act *was B & W Farms v. Miss. Trans. Comm.*, 922 So.2d 857 (Miss Ct. App. 2006). In that case, plaintiff said defendant "unlawfully and negligently diverted and obstructed the natural flow of surface water," but failed to include in its complaint that its claim was being made under Article 3, Section 17 of the Mississippi Constitution. Id. at 858.

In the above cases, the Court denied relief because of what some would say were relatively minor problems in the complaints. The complaints gave notice that relief was sought, but they simply did not give adequate notice or how and why such relief was sought. The Court had to draw a line somewhere. The question before the Court now is this: does a complaint which does not contain defendant's name, contain any operative fact tying defendant to the case, or ask for any relief from defendant, provide more or less notice than the two cases cited above?

BancorpSouth could have, at any time, amended its complaint. Holly Springs Realty Group then would have had the right to amend its defenses. BancorpSouth chose not to do so. This was not a case where BancorpSouth would be denied relief; respecting Holly Springs's due process rights would have merely resulted in a delay.

The need to amend a clearly deficient complaint is not optional. The Due Process claims under the Fifth Amendment of the U.S. Constitution and the Mississippi Constitution simply do not go away. Appellant Holly Springs Realty Group has been denied its due process rights. It asserts them and demands relief.

ISSUE TWO

The chancellor erred by allowing plaintiff to determine which property should be charged instead of requiring plaintiff to stand quietly by while the defendants presented their claims to the court

BancorpSouth Response to Issue 2: BancorpSouth did not attempt to usurp the authority of the Court, but rather to afford the Chancellor a more proper analysis of the doctrine of inverse order of alienation. Nothing prohibits plaintiff from arguing to the Court that Holly Springs is not entitled to protection under the doctrine. (BancorpSouth has renumbered this as Issue 3).

Reply Argument: BancorpSouth's secret, collusive agreement with favored defendants went far beyond assisting or making an argument to the Court. BancorpSouth had no standing to present the case of the other defendants and was required to remain impartial. (The argument for Issues 2 and 3 are presented together).

ISSUE THREE

The chancellor erred in finding that according to the inverse order of alienation rule, a property purchased at a tax sale should be sold for the benefit of properties aliened from the mortgagor

BancorpSouth Response to Issue 3: Tax sale purchaser not entitled to protection under inverse order of alienation doctrine because Equity will not permit, deed contains no warranty and buyer only purchased an equity of redemption which Mortgagee not obliged to recognize. (BancorpSouth has renumbered this as Issue 1).

Reply Argument: Regardless of what rule is applied, the rule of law must be followed. The lack of warranty indicates grantor's intentions, which are of no consequence once a property is sold in a tax sale. BancorpSouth's and the Five Other Owners do not have clean hands. Holly Springs took title to a piece of land and did not purchase an equity of redemption.

The main interest of Holly Springs Realty Group in this action is that Rule of Law

be followed. It has always been open to any suggestions as to how to fairly charge the properties, as long as the result is not 100 percent of its equity going to the benefit of the Five Other Owners who refused to file an Answer.

For example, suppose that the Court were to rule that the Holly Springs Realty Group property were to be sold last – free and clear of debt. What about the issue of the $24,005.89 which BancorpSouth paid in taxes solely for the benefit of Unit 309? This sum was added by BancorpSouth to Van Buren Group's debt. In a final charging order, this sum should certainly be charged against Unit 309. But before this can happen, the other property owners subject to the debt have to show up in court to assert their rights, which did not happen here.

BancorpSouth claims that "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." (Brief of Appellee, page 30). Yet BancorpSouth did not simply argue to the Court. It made an extrajudicial decision to secretly allow five favored defendants not to answer while it proceeded against the party that it had judged, on its own without the aid of the Court, to be most liable for the payment of the debt. The fact that the Chancellor was willing to go along with this after the fact does not make it right.

Holly Springs does not understand why BancorpSouth feels such a need to "argue to the court." Its debt will be paid in any event; according to the reasoning in *Raines v. Gardner*, 731 So.2d 1192 (Miss. 1999), BancorpSouth lacks standing to bring these arguments. *In rem* actions, where properties are subject to a common debt with no personal liability on the owners, should be brought in the following manner, by a

plaintiff who then stands back and allows the case to proceed without its interference:[2]

> 1. Plaintiff brings suit seeking validation of debt and charging of properties;
>
> 2. Property owners file answers stating why their properties shouldn't be charged or to what extent their properties should be charged, including any claims contesting the validity of the debt, and any estoppel defenses; cross and third-party claims may also be brought at this time;[3]
>
> 3. Docket entries of default must be entered against those who do not answer, but reasonable extensions are certainly permissible at the discretion of the trial judge;
>
> 4. Plaintiff, assured of repayment, remains impartial while defendants argue how properties are to be charged. Plaintiff remains ready to provide evidence but must not take sides;
>
> 5. Court enters an *in rem* judgment against the property owners, along with a charging order and order of sale, indicating which properties are to be charged for what portion of the debt, and in which order the properties are to be sold in satisfaction of the debt. Properties belonging to defaulting parties must be charged and sold first.

Suppose this were an Interpleader action and Holly Springs were the only party to file an answer. Would BancorpSouth have the right to secretly permit the other parties not to answer, seek summary judgment against Holly Springs and then allow the remaining defendants to battle over the res? The answer is no; such behavior would not be seen as "arguing" to the court, but interfering with the court. And that is exactly what BancorpSouth has done in this case.

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[2] A similar process is Interpleader, where plaintiff finds itself in possession property (or res) and wishes for the court to determine which among several defendants is entitled to ownership and possession, except there is no need to establish a debt or charge properties.

[3] Holly Springs Realty Group chose not to file cross claims against the Five Other Owners since by not filing Answers they had already confessed that BancorpSouth was entitled to the relief sought from them. Without knowing for certain their reasons for not filing an answer, Appellant did not want to hand them the "keys to the Courthouse" by the filing of a cross-claim.

BancorpSouth repeatedly raises the issue of the importance of general covenants of warranty in relation to the Inverse Order of Alienation Rule. These covenants do not bestow some magical quality to the deed to which they are attached. The best view is that they are merely evidence that the grantor intended the mortgage debt to be paid for the benefit of the property first sold by those properties he retains. For an analysis, see *Sale In Inverse Order of Alienation*, 131 A.L.R. 4, 102.

Once a property has been sold in a tax sale the intentions of the former owner are of no consequence. And there can be no legal justification whatsoever for the notion that once a property has sold in a tax sale, the former owner can place entirely new equitable burdens on it in the future by placing the word "warranty" in any subsequent property transfers. The grantor's right to require that his debts be paid by property owned by another simply cannot be supported by any sort of legal reasoning.

BancorpSouth claims that equity prohibits Holly Springs Realty Group from benefitting from the Inverse Order of Alienation Rule. Appellant has three objections to this line of thinking.

First, any equitable arguments against the use of the Inverse Order of Alienation Rule must be made by the Five Other Owners, not the mortgagee, who has no standing to bring these arguments. See *Raines v. Gardner*, 731 So.2d 1192, 1195 (Miss. 1999). The mortgagee gets paid either way. Its duty is to stand quietly by while the defendants present their defenses to the Court and assist the Court in developing a charging order.

Second, merely waving the flag of equity does not do away with the rule of law.

"The fact that a proceeding is equitable does not give the judge a free-floating discretion to redistribute rights in accordance with his personal views of justice and fairness, however enlightened those views may be." *In re Chicago, Milwaukee, St. Paul & Pacific Railroad*, 791 F.2d 524, 528 (7th Cir. 1986). The fact is that due process rights must be respected and parties seeking equitable relief must ask for it. None of that has happened in this case.

Third, those who seek equity must come with clean hands. The Five Other Owners and BancorpSouth, by virtue of their participation in a secret, collusive agreement designed to perpetrate a fraud upon the Court and deny Holly Springs its due process rights to a fair judicial proceeding certainly do not have clean hands. "It is one of the oldest maxims of the law that no man shall, in a court of justice, take an advantage which has his own wrong as a foundation for that advantage." *Crabb v. Comer*, 190 Miss. 289, 200 So. 133, 135 (1941). Or, to put it more prosaically: "He who doeth fraud, may not borrow the hands of the chancellor to draw equity from a source his own hands hath polluted." *Thigpen v. Kennedy*, 238 So.2d 744, 746-47 (Miss.1970).

Appellant has addressed BancorpSouth's remaining arguments, including the fact that it did not purchase an equity of redemption, in its original brief.

ISSUE FOUR

Where plaintiff entered into a secret, Mary Carter-type of agreement with five favored *in rem* defendants, it was an abuse of discretion not to estop plaintiff from proceeding against appellant

BancorpSouth Response to Issue 4: Holly Springs's claim that there was something similar to a Mary Carter agreement is absurd and frivolous. There was no Mary Carter agreement. The defenses of the Five Other Owners would not inure to Holly Springs. Its title was defective and it stepped into the shoes of Van Buren.

(BancorpSouth has renumbered this as Issue 11).

Reply Argument: The name given to the collusive agreement is unimportant. It existed. It was designed to harm Holly Springs and did so. The defenses of the Five Other Owners might well inure to the benefit of Holly Springs. Appellant's title was perfect and it stepped into the shoes of the Sovereign, not Van Buren.

Appellant asks the Court to consider again the affirmative efforts to conceal what BancorpSouth characterizes as a simple "extension of time" for the Five Other Owners to file an answer:

> 1. When asked if it knew why the Five Other Owners had not filed an Answer to Plaintiff's Complaint, Plaintiff gave counsel for Holly Springs Realty Group a negative or noncommital response. (R272, T12, L28-29; T13, L1-4; T19, L4-7; T41, L18-20, Hurdle).
>
> 2. Plaintiff provided a clearly false answer to Appellant's interrogatory, which sought information as to why BancorpSouth had not sought a default judgment against the Five Other Owners (R-279).
>
> 3. The Five Other Owners flatly denied the following Request for Admission: "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)." (R224-232).

BancorpSouth argues that this blanket denial is an honest and acceptable answer:

> 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.

(*Brief of Appellee BancorpSouth*, page 51).

This argument, quite honestly, is hardly worthy of response. *Mississippi Bar Ethics Opinion 161* places a burden on beneficiaries of a Mary Carter agreement to reveal the

existence of this agreement prior to being asked in discovery. This opinion obviously would apply to any other collusive agreement – and if there is a benefit to the participants, it is an agreement. Thus the reply of the Five Other Owners, if not dishonest on its face, is certainly dishonest when considered in light of the requirements of *Ethics Opinion 161.*

If the answer provided by the Five Other Owners was so honest, how does BancorpSouth account for its own answer to an almost identical question? "Denied as stated, however, BancorpSouth has agreed to not require said Defendants to file an Answer until we ask them to." (R265). Why did BancorpSouth, after initially providing dishonest answers, suddenly find the need for candor when faced with the legally more significant Request for Admissions?

It is disingenuous, to put it mildly, of Plaintiff to portray its agreement with the Five Other Owners as a mere extension of time in which to file a responsive pleading. This "extension of time" was actively concealed, lasted for almost two years, and was designed to harm Holly Springs Realty Group and in fact did so. According to filings by BancorpSouth, the case is now proceeding against at least some of the other defendants in the Chancery Court. Therefore, the terms of the agreement now seem clear: BancorpSouth told the Five Other Owners they did not have to file an answer until told to do so, and at some point reached the implicit or explicit agreement that they would not have to file until BancorpSouth removed the pesky tax sale purchaser from the picture for everyone's benefit.

BancorpSouth states on page 51 of its brief: "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." Plaintiff is wrong three times in one paragraph: 1) Holly Springs may benefit from the defenses of others; 2) Holly Springs's title is not defective, but rather perfect, merely subject to a lien, and the lack of warranty is of no consequence (see page 6); and 3) it did not step into Van Buren's shoes, but rather those of the Sovereign.

Holly Springs Realty Group said in its Answer to BancorpSouth's complaint: "TWENTY-FIRST DEFENSE: To the extent applicable and to the extent not inconsistent with Holly Springs Realty Group's denial of all liability, Holly Springs Realty Group adopts and asserts all defenses raised by any other defendant in this matter." (R165). By keeping these defendants from answering, BancorpSouth successfully kept Holly Springs Realty Group from asserting all of its defenses. These defenses, some of which were presented in Appellant's original brief, could include:

> 1. Satisfaction: Funds were paid to the bank but not credited against the mortgage.
>
> 2. Accord and Satisfaction: BancorpSouth has accepted funds in satisfaction for some or all of the debt. For example, Claiborne Fraiser allowed a default judgment to be entered against him and did not contest an order charging certain LLC interests in which he held ownership. If this were part of a pre-arranged deal with BancorpSouth, there would be an obligation on the part of the mortgagee to satisfy some or all of the mortgage from these sources rather than from foreclosure.
>
> 3. Gratuitous releases: The existence of any gratuitous or nominal release after the time of the Oxford Municipal Tax Sale would have to be credited against the debt for the benefit of Holly Springs Realty Group. One such

> release of almost $750,000 – not disclosed by plaintiff in its pleadings – was discovered after Plaintiff had requested summary judgment, although this release had been made prior to the tax sale (unless subject to Regulation O, below).
>
> 4. Releases in violation of FDIC Regulation O: Appellant believes that any gratuitous release granted to an "insider" of BancorpSouth bank would be subject to Regulation O, which would require the members of the board of directors granting the release to immediately pay against the mortgage, from their own funds, the value of the property improperly released, regardless of when that release was made.[4]

As to Plaintiff's claim that Holly Springs Realty Group stepped into the shoes of Van Buren Group after the tax sale, this is completely contrary to law. A tax sale purchaser steps into the shoes of the Sovereign. The nature of a tax title is best described by the case of *Baird v. Stubbins*, 58 N.D. 351, 226 N.W. 529, 531 (1929), in which the North Dakota Supreme Court described the status of a tax sale purchaser:

> The defendant here was not such a purchaser. She does not claim under the record owner, but by conveyance from the state, which, if valid, cuts off the title of the record owner altogether. A tax deed makes no reference to the former owner or owners. It does not purport to convey the estate of the former record owner. There is no privity between the holder of the fee and one who claims a tax title upon the land. The latter title is not derived from, but in antagonism to, the former. The holder of the latter is not a privy in estate with the holder of the former. [citations omitted]

Id.

Plaintiff takes great pains to note that a Mary Carter Agreement is something used in tort litigation, and the term has been misused. Holly Springs has repeatedly stated that the Appellees participated in a collusive agreement that was similar to, but not exactly like, a Mary Carter agreement.. It doesn't matter whether it's called a "Mary

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[4] Regulation O, 12 C.F.R. Part 215. It is beyond the scope of this reply brief to fully discuss possible remedies for violations of Regulation O, except to say that Appellant believes that such a violation would require BancorpSouth or the members of its board of directors personally to reduce Van Buren Group's mortgage by the amount of any gratuitous release granted to any "insider," as defined by Regulation O, § 215.1(h), regardless of when made.

Cater Agreement" or "Jiminy Cricket Agreement." This silly semantic gamesmanship does not disguise the fact that in an equity case such a collusive agreement is an abomination. In renders our court of equity into a giant game of liar's poker and undermines public faith in the entire legal system. Such behavior is outrageous and constitutes a fraud upon the Court and a full frontal assault on the integrity of our judicial process.

ISSUE FIVE

The court erred when it denied appellant's motion to dismiss case for failure to join all necessary and indispensable parties and failure to fully prosecute

BancorpSouth Response to Issue 5: It is the person not served who must bring the Rule 4(h) motion, and such motion must be brought in the initial responsive pleading. Therefore Holly Springs lacked standing. All necessary parties to the foreclosure of Unit 309 were joined. (BancorpSouth has renumbered this as Issue 6).

Reply Argument: Holly Springs is asking for an exception to the *Raines* doctrine, based specifically on the *Raines* requirement of standing; that is, any party who is harmed should be able to bring a motion for relief.

BancorpSouth cites the statement in the case of *Raines v. Gardner*, 731 So.2d 1192, 1195 (Miss. 1999) that "or upon motion" logically infers the party upon whom the process was not served. 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.*

The fact situation in Raines is completely different than the fact situation in this case. In *Raines*, an attorney moved that a complaint be dismissed against his client, Ms. Gardner, on the grounds that service did not occur within 120 days. The attorney then asked the Court to dismiss charges against another defendant, even though the defective service caused neither his client nor him any harm. "I'm not representing to the Court that I represent anybody but Ms. Gardner, but Ms. Clark ought to also be dismissed. It's the Court's duty under this rule to do that" *Id.* at 1194. The Court

granted the motion, even though made by a person without legal standing, thus setting the stage for the *Raines* decision.

In the current case, Holly Springs Realty Group did have standing. There was a great benefit to be had should the case be dismissed. In addition, Appellant had a right to know just where these people stood. A year had gone by since their defective service and they had not answered or objected to defective service. Holly Springs was suffering harm as a result of BancorpSouth's defective service. It had standing to raise the issue.

As for the portion of M.R.C.P. 12(h) which requires that deficiency of service be raised in defendant's initial responsive pleadings, clearly this rule is aimed at the overwhelming majority of cases where the objection is raised for oneself. The circumstances where one would have standing to raise a deficiency of service motion for a co-defendant are quite rare, and once that co-defendant should file a timely answer the right to bring the motion would be lost, as the deficiency would then be waived.

As for Bancorp's South claim that the Trial Court had discretion to proceed without all parties being joined pursuant to M.R.C.P. Rule 19, this is simply not the case; the Mississippi Supreme Court has specifically said otherwise where real estate is involved. *Bd. of Education of Calhoun Cty. v. Warner*, 853 So.2d 1159, 1170 (Miss. 2003). The fact that BancorpSouth only wished to foreclose on Unit 309 did not relieve it of the obligation to join each and every person owning property subject to that mortgage. BancorpSouth was well aware of its failure to join necessary and indispensable parties and simply chose not to join these people. It has failed to articulate any rational reason why they were not joined, or to even address the fact that they were not joined. Therefore, the Chancellor's entry of summary judgment and order of sale was error and must be overturned.

ISSUE SIX

It was an abuse of discretion for the Chancellor to fail to enter a docket entry of default against five co-defendants who intentionally did not file an answer for more than one year, when such failure was apparently a matter of trial strategy

BancorpSouth's Response to Issue 6: The grant of default is discretionary and where possible there should be a trial on the merits. An application for default must be made by an adversary. (BancorpSouth has renumbered this as Issue 7).

Reply Argument: This issue is addressed at the Five Other Owners, not BancorpSouth, which does not have standing to address it. *Smith v. Everett* has nothing to do with what party may bring a default motion, and the word "adversary," used once, does not even rise to the level of dictum.

This issue does not involve BancorpSouth, and it does not have standing to present an argument on behalf of the Five Other Owners. See *Raines v. Gardner*, 731 So.2d 1192 (Miss. 1999), where standing is addressed.

Appellant agrees wholeheartedly that cases should be decided on their merits, not lost because of a technical default. BancorpSouth cites the case of *Smith v. Everett*, "Whenever there is doubt whether a default should be entered, the court ought to allow the case to be tried on the merits," 483 So.2d 325, 327.

Yet the facts in *Smith v. Everett* deal with a party who was held in default even though he had properly filed an answer. In addition, he did not receive a three-day notice of default. *Id.*, at 326. Thus the entry of a default judgement clearly deprived that party of his due process rights. Contrary to BancorpSouth's assertion, *Smith v. Everett* has absolutely nothing at all to do with the requirement that a default motion be brought by an adversary. The opinion does state, near its end, the following: "Rule 55 contemplates and requires that a party seeking the default of an adversary must make written application to the court therefor, setting forth the grounds therefor." *Id.*, at 327. In *Smith*, there was no application for default; the judge just entered an entry on his own motion with no notice – a far cry from the current case.

In the case at bar, Holly Springs objected to the fact that certain favored defendants had not answered the plaintiff's complaint for more than a year, with no

notice or explanation on the court record. The failure to file was intentional and was almost certainly a matter of trial strategy. The Five Other Owners intended for their actions to harm their co-defendant, Holly Springs Realty Group, and did in fact harm Appellant. Holly Springs had a right to seek a remedy for the harm being intentionally caused to it by its co-defendants – who by their behavior were in fact its adversaries – and the Court had an absolute non-discretionary duty to grant that remedy.

In fact, the Mississippi Supreme Court has recognized that parties such as the Five Other Owners are adversaries to Holly Springs Realty Group. An *in rem* action of this type – where defendants compete to keep their properties from being held primarily liable for a debt – is similar to an *in rem* Interpleader action, where defendants are forced to compete with each other in claiming personal property, or *res.* The Court recognized the inherent adversarial nature of these co-defendants in *Gayden v. Kirk*, 208 Miss. 283, 44 So.2d 410 (1950). "While the defendants in interpleader actions are rival claimants to an impounded fund and adversary parties with reference thereto, their aim is not directed against each other but from a common vantage point converges upon the fund as a res." *Id.*, at 288, explaining why the victor of such a *in rem* action could not claim interest from or have a personal judgment against his unsuccessful co-defendant following an unsuccessful appeal by the latter.

Holly Springs would respectfully ask the Court if one year of refusing to answer a complaint to the detriment of a co-defendant is not enough to be held in default, how long must it be? Two years? Five? Ten?

Finally, Appellant notes that this request for a docket entry of default was directed at the Five Other Owners: Appellees Norma S. Bourdeaux, Langston Oxford Properties, L.P., Susan M. Bryan, Lynn M. Grenfell, and John Albriton. None of these parties have chosen to file an appellee's brief. This is simply none of BancorpSouth's business.

The course of action that the Court shall take when an appellee fails to file a brief

is provided in *May v. May*, 297 So.2d 912 (1974):

> We shall, in this court, at our discretion, on default of appellee, take one or the other of the following two courses: (1) When the record is complicated or of large volume, and the case has been thoroughly briefed by appellant with a clear statement of the facts, and with apt and applicable citation of authorities, so that the brief makes out an apparent case of error, we will not regard ourselves as obliged to look to the record or to search through it to find something by which to avoid the force of appellant's presentation, but will accept appellant's brief as confessed and will reverse. Or (2) when the record is in such condition that we can conveniently examine it, and when upon such an examination we can readily perceive a sound and unmistakable basis or ground upon which the judgment may be safely affirmed, we will take that course and affirm, thereby to that extent disregarding the default of appellee. But when, taking into view the argument presented by appellant, the basis or grounds of the judgment, and the facts in support of it are not apparent, or are not such that the court could with entire confidence and safety proceed to affirmance, the judgment will be reversed without prejudice. [citations omitted]

Id. at 913.

The record in this case consists of almost 500 pages of court documents. The facts, issues and arguments are remarkably complex. The Five Other Owners all had property rights which were adversarial to those of Holly Springs Realty Group, and apparently did not file an answer to BancorpSouth's complaint as a matter of trial strategy, in a brazen effort to perpetrate a fraud upon the Court. According to the *May* doctrine, the failure of these parties to file appellee's briefs must be taken as an admission of error, and the Chancellor's denial of Holly Springs's Motion for a Docket Entry of Default must be overturned.

ISSUE SEVEN

By allowing plaintiff to unilaterally grant enlargement of time by which certain favored parties might answer, the chancellor evidenced a bias in favor of plaintiff such that appellant was not assured of receiving a fair hearing

BancorpSouth's Response to Issue 7: Holly Springs has not cited any authority in support of its claim and it should not be considered. If it is considered, Holly Springs has not shown any evidence of bias. (BancorpSouth has renumbered this as Issue 8).

Reply Argument: The bias created by the Chancellor's legal error is plainly evident, and no case law need be cited.

Appellant wants to make clear that it does not accuse the Chancellor of any

personal bias or animus towards it, its management, or its counsel. It was legal error for the Chancellor's to allow plaintiff to make decisions which were supposed to be reserved exclusively to the Court. By ceding its authority, the Court turned the right to selectively enforce the M.R.C.P. into weapon to be used by BancorpSouth, which caused the proceedings to be biased against Holly Springs.

Appellant did not cite any case law in support of this argument, and is not required to, as the inherent bias created by the Chancellor's error is plainly evident.

ISSUE EIGHT

It was an abuse of discretion (error) for the court to grant summary judgment and foreclosure of appellant's property when five other in rem defendants had not filed an answer

BancorpSouth's Response to Issue 8: The hearing where the Court ordered foreclosure was a bifurcated separate trial, not a hearing on summary judgment. Regardless. of Holly Springs's arguments, the fact is that no matter what its equity was always going to be wiped out. (BancorpSouth has renumbered this as Issue 9).

Reply Argument: BancorpSouth's claim that it did not seek a judgment and that the event held on May 6, 2008 was a bifurcated trial for which Holly Springs had no advance notice or awareness of at the time of is yet more evidence of due process violations which may render the foreclosure sale void

Appellant's original brief should have referred to this as error rather than an abuse of discretion.

In an *in rem* action to determine if or how properties are to be charged for the payment of a common debt there must be a single trial or hearing and a single charging order.

BancorpSouth cites a number of cases in support of its claim that separate trials or hearings are permissible. Appellant does not disagree that in many cases they are, but none of the cases cited by BancorpSouth appear to involve the foreclosure of real estate, where the rights of the parties are inexorably intertwined, as in the current case. In an *in rem* action where the court must decide if or how properties are to be charged for the payment of a common debt, common sense and due process considerations dictate that there must be a single charging order arising from a single

judicial proceeding. Separate trials should either never be permitted or permitted only in the rarest of circumstances.

BancorpSouth argues that the court proceeding was not a summary judgment hearing. If so, Holly Springs Realty Group was dispossessed of it property on the basis of a mere motion which the Court lacked authority to grant. BancorpSouth also claims that neither party presented the standard for granting summary judgment to the Court. If neither party presented the standard for granting summary judgment, then BancorpSouth did not meet its required burden and the Chancellor's order must be overturned.

> The moving party has the burden of demonstrating that no genuine issue of material facts exists, and the nonmoving party must be given the benefit of the doubt concerning the existence of a material fact. If no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law, summary judgment should be entered in that party's favor. [citations omitted]

Rowan v. Kia Motors America, Inc., 16 So.3d 62 (2009)

It is not enough for defendant not to raise the defense; plaintiff has an affirmative burden to demonstrate that there are no genuine issues of material fact in existence, and if it fails to do so the grant of summary judgment is in error. The fact is, however, that counsel for Holly Springs Realty repeatedly stated that the case was not a candidate for Summary Judgment. The first two attempts can be found on Page 29 of the transcript, Lines 5-12 and 18-20 (Hurdle), although counsel was not able to finish his remarks due to interruption. Appellant counsel later said:

> MR. HURDLE: I do plan to argue that this is not yet ripe for summary judgment. [for the reason] that all of the answers – it is my argument that in [an in rem action] a plaintiff simply brings [it] to the court and everyone asserts their rights. And our position is if it's decided today it has to be decided in our favor because no other rights have been asserted. As so I just wanted to present that now before he went into all of his notes. [bracketed words are minor corrections made to transcript]
>
> THE COURT: All right. It's noted.

(T-32, L15-25)

Holly Springs Realty Group's counsel twice attempted to object to summary

judgment and was cut off, and then clearly articulated to the Court that summary judgment should not be granted where all of the necessary and indispensable parties had not answered. In such a case, clearly all of the material facts are not known. In closing, he again stated that there were still answers to be filed. (T-52, L-26, Hurdle).

Furthermore, in its memorandum filed in opposition to BancorpSouth's motion, Holly Springs Realty Group stated: "Plaintiff's motion is essentially a motion for partial summary judgment against defendant. Defendant has already stated reasons why this motion should not be granted. Defendant further believes that there are legitimate undetermined questions of fact that would militate against the granting of this motion." (R-335) Appellant also stated in its trial brief that "Holly Springs Realty Group asserts that . . . BancorpSouth's negligence is an unanswered question of fact." (R-333). Appellant also argued in its trial brief that the motion should not be granted without evidence of what the other parties paid for their properties (R-316).

BancorpSouth cites *Ammons v. Cordova Floors, Inc.*, 904 So.2d 185 (Miss. App. 2005) in support of its claim that a judge may make findings of fact at a hearing, thus converting a hearing into a trial. Yet the *Ammons* decision rested entirely on the fact that there were no objections to the trial judge making findings of fact prior to the appeal and that all parties came ready to present evidence. "While Rule 56 would have appeared to have been the more appropriate procedure for ruling on Cordova's motion, as presented to and ruled on by the circuit court, the hearing on Cordova's motion to enforce settlement appears to have been treated by the court and parties as a Rule 42(b) separate trial on Cordova's counterclaim, with the parties consenting to the presentation of evidence by affidavit and to the determination of fact by the trial judge." *Id.*

Holly Springs repeatedly made it clear that it believed it was entitled to a trial on the merits with all necessary and indispensable parties either present or subject to default judgments. Furthermore, the Chancellor did not make any formal findings of

fact; he simply ordered the sale of Holly Springs's property. Taken with Holly Springs's repeated objections, which the Chancellor "noted," *Ammons* has absolutely no application whatsoever.

BancorpSouth further states that "regardless of the other unit owner's involvement in this litigation, Unit 309 was always going to be wiped out in this foreclosure action." (*BancorpSouth Appellee Brief*, page 44). BancorpSouth then admits that legally, it might be proper to charge and sell those properties sold and recorded after the tax sale before charging the property of Holly Springs Realty Group, but that the sale of these two properties would not raise enough money to satisfy the debt, and so Unit 309 would have to be sold anyway. "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." (*BancorpSouth Appellee Brief*, page 44).

Holly Springs continues to maintain that its property should be sold last because it is not equitably burdened. But, by conceding that it possibly should have been third in line to be sold, BancorpSouth admits that Appellant's due process rights have been violated. Holly Springs has cited numerous potential defenses that might reduce the amount of the mortgage to which it is subject to be charged. Should the Court rule that two properties must be charged first, before Appellant, then it is quite possible that Holly Springs Realty Group would not have been "wiped out." These were matters of fact and law, to be determined at trial, not secretly inside the collective, corporate mind of BancorpSouth.

One who invokes the Inverse Order of Alienation Rule need not show that the sale of the junior properties subject to the mortgage will satisfy the underlying debt. A property, once entitled to protection, enjoys that protection as a matter of right. *Scheuer v. Kelly*, 26 So. 4 (Ala. 1899). In light of BancorpSouth's assertions, it is clear that by selling its property out of turn, Appellant's federal and state Constitutional due process rights have clearly been violated.

The fact that BancorpSouth claims that it did not seek or obtain a judgment against Holly Springs Realty Group prior to obtaining an order is especially troubling. It is the judgment which authorizes the Chancellor or any other court to issue an order of sale. There can be no execution without judgment, and therefore, if there indeed is no judgment, the Chancellor's order of sale and resultant sale of the property is void *ab initio*. "Most of the courts which have considered the question have reached the conclusion that a void judgment 'is but a solemn fraud, not so much a judicial sentence as an arbitrary sovereign edict, having none of the elements of a judicial proceeding,' and that all the titles acquired at a sale under it fall with it." *Restitution of Property Transferred Under Void or Later Reversed Judgments*, 9 Miss. L.J. 157, 172 (1936-1937). Needless to say, where a sale under a void judgment is invalid, a sale held when there is no judgment at all is doubly invalid.

This Court has held that a judgment is void when the Court which renders it acts in a manner inconsistent with due process of law, *Bryant, Inc. v. Walters*, 493 So.2d 933, 938 (Miss. 1986). "A void judgment is just that, void." *Id.* at 937. If there is indeed no judgment, then a void order of sale is just that, void.

ISSUE NINE

The chancellor erred in failing to find that plaintiff's materially breached the agreed order which resulted in there being no lien on the property

BancorpSouth Response to Issue 9: No contract was created due to mutual mistake as to the what the contract promised. If there was a contract, there was no breach because no time for performance was specified.

Reply Argument: Where a contract does not specify a time for performance, the contract doesn't fail, instead the performance must be done in a "reasonable" time. BancorpSouth's remaining arguments are specious.

Where a contract fails to specify a time for performance, the time for performance shall be reasonable under the circumstances. "When a contract does not specify time of performance, the law implies a reasonable time. What constitutes a reasonable time for performance depends upon the facts and circumstances of the particular case."

Savasta v. 470 Newport Assocs., 623 NE 2d 1171 (N.Y. 1993). "This Court long ago instructed that, in cases in which the contract fails to specify a time for performance or for asserting one's contractual right, the performance or assertion generally must occur within a 'reasonable time.'" *Assoc. Commercial Corp. v. Parker Used Trucks Inc.*, 601 So.2d 398, 402 (Miss. 1992).

BancorpSouth's remaining arguments are specious. It simply cannot claim that there was no meeting of the minds because it decided to breach the Agreed Order. It entered a contract and breached it.

ISSUE TEN

BancorpSouth Response to Issue 10: Appellee's response is omitted as Holly Springs believes no reply is needed on this issue. (BancorpSouth has renumbered this as Issue 2).

ISSUE ELEVEN

The chancellor erred in finding that plaintiff's dishonest behavior and bad faith towards appellant did not release appellant from its duty as a surety

BancorpSouth Response to Issue 11: BXS refers the Court to its argument in Appellant Issue 7 (BXS Issue 8), which outlines requirements for Court to entertain issue on appeal. Holly Springs has cited no or insufficient case law or authority to support its position. (BancorpSouth has renumbered this as Issue 12).

Reply Argument: Appellant has adequately supported its position. As to the issue of BancorpSouth's dishonest behavior and bad faith, it is well documented and reasonable minds cannot differ.

In response to BancorpSouth's argument that it has failed to provide enough case law in support of its position, Holly Springs gladly cites additional authority.

See, for example, *In Re Boswell Land and Livestock, Inc.*, 86 B.R. 665 (D. Utah 1988): "The basis of the inverse order of alienation rule is that each of the successive purchasers has bought his parcel on terms which impose upon the mortgagor and the remaining property in his hands the primary obligation of paying the mortgage debt. The property in the hands of the grantee, although still liable, stands merely in the position of *surety*." [emphasis added]

Another case which describes a person owning subject to the mortgage of another

as a surety is *Ricketts v. Alliance Life Ins. Co.*, 135 S.W.2d 725, 734 (Tex.Civ.App.-Amarillo 1939, writ dism'd judgmt cor.) "The purchaser is not technically a *surety* for the vendor, but in virtue of his ownership of lands encumbered by the judgment or mortgage against the grantor under whom he claims title, who conveyed the same for full value with covenants of warranty, he occupies a position very similar to that of *sureties*, and is entitled to the same equities, so far as they can be administered consistently with the rights of others." *Id.* [emphasis added] It should be noted that the issue of covenants of warranty was important in *Ricketts* only because the surety sought the right of subrogation against the original mortgagor for payments made to prevent foreclosure. Where there are no covenants of warranty, the owner of land subject to the mortgage of another remains a surety, but can make no claim against the original mortgagor.

ISSUE TWELVE

BancorpSouth Response to Issue 12: Appellee's response is omitted as Holly Springs believes no reply is needed on this issue. (BancorpSouth has renumbered this as Issue 4).

CONCLUSION

Contrary to the great deal of time spent discussing it, this is not a case about the Inverse Order of Alienation Rule. This is a case about whether a tax sale purchaser is entitled to basic due process protection in a civil action, with the rules of civil procedure being applied evenly and fairly to one and all. It is about whether the rules of civil procedure and the rulings of the Mississippi Supreme Court apply to everyone, or everyone except tax sale purchasers.

Holly Springs would ask the Court to recognize that any party to a lawsuit who is harmed by the refusal of another party to follow the rules of civil procedure has a right to seek redress.

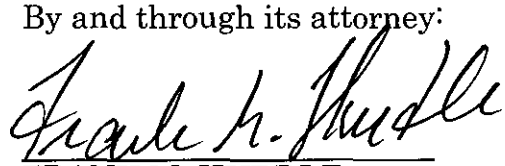
Holly Springs would further ask the Court to find that in equity actions, collusive agreements between a plaintiff and favored defendants are prohibited and an offense

to justice.

WHEREFORE, PREMISES CONSIDERED, Appellant Holly Springs Realty Group renews its prayer that this Court will reverse the Chancellor's grant of summary judgment and/or order of foreclosure and render judgment in favor of Appellant; and that the relief requested in its original brief be granted, or that the Court grant such relief as it believes justice demands. As this ruling was plain error and involved grievous misconduct on the part of Appellees, Holly Springs further prays that this Court award it costs of this appeal as well as all costs and attorneys fees incurred in defending this action. Holly Springs prays Chancellor's denial of Appellant's Motions for Entry of Default and Motion to Dismiss be reversed.

Respectfully submitted, this the 18th day of February, 2010

HOLLY SPRINGS REALTY GROUP, LLC
By and through its attorney:



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CERTIFICATE OF SERVICE

I, Frank M. Hurdle, attorney for Appellant, Holly Springs Realty Group, LLC, certify that I have this day served a true and correct copy of the above and foregoing *Reply Brief of Appellant* by United States mail with postage prepaid on the following persons at these addresses:

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Signed this the 18th day ~~of October~~ of February, 2010.

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